Prisoners' Rights in Alberta: Challenges and Opportunities

IX Processes for Challenging Violations of Prisoners' Rights

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> "Rights without remedies are no rights at all…Prisoners have very limited access to remedies. The system is broken and often completing the grievance process is a condition precedent to going to the courts. The correctional investigator's recommendations are advisory only and will not directly fix any human rights violations that are found…The citizen advisory committees are advisory to the CSC only and exercising habeas corpus rights to challenge unlawful detention is extremely difficult for prisoners and poorly understood. Access to counsel is limited and even access to legal materials so prisoners can self-represent is inadequate… I invite the committee members to be vigilant about prisoners experiencing negative repercussions for having asserted their rights. I am told that those seeking rights can be viewed as management problems and lose access to programs and privileges."[1]

[1] Canada, Parliament, Senate Standing Committee on Human Rights, *Minutes of Proceedings and Evidence*, 42nd Parl, 1st Sess, No 14 (1 February 2017) at p 31 (from remarks of Catherine Latimer, Executive

A prisoner seeking to challenge a decision or action of a correctional authority must, in most cases, begin by filing a complaint with the correctional institution in which the decision was made, in accordance with its internal complaints process. If a prisoner disagrees with the result of the internal grievance process, depending upon the nature of the complaint, the next step is to file a complaint with the Alberta Ombudsman, the Alberta Human Rights Commission (AHRC), or the courts. One important exception to this rule is when a prisoner seeks to challenge a correctional authority's decision to restrict his or her residual liberty rights (discussed below), for example, a decision to move a prisoner into segregation. In such cases, the prisoner can, in most cases, bypass the internal complaints process and file an application for judicial review seeking the remedy of habeas corpus directly with the court.

A. ALBERTA CORRECTIONAL SERVICES INTERNAL COMPLAINTS PROCESS

"Even in the most transparent setting, it is not enough for rights to be set out in law and policy; a rights-respecting system must also provide mechanisms for complaint and redress. The closed nature of corrections heightens this imperative. A fair and expeditious complaints process that allows inmates to complain about improper or illegal treatment without fear of reprisal is a critical component of a rights-respecting correctional system. An effective complaint procedure also has significant benefits for rehabilitation and institutional management. Addressing complaints in a fair and timely manner can also ease institutional tensions and allow for the early identification and resolution of issues."[2]

1. Legislation

The legislation governing the Alberta Correctional Services (ACS) complaints process is minimal and ACS policies governing the handling of prisoner complaints are not publicly available.

Section 6 of the *Corrections Act*[3] provides for the investigation of complaints against employees of a correctional institution, some of which would originate from prisoners of the institution, but does not require that prisoners be involved or receive notice of the investigation. Section 6 states that If, "in the opinion of the director of the institution, it is necessary to investigate a complaint that an employee has behaved in a manner that is detrimental to the operation of the institution", the director may either relieve the employee of his or duties or remove the employee from the institution. The director is required to send

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Director, John Howard Society), online: <https://sencanada.ca/Content/SEN/Committee/421/RIDR/pdf/14issue.pdf>.

[2] Independent Review of Ontario Corrections, *Corrections in Ontario – Directions for Reform* (Toronto: Queen's Printer for Ontario, 2017) at 30 [*2017 Independent Review of Ontario Corrections*], online: <https://www.mcscs.jus.gov.on.ca/sites/default/files/content/mcscs/docs/Corrections%20in%20Ontario%2C%20Directions%20for%20Reform.pdf>.

[3] *Corrections Act*, RSA 2000, c C-29.

the ACS Chief Executive Officer (CEO) written notice of an investigation and the director's actions with respect to the employee.

Section 28 of the *Corrections Act* states that the director of an institution *may* establish an Inmate Advisory Committee and requires the executive of the Committee "to deal cooperatively with the Director with respect to complaints and grievances and any other matter relating to the effective and efficient operation of the institution." It does not stipulate the process for involving the Committee.

Section 56 of the *Correctional Institution Regulation*[4] states that the director of a correctional facility is to give "all inmates an opportunity to request an interview with the director." It requires requests to be given to the director forthwith and to be reviewed by the director on a daily basis, except on weekends and statutory holidays. The prisoner filing the request is to be personally interviewed by the director, "if in the Director's opinion an interview is warranted."

