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Separate but Unequal: Immigration Detention in Canada and the Great Writ of Liberty

Siena Anstis, Joshua Blum and Jared Will

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See table of contents

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Article abstract

Canada maintains a separate legal regime for immigration detainees who, until recently, were denied the right to seek release by way of *habeas corpus*. This denial of one of the most deeply entrenched rights at common law and under the *Canadian Charter of Rights and Freedoms* was justified by the proposition that the immigration detention scheme is "separate but equal"—that it provides an adequate remedy such that *habeas corpus* is not necessary. Perhaps unsurprisingly, this "separate but equal" regime has failed to provide basic procedural and substantive protections that are available in other Canadian legal regimes where liberty is at stake. However, in 2015, the Court of Appeal for Ontario reignited the availability of *habeas corpus* as a remedy to indefinite detention in the immigration context in *Chaudhary v. Canada* (*Public Safety and Emergency Preparedness)*. By reversing a line of cases that had confined immigration detainees to review by an administrative tribunal and judicial review in the Federal Court, *Chaudhary* has opened the door to the superior courts for immigration detainees. This article provides a review of the immigration detention system in Canada, the applicable legislation, procedures, and case law, and canvasses the impact of *Chaudhary* on the rights of immigration detainees. It then considers the benefits of *habeas corpus* as a litigation strategy, the role it has played in debunking the "separate but equal" myth, and suggests other potential issues now ripe for further litigation.

SEPARATE BUT UNEQUAL: IMMIGRATION DETENTION IN CANADA AND THE GREAT WRIT OF LIBERTY

Siena Anstis, Joshua Blum and Jared Will[*]

Canada maintains a separate legal regime for immigration detainees who, until recently, were denied the right to seek release by way of *habeas corpus*. This denial of one of the most deeply entrenched rights at common law and under the *Canadian Charter of Rights and Freedoms* was justified by the proposition that the immigration detention scheme is "separate but equal"—that it provides an adequate remedy such that *habeas corpus* is not necessary. Perhaps unsurprisingly, this "separate but equal" regime has failed to provide basic procedural and substantive protections that are available in other Canadian legal regimes where liberty is at stake. However, in 2015, the Court of Appeal for Ontario reignited the availability of *habeas corpus* as a remedy to indefinite detention in the immigration context in *Chaudhary v. Canada* (*Public Safety and Emergency Preparedness)*. By reversing a line of cases that had confined immigration detainees to review by an administrative tribunal and judicial review in the Federal Court, *Chaudhary* has opened the door to the superior courts for immigration detainees. This article provides a review of the immigration detention system in Canada, the applicable legislation, procedures, and case law, and canvasses the impact of *Chaudhary* on the rights of immigration detainees. It then considers the benefits of *habeas corpus* as a litigation strategy, the role it has played in debunking the "separate but equal" myth, and suggests other potential issues now ripe for further litigation.

Le Canada opère un régime juridique distinct pour les détenus issus de l'immigration. Jusqu'à récemment, ceux-ci se voyaient refuser le droit de demander leur libération par voie d'*habeas corpus*. Cette négation de l'un des droits les plus profondément enracinés en common law et en vertu de la *Charte canadienne des droits et libertés* était justifiée par la proposition selon laquelle le régime de détention en matière d'immigration est « distinct, mais équivalent », de sorte que l'*habeas corpus* ne serait pas nécessaire. Sans surprise, ce régime « distinct, mais équivalent » a échoué à assurer des protections procédurales et substantives de base disponibles dans d'autres régimes juridiques canadiens où la liberté de la personne est en jeu. Cependant, en 2015, la Cour d'appel de l'Ontario a de nouveau rendu disponible le recours à l'*habeas corpus* comme moyen de remédier à la détention indéfinie dans le contexte de l'immigration dans l'affaire *Chaudhary v. Canada* (*Public Safety and Emergency Preparedness)*. En renversant une série de décisions qui avaient confiné l'adjudication des détentions du domaine de l'immigration à un tribunal administratif et à un contrôle judiciaire devant la Cour fédérale, *Chaudhary* a ouvert la porte au recours devant les tribunaux supérieurs pour les détenus en matière d'immigration. Cet article présente un examen du système de détention en matière d'immigration au Canada, de la législation, des procédures et de la jurisprudence applicables, et analyse l'impact de *Chaudhary* sur les droits des détenus de l'immigration. Il considère ensuite les avantages de l'*habeas corpus* comme une stratégie de contentieux, le rôle qu'il a joué dans la démystification du mythe « séparé, mais équivalent » et suggère que d'autres poursuites potentielles sont maintenant disponibles pour de nouveaux litiges.

* Siena Anstis is a litigation associate at Morrison & Foerster LLP in New York City with an interest in asylum and detention. Joshua Blum and Jared Will practice immigration and refugee law at Jared Will & Associates in Toronto, Ontario and have acted as counsel in a number of immigration detention cases, including several cases under discussion in this article. This article is dedicated to Barbara Jackman and William Sloan for their tireless efforts over the past decades to preserve the right to *habeas corpus* for non-citizens in Canada. The authors also thank Caitlin Leach for her invaluable assistance in editing.

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Introduction

It has been more than six decades since the Supreme Court of the United States made the rather obvious observation that "separate but equal" is a fiction wherever those so separated are politically and socially disadvantaged.[1] During the same intervening decades, Canada has maintained a distinct legal regime for the detention of non-citizens under its immigration laws. The power to detain non-citizens is broader, and the protections afforded to non-citizen detainees fewer, than under any other legal regime known to Canadian law.[2] Under this regime, where detention is, by definition, of indeterminate length, long-term detentions in maximum-security criminal facilities have become common and widespread.[3]

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1 See *Brown v Board of Education of Topeka*, 347 US 483 at 493–95, 74 S Ct 686 (1954). As Stephanie J Silverman and Petra Molnar write, immigration detainees are faced with not only the deprivation of their basic liberty interests but also the "irreparable psychological, physical, and social damage" that detention inflicts. See Stephanie J Silverman & Petra Molnar, "Everyday Injustices: Barriers to Access to Justice for Immigration Detainees in Canada" (2016) 35:1 Refugee Survey Q 109 at 109 [Silverman & Molnar, "Everyday Injustices"]. Those detained do not hold the same rights as Canadians and are managed and excluded. As Silverman and Molnar note: "[L]egislation, rhetoric, policies and rule-making governance systems imported from the carceral setting are constructing detainees as the ultimate foreigners. They must be identified, managed, and incapacitated" (*ibid* at 115). See also Anna Pratt, *Securing Borders: Detention and Deportation in Canada* (Vancouver: UBC Press, 2005) [Pratt, *Securing Borders*]; Mary Bosworth & Sarah Turnbull, "Immigration Detention, Punishment, and the Criminalization of Migration" in Sharon Pickering & Julie Ham, eds, *The Routledge Handbook on Crime and International Migration* (Oxford: Routledge, 2015) 91 at 97; Amy Nethery & Stephanie J Silverman, eds, *Immigration Detention: The Migration of a Policy and its Human Impact* (Abingdon, UK: Routledge, 2015).

2 For a discussion of the immigration detention regime in Canada, see Silverman & Molnar, "Everyday Injustices", *supra* note 1; Janet Cleveland, "Not so Short and Sweet: Immigration Detention in Canada" in Nethery & Silverman, *supra* note 1, 79; Rayner Thwaites, *The Liberty of Non-Citizens: Indefinite Detention in Commonwealth Countries* (Oxford: Hart, 2014) ch 8 [Thwaites, *Liberty of Non-Citizens*]; Arghavan Gerami, "Challenging Prolonged and Indefinite Immigration Detention: Necessary Amendments to the *Immigration and Refugee Protection Act*" (2016) 10:1 JPPL 205.

3 Immigration detainees in Canada are housed either in administrative "Immigration Holding Centers" (IHCs) or in provincial jails. According to the data available, a majority of time spent in immigration detention is actually spent in the latter—i.e. in provincial maximum security jails. See Brendan Kennedy, "Caged by Canada", *The Toronto Star* (17 March 2017), online: <https://www.thestar.com>, archived at https://perma.cc/4M9Q-U3Q4 [Kennedy, "Caged by Canada"] (finding that two-thirds of immigration detainees, including almost all of the long-term detainees, are held in maximum-security provincial jails). See also *Ali v Canada (AG)*, 2017 ONSC 2660 (Cross-examination of John Helsdon on 7 March 2017 at para 135) (confirming that two-thirds of the total number of days spent in immigration detention in Canada are spent in provincial jails). These findings contributed to the judgment in *Ali v Canada (AG)*, 2017 ONSC 2660, 137 OR (3d) 498 [*Ali*]. For more data on the number of people detained in Canada and an overview of the conditions of immigration detention in provincial correctional facili-

Notwithstanding the state's broad powers to detain non-citizens under immigration legislation, courts have, until recently, held that the right of all detainees to seek release by way of *habeas corpus*, enshrined in section 10(c) of the *Canadian Charter of Rights and Freedoms*,[4] was inapplicable to immigration detainees. Non-citizens were segregated out of the jurisdiction of provincial superior courts to grant *habeas corpus* relief on the premise that the legal regime already in place for them is "separate but equal".[5]

The laxity afforded by this "separate but equal" legal universe allowed the executive branch and its administrative tribunals to develop practices and norms that further disadvantaged immigration detainees. As we seek to demonstrate in this article, the legal regime for detaining non-citizens in Canada disregards the most basic norms of procedural fairness and *Charter* rights. This disregard continues notwithstanding the fact that sections 7, 9, and 12 of the *Charter* apply to "everyone" in Canada and ought therefore to protect equally against unjust, arbitrary, and cruel detentions.[6] Without any particular attempt to justify this reality, Canada

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ties, see e.g. Silverman & Molnar, "Everyday Injustices", *supra* note 1 at 115, 117–120; Stephanie J Silverman, "In the Wake of Irregular Arrivals: Changes to the Canadian Immigration Detention System" (2014) 30:2 Refuge 27 at 30ff; Hanna Gros & Paloma van Groll, "We Have No Rights': Arbitrary Imprisonment and Cruel Treatment of Migrants with Mental Health Issues in Canada" (2015) University of Toronto Faculty of Law International Human Rights Program Report at 29, online: <https://ihrp.law.utoronto.ca/We_Have_No_Rights>.

4 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

5 The leading case to this effect is *Peiroo v Canada (Minister of Employment and Immigration)* (1989), 69 OR (2d) 253, 60 DLR (4th) 574 [*Peiroo* cited to OR]. In *Peiroo*, the Court of Appeal for Ontario concluded that it "should leave the review of immigration matters with the Federal Court of Canada" and thus declined to grant the appellant the remedy of *habeas corpus* (*ibid* at 262). As discussed herein, the Court of Appeal for Ontario held in *Chaudhary v Canada* (*Public Safety and Emergency Preparedness)*, 2015 ONCA 700, 127 OR (3d) 401 [*Chaudhary* ONCA] that *Peiroo* does not in fact justify denial of *habeas corpus* to immigration detainees where the issue raised is the length and indefinite nature of the detention. This finding was recently affirmed in *Ogiamien v Ontario (Community Safety and Correctional Services)*, 2017 ONCA 839 at para 13, [2017] OJ No 5702 (QL) [*Ogiamien* ONCA]. See notes 85, 86, and 92 below for the cases applying *Peiroo* to immigration detainees.

6 For example, in a recent detention review the Immigration Division held that it did not "need documentation from the Minister to accept what the Minister [was] saying about what has been happening so far," and repeatedly referenced accepted institutional practice as grounds for denying basic procedural protections under the *Charter*. See *Re Ebrahim Toure* (15 June 2017) 0003-133-00505, Immigration and Refugee Board.

Discretion and the exercise of that discretion in a broad manner has "always been a component of the administration of Canadian immigration law" and the Immigration Division's reluctance to apply basic procedural rights afforded under the *Charter* is per-

has endorsed a policy of exceptionalism when it comes to the liberty of non-citizens.[7]

The fallacy of the "separate but equal" status of the immigration detention regime in Canada was recently recognized by the Court of Appeal for Ontario in *Chaudhary*.[8] The court found that immigration detainees face inequalities in challenging indefinite detention through administrative review and judicial review to the Federal Court,[9] and must therefore

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haps only a reflection or an extension of that reality. For further discussion on discretion and the Canadian immigration system, see e.g. Anna C Pratt, "Dunking the Doughnut: Discretionary Power, Law and the Administration of the Canadian Immigration Act" (1999) 8:2 Soc & Leg Stud 199 at 201 [Pratt, "Dunking the Doughnut"]. As Pratt explains, it is a long-standing feature of the immigration detention regime that immigration detainees are afforded fewer rights than Canadians in general. In 1999, she noted that "[w]hile those who are detained may experience their detention as punishment, they are not accorded the degree of rights and protections that would be theirs if they were actually *being punished*" (*ibid* at 206 [emphasis in original]). As noted in note 11, the *Charter* has been interpreted as possessing its own form of "separate but equal" with the rights under ss 7, 9, 12 and 15 of the *Charter* being constricted or limited when applied to non-citizens in Canada. On judges' inability to untangle disputes over the right to remain from the right to personal liberty, see generally Daniel Wilsher, "Whither Presumption of Liberty? Constitutional Law and Immigration Detention" in Michael J Flynn & Matthew B Flynn, eds, *Challenging Immigration Detention: Academics, Activists and Policy-Makers* (Cheltenham, UK: Edward Elgar, 2017) 66.

7 The notion that non-citizens and citizens do not share the same liberty interests is not limited to Canada. As Justice Kennedy of the United States Supreme Court wrote in his dissenting opinion in *Zadvydas v Davis*, 533 US 678 (2001) at 717 [*Zadvydas*], "[t]he reason detention is permitted at all is that a removable alien does not have the same liberty interest as a citizen does." This kind of legal exceptionalism is all too commonly drawn with regards to the rights of refugees and migrants. See e.g. Hannah Arendt, *The Origins of Totalitarianism*, 3rd ed (San Diego: Harcourt, Brace & Company, 1973) at 22; Giorgio Agamben, *Means without End: Notes on Politics*, translated by Vincenzo Binetti & Cesare Casarino (Minneapolis: University of Minnesota Press, 2000) at 15–28; Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton: Princeton University Press, 2006).

