Court File No. 37770

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Alberta)

BETWEEN:

MINISTER OF PUBLIC SAFETY & EMERGENCY PREPAREDNESS and ATTORNEY GENERAL OF CANADA

Appellants
(Respondents)

– and –

TUSIF UR REHMAN CHHINA

Respondent
(Appellant)

– and –

END IMMIGRATION DETENTION NETWORK, CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DEFENCE FOR CHILDREN INTERNATIONAL CANADA, AMNESTY INTERNATIONAL CANADA, COMMUNITY & LEGAL AID SERVICES PROGRAMME, CANADIAN COUNCIL FOR REFUGEES, QUEEN'S PRISON LAW CLINIC, EGALE CANADA HUMAN RIGHTS TRUST, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION and CANADIAN PRISON LAW ASSOCIATION

Interveners

FACTUM OF THE INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION ("CCLA")

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW

1. Non-citizens should not be denied a fundamental *Charter* right—available to other inmates—to seek review of immigration detention by way of a *habeas corpus* application. As the Court of Appeal for Ontario recognized in *Chaudhary*, administrative review of detention under the *Immigration and Refugee Protection Act* ("*IRPA*"),[1] coupled with the possibility of judicial review before the Federal Court, does not sufficiently protect the liberty interest of non-citizens, and therefore they must have the right to seek release by way of *habeas corpus* in provincial superior courts.[2]

2. The Canadian Civil Liberties Association ("CCLA") submits that this Court should affirm the principles laid out in *Chaudhary* and decline any invitation to apply the judge-made rule referred to as the "*Peiroo* exception"[3] to foreclose the availability of *habeas corpus* in immigration detention matters. This result is compelled by two reasons:

(a) First, the *Charter* values of equality before the law, and equal protection and benefit of the law,[4] must lead to rejecting any judge-made rule which impacts exclusively non-citizens deprived of liberty and denies them access to a constitutionally-guaranteed remedy that protects their liberty interest.

(b) Second, an effective review mechanism, such as *habeas corpus*, is crucial to protecting non-citizens against unlawful deprivations of their liberty.

PART II - QUESTIONS AT ISSUE

3. The CCLA's submissions bear upon the following issue raised in this appeal: whether review of immigration detention decisions under the *IRPA* scheme, including judicial review by the Federal Court, is more limited and less favourable than review by way of *habeas corpus*.

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[1] *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].
[2] *Chaudhary v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 ONCA 700 at paras 111-115 [*Chaudhary*].
[3] *Peiroo v Canada (Minister of Employment and Immigration)*, 1989 OR (2d) 253 at paras 21-22 [*Peiroo*].
[4] *Canadian Charter of Rights and Freedoms*, s 15, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

PART III - ARGUMENT

A. The common law must be developed in accordance with the *Charter*, including the *Charter* rights to liberty and *habeas corpus* and the *Charter* value of equality before the law

4. The *Charter* value of equality before the law should compel this Court to reject any rule that would oblige a superior court to deny access to *habeas corpus* to non-citizens experiencing a deprivation of liberty under the *IRPA*.

5. Parliament did not explicitly legislate the ouster of non-citizens' constitutionally-protected access to superior courts' *habeas corpus* jurisdiction in matters involving deprivations of their liberty under the *IRPA*. Any such legislation would be subject to a rigorous debate and a robust s. 1 analysis on a constitutional challenge. Instead, the Court is asked to endorse a rule which would exclude categorically from the reach of *habeas corpus* an entire category of detainees who fall within a class of persons recognized as protected from discrimination under s. 15 of the *Charter*. This is a result no court should embrace. To the contrary, to condone a common law rule that is inconsistent with the values enshrined in the *Charter* would be contrary to this Court's duty to develop the common law in accordance with the values and rights underlying the *Charter*.[5]

6. In its first decision applying s. 15 of the *Charter*, this Court held that Canada's constitutional guarantee of equality before the law and equal benefit of law extends to non-citizens.[6] In *Andrews*, Wilson J. premised her conclusion that "non-citizens fall into an analogous category to those specifically enumerated in s. 15" on considerations that apply with equal force to the issues in this appeal:

> Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among "those groups in society to whose needs and wishes elected officials have no apparent interest in attending": see J. H. Ely, Democracy and Distrust (1980), at p. 151. Non-citizens, to take only the most obvious example, do not have the right to vote. Their vulnerability to becoming a disadvantaged group in our society is

[5] *R v Salituro*, [1991] 3 SCR 654 at 671.
[6] *Andrews v Law Society of British Columbia*, 1989 [1] SCR 143 at 151-152, 183 [*Andrews*].