In response to a request for information about the ACS prisoner complaint process, ACS advised the following.[5] The primary way that prisoners in a correctional facility gain information or lodge a complaint is through the use of the Request for Interview (RFI) form, and the process involves the following steps. Prisoners are told to attempt to deal with any concerns or complaints at the lowest level, to give the staff at the facility an opportunity to resolve the issue before escalating it to the next level. If the issue is not dealt with to the prisoner's satisfaction at the staff level, the prisoner can escalate the issue by completing a RFI form. The prisoner has the option of routing the RFI directly to the director via the "Director's Mailbox" in cases where the complaint may be of a sensitive nature. If the issue is not resolved to the prisoner's satisfaction by the director, the inmate can contact the Branch Executive Director, the Alberta Ombudsman, or the AHRC. Prisoners may also lodge a complaint (in writing or via telephone) with their MLA, MP or any other official/department. This process is outlined to a degree in each correctional facility's "Inmate Manual", which is a resource available to every inmate within a centre and provides basic direction on how the centre functions, expectations, rules and a variety of other information that an inmate would be required to know within a correctional centre. Alberta correctional institutions also post information posters in prisoner units listing the contact information for organizations that may assist prisoners with complaints against ACS, such as the Alberta Ombudsman and Legal Aid Alberta.

2. Case law

Alberta court decisions confirm that ACS prisoner complaints are initiated on "request for information" or "request for interview" forms, although it is not clear if or how these forms differ. For example, in *R v Adams*[6], the court stated: "I formed the distinct impression from

[4] *Correctional Institutional Regulation*, Alta Reg 205/2001.
[5] Email from Alberta Correctional Services to Alberta Civil Liberties Research Centre dated May 8, 2017.
[6] *R v Adams*, 2016 ABQB 648 (CanLII) at para 26 [*Adams*], online: <https://www.canlii.org/en/ab/abqb/doc/2016/2016abqb648/2016abqb648.html?resultIndex=18>.

reading his [the prisoner's] notes and his requests for information (complaints) and from listening to his testimony, that he was hypersensitive to every perceived injustice." The decision also reveals that, among other things, the process may be an ineffective and frustrating way to deal with complaints for both prisoners and prison correctional officers, and in this case, the court sympathized with the frustration experienced by the correctional officers who were inundated with complaints from the prisoner:

> The sheer number of the accused's complaints, lawyers' letter, and requests for information would have reasonably caused even the most naive persons to worry about their behaviours and make sure they did not overstep the bounds of propriety. In that environment, it would seem unlikely that the guards would undertake activity which might result in criminal charges, loss of employment, discipline and the like. On the other hand, it is not hard to imagine that the guards might very well be frustrated by the accused's constant stream of complaints to their superiors and the accused's constant belligerent attitude toward them. In the end, I think the truth about the events described in the blizzard of complaints made by the accused lies somewhere between his version of those events and those of the guards. I accept that the guards did not treat the accused kindly or considerately. I accept that they were rude and unaccepting on occasion and felt no obligation to help an accused who was on a mission to make them account for every real or imagine [sic] slur, comment, slight or imperfection. In my view, the bulk of Mr. Adams' complaints fall into this category. His treatment at the hands of Centre staff was different, but he brought it upon himself, at least in some measure.[7]

The recent *2017 Independent Review of Ontario Corrections*, headed by the former federal Correctional Investigator, Howard Sapers, reviewed and made recommendations for changes to the Ontario Corrections complaints process. The following passage from the Review suggests that the Ontario correctional system uses processes for initiating and processing prisoner complaints that are somewhat similar to those used in Alberta, a process that the Review concluded was ineffective in resolving prisoner complaints:

> ….inmates would lodge complaints on the same general request form that is used to request services such as health care, special meals, or programming. All these forms must be given to front-line correctional officers for processing. It is likely that some inmates would be unwilling to file written complaints about staff behaviour given that the complaint or request forms are first read and initially processed by front-line staff. Interviewees stated that in their experience, inmates had withdrawn complaints about staff members after being threatened with transfer or placement in segregation for their own protection. Some interviewees reported that it was common to hear that complaint forms had gone "missing." In the vast majority of institutions, inmates are not given a copy of their complaint slip and are not able to retain any written record of the complaint having been received, read, or dealt with. Several interviewees reported that it was

[7] *Adams* at para 37.

> common for inmates not to know what, if any, action had been taken in response to their complaints."[8]

B. DISCIPLINARY HEARINGS AND APPEALS

1. Legislation

Sections 15(1) – 15.3 of the *Corrections Act* govern disciplinary hearings, appeals and judicial review of disciplinary hearing appeals.