8 *Supra* note 5. See also *Ogiamien* ONCA, *supra* note 5 at paras 15–18, where the Court of Appeal for Ontario provided further clarification on the scope of *habeas corpus* and its decision in *Chaudhary*. Also note that while this article focuses primarily on Ontario case law and specifically on *Chaudhary*, the Court of Appeal for Alberta recently endorsed and applied *Chaudhary* in *Chhina v Canada (Public Safety and Emergency Preparedness)*, 2017 ABCA 248 at para 8, 56 Alta LR (6th) 1, leave to appeal to SCC granted, 37770 (3 May 2018) [*Chhina*].

9 *Chaudhary* ONCA, *supra* note 5 at paras 89–96. The only statutory remedy for detainees who wish to contest a decision to maintain their detention under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] lies under s 72(1) of the *IRPA,* whereby a permanent resident or foreign national can file an application for leave to seek judicial review at the Federal Court. While the judicial review process may provide an effective mechanism for reviewing the decisions of administrative tribunals in general, the same cannot be said in the specific context of reviewing the detention of immigration detainees in Canada. Also note that the Federal Court is a statutory court, and has

have the right to seek release by way of *habeas corpus* applications in provincial superior courts. This holding in *Chaudhary*, in turn, has allowed for greater scrutiny of the immigration detention regime. Later this year, in an appeal of an Alberta decision following *Chaudhary*, the Supreme Court of Canada will hear arguments and will then effectively decide whether *Chaudhary* will be overruled or applied nationwide.[10] As argued below, the brief career of immigration detention *habeas corpus* in Ontario has already demonstrated the necessity of preserving superior court jurisdiction over immigration detainees.

In an effort to deconstruct the myth that the Canadian immigration detention regime is "separate but equal", Part I of this article reviews the structure of the immigration detention regime in Canada and highlights its deficiencies. Part II examines the emergence of *habeas corpus* as a remedy in the immigration detention context and as the key mechanism by which the notion of "separate but equal" is being debunked in the courtroom and subjected to broader public scrutiny. Finally, Part III looks at the advantages of *habeas corpus* applications and charts some terrain for future litigation. In so doing, we hope to contribute more broadly to the literature on the dilution and distortion of *Charter* rights when applied in the domain of immigration law.[11] We also seek to initiate a discussion among practitioners and scholars on the intersection of *habeas corpus* and immigration detention, and the potential of *habeas corpus* litigation as *one* strategic tool for exposing and reversing the segregation and unequal treatment of immigration detainees.[12]

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no inherent jurisdiction. Its constitutive statute, the *Federal Courts Act*, RSC 1985, c F-7, s 18(2), does not grant it *habeas corpus* jurisdiction. The application for judicial review is thus the only remedy available in the Federal Court and under the *IRPA* for detainees. While one judge of the Federal Court speculated to the contrary in *Warssama v Canada (Citizenship and Immigration)*, 2015 FC 1311 at paras 40–46, [2015] FCJ No 1356 (QL), it remains that the Federal Court is statutory and simply does not have *habeas corpus* jurisdiction (except in the court martial context). See *Mission Institution v Khela*, 2014 SCC 24 at para 32, [2014] 1 SCR 502 [*Khela*].

10 See *Chhina, supra* note 8.

11 The erosion of the constitutional rights that non-citizens in Canada are equally entitled to under the *Charter* is a small but growing area of academic study. See e.g. Gerald Heckman, "Revisiting the Application of Section 7 of the *Charter* in Immigration and Refugee Protection" (2017) 68 UNBLJ 312; Catherine Dauvergne, "How the *Charter* Has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence" (2013) 58:3 McGill LJ 663; Rayner Thwaites, "Discriminating Against Non-Citizens Under the *Charter*: *Charkaoui* and Section 15" (2009) 34:2 Queen's LJ 670.

12 While there has been significant work on immigration detention in Canada and elsewhere—see notes 2, 3, 44, 52, 87; Alan Desmond, "The Development of a Common EU Migration Policy and the Rights of Irregular Migrants: A Progress Narrative?" (2016)

I. A Review of Immigration Detention in Canada

This Part provides a brief overview of the legal regime for immigration detention in Canada, as contained in the *Immigration and Refugee Protection Act* (*IRPA*)[13] and the *Immigration and Refugee Protection Regulations* (*IRPR*).[14] While the constitutionality and fairness of the relevant provisions is not the focus of this article, it is necessary to identify the deficiencies in the legislative regime governing immigration detention in Canada to fully understand the importance of *habeas corpus* to immigration detainees.[15] To that end, one must be mindful not only of what the legal regime says about the parameters of immigration detention but also, perhaps more importantly, what it fails to say. We endeavour to highlight these silences in our review. Over and above that, we seek to highlight three overarching and unjustifiable features of the detention regime: it allows for indefinite administrative detention;[16] it allows for detention that is arbitrary because there is no subsisting connection to its underlying purposes;[17] and it allows for the preventive detention of non-citizens under conditions that are far harsher and more restrictive than can be justified in the circumstances.[18]

16:2 Human Rights L Rev 247—the issue of *habeas corpus* as a remedy to indefinite immigration detention in Canada has received little academic attention. This is perhaps because, previous to *Chaudhary*, the possibility of *habeas corpus* seemed foreclosed. On *habeas corpus* as a remedy to detention more generally, see Judith Farbey, RJ Sharpe & Simon Atrill, *The Law of Habeas Corpus*, 3rd ed (Oxford: Oxford University Press, 2011); Debra Parkes, "The 'Great Writ' Reinvigorated? *Habeas Corpus* in Contemporary Canada" (2012) 36:1 Man LJ 351; Matthew Groves, "The Use of *Habeas Corpus* to Challenge Prison Conditions" (1996) 19:2 UNSWLJ 281.

13 *Supra* note 9, s 55(1)ff.

14 SOR/2002-227 [*IRPR*].

15 In *Khela*, *supra* note 9 at paras 43–49, the Supreme Court of Canada made clear that the comparative advantages of *habeas corpus* applications must be considered in determining whether a court can or should decline to exercise its *habeas jurisdiction*.

16 Indefinite detention is understood in the jurisprudence as an indeterminate period of detention that has exceeded the period of time reasonably necessary to carry out the immigration-related purpose of the detention, being either examination for purposes of assessing the right to enter or remain in the country or deportation upon finding that the person has no right to remain in Canada. See *Chaudhary* ONCA, *supra* note 5 at para 81; *Sahin v Canada (Minister of Citizenship and Immigration)*, [1995] 1 FCR 214 at 229–31, 85 FTR 99 (TD).

17 *Ibid.* Most frequently, this occurs where a non-citizen is detained for purposes of deportation but there is no reasonable prospect of deportation within a reasonable time.

18 See generally *supra* note 3. The profound impacts felt by those detained ought to remain at the core of any discussion of law in this area. As noted in Stephanie J Silverman & Evelyne Massa, "Why Immigration Detention is Unique" (2012) 18:6 Population, Space & Place 677 at 678:

A. Separate but Unequal: Deficiencies in Canada's Immigration Detention Regime

The *IRPA* and the *IRPR* set out the statutory framework for the detention of foreign nationals and permanent residents in Canada. After a foreign national or permanent resident is arrested and detained under the *IRPA*,[19] it falls to the Immigration Division, a branch of the Immigration and Refugee Board of Canada—the administrative tribunal that decides immigration and refugee cases in Canada—to determine whether detention is justified under the *IRPA*.[20] The Immigration Division is required to order the release of a detained foreign national or permanent resident unless it "is satisfied" that: (a) the individual is a danger to the public; (b) the individual is unlikely to appear for removal or an immigration proceeding; (c) the Minister of Public Safety is taking necessary steps to inquire into a reasonable suspicion that the individual is inadmissible on the grounds of security, violating human or international rights, serious criminality, criminality, or organized criminality; or (d) the Minister "is of the opinion"

> Put frankly, people deteriorate the longer they are detained. Children, torture survivors, and other vulnerable people are at particular risk of suffering lifelong psychological damage from even short periods of immigration detention. Research conducted in the UK, Australia, Canada, and the US, amongst other states, exhaustively documents the negative impact of immigration detention on the mental and physical health of detainees.

19 With some exceptions where the individual is a "designated foreign national" (DFN), which is not the focus of this article, the *IRPA*, *supra* note 9, s 55(1), provides that an immigration officer can arrest and detain a permanent resident or foreign national where the officer has "reasonable grounds to believe" that the permanent resident or foreign national is "inadmissible and is a danger to the public or is unlikely to appear for examination, for an admissibility hearing, for removal from Canada or at a proceeding that could lead to the making of a removal order by the Minister." A foreign national can also be detained where the immigration officer is not satisfied of the foreign national's identity. A permanent resident or foreign national may also be detained upon entry into Canada if the immigration officer considers it "necessary" for completion of an examination or has "reasonable grounds to suspect" that the individual "is inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality" (*ibid*, s 55(3)). An immigration officer has the discretion to release a foreign national or permanent resident before the first detention review if the officer "is of the opinion" that the reasons for detention no longer exist (*ibid*, s 56(1)). For further discussion of the regime for DFNs, see Luke Taylor, "Designated Inhospitality: The Treatment of Asylum Seekers Who Arrive by Boat in Canada and Australia" (2015) 60:2 McGill LJ 333.

20 The Immigration Division is required to review the reasons for the continued detention of a foreign national or permanent resident within the first forty-eight hours, at least once during the seven days following the initial review and then at least once during each thirty-day period following the seven-day review. See *IRPA*, *supra* note 9, ss 57–58.

that a foreign national's identity has not been, but may be, established.[21] In the final case, the Division must also be satisfied either that the Minister is making reasonable efforts to establish identity or that the detainee has not "reasonably cooperated" in this respect.[22] Sections 244 to 247 of the *IRPR* provide certain non-exhaustive factors that "shall be taken into consideration" when the Immigration Division is assessing whether a person is unlikely to appear (i.e. is a flight risk), is a danger to the public, or is a foreign national whose identity has not been established.[23]

Of particular note for present purposes are the silences that resonate from these provisions. Absent from these provisions are: (1) procedural protections for detainees in the detention review process; (2) a grant of jurisdiction to the Immigration Division to review or control the conditions of an individual's continued detention, a matter left solely to the discretion of the Canadian Border Services Agency (CBSA); and (3) any requirements to release the detainee where his or her detention has become

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21 *Ibid*, s 58(1).

22 *Ibid*, s 58(1)(d).

23 *Supra* note 14, ss 244–47. Of note with respect to these provisions is that there is no provision in the *IRPA* or *IRPR* that requires consideration of criteria that speak to an assessment of whether an individual is a *current* danger to the public. Past convictions and prior danger opinions can support a danger finding without regard for the passage of time, rehabilitation or the actual facts and circumstances underlying the convictions or other findings. As a result, for example, a decade-old conviction for a relatively minor offence under the *Controlled Drugs and Substances Act*, SC 1996, c 19 is a factor in support of a finding that they are a danger to the public. See e.g. *Ali*, *supra* note 3 at paras 15, 24, 34 and the records of detention review proceedings before the Federal Court in *Brown v Canada (Citizenship and Immigration)*, 2017 FC 710, 25 Admin LR (6th) 191, leave to appeal to the FCA granted [*Brown* FC]. In *Brown*, the reviews held from September 2011 to August 2016 all found that Mr. Brown was a danger to the public solely because of his criminality prior to the detention. See *ibid* (Evidence, Reason of Detention Review on 10 December 2012): "I am satisfied that you are both a danger to the public and unlikely to appear for removal for the same reasons [as previous ones]. You have already been given numerous times I am sure you do not need that repeated to you"; *ibid* (Evidence, Reason of Detention Review on 12 February 2014): "In the matter of danger to the public, again I uphold the prior decisions. ... You also have some serious convictions of recent vintage from May of 2011"; *ibid* (Evidence, Record of Hearing for Detention Review on 2 July 2014): "I won't go into detail on the concerns regarding danger to the public and unlikely to appear. They've been stated many times"; *ibid* (Evidence, Record of Hearing for Detention Review on 12 November 2015): "With respect to finding of danger to the public I note that you have approximately 17 convictions and they are fairly serious ... Today though I do find that the concerns that have been raised by my colleagues at your previous detention reviews still remain valid"; *ibid* (Evidence, Record of Decision in Detention Review on 15 March 2016): "So Mr. Brown's detention will continue today on both statutory grounds. There definitely did not appear to be any new significant changes in the circumstances of his case that would make me come to a different decision that I myself have or that my colleagues have so far at detention review hearings."

indefinite or unhinged from its immigration-related purpose.[24] We turn to an examination of the deficiencies that flow from these three silences.[25]

1. Silence 1: Procedural Unfairness and Evidentiary Issues

Under the regime as implemented, the Minister is represented at each detention review before the Immigration Division by a Hearings Officer. The Hearings Officer presents the Minister's case based on oral submissions, and does not, in the normal course of things, present evidence in support of the factual allegations made in those submissions.[26] Though Hearings Officers present the case against the detainee, they are neither sworn as witnesses nor subject to cross-examination. They generally have no first-hand knowledge of the facts alleged, and rely on file notes and correspondence from other CBSA officers. Thus, virtually all of the factual basis for detention is presented in the form of unsworn hearsay, where even the person relaying the hearsay information is not subject to cross-examination.[27] The absence of strict rules of evidence is standard in the administrative tribunal context—but the engagement of the liberty interest is rare in proceedings before administrative tribunals, Unlike in criminal law, where exceptions to the rule against hearsay are rigorously enforced because liberty is at stake,[28] reliance on hearsay is the norm in the detention of non-citizens.

The reliance on hearsay is compounded by the absence of advance disclosure. Unlike other domains where liberty is at stake, and the right to

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24 *Cf Chaudhary* ONCA, *supra* note 5 at para 81.

25 Many of the deficiencies discussed in the following sections were detailed in the recently released report that contains a summary of the findings of an independent auditor who reviewed over 300 detention review hearings before the Immigration Division. See Immigration and Refugee Board of Canada, *Report of the 2017/2018 External Audit (Detention)* (20 July 2018), available online: <https://irb-cisr.gc.ca/en/transparency/reviews-audit-evaluations/Pages/ID-external-audit-1718.aspx>, archived at https://perma.cc/FJ66-XLK9.

26 The standard practice is described in *Brown* FC *supra* note 23 (Cross-examination of Parminder Singh on 13 March 2017 at paras 30–34; Affidavit of Parminder Singh sworn on 10 February 2017 at para 7). For discussion, see *Brown* FC*, supra* note 23 at paras 121–28.