> captured by John Stuart Mill's observation in Book III of Considerations on Representative Government that "in the absence of its natural defenders, the interests of the excluded is always in danger of being overlooked...."[7]

7. Justice Wilson went on to state that "[w]hile legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others."[8]

8. Few minorities in Canada are more "discrete and insular"[9] than non-citizens who are experiencing lengthy and uncertain detention under s. 58 of the *IRPA*. Without access to the political process, and with few "natural defenders,"[10] such immigration detainees depend upon the courts, and the core rights guaranteed by the *Charter*, to defend a liberty interest that is already severely compromised by the fact of their detention.

9. Non-citizens are entitled to protection under s. 15(1) of the *Charter*. This case does not fall within the limited exception to that general rule. One exception found in law pertains to the operation of s. 6 of the *Charter* and the deportation of non-citizens. However, this exception certainly does not apply to a detention that is unhinged from the purpose of deportation.[11]

10. The common law propositions from *Peiroo* and *Reza*[12] about the non-availability of *habeas corpus* in the immigration context must be read in their proper context: each of those cases involved a challenge to a deportation – not a challenge to a detention. At issue in this case is the infringement of non-citizens' liberty interest and the CCLA submits that the *Charter* requires that this must be protected.

11. To endorse a common law rule that treats non-citizens—who have been acknowledged by the jurisprudence to be particularly vulnerable—differently from other types of federal prisoners

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[7] *Andrews*, *supra* note 6 at 152.
[8] *Ibid.*
[9] *Ibid* (quoting *United States v Carolene Products Co*, 304 US 144 [1938] at 152-153, n 4).
[10] *Ibid*.
[11] *Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9. Rayner Thwaites, "Discriminating against Non-Citizens under the *Charter*: *Charkaoui* and Section 15" (2009) 34:669 Queen's LJ 669 at 678.
[12] *Reza v Canada (Minister of Employment and Immigration)*, [1994] 2 SCR 394 [*Reza*].

is inconsistent with the *Charter* value of equality. The Court should instead take a similar approach to the one taken in *May v Ferndale*, which also involved an overlap with the jurisdiction of the Federal Court.[13] *May* concerned the right of federal prisoners to challenge their detention by way of *habeas corpus* in the provincial superior courts. This Court ruled in favour of a "concurrent jurisdiction approach" wherein federal prisoners have access to the remedy of *habeas corpus*.[14] This Court found that such an "approach properly recognizes the importance of affording prisoners a **meaningful and significant access to justice in order to protect their liberty rights**" and that "[t]imely judicial oversight, in which provincial superior courts must play a concurrent if not predominant role, is still necessary to safeguard the human rights and civil liberties of prisoners, and to ensure that the rule of law applies within penitentiary walls."[15]

12. The option of where and how to pursue the application should belong to the person whose liberty is infringed. Similarly to federal prisoners, non-citizens should have the option to pursue a challenge to their deprivation of liberty by way of *habeas corpus* or under the statutory scheme. There is no legal basis for treating non-citizen detainees differently from other federal prisoners when their liberty interest is engaged, and such a distinction would adversely affect members of a vulnerable group.

B. *IRPA* is not an effective review process

13. An effective review process is crucial to guarding against unlawful deprivations of liberty. Non-citizens should not have their right to seek an effective remedy from a court abrogated. The *IRPA* scheme does not provide a complete, comprehensive, or effective review process for at least two reasons:

(a) The appellate courts in *Chaudhary* and *Chhina*[16] were correct: from the perspective of a person deprived of liberty under the *IRPA* and seeking to

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[13] *May v Ferndale Institution*, 2005 SCC 82 at para 1 [*May*].
[14] *Ibid* at paras 65-72.
[15] *Ibid* at para 72.
[16] *Chhina v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 ABCA 248 [*Chinna*].

challenge that deprivation, the *IRPA* process is, in several respects, **not** as advantageous as *habeas corpus*; and

(b) The short history of *habeas corpus* proceedings in Ontario enabled by *Chaudhary* and the findings of maladministration surrounding the *IRPA* scheme raise significant doubt as to its effectiveness.

1. *IRPA* is not as advantageous as *habeas corpus*

14. *Chaudhary* identified three features of *habeas corpus* which, taken together, make *habeas corpus* broader and more advantageous than the *IRPA* scheme for detention review:[17]

(a) the way the question is framed is broader on a *habeas corpus* application and weighs in favour of the applicant;

(b) the onus lies on the government to justify the detention on a *habeas corpus* application; and

(c) the review process is more advantageous to the applicant on a *habeas corpus* application.