Section 15(1) of the *Corrections Act* grants disciplinary hearing adjudicators the power to conduct disciplinary hearings to review and determine the punishment that prisoners will receive for breaches of the regulations or the rules of the correctional institution. Hearing adjudicators are appointed by the Ministry responsible for Alberta corrections and cannot be employees of the correctional institution at which the disciplinary hearings will be held, but can be employees of the government. Section 15(1.5) states that the hearing adjudicator is not bound by the rules of evidence applicable to judicial proceedings but may accept any evidence that the adjudicator considers relevant to the determination of the issues. Section 15(2) provides that hearing adjudicators must consider imposing the loss of earned remission, in addition to any other punishment, if the contravention of the regulations or of the rules of the correctional institution involves various things including illicit drug trafficking; use or possession of an illicit drug or having an illicit drug in the prisoner's body; possession or use of a weapon; an assault; gang-related activity; or an "inappropriate response by an inmate to a lawful request by an employee under the direction of the [director of the institution]". Section 15(3) states that the fact that the prisoner's action is alleged to be an offence under a Canadian or Alberta enactment does not prevent disciplinary action. Section 15(1.1) gives the Ministry responsible for ACS the power to appoint appeal adjudicators to conduct, subject to the regulations, appeals of decisions of disciplinary hearing adjudicators.

Section 15.2 governs appeals from a decision of a disciplinary hearing adjudicator. Both the prisoner and the director of the correctional institution where the inmate was charged have the right to appeal. The prisoner must file a written appeal with the director of the correctional institution in which the prisoner is incarcerated within 7 calendar days of the decision. The director must file an appeal with the CEO of ACS within 7 calendar days of the decision. The request for an appeal must set out: (a) the circumstances and any other relevant particulars of the matter being appealed, (b) the grounds for the appeal, and (c) the relief being requested. An appeal is based solely on the record of the disciplinary hearing and the decision of the hearing adjudicator. The appeal adjudicator can: (a) confirm, revoke or vary the decision of the hearing adjudicator, or (b) order that a new disciplinary hearing be held.

Section 15.3 provides that the prisoner and the director of the correctional institution have a right of judicial review.

[8] *2017 Independent Review of Ontario Corrections* at pp 34-35.

The standard of proof to be applied at disciplinary hearings is not identified in the legislation. If the standard applied is the civil standard of the "balance of probabilities", a finding of guilt can result if the adjudicator finds, on the balance of probabilities, that the accused was more likely than not to have committed the offence. This is a less onerous standard of proof than the "beyond a reasonable doubt" standard that is applied in criminal proceedings.

2. Case law

The disciplinary hearing sections of the *Corrections Act* were amended in 2007 to add subsections 15(1) to 15.3 in response to a successful constitutional challenge to the lack of independent adjudicators in Alberta prison disciplinary hearings in *Currie v Alberta (Edmonton Remand Centre)*.[9] The legislation had previously granted directors of correctional institutions the power to appoint members of disciplinary panels from employees of the institution. The court ruled that this resulted in a clear conflict of interest between an employee guard's duty to maintain the safety and security of the institution and their duty to act as an impartial adjudicator at a disciplinary hearing where the charges laid against prisoners involved the safety and security of the institution. The court ruled that this violated prisoners' section 7 *Charter*[10] right not to be deprived of liberty except in accordance with the principles of fundamental justice.

In *Paxton v Calgary Remand Centre*,[11] discussed below, the Court concluded that these new provisions of the *Corrections Act* constitute a complete, comprehensive, and expert process for the review of losses of residual liberty by persons restricted to disciplinary segregation in Alberta provincial correctional institutions.

C. ALBERTA HUMAN RIGHTS ACT APPLICATIONS AND REMEDIES

An overview of the law governing prisoners' complaints under human rights law, including complaints to the Alberta Human Rights Commission (AHRC) under the *Alberta Human Rights Act,*[12] is provided under Chapter VII: Laws Affecting Prisoners' Rights.

The Alberta Civil Liberties Research Centre (ACLRC) resource, *Human Rights in Alberta*, provides a brief summary of human rights laws applicable to Albertans, which includes prisoners under the supervision of ACS. The ACLRC resource, *Making a Human Rights Complaint,* provides information on the process for filing, investigating, making decisions, accommodating and ordering remedies for discrimination under the *AHRA*. In most cases, prisoners must exhaust the ACS internal complaints process before they will be allowed to file a complaint under the *AHRA*.

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[9] *Currie v Alberta (Edmonton Remand Centre)*, 2006 ABQB 858 (CanLII), online: <https://www.canlii.org/en/ab/abqb/doc/2006/2006abqb858/2006abqb858.html?resultIndex=2>.
[10] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*].
[11] *Paxton v Calgary Remand Centre*, 2014 ABQB 438 (CanLII) at paras 59-71 [*Paxton*], online: <http://canlii.ca/t/g8nfj>.
[12] *Alberta Human Rights Act*, RSA 2000, c A-25.5 [*AHRA*].