27 *Ibid*. See also Gros & van Groll, *supra* note 3 at 56; Kennedy, "Caged by Canada", *supra* note 3; Citizenship and Immigration Canada, *ENF 3: Admissibility, Hearings and Detention Review Proceedings* (2015), s 6.5; Citizenship and Immigration Canada, *ENF 20: Detention* (2015), ss 5.5, 6. See also *IRPA*, *supra* note 9, 173(d), which authorizes the Immigration Division to accept hearsay evidence, but does not expressly state that hearsay evidence can form the basis of a decision to detain.

28 See e.g. *R v F (WJ)*, [1999] 3 SCR 569 at para 7, 178 DLR (4th) 53.

advance disclosure is well-established,[29] there is no substantive or procedural rule requiring the Minister to disclose in advance the *information* on which a Hearings Officer will rely in seeking continued detention. The only disclosure rule, found in the *Immigration Division Rules*, requires advance disclosure of *documents* that the Minister will tender at the hearing.[30] Because the CBSA is permitted to make its case on the basis of the Hearings Officer's oral representations alone, the use of documents at hearings is exceptional, and thus so is the applicability of the regulatory disclosure obligation.[31]

Finally, the absence of procedural protections is compounded by the continuing effect of prior orders to detain. Once an Immigration and Refugee board member orders a person's detention, members in subsequent reviews of that detention are to depart from a prior decision to detain only where they can provide "clear and compelling" reasons to do so.[32] As the Court of Appeal for Ontario notes in *Chaudhary*, the Minister can simply rely on the reasons given at prior detention hearings without presenting any further evidence in favour of *continued* detention, and it is the detainee who bears the burden of furnishing grounds for departing from prior decisions.[33] In this context, it is unsurprising that detention reviews be-

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29 See *R v Stinchcombe*, [1991] 3 SCR 326 at 343–44, 68 CCC (3d) 1; *R v O'Connor*, [1995] 4 SCR 411 at paras 73–74, 100, 130 DLR (4th) 235. In other contexts, see e.g. *Mental Health Act*, RSO 1990, c M7, s 35(3); *Corrections and Conditional Release Act*, SC 1992, c 20, s 141.

30 SOR/2002-229, s 26.

31 See *Brown* FC, *supra* note 23 (the Federal Court observed that Mr. Brown raised "legitimate concerns about the timeliness and quality of pre-hearing disclosure" at para 127). In particular, a Hearings Officer with the CBSA admitted that disclosure was "not always provided in advance" to the detainee and documents were "sometimes produced only at the detention review" (*ibid* at para 126). The officer further acknowledged that "detainees and counsel may not have an adequate opportunity to request documents or provide rebuttal" (*ibid*). The Federal Court ultimately found that any failure by the government in its disclosure practises was an issue of maladministration and not an indication that the statutory scheme is unconstitutional (*ibid* at para 127). The fact remains, however, that the legislative regime does not mandate advance disclosure. Moreover, in practice, Hearings Officers are not assigned until the day before the hearing, which precludes meaningful advanced disclosure. See *Brown* FC, *supra* note 23 (Cross-examination of Parminder Singh on 13 March 2017 at paras 140, 432–446). Even subsequent to the *Brown* FC judgment, the CBSA appears to have taken no action to ensure timely disclosure. See *Dadzie v Canada*, Toronto CR-17-9-196-140 (Ont Sup Ct) (Cross-examination of Merfed Douri on 29 September 2017 at paras 54–66).

32 See *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4 at para 10, 236 DLR (4th) 329 [*Thanabalasingham*].

33 *Supra* note 5 at paras 88–90. The court noted that, as the length of the detention increases, it becomes increasingly difficult for the detainee to find a "clear and compelling reason" for the Immigration Division to depart from prior decision and order release or to argue that an additional 30 days spent in detention since the last review constitutes

come increasingly perfunctory as the accumulation of past orders becomes the basis for continued detention. Where the detainee is unable to marshal new facts or present novel alternatives to detention, there is a tendency for the Immigration Division to simply note the absence of new facts, adopt the conclusions reached in prior reviews, and maintain detention. Little to no attention is paid to the Minister's burden to prove that detention *remains* justified.[34]

2. Silence 2: Conditions of Detention and Treatment of Immigrants as Criminals

There is nothing in the legislative regime that curtails the Minister of Public Safety's discretion as to where and how immigration detainees are held as the *IRPA* is silent with respect to the location and conditions of detention. The authority to detain is exercised in practice by the CBSA, which has interpreted this power as conferring an unfettered discretion to detain migrants wherever and however it sees fit.[35] The Immigration Division has no jurisdiction to review the CBSA's decisions regarding the locations and conditions of a non-citizen's detention.[36]

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a "clear and compelling reason" to depart from an earlier decision, and cited statistical evidence demonstrative of this problematic phenomenon. In the recent judgment in *Brown* FC, *supra* note 23 at paras 116–20, the Federal Court noted the criticism levelled in *Chaudhary*, but affirmed *Thanabalasingham* without further analysis.

34 See the detention review decisions in *Brown* FC, *supra* note 23. See also Gros & van Groll, *supra* note 3 at 27–28.

35 CBSA Manager of the Detentions Unit in the Inland Enforcement Program Management Division John Helsdon confirmed this position in *Brown* FC, *supra* note 23 (Affidavit of John Helsdon sworn on 28 March 2017 at para 6) and in *Ali*, *supra* note 3 (Cross-examination of John Helsdon on 7 March 2017 at paras 92–103). On the discretion afforded to Canada's immigration machinery, see Pratt, "Dunking the Doughnut", *supra* note 6.

36 See *IRPA*, *supra* note 9, s 58(3); *Brown* FC, *supra* note 23 at para 129, citing *Canada (Minister of Citizenship and Immigration) v Jama*, 2007 CanLII 12831 (Can IRB); *Toure v Canada (Minister of Public Safety)*, 2017 ONSC 5878 at paras 71–72, [2017] OJ No 5295 (QL) [*Toure* SC]. See also Immigration and Refugee Board of Canada, *Guideline 2: Guideline on Detention* (2013), s 1.1.4, which describes the powers of Members of the Immigration Division to be limited to either order continued detention or release. In *Toure v Canada (Public Safety & Emergency Preparedness)*, 2018 ONCA 681 at paras 71–72, 2018 CarswellOnt 13232 (WL Can) [*Toure* ONCA], the Court of Appeal for Ontario found that a detainee's ability to lodge a complaint to the CBSA about conditions of detention was sufficient. This is to be contrasted with what was established in *PS v Ontario*, 2014 ONCA 900 at para 92, 123 OR (3d) 651, which held that the body with jurisdiction to review non-punitive detention must "have the procedures and powers necessary to render a decision that is minimally restrictive on liberty in light of the circumstances necessitating the detention." For more discussion on this point, see Gros & van Groll, *supra* note 3 at 88.

One way that the CBSA exercises its discretion is in deciding whether to detain non-citizens in specialized immigration holding centres (IHCs) or in provincial jails. There are currently only three IHCs in Canada, and both the conditions within them and the criteria for admission vary significantly.[37] Though it is contrary to international human rights standards to detain migrants in criminal facilities,[38] overall, sixty-six per cent of the days migrants spend in detention in Canada are spent in provincial criminal jails.[39] In areas of Canada where there is no IHC (i.e. anywhere outside of Toronto, Vancouver, or Montreal), immigration detainees are *automatically* placed in provincial jails.[40] In regions where there are IHCs, the CBSA still decides, at its discretion, whether a particular detainee will be held in a jail or in an IHC.

Once the CBSA transfers a detainee to a provincial jail, it loses control over the conditions of their detention.[41] Thus, immigration detainees in

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37 See *Brown* FC, *supra* note 23 (Affidavit of John Helsdon sworn on 28 March 2017 at paras 7–14); *Ali*, *supra* note 3 (Affidavit of John Helsdon sworn on 28 March 2017 at paras 7–12). For example, until recently, the IHC in Laval would accept detainees with a criminal record, whereas the IHC in Toronto would not do so because its insurance policy precluded it. See *Ali*, *supra* note 3 (Cross-examination of John Helsdon on 7 March 2017 at paras 106–07).

38 See *Standard Minimum Rules for the Treatment of Prisoners*, UNCPCTO, 1st Sess, Annex, Agenda Item 1 UN Doc A/Conf/6/1, (1956) 67 at 68 (Rule 8); *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UNGAOR, 70th Sess, Sup No 49, UN Doc A/70/49 (2015) 806 at 813, 832 (Rules 11, 122); Canadian Red Cross, "Annual Report on Detention Monitoring Activities in Canada" (2012–2013) at 38ff, online: Global News <https://shawglobalnews.files.wordpress.com/2014/11/red-cross-reports-on-canada-s-immigration-detention-system.pdf>; UNHCR, *Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* (February 1999) at 9–10 (Guideline 10), online: <http://www.unhcr.org/protection/globalconsult/3bd036a74/unhcr-revised-guidelines-applicable-criteria-standards-relating-detention>, archived at https://perma.cc/46REGCW5; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 10(2) (entered into force 23 March 1976, accession by Canada 19 May 1976, Can TS 1976 No 47) [*ICCPR*]; *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, GA Res 43/173, UNGAOR, 43rd Sess, Supp No 49, UN Doc A/43/49 (1988) 297 at 298 (Principle 8). For EU rules, see EC, *Commission Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, [2008] OJ, L 348/98, art 16(1) [*Directive 2008*].

39 See the sources cited in *supra* note 3.

40 See *Brown* FC, *supra* note 23 (Affidavit of John Helsdon sworn on 28 March 2017 at para 7).

41 This is expressly stated in the memorandum of understanding between the CBSA and the Ontario Ministry of Community Safety and Correctional Services regarding immigration detainees that was executed on 21 January 2015. See *Ali*, *supra* note 3 (Evidence, Agreement Between Canada and Ontario respecting detention of persons detained under the *Immigration and Refugee Protection Act (IRPA)* executed on 21 Janu-

provincial jails are managed solely under the rules of those institutions, which are designed and run as institutions for housing criminals. The conditions in some provincial jails in Canada are notoriously inhumane, and the situation in Ontario, where most immigration detainees are held, has received particular attention.[42] Immigration detainees are subject to co-mingling with the criminal population, lockdowns, segregation, limited access to health care, and more. They suffer the same abuses and deprivations as the criminal remand and sentenced populations in the jails notwithstanding the fact that the CBSA pays a twenty per cent premium over and above the actual cost of their detention. Immigration detainees in provincial jails are subject to these conditions despite the important fact that they are simply not criminals and only a very small percentage are even being held on the basis of an alleged danger to the public.[43] Thus, in practice, the majority of Canada's immigration detainees are separate and unequal in all but the conditions of their confinement, where they are treated as ordinary criminals.[44] The legislative regime silently condones this reality.

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ary 2015, s 2.17) [CBSA-Ontario MOU]. This was confirmed *Brown* FC, *supra* note 23 (Cross-examination of John Helsdon on 7 March 2017 at paras 36–37).

42 See e.g. *R v Jordan,* [2002] OJ No 5250 (QL) at paras 4–5, 9 (Ont Sup Ct); *Ogiamien v Ontario*, 2016 ONSC 3080, 132 OR (3d) 176 [*Ogiamien* ONSC] (the treatment of Mr. Ogiamien, an immigration detainee, at Maplehurst Correctional Complex was held to be "so excessive as to outrage standards of decency; was disproportionate; and was degrading" at para 268), aff'd 2017 ONCA 667; *Ali*, *supra* note 3 at paras 35–37; *Toure* SC, *supra* note 36 at para 72; Ombudsman Ontario*, Out of Oversight, Out of Mind* (Office of the Ombudsman of Ontario, 2017) at 13, online: <https://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/SORT/Out_of_Oversight-EN-accessible.pdf>; Kristin Rushowy, "'Serious Problems' in Use of Segregation in Prisons, Ontario Ombudsman Reports", *The Toronto Star* (20 April 2017), online: <https://www.thestar.com>, archived at https://perma.cc/Y3KZ-VVBT; Kennedy, "Caged by Canada", *supra* note 3.

43 See *Brown*, *supra* note 23 (Cross-examination of John Helsdon on 7 March 2017 at paras 94–99, 126–29); CBSA-Ontario MOU, *supra* note 41, s 4.

44 This is the case even though only about 6% of detainees are held on the ground that they constitute a danger to the public. See *Brown* FC, *supra* note 23 (Cross-examination of John Helsdon on 7 March 2017 at paras 94–99, 126–29). For judicial critiques of the unjustified overuse of provincial jails, see e.g. *Ali, supra* note 3 at paras 35–36; *Toure* SC, *supra* note 36 at paras 79–91. On the criminalization of migrants, known as "crimmigration", and rising trends in the imprisonment of migrants, see e.g. Bosworth & Turnbull, *supra* note 1 at 97; Cleveland*, supra* note 2 at 84; Juliet Stumpf, "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power" (2006) 56:2 Am U L Rev 367; Matthew B Flynn, "From *Bare Life* to Bureaucratic Capitalism: Analyzing the Growth of the Immigration Detention Industry as a Complex Organization" (2016) 8:1 Contemporary Readings in L & Social Justice 70.

3. Silence 3: No Mandate to Cease Indefinite and Arbitrary Detention

Once the Immigration Division finds that there are grounds for detention (e.g. identity, flight risk, or danger to the public), section 248 of the *IRPR* provides a list of "other factors" for consideration in determining whether release is appropriate. These other factors were added to the *IRPR* following the Federal Court's 1994 judgment in *Sahin*.[45] In that case, Justice Rothstein observed that "what amounts to 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" and therefore violate section 7 of the *Charter*.[46] He further found that "when any number of possible steps may be taken by either side and the times to take each step are unknown, I think it is fair to say that a lengthy detention, at least for practical purposes, approaches what might be reasonably termed 'indefinite.'"[47] He thus concluded that consideration of what are now the section 248 factors was necessary to guard against unconstitutionally indefinite detention.[48]

The section 248 factors include the existence of alternatives to detention; the length of time in detention; whether there are any elements that can assist in determining the length of time for which that detention is likely to continue; and, if so, that length of time.[49] While these factors provide a good overview of what should be important in deciding to continue detention, they remain deficient and cannot cure the statutory scheme under the *IRPA*. Of particular note is the *absence* of both (a) a definition of what constitutes an unacceptable length of time in detention and (b) a mandate to release the detainees where "the length of time that detention is likely to continue" cannot be ascertained. Thus, the Immigration Division is empowered to maintain detention wherever it finds that one or more of the statutory grounds are present. And while the Immigration Division must *consider* the length and indefinite nature of a detention, neither the indefinite nature of a detention nor the fact that it has become unhinged from its underlying immigration purpose are, in themselves, grounds for release.[50] Consequently, the Immigration Division is statutori-

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45 *Supra* note 16 at 231.