15. For an applicant seeking review of an immigration detention decision before a *judicial forum*, the *habeas corpus* remedy offers at least two additional advantages that protect their liberty interest:

(a) *habeas corpus* is a more accessible and speedier remedy than the judicial review procedure under the *IRPA*; and

(b) denial of *habeas corpus* can generally be appealed as of right, while the availability of an appeal from judicial review under the *IRPA* is highly restricted.

16. These advantages—arising at the threshold and conclusion of a *habeas corpus* application—sustain the conclusion that the so-called "*Peiroo* exception" should not foreclose access to *habeas corpus* in immigration matters, for the reasons given below.

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[17] *Chaudhary*, *supra* note 2 at paras 75-106.

a. *Habeas corpus* is more accessible and speedier than judicial review of an Immigration Division decision, under the rules of court in many provinces

17. Under the *IRPA*, to challenge before a judicial forum a deprivation of liberty authorized by the Immigration Division, a detainee must institute a judicial review proceeding by seeking leave of the Federal Court within a default 15 day timeframe.[18] By contrast, access to a court on a *habeas corpus* application is unrestricted by any leave requirement, and the application is not restricted by any timeline.

18. A notable feature of *habeas corpus* — which has no equivalent under judicial review — is that an application can be brought either **by** the person deprived of liberty **or on behalf of** that person by a third party.[19]

19. If a judicial review applicant obtains leave, the default timing for hearing the application is no sooner than 30 days and no later than 90 days after leave is obtained.[20] By contrast, *habeas corpus* applications generally enjoy expedited attention from the court, for example being "returnable immediately"[21] in Ontario, to be heard "on the day it is presented" or else no more than "three days later" in Quebec,[22] and "tak[ing] priority over all other business of the court" in Nova Scotia.[23] The Court of Appeal for Ontario has recently confirmed that "[b]ecause of the importance of the interests at stake" *habeas corpus* applications are "deemed to be urgent" and should be "give[n] priority" by courts.[24] This Court has also recognized that the speed with which a *habeas corpus* application can be heard — as compared to judicial review in the Federal

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[18] *IRPA, supra* note 1, s 72(1).
[19] *Habeas Corpus Act*, RSO 1990, c H.1, s 1(1) [*HCA*]; Art 398 CCP; *Supreme Court Civil Rules*, BC Reg 168/2009, s 21-3(3); Publications Saskatchewan, *The Queen's Bench Rules*, r 3-64(2); *Nova Scotia Civil Procedure Rules*, r 95.02(3) [*NS CPR*]; *MacKinnon v Bowden Institution*, 2017 ABQB 654 at para 1.
[20] *IRPA, supra* note 1, s 74(b).
[21] *HCA, supra* note 19, s 1(1).
[22] Art 399 CCP.
[23] *NS CPR, supra* note 19, r 7.13(1).
[24] *Brown v Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 ONCA 14 at para 20.

Court — is one of the advantages of the *habeas corpus* remedy from the perspective of the applicant.[25]

b. Denial of a *habeas corpus* application can be appealed as of right in most provinces

20. The automatic availability of appellate review of decisions upholding deprivations of liberty under the *IRPA* exists only under the *habeas corpus* process, and is an advantage that would be lost if superior courts were foreclosed from hearing *habeas corpus* applications in the immigration context, given the far more restrictive availability of appeals under the *IRPA* scheme for judicial review.

21. A decision of a superior court denying *habeas corpus* can be appealed as of right to a provincial court of appeal, in most provinces. [26] By contrast, the *IRPA* provides no automatic right to appeal the order of the Federal Court on judicial review of an Immigration Division decision. Instead, the Federal Court must certify a serious question of general importance.[27]

22. Subsequent appellate decisions in Ontario have expanded the scope of what was established by *Chaudhary* and provided helpful clarification of the superior courts' jurisdiction when hearing a *habeas corpus* application by a person deprived of liberty under the *IRPA.*

23. For example, in *Ogiamien v Ontario*, the Court of Appeal for Ontario confirmed that a Superior Court granting a detainee's release on a *habeas corpus* application has the authority to impose appropriate conditions as part of granting release.[28] More recently, in *Wang v Canada*