D. *CHARTER* APPLICATIONS AND REMEDIES

An overview of the *Charter of Rights and Freedoms*[13] and the law applicable to prisoners' *Charter* challenges is provided under Chapter VII: Laws Affecting Prisoners' Rights.

The ACLRC resource, *Know your Rights - The Charter and You*, provides a guide on how the *Charter* works and what it protects. The ACLRC resource, *Launching a Charter case*, provides a guide on instituting a *Charter* case in the courts and before an administrative tribunal.

Section 24(1) of the *Charter* provides a *personal remedy* against unconstitutional government action that can be invoked by prisoners or former prisoners alleging a violation of their constitutional rights.

Section 52(1) of the *Charter* grants the court the power to declare legislation unconstitutional and therefore invalid, if the court determines that it violates the *Charter*. Applications to declare legislation unconstitutional under section 52 of the *Charter* can be brought by prisoners as well as a wider range of entities.[14]

In *Trang v Alberta (Edmonton Remand Centre),*[15] the Alberta Court of Queen's Bench discussed prisoners' civil claims against government authorities and the remedies that can be awarded for successful claims under section 24(1) of the *Charter,* which applies to government *actions,* and distinguished such claims from claims by prisoners and other interested parties alleging that legislation is unconstitutional and the remedies that can be awarded for successful claims under section 52 of the *Charter.*

E. CIVIL CLAIMS AND REMEDIES

Prisoners can commence civil suits seeking remedies for violations of their rights by correctional authorities in the Alberta Provincial Court or the Alberta Court of Queen's Bench, depending upon the monetary amount claimed. A wide range of remedies is available, including the right to monetary damages.

The Alberta Provincial Court, Civil Division, determines claims for damages for $50,000 or less. The Provincial Court resource, *Going to Court*,[16] provides information on procedures and protocol

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[13] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*].

[14] *R v Ferguson*, 2008 SCC 6 at para 61 (CanLII), online: <https://www.canlii.org/en/ca/scc/doc/2008/2008scc6/2008scc6.html?resultIndex=8>.

[15] Trang v Alberta (Edmonton Remand Centre), 2014 ABQB 110 (CanLII) at paras 48-49 [Trang], online : <http://canlii.ca/t/g4k75>.

[16] Provincial Court of Alberta, *Going to Court*, online: <https://www.albertacourts.ca/pc/resources/going-to-court>.

in the Court, and its resource, *Areas of Law – Civil*,[17] provides information for filing a civil claim for damages in the Court.

The Alberta Court of Queen's Bench determines claims for damages greater than $50,000. The process for advancing a claim in the Court of Queen's Bench is much more complex than the process in Provincial Court. The ACLRC resource, *Additional Resources, For Civil Litigation* refers to resources to assist persons who do not have legal representation (self-represented litigants) to file a civil claim in the Court of Queen's Bench. The Alberta Court of Queen's Bench website also provides additional information on the rules, procedures and other matters that litigants should be aware of when making a claim in the Court.[18]

Prisoners also have the right to appeal and seek reversals of decisions of lower courts in the Alberta Court of Appeal. The process for filing an appeal in the Court of Appeal is also complex. The Court of Appeal website[19] provides information about the Court, and access to the Courts' *Rules of Court and Consolidated Practice Directions*,[20] however, it will be very difficult for self-represented prisoners to navigate the appeal process without legal representation.

Research on civil claims by prisoners focusing on allegations that the government or correctional authorities have a duty to protect prisoners against health risks, risks arising from other prisoners or risks of self-harm reveals that such cases have been unevenly resolved and face numerous obstacles. The research concludes that Canadian courts are reluctant to impose duties on government actors, especially when the government conduct involves policy-oriented as opposed to operational action. This is because imposing a duty of care on government authorities would require the courts to make orders resulting in heavy funding implications, which courts are reluctant to do. The research concludes that if this type of litigation were more accessible to prisoners, it could result in improved enforcement of prisoners' rights and better prison conditions.[21]

F. APPLICATION FOR JUDICIAL REVIEW

Judicial review is the process whereby a judge of a superior court of the jurisdiction, in Alberta, the Alberta Court of Queen's Bench, reviews the decision of a government authority such as ACS to ensure that it has acted within its authority and followed fair procedures. In *Mission Institution v Khela*,[22] the Supreme Court stated that "'judicial review', '[i]n its broadest sense', simply refers