46 *Ibid* at 229.

47 *Ibid*.

48 *Ibid* at 230–32.

49 In *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at paras 112–20, [2007] 1 SCR 350 [*Charkaoui*], the Supreme Court reaffirmed the importance of these factors.

50 See *Canada (Minister of Public Safety and Emergency Preparedness) v Okwerom,* 2015 FC 433 at para 8, 2015 CarswellNat 1060 (WL Can) [*Okwerom*]; *Canada (Minister of*

ly empowered to maintain indefinite and arbitrary detentions. Further, particularly in cases where a detainee's criminal past has been invoked in favour of a danger finding, these "other factors" are routinely given short shrift, paving the way for lengthy, and at times indefinite, detentions.[51] In contrast, several other jurisdictions impose statutory time limits to immigration detention or at least require release where the detention has exceeded the time reasonably necessary in the circumstances or where there is no reasonable prospect of removal.[52] Perhaps unsurprisingly, the UN's

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Citizenship and Immigration) v B147, 2012 FC 655 at paras 53–56, 412 FTR 203 [*B147*].

51 See e.g. *Bruzzese v Canada (Public Safety and Emergency Preparedness*), 2014 FC 230 at paras 83, 87, [2015] 2 FCR 693. This was the case, for example, in *Ali*, *supra* note 3 at para 15, and in *Brown* FC, *supra* note 23. The Immigration Division reviews at issue in *Brown* (Immigration Division file No 0003-A4-01743) include the following observations by the decision-maker. From the 10 December 2012 review: "I am satisfied that you are both a danger to the public and unlikely to appear for removal for the same reasons [y]ou have already been given numerous times[.] I am sure you do not need that repeated to you." From the 12 February 2014 review: "In the matter of danger to the public, again I uphold the prior decisions ... You also have some serious convictions of recent vintage from May of 2011." From the 2 July 2014 review: "I won't go into detail on the concerns regarding danger to the public and unlikely to appear. They've been stated many times." From the 12 November 2015 review: "With respect to finding of danger to the public I note that you have approximately 17 convictions and they are fairly serious ... Today though I do find that the concerns that have been raised by my colleagues at your previous detention reviews still remain valid." From the 15 March 2016 review: "So Mr. Brown's detention will continue today on both statutory grounds. There definitely did not appear to be any new significant changes in the circumstances of his case that would make me come to a different decision that I myself have or that my colleagues have so far at detention review hearings."

52 A discussion of immigration detention regimes in other jurisdictions is beyond the scope of this article. It is to be noted, however, that the governing instrument in the European Union, *Directive 2008*, *supra* note 38, Preamble, para 16, arts 15(5)–(6), provide that detention for immigration purposes can only be used where less coercive measures would not be sufficient, and places a hard limit on the duration of detention for removal—6 months in normal circumstances, which can be extended to 18 months where removal is delayed because of non-cooperation by either the detainee or a third state. The European Court of Justice has interpreted the durational cap strictly—18 months is the hard limit even where there are concerns over a danger to the public. See *Mahdi*, C-146/14 PPU at paras 68–71, ECLI:EU:C:2014:1320. In the UK there are well-established common law principles (the "Hardial Singh Principles") that limit detention to the "period that is reasonable in all the circumstances" and mandate release where "it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period." See *Lumba v Secretary of State for the Home Department*, [2011] UKSC 12 at para 22, [2012] 1 AC 245. See also *R (on the Application of I) v Secretary of State for the Home Department*, [2002] EWCA Civ 888 at para 47, [2003] INLR 196. The law in the United States is in a state of flux. In 2001, the Supreme Court of the United States (SCOTUS) held that, in some circumstances, detention in excess of 6 months cannot be justified where there is not a reasonable prospect of removal. See *Zadvydas*, *supra* note 7 at 698–701. On *Zadvydas,* see T Alexander Aleinikoff, "Detaining Plenary Power: The Meaning and Impact of *Zadvydas v Davis*" (2002) 16:2 Geo Immigr LJ 365;

Human Rights Committee has found that the absence of a legislative limit on the duration of immigration detention in Canada violates the protection against arbitrary detention enshrined in article 9(1) of the *International Covenant on Civil and Political Rights*.[53]

Compounding the absence of a legislative limit on the duration of detention, Canada's legislative scheme does not require the Minister to justify the length of detention or its indefinite duration. As noted by the Court of Appeal for Ontario in *Chaudhary*, "the Minister needs only satisfy one of the listed criteria in section 58 to shift the onus to the detainee. The Minister need not explain or justify the length of the detention and its uncertain duration."[54] Similarly, the Minister is not required to prove that the detention's immigration purpose is, in fact, reasonably attainable in the foreseeable future.[55] As such, detention under the *IRPA* can be continued even where it has become unhinged from its immigration-related purpose.

David A Martin, "Graduated Application of Constitutional Protections for Aliens: The Real Meaning of *Zadvydas v Davis*" [2001] Sup Ct Rev 47. On more recent developments, see Christina Elefteriades Haines & Anil Kalhan, "Detention of Asylum Seekers en Masse: Immigration Detention in the United States" in Nethery & Silverman *supra* note 1, 69; Mary Holper, "The Beast of Burden in Immigration Bond Hearings" (2016) 67:1 Case W Res L Rev 75. In *Jennings v Rodriguez*, 583 US (2018), SCOTUS recently held that the relevant statutory provision did not itself require that immigration detainees be granted bond hearings every six months, and that the court below had erred in interpreting it as such. The majority decision, however, declined to rule on the constitutional issue, and remanded the matter back to the 9th Circuit Court with the instruction to address any constitutional challenge to the statute, and that matter remains pending at the time of writing.

53 See Working Group on Arbitrary Detention, *Opinions Adopted by the Working Group of Arbitrary Detention at its Sixty-ninth Session*, *No 15/2014 (Canada)*, UNHRCOR, 69th Sess, UN Doc A/HRC/WGAD/2014/15 (2014) at para 23. See also *Concluding Observations on the Sixth Periodic Report of Canada*, UN Human Rights Committee, 2015, UN Doc CCPR/C/CAN/CO/6 at paras 12–14; *ICCPR, supra* note 38, art 9(1). The same principle has been affirmed in other opinions of the working group. See Working Group on Arbitrary Detention, *Opinions Adopted by the Working Group on Arbitrary Detention at its Sixty-second Session, No 56/2011 (Lebanon)*, UNHRCOR, 62nd Sess, UN Doc A/HRC/WGAD/2011/56 (2011) at para 13; Working Group on Arbitrary Detention, *Revised Deliberation No 5 on Deprivation of Liberty of Migrants (Advance Edited Version)*, UNHRCOR, online: <http://www.ohchr.org/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf>.

54 *Supra* note 5 at para 86.

55 Conversely, the Division is not required to first find that there is a reasonable prospect of removal before ordering continued detention.

*B. The Constitutionality of Indefinite Immigration Detention Pre-*Chaudhary

After initial consideration by the Federal Court in *Sahin,*[56] the issue of indefinite detention in the immigration context was considered in 2007 by the Supreme Court of Canada in *Charkaoui*.[57] *Charkaoui* addressed the detention regime for national security detainees under the security certificate regime. The Court held that "[d]enying the means required by the principles of fundamental justice to challenge a detention may render the detention arbitrarily indefinite and support the argument that it is cruel and unusual."[58] The Court, however, also held that immigration detention of indeterminate duration can be constitutional if accompanied by a "meaningful process of ongoing review" that takes the *Sahin* factors[59] and "the context and circumstances of the individual case" into account.[60]

Charkaoui thus establishes that, at a minimum, the power to detain for an indefinite period of time under the *IRPA* must be tempered by a meaningful process of review sufficiently rigorous to ensure that detainees are released when their detention can no longer be justified. *Charkaoui* did not, however, address the constitutionality of the process of review available to immigration detainees before the Immigration Division and did not decide whether that particular review mechanism is constitutionally sufficient.[61] While courts have previously stated—inaccurately—

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56 See *supra* note 16 and accompanying text.

57 *Supra* note 49.

58 *Ibid* at para 96. Furthermore, the Court held that "onerous conditions of release that seriously restrict a person's liberty without affording an opportunity to challenge the restrictions" may also support the argument that the detention is cruel or unusual (*ibid*).

59 See *supra* note 16. These are the factors now codified in *IRPR*, *supra* note 14, s 248.

60 *Charkaoui*, *supra* note 49 at para 107.

61 The differences between the security certificate review detention process and the detention review process before the Immigration Division are stark. First, unlike proceedings before the Immigration Division, security certificate review is conducted by judges who, according to the Court in *Charkaoui*, *supra* note 49 at para 39, adopt a rigorous and non-deferential approach to the Minister's case. For discussions of the perfunctory approach often adopted by the Immigration Division, see Gros & van Groll, *supra* note 3 at 27–28; *Scotland v Canada (AG)*, 2017 ONSC 4850 at paras 61–63, 2017 CarswellOnt 12509 (WL Can) [*Scotland*]. Second, prior decisions are not binding in the way that they are in the Immigration Division (see *supra* note 32 and surrounding text). Third, the Minister is actually under a duty of timely disclosure and is required to present evidence in support of its position. There is extensive literature on *Charkaoui* and the security certificate regime. See e.g. Rayner Thwaites, "Process and Substance: *Charkaoui* I in the Light of Subsequent Development" (2011) 62 UNBLJ 13 [Thwaites, "Process and Substance"]; Catherine Dauvergne, "Security and Migration in the Less Brave New World" (2007) 16:4 Soc & Leg Stud 533; Colleen Bell, "Subject to Exception: Security Certificates, National Security and Canada's Role in the 'War on Terror'" (2006) 21:1 CJLS 63; Thwaites, *Liberty of Non-Citizens*, *supra* note 2 at 237ff.

that *Charkaoui* affirmed the constitutionality of the detention review regime before the Immigration Division for regular immigration detainees,[62] it is only very recently, in *Brown* FC —a decision now under appeal—, that a court properly pronounced itself on the constitutionality of this process.[63]

Two points from the Federal Court's decision in *Brown* FC are particularly relevant for present purposes. First, the Federal Court recognized that there was evidence of "maladministration" of the detention provisions of the *IRPA* that resulted in constitutionally deficient proceedings,[64] but held that the provisions were themselves constitutional provided that they are applied in adherence to a number of stated principles, including that "detention may continue only for a period that is reasonable in all of the circumstances."[65] While the Supreme Court stated in *Charkaoui* that detention under the *IRPA* must retain a connection to an immigration-specific purpose, such as examination under the *Act* or deportation,[66] it left intact the legislative regime that empowers the Immigration Division to continue indefinite and arbitrary detentions. The Federal Court followed suit in *Brown* FC, and put the ball back into the Immigration Divi sion's court, setting minimal parameters for the constitutional application of the law as currently written and upholding the law, despite its silence with respect to those very parameters.[67] Thus, as Rayner Thwaites observed with respect to the judgment in *Charkaoui*, the Federal Court judgment in *Brown* FC has left the constitutionality of the immigration detention scheme "'intact but uncertain' in its operation."[68]

Second, the Federal Court specifically held that the availability of *habeas corpus* relief is, in part, what renders detention under the *IRPA* scheme *Charter*-compliant, and thus entrusted the provincial superior

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62 See e.g. *Canada (Minister of Citizenship and Immigration) v Li*, 2009 FCA 85 at para 41, [2010] 2 FCR 433; *Brown v Canada (Ministry of Public Safety and Emergency Preparedness)*, 2016 ONSC 7760 at para 99, 371 CRR (2d) 57 aff'd 2018 ONCA 14, 2018 CarswellOnt 144 (WL Can) [*Brown* ONSC].

63 *Supra* note 23.

64 *Ibid* at para 120, where the Federal Court found that if the Immigration Division does not respect the standards it is supposed to follow in practice, "this is a problem of maladministration, not an indication that the statutory scheme is itself unconstitutional."

65 *Ibid* at para 159.

66 *Supra* note 49 at paras 124–30, citing *A (FC) v Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 2 AC 68.

67 *Supra* note 23 at para 159.

68 Thwaites, "Process and Substance", *supra* note 61 at 33. The language of "intact but uncertain" is borrowed from Kent Roach, "*Charkaoui* and Bill C-3: Some Implications for Anti-Terrorism Policy and Dialogue between Courts and Legislatures" (2008) 42 SCLR (2d) 281 at 307.

courts with the role of supervising the legality of immigration detentions.[69] As we argue below, when it comes to deciding the scope and availability of *habeas corpus* in future litigation, this point cannot be given short shrift.

In conclusion, despite the deficiencies of the *IRPA* detention scheme that we have articulated, it has—at least for now—been upheld as constitutional. The silences discussed above, however, leave the door open to detentions that, while pursuant to a purportedly constitutional regime, still violate the basic rights of individual detainees. In the next Part, we turn to how *habeas corpus* became available as a remedy to those violations.

II. The Right of Immigration Detainees to *Habeas Corpus*

A. The Peiroo *Exception Misapplied: Denying Immigration Detainees* Habeas Corpus *Relief*

Habeas corpus is a simple and elegant remedy:

> [T]he applicant must establish that he or she has been deprived of liberty. Once a deprivation of liberty is proven, the applicant must raise a legitimate ground upon which to question its legality. If the applicant has raised such a ground, the onus shifts to the respondent authorities to show that the deprivation of liberty was lawful.[70]

The Supreme Court of Canada has recognized 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."[71]

For over three decades, and despite the fact that the constitutional limits of immigration detention and the process of review remained untested, immigration detainees were deprived of their right under section 10(c) of the *Charter* to seek release by way of *habeas corpus*. The basis for this decision was the 1989 Court of Appeal for Ontario decision in *Peiroo*, which held that there was a statutory scheme that provided "a comprehensive scheme for review and appeal at each stage of the immigration proceedings" and thus *habeas corpus* relief was therefore not available.[72]

A brief description of the facts in *Peiroo* reveals the manner in which it was subsequently misapplied by other courts, including the Supreme

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69 *Brown* FC, *supra* note 23 at paras 113(d), 152.

70 *Khela, supra* note 9 at para 30.

71 *Ibid* at para 29.

72 *Peiroo*, *supra* note 5 at 261.