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[25] *Mission Institution v Khela*, 2014 SCC 24 at para 46.
[26] See *Wang v Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 ONCA 605 at paras 11-14 [*Wang*]; Art 30 CCP; *NS CPR, supra* note 22, s 7.13(1); *Alberta Rules of Court*, r 14.4(1); *Court of Appeal Rules*, BC Reg 297/2001, s 2.1; *Court of Appeal Act, 2000*, SS 2000, c C-42.1, s 8(2); *Judicature Act*, RSNB 1973, c J-2, s 8(3); *Rules of the Supreme Court, 1986*, SNL 1986, c 42, Sch D, ss 58.03(1), 58.04(1).
[27] *IRPA*, *supra* note 1, s 74(d); *Lunyamila v Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 FCA 22 at paras 44, 53.
[28] *Ogiamien v Ontario (Minister of Community Safety and Correctional Services)*, 2017 ONCA 839 at para 47 [*Ogiamien*].

the Court of Appeal for Ontario held that the *habeas corpus* remedy was available with respect to a deprivation of liberty under the *IRPA* that fell short of the applicant being held in custody.[29]

2. Court intervention is appropriate and necessary to protect against rights violations and maladministration

24. The courts have been required to intervene to protect the fundamental rights of non-citizens affected by the *IRPA* scheme. This has been necessary due to deficiencies in the statutory and regulatory scheme, lack of clarity in the provisions of the legislation, and maladministration.

25. As early as 1994, the Federal Court observed that "what amounts to be an indefinite detention for a lengthy period of time may, in an appropriate case, constitute a deprivation of liberty that is not in accordance with the principles of fundamental justice".[30] Justice Rothstein (as he then was) thus concluded that consideration of what are now known as the s. 248 factors[31] is necessary to guard against unconstitutionally indefinite detention. However, these factors remain deficient.[32] They lack (i) rules and clarity about the length of detention, such as the length of time beyond which detention cannot be permitted, and (ii) a mandate to release the detainees where the length of time that detention is likely to continue cannot be ascertained.

26. In *Brown*, the Federal Court encountered evidence of "maladministration" of the detention provisions of the *IRPA* that resulted in constitutionally-deficient proceedings.[33] While the Federal Court dismissed a constitutional challenge to the *IRPA* detention review scheme, it articulated a lengthy list setting out "the minimum requirements of lawful detention for immigration purposes" under the statutory scheme.[34] This decision has been critiqued as leaving the constitutionality of the immigration detention scheme "intact but uncertain in its operation".[35]

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[29] *Wang, supra* note 26 at paras 33-35.
[30] *Sahin v Canada (Minister of Citizenship and Immigration*), [1995] 1 FC 214 at para 26.
[31] See *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 248.
[32] Siena Antsis, Joshua Blum & Jared Will, "Separate but Unequal: Immigration Detention in Canada and the Great Writ of Liberty" (2017) 63:1 McGill LJ 1 at 15 [Antsis].
[33] *Brown v Canada (Minister of Citizenship and Immigration),* 2017 FC 710 at paras 120, 127 [*Brown*].
[34] *Ibid* at paras 159(a) – (i).
[35] Antsis, *supra* note 32 at 19.

27. Most significantly, the Federal Court in *Brown* specifically found that the availability of review mechanisms that **included** an application for *habeas corpus* fell within the minimum requirements for lawful detention for immigration purposes under the *IRPA*.[36]

28. The short history of *habeas corpus* proceedings in Ontario enabled by *Chaudhary* and its progeny confirms that the availability of *habeas corpus* provides, at a minimum, a crucial review mechanism given that the *IRPA* detention review process has been unresponsive to the circumstances of non-citizen detainees and insufficient to protect their rights.

29. For example, in *Ali v Canada*,[37] *habeas corpus* was used to finally end the lengthy and uncertain detention — in excess of seven years — of an applicant with no status in Canada. The Court held that the detainee's detention was not justified for legitimate immigration purposes and thereby violated ss. 7 and 9 of the *Charter*, warranting his release.[38] The Attorney General of Canada, the Canadian Border Services Agency (CBSA), and the immigration authorities could point to nothing more than skepticism and speculation to support their assertion that the applicant was actively preventing them from confirming his country of citizenship so they could deport him.[39]

30. More recently, in *Scotland v Canada*,[40] the application judge was critical of a detention review process before the Immigration Division characterized by a "vicious cycle of errors".[41] These errors by the Immigration Division included:

(a) "Uncritical accept[ance]" of the CBSA's determination that the applicant had breached conditions on his release, rather than discharging its duty to actually make the decision in issue in ordering his return to detention;[42]

(b) Ordering a return to detention for "*de minimis*, unintended actions" alleged by the CBSA to be breaches of the applicant's conditions of release;[43] and

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[36] *Brown*, *supra* note 33 at para 159.
[37] *Ali v Canada (AG)*, 2017 ONSC 2660 [*Ali*].
[38] *Ibid* at para 39.
[39] *Ibid* at paras 31-32.
[40] *Scotland v Canada (AG)*, 2017 ONSC 4850 [*Scotland*].
[41] *Ibid* at para 59.
[42] *Ibid* at paras 11, 61-62.