[17] Provincial Court of Alberta, *Civil Claims*, online: <https://www.albertacourts.ca/pc/areas-of-law/civil/claims>.
[18] Alberta Court of Queen's Bench, online: <https://www.albertacourts.ca/qb>.
[19] Alberta Court of Appeal, online: <https://www.albertacourts.ca/ca>.
[20] Alberta Court of Appeal, online: <https://www.albertacourts.ca/ca/publications/directions>.
[21] Adelina Iftene, Lynne Hanson & Allan Manson, "Tort Claims and Canadian Prisoners" (2014) 39:2 Queen's LJ 655, online: <http://www.queensu.ca/lawjournal/sites/webpublish.queensu.ca.qljwww/files/files/issues/pastissues/Volume39-2/09-Hanson.pdf>.
[22] *Mission Institution v Khela*, 2014 SCC 24 (CanLII) at para 37 [*Khela*], online: <http://canlii.ca/t/g69pq.

to the supervisory role played by the courts to ensure that executive power is exercised in a manner consistent with the rule of law."

A judicial review has two important differences from an appeal: (1) the standard of review that the court must apply; and (2) the remedies that can be granted.

The "standard of review" refers to the deference that the court reviewing the decision must give to the decision-maker. There are two standards of review: reasonableness and correctness. If the standard of review applied is reasonableness, the court must give a greater degree of deference to the decision under review, and if the court finds that the decision was reasonable, it will not interfere with it. If the standard of review is correctness, the decision must be correct and if it is not, the court will intervene and correct it.

The remedies that a court is permitted to grant in a judicial review application are also much more limited than those that can be granted under an appeal. The court cannot grant the remedy of damages but is restricted to making an order for a "prerogative writ", an injunction or a declaration. The process of judicial review, the standard of review and the types of prerogative writs that can be applied for in a judicial review application are briefly described in the ACLRC resource, Judicial Review of Human Rights Decisions.

G. APPLICATION FOR HABEAS CORPUS

The remedy of habeas corpus is both a common law remedy and a guaranteed right under section 10(c) of the *Charter*. In *Khela*, the Supreme Court stated that "[h]abeas corpus is in fact the strongest tool a prisoner has to ensure that the deprivation of his or her liberty is not unlawful."[23]

Habeas corpus is an important means of protecting two fundamental *Charter* rights: the section 7 right to liberty of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice; and the section 9 right not to be arbitrarily detained or imprisoned.[24]

An application for habeas corpus is brought in cases where a prisoner challenges a correctional authority's decision to restrict his or her "residual liberty rights", which is discussed below and, in general, refers to restrictions on a prisoner's liberty that go beyond those imposed on the prison population generally, for example, the placement of a prisoner in segregation.[25] The application

[23] *Khela* at para 29.
[23] *Khela* at para 30.
[24] *Khela* at para 29.
[25] *Khela* at para 34.

must challenge a current and ongoing loss of residual liberty rights and the only remedy that may be obtained under the application is release to the pre-detention condition.[26]

The provincial superior courts of each jurisdiction have exclusive jurisdiction to hear an application for habeas corpus from both federal and provincial prisoners incarcerated in correctional institutions in their respective jurisdictions.[27] In *Khela*,[28] the Supreme Court confirmed its decision in *May v Ferndale Institution*[29] that in principle, the governing rule is that provincial superior courts should exercise their jurisdiction to hear applications for habeas corpus unless "…(1) a statute such as the *Criminal Code* confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be or (2) the legislator has put in place complete, comprehensive and expert procedure for review of an administrative decision." In *Khela*, the court ruled that the internal grievance process for federal prisoners contained in the *Corrections and Conditional Release Act*[30] did not provide such a review procedure. This resulted in the court finding that in cases where a prisoner in the federal correctional system challenges a restriction of residual liberty rights, the provincial superior courts have concurrent and overlapping jurisdiction with the federal court, giving federal prisoners the choice to seek a review of the correctional decision limiting their residual liberty rights through a judicial review application in the Federal Court or through an application for habeas corpus in the provincial superior court.

In *Paxton v Calgary Remand Centre*,[31] the court declined to exercise its jurisdiction to hear an application for habeas corpus challenging the prisoner's confinement in disciplinary segregation on the basis that the 2007 amendments to the disciplinary hearing sections of the *Corrections Act* represented a complete, comprehensive, and expert scheme for persons detained in provincial institutions. Several subsequent Alberta court decisions have referred to this decision but have not found it necessary to apply it.[32]

There are a number of distinctions between an application for habeas corpus and an application for judicial review, which often makes the habeas corpus application more advantageous for prisoners challenging the restriction of their residual liberty rights.