Court of Canada. The appellant in *Peiroo* filed a *habeas corpus* application to challenge a deportation order.[73] She contested the immigration adjudicator's finding that there was no credible basis for her refugee claim and unsuccessfully applied for the issuance of a writ of *habeas corpus* in the Ontario Superior Court of Justice to halt her deportation.[74] The Court of Appeal for Ontario rejected the appeal on jurisdictional grounds, finding that the remedy of *habeas corpus* was not available "by reason of the existence of alternative remedies available to the appellant" to challenge the no credible basis finding and her resultant deportation.[75] The court noted that the writ of *habeas corpus* should be considered an "extraordinary remedy" and that generally there is no recourse to such a remedy "where there is an alternative remedy available, such as an appeal."[76] The court found that the appellant had alternative remedies available to her—namely provisions of judicial review to the Federal Court and appeal to the Federal Court of Appeal—which the court considered to be as broad as, if not broader than, the superior court's *habeas corpus* jurisdiction.[77] On this basis, the Court of Appeal for Ontario held that superior courts should decline to exercise their *habeas corpus* jurisdiction and force the issues to be litigated, if at all, by way of judicial review in the Federal Court.[78]

In its 1994 judgment in *Reza v. Canada*, the Supreme Court endorsed *Peiroo* and held that an Ontario judge "properly exercised his discretion" to decline jurisdiction to decide an immigration matter on the basis that "Parliament had created a comprehensive scheme of review of immigration matters and the Federal Court was an effective and appropriate forum."[79] The respondent had claimed refugee protection in Canada and a two-member panel found that he did not have a credible basis for his claim. His claim was not referred to the Immigration and Refugee Board and a deportation order was issued.[80] That decision was challenged by way of a *habeas corpus* application. In the dissenting judgment of the Court of Appeal for Ontario, which the Supreme Court of Canada en-

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73 *Ibid* at 256–57.

74 *Ibid*.

75 *Ibid* at 257.

76 *Ibid*.

77 *Ibid* at 258.

78 *Ibid* at 262. It bears emphasis that it has never been contested that superior courts have jurisdiction to hear *habeas corpus* applications by immigration detainees, the issue has always been one of whether they should exercise their *discretion* to decline to hear them on grounds that the Federal Court is a more appropriate forum.

79 [1994] 2 SCR 394 at 405, 116 DLR (4th) 61 [*Reza*].

80 *Ibid* at 397–98.

dorsed, the application was characterized as "at heart, an attempt to have the credible basis decision and the deportation order reviewed and relitigated by a different forum by recharacterizing and reformulating as constitutional the outcomes and procedures the [respondent] had previously (and unsuccessfully) invoked."[81] The Supreme Court of Canada approved of the application of the "*Peiroo* exception" on these facts and found that the court below had properly declined to exercise its *habeas corpus* jurisdiction.

In 2005, the Supreme Court of Canada rendered judgment in *May v. Ferndale Institution*.[82] The Court, *in obiter*, held that *Peiroo* and *Reza* stood for the proposition that "in matters of immigration law, because Parliament has put in place a complete, comprehensive and expert statutory scheme which provides for a review at least as broad as that available by way of *habeas corpus* and no less advantageous, *habeas corpus* is precluded."[83] It is unclear whether or not the Court intended to affirm a blanket exception to *habeas corpus* in immigration matters, regardless of the issue raised. While both *Peiroo* and *Reza* involved attempts to challenge a deportation, neither involved immigration detention, and neither therefore engaged section 10(c) of the *Charter*.[84] The Court's laconic treatment of the "*Peiroo* exception" in *May* left room for doubt on the scope of the exception particularly because the court did not address the question of whether the *"Peiroo* exception" could be applied in cases where the person is in fact detained notwithstanding the clear language of section 10(c) of the *Charter*.

Even before *May,* however, the *Peiroo* exception had already been relied upon to reject *habeas corpus* applications for release from immigration detention.[85] The same approach was then maintained following

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81 *Ibid* at 402. Mr. Reza had applied for leave to the Federal Court of Appeal to challenge the deportation order, but it was rejected, as were his other attempts, including a humanitarian and compassionate grounds application (*ibid* at 398). It was only after this that he brought an application to the Ontario Court (General Division) for a declaration that the "credible basis" scheme, among other issues, was violated the *Charter* (*ibid* at 398).

82 2005 SCC 82, [2005] 3 SCR 809 [*May*].

83 *Ibid* at para 39.

84 Section 10(c) of the *Charter*, *supra* note 4, expressly provides for the right of "everyone" who is "detained" to have the validity of their detention "determined by way of *habeas corpus* and to be released if the detention is now lawful".

85 *R v Pacificador*, 1998 CarswellOnt 743 (WL Can) at para 7, [1998] OJ No 658 (QL); *Baroud v Canada (Minister of Citizenship and Immigration)*, 22 OR (3d) 255, 121 DLR (4th) 308 [*Baroud*]; *Zundel v R*, 2003 CanLII 23552 at para 9, 127 ACWS (3d) 116 (ON SC).

May.[86] The disadvantages of challenging one's detention under the *IRPA* regime as compared to a *habeas corpus* application were simply ignored or discounted in these judgments.[87] As a result, until 2015, the review mechanisms available to immigration detainees were held to be "separate but equal" and such detainees were, on that basis, denied their constitutional right under section 10(c) of the *Charter* to seek release by way of *habeas corpus*.

B. Chaudhary*:* Habeas Corpus *Relief for Immigration Detainees*

When *Chaudhary* came before the Court of Appeal for Ontario in May 2015, a wave of grassroots activism by migrant justice organizations and a hunger strike by immigration detainees inside a maximum-security jail had recently brought heightened public awareness to the issue of immigration detention in Canada.[88] The timing was ripe for a decision exploring the burdens and disadvantages faced by immigration detainees under their "separate but equal" regime.

The applicants in *Chaudhary* were four long-term immigration detainees who sought *habeas corpus* relief and challenged the applicability of the *Peiroo* exception. In the first instance, the Ontario Superior Court of Justice had applied the *Peiroo* line of authority, and refused to assume

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86 See *Kippax v Canada (AG)*, 2014 ONSC 3685 at paras 13–16, 114 WCB (2d) 318; *Sancho c Quebec (Directeur de l'établissement pénitencier à Rivière-des-Prairies*), 2008 QCCS 5346 at paras 3–6, 2008 CarswellQue 11027 (WL Can) [*Sancho*]; *Apaolaza-Sancho c Quebec (Director of Établissement de détention de Rivière-des-Prairies)*, 2008 QCCA 1542, [2008] QJ No 7743 (QL) [*Apaolaza-Sancho*]; *Chaudhary v Canada*, 2015 ONSC 1503 at para 26, [2015] OJ No 1055 (QL) [*Chaudhary* ONSC].

87 The stilted logic of applying the *Peiroo* exception when the remedy sought is release from detention was acknowledged by the Court of Appeal for Ontario in *Baroud, supra* note 85, where the court noted that that the substantive remedies sought in both *Peiroo* and *Reza* were in fact available in the Federal Court, and that this was a relevant ground for distinguishing such cases from a situation where the remedy sought was release. It would be another twenty years, however, before the same court expressly recognized, in *Chaudhary* ONCA, *supra* note 5, that the *Peiroo* exception is simply inapplicable where the issue is the legality of a lengthy detention.

88 See Anne-Marie Yvon, "Canada: détention arbitraire de sans-papiers*"*, *Radio Canada International* (10 June 2014), online: <www.rcinet.ca>, archived at https://perma.cc/5KLA-GY42; Doug Hempstead, "Free Jailed Immigrants, Group Tells Feds", *The Ottawa Sun* (15 June 2014), online: <ottawasun.com>, archived at https://perma.cc/D9YP-SP5Q; Jessica Nyznik, "Lindsay Detainees on Hunger Strike", *The Peterborough Examiner* (19 June 2015), online: <www.thepeterboroughexaminer.com>, archived at https://perma.cc/S43L-4YKK. On resistance inside and outside of sites of immigration detention, see Alessandro Spena, Letter to the Editor, "Resisting Immigration Detention" (2016) 18:2 Eur J Migr & L 201; Rachel Kronick et al, "International Solidarity to End Immigration Detention" (2017) 389:10068 Lancet 501.

habeas corpus jurisdiction.[89] On appeal, the Court of Appeal reversed this holding. Two aspects of its decision are important.

First, the Court of Appeal's decision begins to more precisely define the constitutional limitations on indefinite immigration. For example, the court held that:

> A detention cannot be justified if it is no longer reasonably necessary to further the machinery of immigration control. Where there is no reasonable prospect that the detention's immigration-related purposes will be achieved within a reasonable time (with what is reasonable depending on the circumstances), a continued detention will violate the detainee's ss. 7 and 9 *Charter* rights and no longer be legal.[90]

While much remains to be desired in refining this standard, the content given to the protections against indefinite and arbitrary detention in *Chaudhary* is important. Whereas *Sahin* and *Charkaoui* had left the difficult normative questions wholly unanswered,[91] the requirement for the Minister to prove the existence of a "reasonable prospect of removal within a reasonable time" to render the detention lawful begins to provide some substance to the applicable norms.

Second, the court refused the government's invitation to apply *Peiroo* and opened the door to challenging the constitutionality of ongoing detention via *habeas corpus*. To do so, the court made findings which, despite their patency and repeated argument to the same effect, had remained obfuscated in prior case law.[92] The court noted that the *Peiroo* exception could not be a blanket bar to *habeas corpus* in immigration matters because its rationale, as explained above, applied in respect of the examination and deportation elements of the immigration regime, not to the power of detention itself.[93] Whereas *Peiroo* and its progeny stood for the principle that *habeas corpus* "cannot be used to mount a collateral attack of

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89 *Chaudhary* ONSC, *supra* note 86 at para 26.

90 *Chaudhary* ONCA, *supra* note 5 at para 81.

91 For an incisive criticism of the Supreme Court's failure in *Charkaoui* to provide content to the norms pronounced, see Thwaites, "Process and Substance", *supra* note 61 at 18, 33.

92 See e.g. *Baroud, supra* note 85; *Eze Nelson c Canada (Ministre de la sécurité publique et protection civile)*, 2006 QCCS 3075, [2006] JQ no 5404 (QL)*; Sancho, supra* note 86; *Apaolaza-Sancho*, *supra* note 86.

93 *Chaudhary* ONCA, *supra* note 5 at paras 54, 71. Notably, the Court of Appeal for Ontario in *Baroud, supra* note 85 had already noted in 1995 that the nature of the remedy sought (release from detention versus reversing some other immigration decision) could distinguish *Peiroo* and *Reza*, but none of the subsequent judgments paid heed. *Baroud* was pleaded two decades earlier by Barbara Jackman, the same counsel as in *Chaudhary*.

immigration decisions,"[94] a *habeas corpus* application seeking a determination as to the legality of an ongoing detention is a matter entirely distinct from seeking a determination on ongoing immigration matters relating to the right to enter or remain in Canada.[95] When a court is faced with a *habeas corpus* application related *solely* to detention, it is not answering a question with regards to the immigration status of the applicant: "[a]ll that will be decided is whether there continues to be a constitutionally valid basis for their detentions pending those immigration decisions and dispositions."[96]

Applying the broader principles articulated by the Supreme Court in *May* and *Khela*,[97] the Court of Appeal for Ontario then found that the procedures available under the *IRPA* are not as broad and advantageous as those available in a *habeas corpus* application, and that superior courts should not therefore decline *habeas corpus* jurisdiction. In support of this finding, the Court of Appeal identified three "critical differences", briefly reviewed below, between the *IRPA* review mechanisms and *habeas corpus* processes: the question the court is asked to answer, the onus, and the review process.[98]

First, the question the court is asked to answer on a *habeas corpus* application is "whether, because of their length and the uncertainty as to their continued duration, the detentions have become illegal, in violation of the detainees' sections 7 and 9 *Charter* rights and international instruments to which Canada is a signatory."[99] This question is different from the immigration detention review process where

> [t]he [Immigration Division] and the Federal Court on judicial review are not tasked with the question of determining whether the immigration detention no longer reasonably furthers the machinery of immigration control and is or has become illegal based on *Charter* or human rights principles.[100]

Second, unlike a detention review where the Minister can satisfy his or her onus by simply referring to the reasons given at prior detention hearings,[101] in *habeas corpus* review the issues are considered afresh and

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94 *Chaudhary* ONCA, *supra* note 5 at para 71.

95 *Ibid* at paras 60, 63.

96 *Ibid* at para 72.

97 *May*, *supra* note 82 at paras 35, 44; *Khela*, *supra* note 9 at para 55ff.

98 *Chaudhary* ONCA, *supra* note 5 at para 79. This was further explained in *Ogiamien* ONCA, *supra* note 5 at paras 15–18.

99 *Chaudhary* ONCA, *supra* note 5 at para 81.

100 *Ibid* at para 82.

101 *Ibid* at paras 87–88. See also *supra* notes 29–30 and accompanying text.

the onus is on the Minister to show that the detention is legal despite its length and its uncertain duration. Proving that one of the statutory grounds provided in the *IRPA* is made out is insufficient and the Minister must justify the length and indefinite nature of the detention.[102]

Third, the court noted the important differences between the judicial review process available to challenge the legality of Immigration Division decisions and a *habeas corpus* application.[103] Whereas judicial review under the *IRPA* requires leave from the Federal Court and is itself a discretionary remedy, *habeas corpus* is non-discretionary.[104] Further, whereas in a judicial review the immigration detainee has the onus of showing that the Immigration Division's detention was "unreasonable, incorrect or procedurally unfair," there is no deference to be shown to the Immigration Division's prior decision in a *habeas corpus* application.[105] It is also notable that, even if it finds that the decision to detain was unreasonable, the Federal Court has no jurisdiction to order release—it can only send the matter back for redetermination by another member of the Division, who may order continued detention.[106]

Upon finding that the *IRPA* regime, including judicial review in the Federal Court, is less advantageous, and in fact insufficient to ensure respect for detainees' *Charter* rights, the Court of Appeal in *Chaudhary* opened the door to *habeas corpus* applications for immigration detainees in Ontario where the issue raised is whether the length and uncertain duration of the detention renders it contrary to sections 7 and 9 of the *Char-*

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[102] *Chaudhary* ONCA, *supra* note 5 at paras 86, 91.

[103] *Ibid* at paras 92–96.

[104] *Ibid* at para 94.