(c) Lapsing into circular reasoning such that "once a decision to detain is rendered at the first detention review, for all practical purposes the CBSA has met its burden, and at every subsequent detention review it is difficult, if not impossible, to displace the initial decision".[44]

31. A statutory scheme that is vulnerable to maladministration and/or does not have sufficient rights protections, should not be insulated from scrutiny. At a minimum, it should be subject to rigorous judicial scrutiny and the persons subject to its operation should be able to access the courts for an effective judicial remedy.

C. Conclusion

32. In conclusion, *habeas corpus* jurisdiction should not be declined merely because another alternative remedy exists, in particular where this scheme is not adequate, comprehensive, or sufficient to protect the *Charter* rights of non-citizens detained in Canada.

PART IV - SUBMISSIONS ON COSTS

33. The CCLA seeks no costs and asks that no costs be awarded against it.

PART V - REQUEST TO PRESENT ORAL ARGUMENT

34. By order dated September 27, 2018, the Court granted the CCLA permission to present oral argument not exceeding five minutes at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of October, 2018:

per **Ewa Krajewska**

per **Pierre N. Gemson**

Counsel for the Intervener,
Canadian Civil Liberties Association

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[43] *Scotland, supra* note 40 at para 65.
[44] *Ibid* at para 73.

PART VI - TABLE OF AUTHORITIES

AUTHORITY	PARAGRAPH REFERENCED
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PART VII – STATUTES, RULES, ETC.

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EXCERPTS FROM STATUTES, RULES, AND REGULATIONS RELIED UPON

RULES:

***Alberta Rules of Court*, r 14.4(1)**
14.4(1) Except as otherwise provided, an appeal lies to the Court of Appeal from the whole or any part of a decision of a Court of Queen's Bench judge sitting in court or chambers, or the verdict or finding of a jury.

Code of Civil Procedure, C-25.01, Arts 30, 398-399	
30. Judgments of the Superior Court and the Court of Québec that terminate a proceeding, and judgments or orders that pertain to personal integrity, status or capacity, the special rights of the State or contempt of court, may be appealed as of right. The following, however, may be appealed only with leave: **(1)** judgments where the value of the subject matter of the dispute in appeal is less than $60,000; **(2)** judgments rendered according to the procedure for non-contentious proceedings and not appealable as of right; **(3)** judgments dismissing a judicial application because of its abusive nature; **(4)** judgments denying an application for forced or voluntary intervention of a third person; **(5)** judicial review judgments of the Superior Court relating to the evocation of a case pending before a court or to a decision made by a person or body or a judgment rendered by a court that is subject to judicial review by the Superior Court, or relating to a remedy commanding the performance of an act; **(6)** judgments ruling on legal costs awarded to punish a substantial breach; **(7)** judgments confirming or quashing a seizure before judgment;	**30.** Peuvent faire l'objet d'un appel de plein droit les jugements de la Cour supérieure et de la Cour du Québec qui mettent fin à une instance, de même que les jugements et ordonnances qui portent sur l'intégrité, l'état ou la capacité de la personne, sur les droits particuliers de l'État ou sur un outrage au tribunal. Toutefois, ne peuvent faire l'objet d'un appel que sur permission: **1°** les jugements où la valeur de l'objet du litige en appel est inférieure à 60 000 $; **2°** les jugements rendus suivant la procédure non contentieuse qui ne font pas l'objet d'un appel de plein droit; **3°** les jugements qui rejettent une demande en justice en raison de son caractère abusif; **4°** les jugements qui rejettent une demande d'intervention volontaire ou forcée d'un tiers; **5°** les jugements de la Cour supérieure rendus sur un pourvoi en contrôle judiciaire portant sur l'évocation d'une affaire pendante devant une juridiction ou la révision d'une décision prise par une personne ou un organisme ou d'un jugement rendu par une juridiction assujetti à ce pouvoir de contrôle ou sur un pourvoi enjoignant à une personne d'accomplir un acte; **6°** les jugements rendus sur les frais de justice octroyés pour sanctionner des

