



**SUPREME COURT OF CANADA**

**CITATION:** Canada (Public Safety and Emergency Preparedness) v. Chhina, 2019 SCC 29

**APPEAL HEARD:** November 14, 2018  
**JUDGMENT RENDERED:** May 10, 2019  
**DOCKET:** 37770

**BETWEEN:**

**Minister of Public Safety and Emergency  
Preparedness and Attorney General of Canada**  
Appellants

and

**Tusif Ur Rehman Chhina**  
Respondent

- and -

**End Immigration Detention Network, Canadian Association of Refugee Lawyers,  
Defence for Children International-Canada, Amnesty International Canada  
(English Branch), Community & Legal Aid Services Programme, Canadian  
Council for Refugees, Queen's Prison Law Clinic, Egale Canada Human Rights  
Trust, British Columbia Civil Liberties Association, Canadian Civil Liberties  
Association and Canadian Prison Law Association**  
Interveners

**CORAM:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté and Brown JJ.

**REASONS FOR JUDGMENT:**  
(paras. 1 to 71)

Karakatsanis J. (Wagner C.J. and Moldaver, Gascon, Côté and Brown JJ. concurring)

**DISSENTING REASONS:**  
(paras. 72 to 147)

Abella J.

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CANADA (PSEP) v. CHHINA

**Minister of Public Safety and Emergency Preparedness and  
Attorney General of Canada**

*Appellants*

v.

**Tusif Ur Rehman Chhina**

*Respondent*

and

**End Immigration Detention Network,  
Canadian Association of Refugee Lawyers,  
Defence for Children International-Canada,  
Amnesty International Canada (English Branch),  
Community & Legal Aid Services Programme,  
Canadian Council for Refugees,  
Queen's Prison Law Clinic,  
Egale Canada Human Rights Trust,  
British Columbia Civil Liberties Association,  
Canadian Civil Liberties Association and  
Canadian Prison Law Association**

*Interveners*

**Indexed as: Canada (Public Safety and Emergency Preparedness) v. Chhina**

**2019 SCC 29**

File No.: 37770.

2018: November 14; 2019: May 10.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté and Brown JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

*Courts — Jurisdiction — Habeas corpus — Exceptions to exercise of jurisdiction by provincial superior courts — Immigration detainee applying for habeas corpus — Superior court declining jurisdiction to hear application on basis that detention review scheme in Immigration and Refugee Protection Act is complete, comprehensive and expert statutory scheme providing for review at least as broad as that available by way of habeas corpus and no less advantageous — Whether superior court erred in declining jurisdiction — Immigration and Refugee Protection Act, S.C. 2001, c. 27.*

After C’s refugee status was vacated and a deportation order was issued, he was placed in immigration detention in a maximum security unit. Immigration officials reviewed C’s detention on a monthly basis, each time upholding the decision that he should be detained. After 13 months in detention, C filed an application for *habeas corpus* on the ground that his detention was unlawful both because it had become lengthy and indeterminate and because the conditions of his detention were inappropriate, thus breaching his rights under ss. 7 and 9 of the *Canadian Charter of Rights and Freedoms*. The chambers judge declined jurisdiction to consider C’s application on the basis that the scheme set out in the *Immigration and Refugee Protection Act* (“IRPA”) satisfied one of the two limited exceptions to the availability

of *habeas corpus*, as the legislator had 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 (the *Peiroo* exception). The Court of Appeal allowed C's appeal, holding that the exception did not apply and that the chambers judge should have exercised his discretion to hear the application.

*Held* (Abella J. dissenting): The appeal should be dismissed.

*Per* Wagner C.J. and Moldaver, **Karakatsanis**, Gascon, Côté and Brown JJ.: The *IRPA* does not provide a review procedure that is at least as broad and advantageous as *habeas corpus* regarding the specific challenges to the legality of the detention raised by C's *habeas corpus* application. Accordingly, C was entitled to have his application heard by the chambers judge.

The writ of *habeas corpus* is an ancient legal remedy that remains fundamental to liberty and the rule of law. Entrenched in s. 10(c) of the *Charter*, the right to *habeas corpus* permits those in detention to go before a provincial superior court and demand to know whether the detention is justified in law. A limited exception to this right arises where the legislator 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. However, exceptions to the availability of *habeas corpus* must be interpreted restrictively. The determination of whether a scheme is as broad and advantageous as *habeas corpus* must be considered with respect to the particular basis upon which the lawfulness of

the detention is challenged in the *habeas corpus* application. It is necessary to ask upon what basis the legality of the detention is being challenged, and whether there is a complete, comprehensive and expert scheme that is as broad and advantageous as *habeas corpus* in relation to the specific grounds in the application. The scheme will not be as broad and advantageous as *habeas corpus* if it fails entirely to include the grounds set out in the application, or if it provides for review on the grounds in the application but the review process is not as broad and advantageous as that available through *habeas corpus*, considering both the nature of the process and any advantages each procedural vehicle may offer.