[105] *Ibid* at paras 95–96. For two examples of this deferential approach see, among many, see *Khaira v Canada (Minister of Citizenship and Immigration)*, 2004 FC 62 at para 9, 43 Imm LR (3d) 72; *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2015 FC 876 at para 20, [2015] FCJ No 944 (QL) [*Ahmed* FC 876]. Even in cases where the court has expressly averred to the constitutionality of the detention, it has deferred to the Immigration Division's weighing of the regulatory factors. For example, in *Ahmed* FC 876, Justice Fothergill said indefiniteness was a section 7 issue, but the Immigration Division properly weighed it against other factors (*ibid* at paras 27, 35). The UK courts have also rejected the notion that any deference is owed to the administrative decision where the legality of detention is challenged on a *habeas corpus* application. See Farbey, Sharpe & Atrill, *supra* note 12 at 139, n 85.

[106] See Gerami, *supra* note 2 at 217–28; *Ahmed v Canada (Minister of Citizenship and Immigration),* 2015 FC 792 at para 14, 36 Imm LR (4th) 235; *Ahmed* FC 876*, supra* note 105 at paras 23–24; *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1012 at para 20, 2015 CarswellNat 4788 (WL Can). While it has been suggested that the court could direct the Immigration Division to order release upon redetermination of the matter *(ibid* at para 18), this would be highly exceptional and the authors are not aware of any case in which this has been done.

ter.[107] The Court of Appeal of Alberta in *Chhina* has recently followed *Chaudhary*, and there is no principled reason why the same result should not follow elsewhere in Canada, as all provincial superior courts exercise the same inherent jurisdiction to hear *habeas corpus* applications.[108]

While the government did not seek leave to appeal *Chaudhary* to the Supreme Court of Canada, the Minister did seek leave to appeal in *Chhina*. Leave to appeal was granted and a hearing date was set for November 2018. Although the government had not previously contested the jurisdictional issue and effectively conceded the terms set by *Chaudhary* in Ontario, it is apparent that its position differs in Alberta and before the Supreme Court of Canada. As a result, the question of whether immigration detention is an exception to the right of *habeas corpus* will now be brought to a final answer from Canada's highest court, which will have to grapple with the question of whether the immigration detention regime under the *IRPA* the separate but equal.

C. Challenging Immigration Detention Under Chaudhary

As discussed further on, *Chaudhary* has made inroads in bringing greater transparency and accountability to the detention of non-citizens under immigration legislation in Canada. That said, the outcomes in these cases have been mixed, and not all courts have agreed that a detention of several years is sufficiently lengthy to justify the exercise of *habeas corpus* jurisdiction.

In *R. v. Ogiamien*, the first post-*Chaudhary* decision in Ontario, the Superior Court of Justice found that an immigration detainee, who had been detained for just under two years, should be released.[109] Without delving into the *Charter* issues, Justice Coats simply found that there was no lawful basis for the detention as the Minister had not met its burden to show that the detainee was a danger or a flight risk. These findings were subsequently affirmed by the Court of Appeal for Ontario.[110]

In *Brown* ONSC, the applicant sought release pursuant to *habeas corpus*, as well as *Charter* damages.[111] However, the applicant was deported

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[107] Legal Aid Ontario has changed their policy to fund applications by immigration detainees to exercise their rights for release at the Superior Court. See Petra Molnar & Stephanie J Silverman, "Cracks Where the Light Gets in: Recent Legal Breakthroughs in Detention and Crimmigration in Canada", *Metropolitics* (7 December 2016), online: <www.metropolitiques.eu>, archived at https://perma.cc/V682-38KX.

[108] See *Chhina*, *supra* note 8.

[109] 2016 ONSC 4126 at paras 95–96, [2016] OJ No 4002 (QL).

[110] *Ogiamien* ONCA, *supra* note 5.

[111] *Brown* ONSC, *supra* note 62 at para 1.

before the conclusion of the matter. As a result, the Ontario Superior Court of Justice considered only whether Mr. Brown was entitled to *Charter* damages on the basis of his past detention. While Justice O'Marra applied *Chaudhary*, he rejected the claim for *Charter* damages, finding that there was no *Charter* breach. The court's key conclusion was that the applicant had been held pursuant to a constitutionally-compliant regime and that his *Charter* rights had therefore not been breached.[112] Further, despite the clear conclusion by the Court of Appeal for Ontario in *Chaudhary* that meeting the criteria of detention was *not* the only question when assessing the constitutionality of the detention, Justice O'Marra still concluded that there was no violation of sections 9 or 12 of the *Charter* because the detention was maintained pursuant to the criteria set out in the *IRPA* and was for the valid purpose of removal.[113] On appeal, these fact-intensive findings were not disturbed.[114] The Court of Appeal proceeded to also find that the superior court should not consider arguments for monetary damages as a remedy for *Charter* breaches in the context of *habeas corpus* applications. Because, in its view, the question to be answered under *Chaudhary* is based on a forward-looking analysis, and in light of the expeditious nature of *habeas corpus*, the Court of Appeal found claims for *Charter* damages should be brought in a separate application and heard on a normal schedule.[115] Mr. Brown has sought leave to appeal this decision to the Supreme Court of Canada.

In *Canada (Minister of Citizenship and Immigration) v. Dadzie*, the applicant, who had been held in immigration detention for two-and-a-half years, brought an application for *habeas corpus* relief.[116] In assessing whether the applicant had established that his detention was lengthy and of uncertain duration, the Superior Court of Justice held that it could take into account the nature of the place of the applicant's detention—a maximum security facility—in deciding whether the applicant had met his onus under a *habeas corpus* application.[117] Justice Clark clarified that the period of detention under review was that of the *present* detention, and the court was not to consider the applicant's past detention—he had been detained but released in the past, prior to the detention under review.[118] With regards to the cooperation of the applicant, Justice Clark found that

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[112] *Ibid* at para 99–113.

[113] *Ibid* at para 103. *Cf Chaudhary* ONCA, *supra* note 5 at paras 75, 81–82.

[114] *Brown v Canada (Minister of Public Safety & Emergency Preparedness)*, 2018 ONCA 14, 420 DLR (4th) 124 [*Brown* ONCA].

[115] *Ibid* at paras 19–21, 51–56

[116] 2016 ONSC 6045 [2016] OJ No 5185 (QL) [*Dadzie*].

[117] *Ibid* at para 33.

[118] *Ibid* at para 35.

delay caused by the applicant to the deportation process should be held against him.[119] Justice Clark concluded that, based on the facts of the case, the uncertainty of how long the applicant would remain in detention was "largely, if not entirely, a function of his failure to cooperate in a forthright and meaningful way."[120] As he found the applicant responsible for the length and uncertain duration of his ongoing detention, Justice Clark determined that the *Chaudhary* threshold was not met.[121]

In *Ali*, the Ontario Superior Court of Justice considered an immigration detention of over seven years.[122] Unlike in *Brown* ONSC, Justice Nordheimer (as he then was) in *Ali* rejected the government's argument that the court should decline to exercise jurisdiction because the detention review process complied with the *Charter*. While the issue in *Brown* was not one of jurisdiction, it is clear that the court took such an approach in finding no breach of the *Charter*.[123] Relying on *Chaudhary*, Justice Nordheimer disagreed with this position, stating that "notwithstanding the complete, comprehensive and expert scheme for the review of a detention under the *IRPA*, *habeas corpus* petitions involving immigration detainees should nonetheless be heard in this court, on their merits, in exceptional circumstances."[124] On the requirement of exceptionality, Justice Nordheimer observed that "a detention of more than seven years must be seen as being exceptional under any proper definition of that word."[125] The court also found that the detention was uncertain and that, given all the efforts undertaken to date, "[t]here is no reason to believe ... that any breakthrough in Mr. Ali's case is going to be made in the immediate future."[126]

The court then considered the next issue, whether the Minister established that the immigration detainee's detention was justified for immigration purposes. The Minister relied on the detainee's alleged lack of cooperation as justifying the continued detention.[127] While the Minister tried to analogize Mr. Ali's case to *Dadzie*, Justice Nordheimer rejected

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119 *Ibid* at para 36.

120 *Ibid* at para 65.

121 *Ibid* at para 60.

122 *Supra* note 3 at para 23.

123 *Brown* ONSC, *supra* note 62 at paras 6, 99–100.

124 *Ali*, *supra* note 3 at para 17. The exceptional circumstances are the requirement that the detention "has become unduly lengthy, and its continuing duration is uncertain" (*ibid*).

125 *Ibid* at para 19.

126 *Ibid* at para 20.

127 *Ibid* at para 21.

this comparison, finding instead that "the individual facts of each case will determine whether the detainee's failure to co-operate with the authorities is sufficient to justify his/her continued detention."[128] He concluded that it could not be said that there was a lack of meaningful cooperation by Mr. Ali.[129]

Importantly, Justice Nordheimer also underlined that it is untenable to assert that "a lack of cooperation by a detainee can justify detention indefinitely."[130] Such an interpretation, he noted, "could justify the continued detention of a person forever."[131] The court also noted the perversity of the view that concluding otherwise would *reward* the detainee who does not cooperate, an argument that had previously been advanced by the Minister and accepted in the Federal Court.[132] As noted in *Ali*: "The purpose under the *IRPA* is not the punishment of uncooperative detainees. For the continued detention of the individual to be proper, it must be necessary to further a legitimate immigration purpose."[133]

Less than six months later, Justice O'Marra of the Ontario Superior Court of Justice adopted yet a different stance on the sections 7 and 9 *Charter* issues in *Toure* SC.[134] There, Justice O'Marra found, as in *Dadzie*, that it was the detainee's prior lack of cooperation that engendered the delays in removal and that there remained a reasonable prospect of removal provided that Mr. Toure continued to cooperate with the CBSA in its removal efforts.[135] While not stated explicitly, the logic of the *Toure*

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128 *Ibid* at para 22.

129 *Ibid* at para 23.

130 *Ibid* at para 25.

131 *Ibid* at para 26.

132 See *Canada (Minister of Public Safety and Emergency Preparedness) v Lunyamila*, 2016 FC 1199 at paras 95, 114, [2017] 3 FCR 428 [*Lunyamila*].

133 *Supra* note 3 at para 26.

134 *Supra* note 36 at paras 46–66.

135 *Ibid* at para 66. In comparing *Chaudhary* and *Ali* with the decisions in *Brown* ONSC and *Toure* SC, the Ontario Superior Court's responses to long-term detention line up with the "rights-protecting" and "rights-precluding" model proposed in Rayner Thwaites, *Liberty of Non-Citizens*, *supra* note 2 at 15–16. In the "rights-protecting" model, the focus is purely on the reasonable foreseeability of removal, and when the time the removal will be carried out cannot be identified with precision, the detention can no longer be justified by an immigration purpose. In the "rights-precluding" model, exhibited in *Brown* ONSC, the state is given broad deference in exercising its immigration power and the notion of "pending deportation" is widely stretched to apply no matter what contingencies may stand in the way. For examples of the "rights-precluding" model, see *Brown* ONCA, *supra* note 62 at paras 103, 109; *Brown* ONCA, *supra* note 114 at paras 28–29; and *Toure* SC, *supra* note 36 at paras 63–65. In this model, the court sees its role as only to ensure the government is making *bona fide* efforts. So

judgment, like that of *Dadzie* and a companion judgment of the Federal Court in *Lunyamila*,[136] is that a detainee's non-cooperation with removal can justify indefinite detention. The Court of Appeal for Ontario maintained this logic—at least implicitly—in *Toure*.[137]

More promisingly, however, Justice O'Marra found that Mr. Toure's right to be free of cruel and unusual treatment under section 12 of the *Charter* was breached by the decision to hold him in a maximum security criminal facility over the five years of his detention. The court noted the Immigration Division's lack of jurisdiction to control the location and conditions of detention, and found that the review mechanism did not therefore fulfill the constitutional requirement, stipulated by the Supreme Court in *Charkaoui*, that there be a process "that takes into account the context and circumstances of the individual case."[138] In addition to offering a scathing critique of the mistreatment of Mr. Toure, Justice O'Marra ordered that Mr. Toure be transferred to a minimum security IHC.[139] The section 12 analysis in *Toure* highlights the fact, as noted above, that the silence of the *IRPA* detention review regime with respect to the location and conditions of detention renders it constitutionally deficient.

However, on appeal, the Court of Appeal for Ontario concluded that "the evidence" in Mr. Toure's case fell "far short of concluding" that Mr. Toure met the "high bar of showing that his treatment was cruel and unusual".[140] In allowing the government's cross-appeal on section 12, the Court of Appeal concluded that the application judge's errors were "largely linked to the lack of evidentiary foundation."[141] Without reference to its own recent finding in *Brown* that appellate review of *Charter* findings on

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long as the state is able to show it is acting in good faith, the detention remains lawful regardless of how practically foreseeable deportation may be, and how long the detention may still last: see Thwaites, *Liberty of Non-Citizens*, *supra* note 2 at 16–17.

136 *Supra* note 132.

137 In assessing whether the application judge sanctioned indefinite detention, the Court of Appeal found that the application judge had properly considered "lack of cooperation" as "an important factor" in the ongoing detention and that "it is a well-established principle that unexplained delay or lack of diligence should count against the offending party." Further, "[n]on-cooperation is clearly a factor that may contribute to the length of someone's detention." See *Toure* ONCA, *supra* note 36 at paras 44–49. Despite its statement that the application judge's reasons do not sanction indefinite detention on the basis of non-cooperation, the Court of Appeal upheld the finding that the detention could not become unlawful unless it was shown that the detainee had been cooperating with removal, and thus at least implicitly endorsed the analysis of the court below.

138 *Toure* SC, *supra* note 36 at paras 68–72, citing *Charkaoui, supra* note 49 at para 107.

139 *Toure* SC, *supra* note 36 at paras 67–92.

140 *Toure* ONCA, *supra* note 36 at para 70.