Code of Civil Procedure, C-25.01, Arts 30, 398-399	
(8) judgments ruling on execution matters. Leave to appeal is granted by a judge of the Court of Appeal if that judge considers that the matter at issue is one that should be submitted to that Court, for example because it involves a question of principle, a new issue or an issue of law that has given rise to conflicting judicial decisions. If it is necessary to calculate the value of the subject matter of the dispute in appeal, account must be taken of interest already accrued on the date of the judgment in first instance and of the additional indemnity mentioned in article 1619 of the Civil Code. Legal costs are disregarded. If the subject matter of the appeal is the right to additional damages for bodily injury, only the amount of those damages is to be taken into account. … **398.** Any person deprived of liberty without it having been ordered by a decision of the competent court may ask the Superior Court to rule on the lawfulness of the detention and order the person's release if the detention is unlawful. A third person may act on the person's behalf. The summons directs the detaining authority to appear before the court on the date specified in order to explain the reasons for the detention. If the deprivation of liberty is due to confinement in an institution governed by health services and social services legislation or to detention in a correctional facility or a penitentiary, the application must be notified to the Attorney General, together with a notice of the date of presentation.	manquements importants; **7°** les jugements qui confirment ou annulent une saisie avant jugement; **8°** les jugements rendus en matière d'exécution. La permission d'appeler est accordée par un juge de la Cour d'appel lorsque celui-ci considère que la question en jeu en est une qui doit être soumise à la cour, notamment parce qu'il s'agit d'une question de principe, d'une question nouvelle ou d'une question de droit faisant l'objet d'une jurisprudence contradictoire. S'il y a lieu de déterminer la valeur de l'objet du litige en appel, il est tenu compte des intérêts courus à la date du jugement de première instance de même que de l'indemnité additionnelle visée à l'article 1619 du Code civil. Les frais de justice ne sont pas pris en considération. Si l'appel porte sur le droit à des dommages-intérêts additionnels en réparation d'un préjudice corporel, il n'est tenu compte que de la valeur de ces dommages-intérêts. … **398.** Toute personne privée de sa liberté sans qu'une décision du tribunal compétent l'ait ordonné peut s'adresser à la Cour supérieure afin qu'il soit statué sur la légalité de sa détention et que sa libération soit ordonnée si la détention est illégale. Un tiers peut également agir pour elle. L'avis d'assignation enjoint à celui qui exerce la garde de se présenter à la date qui y est indiquée afin d'exposer au tribunal les motifs de la détention. Lorsque la privation de liberté résulte d'une

Code of Civil Procedure, C-25.01, Arts 30, 398-399	
399. The application must be tried on the day it is presented. The plaintiff's proof may be made by affidavit. If the court considers that the Attorney General has a sufficient interest, it orders that the application be notified to the Attorney General and adjourns the trial to an early date, which cannot be more than three days later.	garde dans un établissement visé par les lois relatives aux services de santé et aux services sociaux ou d'une détention dans un établissement de détention ou un pénitencier, la demande est notifiée au procureur général, avec un avis de la date de sa présentation. **399.** La demande doit être instruite le jour de sa présentation. La preuve du demandeur peut être faite par déclaration sous serment. Si le tribunal estime que le procureur général a un intérêt suffisant dans la demande, il ordonne que celle-ci lui soit notifiée. Il ajourne alors l'instruction à une date rapprochée ne pouvant pas excéder trois jours.

***Court of Appeal Rules*, BC Reg 297/2001, s 2.1**

2.1 The following orders are prescribed as limited appeal orders for the purposes of section 7 of the Act:

(a) an order granting or refusing relief for which provision is made under any of the following Parts or rules of the Supreme Court Civil Rules:

(i) Part 5 *[Case Planning]*;
(ii) Part 7 *[Procedures for Ascertaining Facts]*, other than Rule 7-7 (6) *[application for order on admissions]*;
(iii) Rule 9-7 (11), (12), (17) or (18) *[adjournment or dismissal, preliminary orders, orders and right to vary or set aside order]*;
(iv) Part 10 *[Property and Injunctions]*;
(v) Part 11 *[Experts]*;
(vi) Rule 12-2 *[trial management conference]*;
(vi.1) Rule 18-1 *[inquiries, assessments and accounts]*;
(vii) Rule 21-7 *[foreclosure and cancellation]*;