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[26] *Chung v Alberta (Attorney General*), 2017 ABQB 456 (CanLII) at para 13 [*Chung*], online: http://canlii.ca/t/h4zzc.
[27] *Khela* at paras 31 – 33.
[28] *Khela* at para 42.
[29] *May v Ferndale Institution*, 2005 SCC 82 (CanLII) [*May*], online: <http://canlii.ca/t/1m7f3>.
[30] *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*].
[31] *Paxton v Calgary Remand Centre (Director),* 2014 ABQB 438 (CanLII) at paras 59-71 [*Paxton*], online: http://canlii.ca/t/g8nfj.
[32] *DG v Bowden Institution*, 2016 ABCA 52 at (CanLII) [*Bowden*], online: http://canlii.ca/t/gnk4z and *Ewanchuk v Canada (Parole Board),* 2015 ABQB 707 (CanLII), http://canlii.ca/t/gm4t3 both involved loss of parole not disciplinary segregation; *Chung* dealt with a detention in administrative segregation.

First, in an application for habeas corpus, the prisoner applicant bears the initial onus of establishing that their residual liberty rights have been restricted and that there is a legitimate ground to question the lawfulness of the restriction. The legal burden then shifts to the correctional authority to show that the restriction is lawful.[33] The shifting of the legal burden to the correctional authority is unique to the remedy of habeas corpus and is one factor distinguishing it from an application for judicial review, under which the prisoner applicant has the sole onus of establishing that the correctional authority's decision was unreasonable or incorrect. In *Khela*, the Supreme Court explained the significance of this distinction, and its importance in the context of this case where the prisoner's application resulted from an emergency or involuntary inmate transfer to a higher security prison:[34]

> Further, on an application for judicial review, it is the applicant who must show that the federal decision maker made an error, whereas, on an application for habeas corpus, the legal burden rests with the detaining authorities once the prisoner has established a deprivation of liberty and raised a legitimate ground upon which to challenge its legality. This particular shift in onus is unique to the writ of habeas corpus. Shifting the legal burden onto the detaining authorities is compatible with the very foundation of the law of habeas corpus, namely that a deprivation of liberty is permissible only if the party effecting the deprivation can demonstrate that it is justified. The shift is particularly understandable in the context of an emergency or involuntary inmate transfer, as an individual who has been deprived of liberty in such a context will not have the requisite resources or the ability to discover why the deprivation has occurred or to build a case that it was unlawful. On an application for judicial review, on the other hand, the onus remains on the individual challenging the impugned decision to show that the decision was unreasonable.

A second important distinction between the two remedies is that an application for habeas corpus results in an expedited hearing. In the recent Alberta Court of Appeal decision in *DG v Bowden*,[35] the court emphasized that this is a particularly important aspect for a prisoner challenging a restriction of their residual liberty rights:

> …How long does it take to secure the judgment of the provincial superior court on this extraordinarily important question? This is a very important criterion for a person incarcerated in a penitentiary. Processes that take a considerable amount of time to navigate are of questionable value to those who invoke them. The passage of time may make the offender's complaint moot or diminish the value of the remedy…
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> The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom. [Footnotes omitted]

[33] *Khela* at para 30.
[34] *Khela* at paras 40.
[35] *DG v Bowden* at paras 120, 122.

Rule 3.9 of the Alberta Rules of Court states that habeas corpus applications can be heard by the Court of Queen's Bench on 10 days' notice, and that time can be shortened at the discretion of the court. Due to the nature of the application, the Alberta Court of Queen's bench accords habeas corpus applications special priority and they are heard without delay.[36]

Third, judicial review is a discretionary remedy, as the court has the authority to determine at the beginning of the hearing whether the case should proceed. In contrast, an application for habeas corpus must proceed to a hearing if the prisoner establishes that their residual liberty rights have been restricted and some basis for concluding that the detention is unlawful.[37]

To summarize, in most cases, it is open to Alberta prisoners to file an application for habeas corpus challenging a restriction on their residual liberty rights with the Alberta Court of Queen's Bench, rather than challenging the restriction through an application for judicial review or following the procedure for appealing the correctional authority's decision set out in legislation. Experts in the field of criminal law and prison law state that a habeas corpus application is the preferred means of challenging both federal and provincial/territorial correctional decisions restricting prisoners' residual liberty rights, as internal grievance procedures lack independence and enforceable remedies and judicial review is slower and has more procedural hurdles.[38]

The Alberta Court of Queen's Bench has expressed concern that habeas corpus applications by prisoners have become a barrier to the court's ability to alleviate access to justice concerns flowing from lack of judicial resources. The decision of the Alberta Court of Queen's Bench in *McCargar v Canada*[39] is a recent example in which this concern was expressed. In *McCargar*, the prisoner, a self-represented litigant, had filed numerous applications on numerous occasions that failed to follow the court's directions and rules of procedure. The court proposed that new restrictions be placed on habeas corpus applications by prisoners, ordered costs against the prisoner applicant, found him prima facie in contempt of court, and restricted his court filing activities pending a hearing on whether he should be declared a vexatious litigant.[40]