Applying this framework to C's case reveals that the statutory scheme set out in the *IRPA* is unable to effectively address the challenge raised by his application in a manner that is as broad and advantageous as *habeas corpus*. The *IRPA* provides a detailed scheme to deal with the review of detention in the immigration context. Once an initial detention order has been made, the *IRPA* review process provides for periodic internal review of detention, for judicial review of those decisions by the Federal Court, and for appeals to the Federal Court of Appeal. Immigration officials are experts in applying their statutory mandates, and the Federal Court contributes an additional layer of immigration-related expertise. The grounds for ordering or continuing detention are clear. However, *IRPA* proceedings do not provide for review as broad and advantageous as *habeas corpus* with respect to the specific basis upon which C has challenged the legality of his detention — that is, the length, uncertain duration and conditions of his detention. Once the Minister has established grounds

for detention, immigration officers must consider factors which may weigh in favour of release, which include: the reason for detention; the length of time in detention; whether detention is likely to continue and, if so, how long; any unexplained delays or unexplained lack of diligence; alternatives to detention; and, the principles applicable to s. 7 of the *Charter*. Although the length and likely duration of detention can be reviewed under the *IRPA* scheme, that review is not as broad and advantageous as that available through *habeas corpus*. The *IRPA* scheme falls short in at least three important ways: the onus in detention review is less advantageous to detainees than in *habeas corpus* proceedings; the scope of immigration detention review before the federal courts is narrower than that of a superior court's consideration of a *habeas corpus* application; and *habeas corpus* provides a more timely remedy than that afforded by judicial review. The *IRPA* scheme therefore fails to provide relief that is as broad and advantageous as *habeas corpus* in response to C's challenge to the legality of the length and uncertain duration of his detention.

*Per Abella J.* (dissenting): The appeal should be allowed. The superior court properly declined to exercise its *habeas corpus* jurisdiction in favour of the complete, comprehensive and expert scheme to which C was entitled under the *IRPA*.

There should be assertive and rigorous scrutiny of the lawfulness of any deprivation of liberty. That is why the *IRPA* should be interpreted in a way that guarantees the fullest possible range of scrutiny for detention, including the conditions of detention. Nothing in the language of the *IRPA* precludes such a

comprehensive review. Rather, the basis for the entire scheme in the *IRPA* requires it. Excluding the possibility of reviewing all aspects of immigration detention, including its conditions and lawfulness, essentially and inappropriately reads out the detention review process in the *IRPA* and elevates *habeas corpus* into the only meaningful route offering detainees a full review of their detention. The better approach is to continue to read the language of the *IRPA* in a manner that is as broad and advantageous as *habeas corpus* and that ensures the complete, comprehensive and expert review of immigration detention, as all of the Court's previous jurisprudence has done.

*Habeas corpus* has historic roots which have spawned a variety of statutory remedies whose goal is to preserve the same protections. These can be found in the *IRPA*. Their legitimacy as a genuine alternative to *habeas corpus* was judicially considered and endorsed in *Pringle v. Fraser*, [1972] S.C.R. 821, *Peiroo v. Canada (Minister of Employment and Immigration)* (1989), 69 O.R. (2d) 253, *Reza v. Canada*, [1994] 2 S.C.R. 394, and *May v. Ferndale*, [2005] 3 S.C.R. 809. Each of these decisions emphasized that the *habeas corpus*-like remedies available in the *IRPA* scheme are as broad as or broader than the traditional scope of review by way of *habeas corpus*. The *IRPA* scheme was intended to provide the same fulsome, *Charter*-compliant review of immigration detention as *habeas corpus*. The *Charter* informs the interpretation of the *IRPA* in a manner that allows for the fullest possible review of a detainee's loss of liberty. The *IRPA* must therefore be interpreted in a way that gives it the widest possible scope for implementing its objectives. The suggestion



that a full review of detention can only occur under *habeas corpus* departs from a longstanding jurisprudential consensus. There is no principled reason to abandon the sound logic in *Pringle*, *Peiroo*, *Reza* and *May*. The Court has consistently endorsed the exception limiting the availability of *habeas corpus* review for immigration matters. Disturbing this jurisprudence will lead to forum shopping, inconsistent decision-making, and multiplicity of proceedings.