(b) an order granting or refusing relief for which provision is made under any of the following Parts or rules of the Supreme Court Family Rules:
(i) Part 5 *[Financial Disclosure]*, other than Rule 5-1 (28) (b) and (c) *[relief]*;
(ii) Rule 7-1 *[judicial case conference]*;
(iii) Part 9 *[Procedures for Obtaining Information and Documents]*, other than Rule 9-6 (6) *[application for order on admissions]*;
(iv) Rule 11-3 (11), (12), (17) or (18) *[adjournment or dismissal, preliminary orders, orders and right to vary or set aside order]*;
(v) Part 12 *[Property and Injunctions]*;

***Court of Appeal Rules*, BC Reg 297/2001, s 2.1**

(vi) Part 13 *[Court Ordered Reports and Expert Witnesses]*;
(vii) Rule 14-3 *[trial management conference]*;
(viii)Rule 18-1 *[inquiries, assessments and accounts]*;

(c) an order granting or refusing interim relief under the *Family Law Act*;

(d) an order, granting or refusing an investigation into a family matter, made under section 211 of the *Family Law Act*;

(e) an order granting or refusing an adjournment or an extension or a shortening of time;

(f) an order granting or refusing costs, or granting or refusing security for costs, if the only matter being appealed is that grant or refusal;

(g) an order of a Supreme Court judge granting or refusing an appeal from any order referred to in paragraphs (a) to (f) of this rule.

***Nova Scotia Civil Procedure Rules*, rr 7.13(1), 95.02(3)**

7.13 (1) Habeas corpus takes priority over all other business of the court.

...

95.02 (3) An individual party who acts on their own and the appointed agent of a corporate party who acts on its own must, unless a judge permits otherwise, sign a document personally, except an agent may sign a notice for habeas corpus.

Publications Saskatchewan, *The Queen's Bench Rules*, r 3-64(2)

3-64 (2) Any person is entitled to bring proceedings, on his or her own behalf or on behalf of any other person, to obtain an order of habeas corpus ad subjiciendum.

***Rules of the Supreme Court, 1986*, SNL 1986, c 42, Sch D, ss 58.03(1), 58.04(1)**

58.03 (1) A person must seek leave of a judge to start an appeal where any of the following circumstances apply:

(a) the person intends to appeal a decision made in an uncompleted matter;
(b) the person intends to appeal a decision which was made by consent;
(c) the only portion of a decision the person intends to appeal relates to costs; or

***Rules of the Supreme Court, 1986,* SNL 1986, c 42, Sch D, ss 58.03(1), 58.04(1)**
(d) a statute requires that the person seek leave of the Court prior to starting an appeal … **58.04 (1)** Where no leave to appeal is required, a person may start an appeal by filing a Notice of Appeal.

***Supreme Court Civil Rules,* BC Reg 168/2009, s 21-3(3)**
21-3(3) The court may order that a person who may be affected by a proceeding for an order in the nature of mandamus may take part in the proceeding to the same extent as if served with the petition.

STATUTES:

***Court of Appeal Act, 2000,* SS 2000, c C-42.1, s 8(2)**
8(2) Leave to appeal an interlocutory decision is not required in the following cases: **(a)** cases involving: (i) the liberty of an individual; (ii) the custody of a minor; (iii) the granting or refusal of an injunction; or (iv) the appointment of a receiver; **(b)** other cases, prescribed in the rules of court, that are in the nature of final decisions.

***Habeas Corpus Act,* RSO 1990, c H.1, s 1(1)**	
1 (1) Where a person, other than a person imprisoned for debt, or by process in any action, or by the judgment, conviction or order of the Ontario Court (General Division) or other court of record is confined or restrained of his or her liberty, a judge of the Ontario Court (General Division), upon complaint made by or on behalf of the person so confined or restrained, if it appears by affidavit that there is reasonable and probable ground for the complaint, shall award a writ of *habeas corpus ad subjiciendum* directed to the person in whose custody or power the person so confined or restrained is, returnable	**1 (1)** Si une personne, à l'exclusion d'une personne emprisonnée pour dette ou par acte de procédure dans une action, ou par jugement, condamnation ou ordonnance de la Cour supérieure de justice ou d'une autre cour d'archives, est emprisonnée, un juge de la Cour supérieure de justice, sur plainte présentée par la personne emprisonnée ou en son nom, accorde un bref d'*habeas corpus ad subjiciendum* contre la personne au pouvoir ou sous la garde de laquelle se trouve la personne emprisonnée s'il lui semble, affidavit à l'appui, qu'il existe des motifs raisonnables et probables justifiant la plainte.