A prisoner's application for habeas corpus will often contain a request for "certiorari in aid of habeas corpus", which essentially seeks a direction from the court to the correctional institution that has restricted the prisoner's residual liberty rights to deliver up its records relevant to the application. If granted, this compels the correctional authority to provide evidence to

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[36] *DG v Bowden* at para 124.
[37] *Khela* at para 41.
[38] Lisa Kerr, "The Right to Maximum Prison Liberty?" (2016) 26 CR (7th) 245 at 245 [*Kerr, Maximum Prison Liberty*].
[39] *McCargar v Canada*, 2017 ABQB 416 (CanLII), online: <http://canlii.ca/t/h4l04>.
[40] For a discussion of this case and the difficulties with striking a balance between the effective use of court resources and protecting the rights of prisoners in custody, see Amy Matchet, "Beyond This Court's Capacity: Habeas Corpus Hearings Restricted to Liberty Remedies Only" (blog), online: <https://ablawg.ca/2017/07/24/beyond-this-courts-capacity-habeas-corpus-hearings-restricted-to-liberty-remedies-only/>.

substantiate the lawfulness of its decision to restrict a prisoner's liberty rights. In *Khela*,[41] the Supreme Court explained the importance of the application for certiorari in aid of habeas corpus and distinguished it from an application for certiorari outside of a habeas corpus application:

> Finally, *Miller* enhanced the effectiveness of habeas corpus by confirming that inmates may apply for certiorari in aid of habeas corpus. Without certiorari in aid, a court hearing a habeas corpus application would consider only the "facts as they appear[ed] on the face of [the] return" or on the "face" of the decision, as the case may be, in determining whether the deprivation of liberty was lawful. But certiorari in aid brings the record before the reviewing judge so that he or she may examine it to determine whether the challenged decision was lawful. Certiorari in aid therefore operates to make habeas corpus more effective by requiring production of the record of the proceedings that resulted in the decision in question. [Citations omitted]
>
> It should be noted that certiorari applied for in aid of habeas corpus is different from certiorari applied for on its own. The latter is often used to quash an order, and it is only available in the Federal Court to an applicant challenging a federal administrative decision. In the context of a habeas corpus application, what is in issue is only the writ of certiorari employed to "inform the [c]ourt" and assist it in making the correct determination in a specific case, and not the writ of certiorari used to bring the record before the decision maker in order to "have it quashed" as would be done on an application for judicial review in the Federal Court. [Citations omitted]

H. BARRIERS TO JUDICIAL REVIEW AND HABEAS CORPUS APPLICATIONS BY PRISONERS

Applications for judicial review and habeas corpus are in large part ineffective to remedy long-term violations of prisoners' rights for a number of reasons.

First, the substantive and procedural laws governing these remedies are complex and the shortage of legal aid coupled with most prisoners' lack of financial resources means that it is very difficult for prisoners to effectively assert these rights, a point made in the opening remarks of the John Howard Society to the Senate Standing Committee on Human Rights quoted at the beginning of this section. Legal aid is not a constitutionally protected right.[42]

Second, because prisoners under provincial/territorial corrections are serving sentences of less than two years and because of the lengthy delays in bringing matters before the courts generally, prisoners are often released from custody or no longer experiencing the violation of rights about which they complain, by the time the matter reaches the court.

[41] *Khela* at paras 35 – 36. *Bacon v Surrey Pretrial Services Centre (Warden)*, 2010 BCSC 805 (CanLII) at paras 24-26 [*Bacon*], online: <http://canlii.ca/t/2b1qj>, illustrates how the writ of certiorari in aid of habeas corpus was used to advance a prisoners' case.

[42] Alberta Civil Liberties Research Centre, *Access to Justice as a Right?,* online: <http://www.aclrc.com/new-page/#expand>.

I. OMBUDSMAN COMPLAINTS AND REMEDIES

The Alberta *Ombudsman Act*[43] establishes the Office of the Alberta Ombudsman, an appointed officer of the Alberta legislature with the power to investigate administrative decisions and actions of the Alberta government. Section 14(2) of the *Ombudsman Act* specifically provides that a complaint from any person in custody on a charge or after conviction for an offence "shall be immediately forwarded, unopened" to the Ombudsman by the person in charge of the place or institution where the person is in custody. Unlike the federal Correctional Investigator, the Alberta Ombudsman is tasked with investigating a wide range of complaints about government, including complaints from prisoners in the Alberta correctional system.