141 *Ibid*.

habeas corpus appeals is to be deferential to the application judge's findings, the Court of Appeal in *Toure* disagreed with the lower court's finding that the evidence established a section 12 breach and allowed the appeal on that basis.[142]

In *Scotland*, which was never appealed, the Superior Court of Justice made a number of findings that highlight the important role of *habeas corpus* litigation in shedding light on the separate and unequal nature of the detention review processes under the *IRPA*.[143] The court in *Scotland* provides a trenchant criticism of the CBSA's conduct and the detention review process. Justice Morgan found: that Mr. Scotland had been detained for "conduct that is not morally blameworthy and that is not aimed at fulfilling its statutory purpose" and his detention was thus arbitrary; that the Immigration Division had failed to retain its impartiality and had unjustifiably deferred to the views of the CBSA; and further that the Division's reliance on its own prior decisions to justify ongoing detention amounted to a "closed circle of self-referential and circuitous logic from which there is no escape."[144] Foreshadowing a finding that the Court of Appeal would soon affirm in *Ogiamien*,[145] the judgment in *Scotland* also suggests that superior court Justices in Ontario should exercise their *habeas corpus* jurisdiction more broadly to supervise the legality of the de-

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[142] Compare *Brown* ONCA, *supra* note 114, at paras 36, 48; *Toure* ONCA, *supra* note 36 at para 70. Notably, the Court of Appeal in *Toure* ONCA relies on the fact that Mr. Toure could have raised his objection to being held in a maximum-security jail with the CBSA and sought judicial review of that decision if dissatisfied in order to justify its finding that there was no section 12 breach because he failed to do so. The Court of Appeal makes no attempt to reconcile this finding with the requirement stipulated in *Charkaoui* that the conditions of detention be subject to a process of *ongoing* review (*Charkaoui, supra* note 49 at paras 107, 123) and fails to explain how the failure to lodge a formal complaint with the CBSA rendered the experience of detention any less cruel and unusual. The Court of Appeal also substitutes its view of the evidence for that of the application judge in finding, without explanation of analysis, that: "While Mr. Toure met several criteria for placement in a lower security detention centre, he also met several criteria for placement in a more secure, maximum facility. Mr. Toure provided no evidence to the contrary" (see *Toure* ONCA, *supra* note 36 at para 73). This lack of deference to the factual findings of the court below is particularly problematic in this instance because it is the Court of Appeal that has misapprehended the evidence. The fact is that Mr. Toure met none of the conditions for being held in a maximum security facility and it is the Court of Appeal's statement that he "met several of the criteria for placement in a more secure, maximum facility" that lacks evidentiary foundation. Perhaps most problematically, the Court of Appeal appears to have disagreed with the application judge's assessment of the psychiatric evidence without even attempting to explain how the court below had erred, or why it drew a different conclusion from that evidence.

[143] *Supra* note 61.

[144] *Ibid* at paras 59, 61–63, 71, 74.

[145] *Supra* note 5 at para 41.

tention and to ensure that detention is substantively justifiable in light of its purpose.[146]

Despite the mixed outcomes in applying *Chaudhary* and in terms of the relief sought by detainees, it is undeniable that *habeas corpus* applications have in some cases meaningful remedies for some long-term immigration detainees, shed much needed light on the persistent injustice in current practices concerning immigration detention, and underscored the deficiencies in the law itself.[147] The door opened in *Chaudhary* has allowed some detainees to step outside of the "closed circle of self-referential and circuitous logic" under which their detentions had been repeatedly maintained and successfully seek a fresh assessment of the legality of their detentions.[148] In the next and final Part, we discuss critical issues that need to be considered and addressed in future *habeas corpus* litigation under the *Chaudhary* framework.

III. *Habeas Corpus* Applications as a Litigation Strategy

A. *Why* Habeas Corpus?

While immigration detention *habeas corpus* litigation is still in its early days, it is clear that the advantages of challenging immigration detention through *habeas corpus* are profound. *Habeas corpus* provides a process that actually accords with the risk of imprisonment that is at stake. It allows immigration detainees to access many of the fundamental procedural rights that are absent from the *IRPA* scheme. As rightly emphasized in *Chaudhary*, the substantive question to be answered in a *habeas*

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[146] See *Scotland*, *supra* note 61 at paras 53–54, 71.

[147] See e.g. Kennedy, "Caged by Canada", *supra* note 3; Brendan Kennedy, "Maximum-Security Jail Ruled Unconstitutional in Immigration Detention Case", *The Toronto Star* (5 October 2017), online: <https://www.thestar.com>, archived at https://perma.cc/4W7N-W6LD; Brendan Kennedy, "'Why is this Man in Prison?', Judge Asks Government Lawyer in Immigration Detention Case", *The Toronto Star* (13 August 2017), online: <https://www.thestar.com>, archived at https://perma.cc/LZV5-ABWV. This is just a small sample of the extensive media coverage that has been done on immigration detention in the past few years since *Chaudhary*. See also the findings in *Toure* SC, *supra* note 36 at paras 67ff and *Scotland*, *supra* note 61 at paras 59, 61–63, 67, 71, 74.

[148] *Ibid* at para 74. See also Silverman & Molnar, "Everyday Injustices", *supra* note 1 at 109–10, where access to *habeas corpus* is expressly conceptualized as an access to justice mechanism for immigration detainees. For a description of the use of *habeas corpus* by prisoners detained in Guantanamo Bay by the US military as a means of reaching outside of the unfair processes under which they were detained and seeking justice in regular courts, see James Oldham, "The DeLloyd Guth Visiting Lecture in Legal History: *Habeas Corpus*, Legal History, and Guantanamo Bay" (2012) 36:1 Man LJ 361 at 380.

corpus application—whether detention has become unhinged from removal—actually functions to terminate arbitrary and indefinite immigration detentions. In this section, we review the concrete advantages of challenging detention in a *habeas corpus* application.

1. Straight to the Point

The flexibility and effectiveness of *habeas corpus* has been widely recognized and defended.[149] At its best, *habeas corpus* permits a detainee to cut through procedural obstacles and insist upon an impartial assessment of the legality of his or her detention. As explained by Justice Sharpe:

> The rich historical hodgepodge of factors and influences shaping habeas corpus has ... traditionally been used to ensure that important constitutional principles are followed and that the law is sufficiently supple and flexible to achieve justice in a wide range of cases.[150]

2. Disclosure Requirements

Habeas corpus applications place a production requirement on the Crown. In initiating the application under a provincial *Habeas Corpus Act*, the detainee can seek to compel disclosure of the Immigration Division's file, and the records from the institutions where they have been concerning the conditions of confinement.[151] While the scope of the CBSA's obligation to disclose its records in the context of a *habeas corpus* application has been limited by two recent lower court decisions in Ontario,[152] even under this restrictive view, the CBSA is required to disclose in advance the evidence on which the state will rely in seeking to justify ongoing detention in the *habeas corpus* application. This requirement, while not wholly satisfactory, is a significant improvement vis-à-vis the procedural rights afforded to detainees in detention reviews under the *IRPA* where advance disclosure is rare.

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[149] See e.g. *Khela*, *supra* note 9 at para 52; *Ogiamien* ONCA, *supra* note 5 at para 47.

[150] Justice Robert J Sharpe, Book Review of *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth* by DJ Clark & G McCoy, (2001) 1:2 OUCLJ 287 at 292. See also Parkes, *supra* note 12 at 354–55, 360. Parkes discusses the flexibility of *habeas corpus* and its gap-filling functions which allow one to step through procedural barriers and get a decision on the merits.

[151] For example, in Ontario, the *Habeas Corpus Act*, RSO 1990, c H1, s 5 allows a person to seek production of the evidence concerning their "restraint of liberty". See also *Habeas Corpus Act*, RSPEI 1988, c H-1, s 9.

[152] See *Toure v Canada (Minister of Public Safety and Emergency Preparedness)* 2017 ONSC 5533 (decision on motion for disclosure) [*Toure* Disclosure]; *Toure* SC, *supra* note 36 (decision on the merits).

3. Cross-Examination

Unlike a process where continued detention based on hearsay is the norm, *habeas corpus* also presents a means to test these allegations through cross-examination. The state's evidence of danger, flight risk, or non-cooperation that sustains lengthy detentions must here be either sworn in an affidavit or given *viva voce*. In either case, the evidence is subject to cross-examination in an adversarial process. There is no such mechanism as of right in the *IRPA* scheme to meaningfully scrutinize the Minister's allegations.

4. *De Novo* Assessment of the Evidence

The judge on a *habeas corpus* application owes no deference to any past decision to maintain detention.[153] As such, the question is no longer just whether anything is "new" after an additional month of the detainee being locked in a cell, which he or she may have inhabited for periods longer than half a decade. Instead, *habeas corpus* presents a chance for a global assessment of the present facts and circumstances of the detention and is concerned only with whether continued detention is legal at the present time rather than asking if some new development justifies a departure from a prior decision.

5. Burden on the Jailor

Related to the *de novo* assessment, *habeas corpus* restores the fundamental procedural principle that the burden of justification for a deprivation of liberty lies with the party seeking to impose or maintain detention. As noted in *Chaudhary*, the *IRPA* scheme as applied pursuant to the Federal Court of Appeal's judgement in *Thanabalasingham* effectively shifts the burden to the detainee to prove that the situation has changed in the past thirty days.[154] For detainees, who are typically left to sit for seventeen hours a day or more in the cell of a maximum security prison with no access to much of the evidence in their case, this is a profoundly unjust state of affairs.[155] *Habeas corpus* applications restore a fair allocation of the burden to justify the deprivation of liberty.

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[153] See *Chaudhary* ONCA, *supra* note 5 ("*[h]abeas corpus* allows the court to take a step back and look at the evidence without the burden of previous ID decisions. The appellants will not be required to show that there has been a change from prior dispositions" at para 91).

[154] *Thanabalasingham*, *supra* note 32 at paras 14–16; *Chaudhary* ONCA, *supra* note 5 at paras 85–90.

[155] In *Ali*, *supra* note 3 at para 37, the court noted the unfairness of requiring detainees to show they are now no longer a flight risk or danger despite having no access to any pro-

Further, in cases where detention for removal is justified by "non-cooperation", the Minister must, on *habeas corpus*, actually put forward evidence to meet their burden. In *Ali*, where the applicant was imprisoned for seven years based on the state's hunch that he was concealing information about his identity, the Ontario Superior Court of Justice refused to countenance this position: "The authorities cannot discharge the onus that rests on them to demonstrate that the continued detention of Mr. Ali is justified, for immigration purposes, based on skepticism and speculation."[156]

6. The Question Asked and the Court that Answers It

Finally, and perhaps most significantly, *habeas corpus* brings detained non-citizens into courts with unmatched expertise in matters of detention and the *Charter* in a process that directly concerns itself with the constitutionality of their ongoing detention. It is uncontroversial that detention issues are the "daily fare" of Superior Courts, and as the Supreme Court stated in *Khela*, "when a loss of liberty is involved, the superior courts are well versed in the *Charter* rights that apply."[157]

As noted above, the Court of Appeal for Ontario in *Chaudhary* was unequivocal that if a lengthy detention has become indefinite, the detention will breach the *Charter*. Although identical *Charter* issues arise before the Immigration Division and on judicial review at the Federal Court, the Federal Court has never found a *Charter* breach in these circumstances. In fact, to the contrary, there is an alarming line of authority in Federal Court jurisprudence holding that it is an error of law for the Immigration Division to order release on *Charter* grounds based solely on a finding that a detention has become indefinite.[158] This line of authority cannot be squared with *Chaudhary*, or with protections against arbitrary detention under sections 7 and 9 of the *Charter* in any other context. In this light, access to the Superior Courts through *habeas corpus* has proved to be the only access to *Charter* protections against arbitrary detention meaningfully available to immigration detainees.

If there was ever an illustration of how differently two courts can conceive of the *Charter,* it is the contrast between the Federal Court's deci-

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gramming that could aid in rehabilitation, all while subjected to lockdowns and appalling prison conditions that only harm their mental and physical health.

156 *Ibid* at para 32.

157 *Supra* note 9 at para 57.

158 See *Ahmed* FC 876, *supra* note 105 at paras 25–27; *Okwerom*, *supra* note 50 at para 8; *B147*, *supra* note 50 at paras 53–56.

sion in *Lunyamila* and the Ontario Superior Court's decision in *Ali*.[159] Both decisions address the issue of indefinite detention for a detainee alleged to be uncooperative with removal. In *Lunyamila,* Chief Justice Crampton of the Federal Court considered the case of an applicant with a long history of violent crimes who would not sign a declaration that would allow for travel documents to be issued to effect his deportation.[160] While the facts of *Lunyamila* presented an exceptional level of danger to the public for an immigration detainee—including attacks against strangers—Chief Justice Crampton made no effort to limit his ruling to the facts. The Federal Court held that even in the case of detention solely based on flight risk, where a detainee is not cooperating with removal, the balance must *always* favour continued detention.[161]

In considering the *habeas corpus* application in *Ali*, on the other hand, the Ontario Superior Court directly addressed the government's reliance on *Lunyamila*.[162] After attempting to distinguish the case on its facts, Justice Nordheimer plainly stated his disagreement with the judgment insofar as it can be read for a general principle legalizing indefinite detention.[163] He noted that the rationale from *Lunyamila* could be read as justifying detention "forever", and affirmed that

> [t]o authorize the Government to hold a person indefinitely, solely on the basis of noncooperation, would be fundamentally inconsistent with the well-established principles underlying ss. 7 and 9 of the Charter. It would also be contrary to Canada's human rights obligations.[164]

There is nothing about the fact that the Federal Court is sitting in judicial review that should prevent it from acting to prohibit arbitrary and indefinite detention. However, the fact that it has not done so, and that on *habeas corpus* the Ontario Superior Court thus far *has*, is a development that cannot be ignored. The ability for non-citizens to enter a forum where their liberty may be treated as equally deserving of protection, and where they can access procedures through which the detention can be meaningfully challenged, speaks to the necessity of *habeas corpus* jurisdiction over immigration detention in Canada, a right that, to date, has been expressly recognized only in Alberta and Ontario.[165] In *Chhina*, the Supreme Court

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159 *Lunyamila*, *supra* note 132; *Ali*, *supra* note 3.

160 *Lunyamila*, *supra* note 132 at paras 8–11.

161 *Ibid* at paras 1–3.

162 *Supra* note 3 at paras 21–26.

163 *Ibid* at para 26.

164 *Ibid* at para 27.

165 See Silverman & Molnar, "Everyday Injustices", *supra* note 1 at 110.

will decide whether or not immigration detainees across will have access to *habeas corpus* or remain relegated to the separate but unequal regime created under the *IRPA*.

B. Effectively Litigating Habeas Corpus*: Beyond* Chaudhary

The judgment in *Chaudhary* is a deeply important step in protecting non-citizens from illegal detention. However, much remains to be done. In this subpart, we identify three areas of importance in future immigration *habeas corpus* litigation. The first is about preserving the ground gained in *Chaudhary*. The second is about ensuring that disclosure requirements remain meaningful in *habeas corpus* applications. The third concerns the need to continue to expand the judgment in *Chaudhary* to its logical conclusion: if it is the *IRPA* detention review process as a whole that is less advantageous than *habeas corpus*, then *habeas corpus* jurisdiction must extend to *all* immigration detainees seeking release on grounds that their detention is unlawful.