***Habeas Corpus Act*, RSO 1990, c H.1, s 1(1)**	
immediately before the judge so awarding the writ, or before any judge of the Ontario Court (General Division).	Le bref est rapportable immédiatement devant le juge qui l'a accordé ou devant un autre juge de la Cour supérieure de justice.

***Immigration and Refugee Protection Act*, SC 2001, c 27, ss 72(1), 74(b), 74(d)**	
72 (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is, subject to section 86.1, commenced by making an application for leave to the Court. ...	**72 (1)** Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est, sous réserve de l'article 86.1, subordonné au dépôt d'une demande d'autorisation. …
74 Judicial review is subject to the following provisions… **(b)** the hearing shall be no sooner than 30 days and no later than 90 days after leave was granted, unless the parties agree to an earlier day… **(d)** subject to section 87.01, an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.	**74** Les règles suivantes s'appliquent à la demande de contrôle judiciaire… **b)** l'audition ne peut être tenue à moins de trente jours — sauf consentement des parties — ni à plus de quatre-vingt-dix jours de la date à laquelle la demande d'autorisation est accueillie… **d)** sous réserve de l'article 87.01, le jugement consécutif au contrôle judiciaire n'est susceptible d'appel en Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci.

***Judicature Act*, RSNB 1973, c J-2, s 8(3)**	
8(3) Subject to subsection (3.1), an appeal to the Court of Appeal may be taken by any party from any judgment, order or decision **(a)** made in the Court of Queen's Bench or by a judge thereof, **(b)** made by a judge of the Court of Queen's	**8(3)** Sous réserve du paragraphe (3.1), une partie peut interjeter appel devant la Cour d'appel de tout jugement, de toute ordonnance ou de toute décision, **a)** rendu en la Cour du Banc de la Reine ou par un de ses juges, **b)** rendu par un juge de la Cour du Banc de la

***Judicature Act,* RSNB 1973, c J-2, s 8(3)**	
Bench who is persona designata by the provisions of an Act that does not expressly deal with the matter of an appeal from that judgment, order or decision, or **(c)** that is stated in any other Act as being subject to an appeal to the Court of Appeal or from any other judgment, order or decision that might heretofore have been appealed to the Court of Appeal, and unless inconsistent with the express provisions of another Act or the Rules of Court, every appeal to the Court of Appeal shall as nearly as possible follow the procedural rules for an appeal from the Court of Queen's Bench to the Court of Appeal, and the Court of Appeal in every appeal shall have the powers, including the power to extend the time for appeal, that it has in the case of an appeal from the Court of Queen's Bench.	Reine commis comme persona designata par les dispositions d'une loi qui ne traite pas expressément de la question d'un appel de ce jugement ou de cette ordonnance ou décision, ou **c)** dont il est indiqué dans une autre loi qu'il est susceptible d'appel devant la. elle peut également appeler de tout autre jugement, ordonnance ou décision dont elle aurait pu, avant l'adoption de la présente loi, interjeter appel devant la Cour d'appel et, sauf incompatibilité avec les dispositions expresses d'une autre loi ou des Règles de procédure, les appels portés devant la Cour d'appel doivent, autant que possible, suivre les règles de procédure applicables aux appels déférés de la Cour du Banc de la Reine à la Cour d'appel, celle-ci ayant pour chaque appel les pouvoirs, y compris celui de proroger les délais d'appel dont elle dispose en cas d'appel déféré de la Cour du Banc de la Reine.

REGULATIONS :

***Immigration and Refugee Protection Regulations,* SOR/2002-227, s 248**	
248 If it is determined that there are grounds for detention, the following factors shall be considered before a decision is made on detention or release: **(a)** the reason for detention; **(b)** the length of time in detention; **(c)** whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time; **(d)** any unexplained delays or unexplained lack of diligence caused by the Department, the Canada Border Services Agency or the person concerned; and	**248** S'il est constaté qu'il existe des motifs de détention, les critères ci-après doivent être pris en compte avant qu'une décision ne soit prise quant à la détention ou la mise en liberté : **a)** le motif de la détention; **b)** la durée de la détention; **c)** l'existence d'éléments permettant l'évaluation de la durée probable de la détention et, dans l'affirmative, cette période de temps; **d)** les retards inexpliqués ou le manque inexpliqué de diligence de la part du ministère, de l'Agence des services frontaliers du Canada ou de l'intéressé;

***Immigration and Refugee Protection Regulations*, SOR/2002-227, s 248**	
(e) the existence of alternatives to detention.	**e)** l'existence de solutions de rechange à la détention.