The Alberta Ombudsman examines the decisions of government actors to determine whether they have the authority to make the decision and have exercised that authority in a manner that satisfies their duty to act fairly. The Alberta Ombudsman applies the rules of natural justice in considering the validity and fairness of government decisions, which are outlined in its *Administrative Fairness Guidelines*.[44]

While both the Alberta Ombudsman and the federal Correctional Investigator can and do make recommendations for change, neither has the authority to remedy violations of prisoners' rights.

Additionally, as noted above, ACS policy directs that, before a complaint can be lodged with the Alberta Ombudsman, prisoners must exhaust the internal complaints process established by ACS. The *2017 Independent Review of Ontario Corrections* states, in response to the Ontario Ombudsman Annual Report 2015-2016 encouraging "inmates to use the facilities' internal complaints processes to address most other concerns":

> It is worth noting that the federal offender ombudsman, the Office of the Correctional Investigator, has a longstanding practice of accepting inmate complaints without requiring them to exhaust the internal grievance mechanism first. It is non-productive to refer complainants back to a process that is dysfunctional and may itself be the source of the complaint.[45]

In response to a request for information from the ACLRC, the Alberta Ombudsman provided the following information regarding the complaints it received from prisoners over the three years prior to October 2016.[46]

The Alberta Ombudsman receives complaints about ACS conduct in correctional, remand and young offender centres and statistics on complaints from these centres are grouped together.

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[43] *Ombudsman Act*, RSA 2000, c O-8.
[44] Alberta Ombudsman, *Administrative Fairness Guidelines*, online: <https://www.ombudsman.ab.ca/determining-fairness/administrative-fairness-guidelines>.
[45] *2017 Independent Review of Ontario Corrections* at p 43.
[46] Information received by ACLRC from Alberta Ombudsman Office, per Daniel Johns, dated November 2, 2016 [*Alberta Ombudsman Information*].

The *Ombudsman Act* requires that a written complaint be made to the Office of the Alberta Ombudsman, before it can conduct a formal investigation. Although new correctional officers must learn that complaints to the Ombudsman must be in writing and forwarded unopened to the Ombudsman's Office, the correctional facilities cooperate well to ensure compliance with this requirement. For most complaints, prisoners are expected to request the director of the correctional facility where they are incarcerated to review the complaint before a written complaint is forwarded to the Ombudsman's Office.

Prisoner complaints about healthcare, which is provided by Alberta Health Services (AHS), are not grouped with complaints about ACS. Prisoners can telephone or send healthcare complaints to the AHS Patient Concern Officer. Complaints are dealt with under section 2(1) of the *Patient Concerns Resolution Process Regulation,*[47] enacted under the *Regional Health Authorities Act.*[48] The Ombudsman has jurisdiction to investigate prisoners' healthcare complaints that are dealt with under the *Patient Concerns Resolution Process Regulation* however, these investigations are conducted in the same manner as a public complaint is conducted.

In the three-year period in question, the Alberta Ombudsman received approximately 278 written complaints about ACS conduct. It estimates that 10% of the written complaints were received from family members of prisoners or prisoners who had already been released from custody.

During the same three-year period, the Alberta Ombudsman also received 944 oral complaints about ACS conduct. Although there are no statistics, a minority of oral complaints are resolved informally and tend to involve emergent complaints such as complaints about health and safety, immediate release dates, passes for a funeral, or something that can obviously be solved with a telephone call.

Typically, prisoners complain about multiple issues, which include but are not limited to complaints, in no particular order, regarding: money and/or prisoner accounts; food or diet; prisoner property; canteen; relations with centre staff; transfers to other institutions; placement in the correctional institution; release/sentence calculation; placement in segregation; assaults by staff or other prisoners; telephone restrictions; visits; temporary passes for things such as funerals; and problems with transfer vehicles.

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[47] *Patient Concerns Resolution Process Regulation*, Alta Reg 124/2006. The Regulation states that patients can make complaints to the health authority regarding: (a) the provision of goods and services to the patient; (b) a failure or refusal to provide goods and services to the patient, or; (c) the terms and conditions under which goods and services are provided to the patient by the health authority or by a service provider under the direction, control or authority of that health authority. Alberta Health Services, Policy Level 1, *Patients Concern Resolution* is accessible at <https://extranet.ahsnet.ca/teams/policydocuments/1/clp-patient-concerns-resolution-process-prr-02-policy.pdf>.

[48] *Regional Health Authorities Act*, RSA 2000, c R-10.

Over the three-year period in question, the Alberta Ombudsman conducted three independent investigations, which are investigations that did not arise out of particular prisoner complaints. These reports involved investigations of a systemic nature and are not publicly available.