1. Reaching the *Chaudhary* Threshold

As noted above, under *Chaudhary*, the door to *habeas corpus* at the superior court is a showing of "reasonable and probable grounds" that an immigration detention is lengthy and of uncertain duration.[166] At that point, the detainee's onus is met, and the burden falls to the government to demonstrate that the detention is nevertheless legal.[167]

As early as the second *habeas corpus* decision applying *Chaudhary*, the government was successful in relieving itself of its legal burden to justify detention. In *Dadzie*, Justice Clark of the Ontario Superior Court found that a detention of over two years was neither lengthy nor of uncertain duration because it was the applicant's *non-cooperation* that was the cause of this state of affairs.[168] While this decision was largely a product of its facts, a caution is nonetheless in order. The analytical approach in *Dadzie* and *Toure* subverts the very essence of *habeas corpus*: that it is the jailor that bears the burden to justify the lawfulness of detention.[169] Under *Chaudhary* and *Charkaoui*, the state may invoke a detainee's lack

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166 *Supra* note 5 at para 81.

167 It remains to be determined exactly when the detainee's onus of reasonable and probable grounds are met and it is clear from the mixed outcomes applying *Chaudhary*, discussed above, that the courts are struggling with this issue.

168 *Supra* note 116 at paras 65, 71.

169 See *Khela*, *supra* note 9 at para 40.

of cooperation to seek to justify a long and indeterminate detention.[170] However, this consideration is just that: a justification. As such, the assessment of a detainee's non-cooperation belongs at the justification stage of the analysis. When this factor is inserted into the threshold question, as was the case in *Dadzie* and again in *Toure*, it shifts the burden back onto the detainee to prove that their own detention is unlawful.[171] The error of the courts in both *Dadzie* and *Toure* is that they asked only whether non-cooperation should count against the detainee: they did not consider either the allocation of the burden or at what stage in the analysis alleged non-cooperation should be considered.

In order to preserve the ground gained in *Chaudhary*, questions of non-cooperation, which may regularly arise in long-term detention cases, must fall to the state to prove, and must not therefore be imported into the jurisdictional threshold stage of the analysis. This approach retains the essence of *habeas corpus*, and accords with *Chaudhary* where the applicants' detentions were found lengthy and of uncertain duration based on the plain meaning of those terms.[172] It also retains analytical coherence as the alternative would lead to an imprecise weighing of unlike properties, balancing "time in detention" against how much the detainee has or has not cooperated. Allegations that the detainee is not cooperating with removal efforts and arguments that such non-cooperation justifies further detention must be assessed at the stage of the lawfulness of the detention. Otherwise, the most critical component of *habeas corpus*, the detaining party's burden to prove the legality of detention, is eroded. If the detainee is required, at the jurisdictional threshold stage, either to prove his or own cooperation with removal efforts or to establish that any non-cooperation does not justify continue detention, then the state is relieved of its burden to establish the legality of the detention.

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[170] *Charkaoui, supra* note 49 at paras 108, 114, citing *Sahin*, *supra* note 16 at 231–32.

[171] *Dadzie*, *supra* note 116 at paras 28, 36; *Toure* SC, *supra* note 36 at paras 21–45. It should be noted that the centrality of "cooperation" to many of these decisions is ripe for discrimination as cultural and socio-economic factors such as knowledge of birth dates and different spellings of a name are invoked to prove that a detainee is not cooperating in establishing their identity. See *Ali, supra* note 3 at paras 7–8; *Toure* SC, *supra* note 36 (Cross-examination of Dale Lewis on 27 September 2017). On race and immigration detention, see generally Bosworth & Turnbull, *supra* note 1; Pratt, *Securing Borders*, *supra* note 1, ch 4.

[172] For example, the 20-month detention of the applicant Carmelo Bruzzese was found to be "lengthy". See *Chaudhary* ONCA, *supra* note 5 at paras 113–15.

2. Uncovering the Whole Factual Picture

In *Toure*, the Ontario Superior Court of Justice held that the *Charter* did not require the Minister to disclose either Mr. Toure's full CBSA file or even a specific list of documents germane to the allegation being advanced by the Minister.[173] The court held that the Minister had disclosed sufficient documents to allow the applicant to know the case to meet in his *habeas corpus* application. The effect of this holding is that the government will not necessarily be obligated to disclose all records relevant to cooperation or the foreseeability of removal even in *habeas corpus* proceedings. Evidence that is relevant to the determinative questions at issue may remain unknown to both the applicant and the presiding judge. This holding can only be reached by disregarding the second of two requirements for a fair detention review process set out by the Supreme Court in *Charkaoui*[174] and reiterated in *Harkat*: "the right to know and meet the case, *and the right to have a decision made by the judge on the facts and the law*."[175] In a proceeding decided in the adversarial context, if the state does not have to make full disclosure, no party is in a position to ensure that the judge is "exposed to the whole factual picture" and thus able to make an informed decision on the facts and law.[176]

This critical fair process requirement will remain absent if the decision in *Toure* on this point is allowed to stand. On appeal, the Court of Appeal for Ontario declined to address the issue in substance, simply asserting that the lack of disclosure was not a "severe unfairness" sufficient to breach the principles of fundamental justice on the facts of the case.[177] While the issue remains unsettled, the judgments in *Toure* represent a problematic shift towards a separate and unequal fairness standard for immigration detainees whereby diluted disclosure obligations suffice because they do not result in "severe unfairness".

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173 *Toure* Disclosure, cited in *Toure* SC, *supra* note 36 paras 50–60.

174 *Supra* note 49 at para 29.

175 *Canada (Citizenship and Immigration) v Harkat,* 2014 SCC 37 at para 41, [2014] 2 SCR 33 [emphasis added]

176 *Ibid* at para 51.

177 *Toure* ONCA, *supra* note 36, at paras 41–43. Unfortunately, the Court of Appeal's finding that the disclosure issue was not fully argued before the application judge is simply incorrect. Contrary to what is stated by the Court of Appeal, the disclosure issued was fully argued. The statement referenced by the Court was made at the close of the evidence on this second day of the hearing (September 27, 2017). The disclosure issued was fully argued on the third day of the hearing (September 28, 2017).

3. Beyond the *Chaudhary* Threshold

Finally, the logic of *Chaudhary* extends beyond detentions that are long and indefinite. In the latter section of the *Chaudhary* decision,[178] the Court of Appeal for Ontario, using the framework from *May* and *Khela*, considered whether the *IRPA* scheme was as broad and advantageous as that available by way of *habeas corpus*. The court found that it was not and that there is therefore no basis for a court to decline to exercise its *habeas corpus* jurisdiction. Some of the initial decisions that followed *Chaudhary* have referred to this jurisdiction as "exceptional"[179] and treated length and indefinite duration as threshold issues that must be assessed in order for the court to take *habeas corpus* jurisdiction.[180] The judgment in *Scotland* rejected this approach, and instead collapsed the issues of lengthy detention and indefinite detention into its analysis of the legality of the detention—refusing to consider them in the abstract as threshold issues.[181]

The Court of Appeal for Ontario has itself now stated in *Ogiamien*, in considering the findings about the *IRPA* scheme made in *Chaudhary*, that there is no principled reason that *habeas corpus* jurisdiction should be limited to cases where the detention is exceptionally lengthy and of uncertain future duration.[182] Justice Sharpe, writing for the court, rejected the Minister's argument to the effect that *Chaudhary* was "restricted to its precise facts."[183] Justice Sharpe further noted that such a submission ig-

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178 *Supra* note 5 at paras 75–106.

179 *Ali*, *supra* note 3 at para 17.

180 See *ibid*; *Toure* SC*, supra* note 36 at para 19. On appeal, the Court of Appeal for Ontario accepted Mr. Toure's submission that "the principle applied in *Chaudhary* is not restricted to the specific facts considered in that case." See *Toure* ONCA, *supra* note 36 at para 23. Yet, at the same time, the Court of Appeal rejected Mr. Toure's submission that the application judge erred because he concluded that he only had jurisdiction to decide the issue if the first part of the *Chaudhary* test was met *because* Mr. Toure had specifically relied on *Chaudhary* in support of his application and he failed to argue that the court had jurisdiction to hear his application because of other "exceptional circumstances". In arriving at this conclusion, the Court of Appeal appears to be saying—although the decision is less than clear on this point—that a court may have jurisdiction to hear a *habeas corpus* application in situations other than that set out in *Chaudhary*, but that, at the very least, this needs to be specifically argued by the detainee (*ibid* at paras 21–27). The Court of Appeal appears to be suggesting is that detainees bear the burden of justification to show that the Court should hear the application, rather than placing the burden on the state to show that the circumstances are such that jurisdiction should be declined.

181 *Supra* note 61 at paras 51–58.

182 *Supra* note 5 at para 41.

183 *Ibid*.

nored "the more general principle upon which *Chaudhary* rests," which is that:

> [T]he Superior Court retains its residual jurisdiction to entertain *habeas corpus* applications where the IRPA process of review under the supervision of the Federal Court is less advantageous than *habeas corpus*, and where releasing the applicant would not alter the immigration status of the applicant or amount to a collateral attack on an immigration decision.[184]

What remains to be seen is the extent to which superior courts will recognize that the "IRPA process of review under the supervision of the Federal Court" is *always* "less advantageous than *habeas corpus*", and that the remedy should therefore always be available to challenge the lawfulness of an immigration detention. This prospect has been rendered somewhat more remote by the Court of Appeal for Ontario's judgment in *Toure*, where it found that it remains the detainee's burden to demonstrate exceptional circumstances justifying the exercise of *habeas corpus* jurisdiction.[185] In so finding, the Court appears to be relieving the government of its burden to demonstrate that the jurisdiction should be declined.

As set out in detail above, the findings in *Chaudhary* on the advantages of *habeas corpus* over the detention review scheme apply equally to other situations where immigration detainees seek to challenge the legality of their detention and there remains no principled reason why it should be limited to "exceptional" cases. The advantages that stem from the onus being on the state, the less favourable review process in Federal Court, the expertise of the Superior Court in *Charter* rights, and the choice, timeliness, and nature of the remedy, are all important advantages for a detainee challenging the lawfulness of their detention regardless of its length and uncertain duration. Each of these factors makes the *IRPA* scheme less advantageous than *habeas corpus*. Having overcome the misapplication of *Peiroo*, as long as the detainee's *habeas corpus* application is directed not at their immigration status, but at the lawfulness of their ongoing detention, there is no principled reason that the rationale of *Chaudhary* should not extend to them as well.

It is also difficult to reconcile the right to *habeas corpus* and release by the court that determines the legality of detention under section 10(c) of the *Charter* with a regime that places the burden on the detainee to show exceptional circumstances justifying *habeas corpus* review. If the "*Peiroo* exception" does not apply, then the right to *habeas corpus* remains the

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184 *Ibid.*

185 *Toure* ONCA, *supra* note 36 at paras 21–27.

applicable rule, and detainees ought not be required to establish that their cases constitute an exception to the (inapplicable) exception.

The availability of *habeas corpus* in a broader range of cases is significant. There are a range of cases of illegal detention that do not meet the "lengthy and indeterminate duration" threshold where the *IRPA* scheme is clearly less advantageous than *habeas corpus*. For example, a detention where there is no reasonable prospect of removal from the outset should not have to wait until the detention is "lengthy" before its arbitrariness can be challenged. Similarly, if a detainee is subject to an unreasonable Immigration Division decision to continue detention, but does not want to languish in jail while the judicial review process runs its course and a rehearing is held by the Immigration Division following judicial review, *habeas corpus* is a faster and more direct mechanism to end the illegal detention. Other challenges could go towards the Minister's unlawful placement of immigration detainees in maximum security provincial jails. Finally, as long as the Designated Foreign National detention regime remains on the books,[186] *habeas corpus* would provide the most advantageous mechanism to quickly and directly challenge the constitutionality of a detention on this basis.

While the Court of Appeal did not in *Ogiamien* take the next step to acknowledge that, on the *Chaudhary* reasoning that it had reaffirmed, there would be no principled basis to deny the right to seek *habeas corpus* to anyone detained under the *IRPA* regime, that is the only logical conclusion to be drawn. Immigration detainees should have access to *habeas corpus* to contest the legality of their detention because the *IRPA* scheme is less advantageous and cannot therefore serve to supplant their section 10(c) *Charter* right to challenge their detention by way of *habeas corpus*.

Conclusion

The effect of successful *habeas corpus* litigation in Canada could be the beginning of the end of the fiction of a "separate but equal" detention scheme for non-citizens. By allowing non-citizens access to provincial superior courts, the immigration detention regime may no longer be able to operate in a state of exception, divorced from the principles of justice that apply to all other persons who face imprisonment in Canada.

Given the deficiencies of the detention review regime as legislated and as applied, it remains necessary for the availability of *habeas corpus* review to exist in parallel to the Immigration Division regime. The writ

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[186] See generally Taylor, *supra* note 19.

should not be treated as "exceptional", but rather as a *Charter* right owed equally to those imprisoned under the immigration detention regime. This would be consistent with the clear language of section 10(c) of the *Charter* and the Supreme Court of Canada's recent position on *habeas corpus* for other administrative regimes that govern detentions where the option of which avenue to pursue belongs to the detainee.[187] It is only by affirming *Chaudhary* and preserving *habeas corpus* for immigration detainees and that the Supreme Court can maintain an internally consistent position and ensure that immigration detainees are not relegated to a separate but unequal legal regime. In the same vein, the pernicious effects of having relegated immigration detainees to the separate but unequal *IPRA* regime should serve as a warning against the establishment of a distinct version of the right of *habeas corpus*—with inverted burdens of proof and justification and diluted procedural rights—for immigration detainees.

Moving forward, there may even be hope that the immigration detention jurisprudence of the provincial superior courts will cross-pollinate into the Federal Court and the Immigration Division and allow *Charter* protections to more meaningfully enter these regimes. Ultimately, until the defects of the *IRPA* scheme are remedied and the Federal Court and Immigration Division properly appreciate that the term "everyone" in sections 7, 9 and 12 of the *Charter* applies equally to non-citizens, access to *habeas corpus* will remain vital.

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[187] See *May*, *supra* note 82 at para 44, cited in *Khela*, *supra* note 9 at para 44.