Nothing in the language of the statutory scheme restricts the scope of *IRPA* detention review to a partial review which must be supplemented by *habeas corpus*. On the contrary, the *IRPA* scheme is structured to provide detainees with at least the same rights they would receive on *habeas corpus* review. All detentions must be reviewed regularly, and review hearings are structured to be expeditious and accessible. Immigration officers are responsible for bringing the detainee before the Immigration Division for all review hearings. The Immigration Division can require the parties to appear, and may order the continued detention of a detainee, their unconditional release, or their release on conditions. A detainee may also apply for leave and judicial review to the Federal Court. In addition, no onus is placed on the detainee, unlike in the case of *habeas corpus* applications. The *IRPA* scheme must be interpreted harmoniously with the *Charter* values that shape the contours of its application and the scheme must be applied in a manner that is at least as rigorous and fair as *habeas corpus* review. The Immigration Division must weigh the purposes served by immigration detention against the detained individual's ss. 7, 9 and 12

*Charter* rights. That necessarily includes consideration of the conditions of detention, and it ensures the protection of *Charter* rights.

Section 248 of the *Immigration and Refugee Protection Regulations* requires the Immigration Division to consider factors to determine if detention should continue. The factors ensure that extended periods of detention do not violate the *Charter*. The Immigration Division must weigh the state's immigration objectives against the detained individual's right to be free from arbitrary or indefinite restraints on liberty. A prior, fact-driven determination that the individual constitutes a flight risk or a danger to the public is entitled to deference. The justification for continued detention decreases as the length of time in detention increases, and the evidentiary burden on the detaining authority increases as the length of detention increases. The Immigration Division must consider conditions of and alternatives to detention, including release. Delays or lack of diligence on the part of the immigration authorities must be considered. The anticipated future length of detention must also be considered, which requires an estimation of how long detention is likely to continue. The Immigration Division is better positioned to assess and address this factor than the superior courts on *habeas corpus*. The process of review demands that the Immigration Division consider at least the same considerations that superior courts weigh on *habeas corpus* review. Properly interpreted, therefore, the *IRPA* scheme provides for the fullest possible review of immigration detention, and, where detention is said to violate ss. 7, 9 and 12 of the *Charter*, the review process allows for at least the same substantive assessment as that undertaken by superior courts on

*habeas corpus* review. Since the Court has repeatedly affirmed that *habeas corpus* will not lie if the statutory alternative provides a remedy that is at least as favourable, the superior court properly declined to exercise its *habeas corpus* jurisdiction.

## Cases Cited

By Karakatsanis J.

**Distinguished:** *Peiroo v. Canada (Minister of Employment and Immigration)* (1989), 69 O.R. (2d) 253; **considered:** *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809; **referred to:** *R. v. Gamble*, [1988] 2 S.C.R. 595; *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502; *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104; *R. v. Miller*, [1985] 2 S.C.R. 613; *R. v. Bird*, 2019 SCC 7; *Jones v. Cunningham*, 371 U.S. (1962); *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459; *Chaudhary v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 ONCA 700, 127 O.R. (3d) 401; *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 839, 55 Imm. L.R. (4th) 220; *In Re Trepanier* (1885), 12 S.C.R. 111; *In Re Sproule* (1886), 12 S.C.R. 140; *Goldhar v. The Queen*, [1960] S.C.R. 431; *Morrison v. The Queen*, [1966] S.C.R. 356; *Karchesky v. The Queen*, [1967] S.C.R. 547; *Korponay v. Kulik*, [1980] 2 S.C.R. 265; *Pringle v. Fraser*, [1972] S.C.R. 821; *Reza v. Canada*, [1994] 2 S.C.R. 394; *Canada (Minister of Citizenship & Immigration) v. Thanabalasingham*, 2004 FCA 4, [2004] 3 F.C.R. 572; *Brown v. Canada (Citizenship and Immigration)*, 2017 FC 710, 25 Admin. L.R. (6th) 191; *Canada (Public Safety and Emergency Preparedness) v. Lunyamila*, 2016

FC 1199, [2017] 3 F.C.R. 428; *Canada (Public Safety and Emergency Preparedness) v. Mehmedovic*, 2018 FC 729; *Canada (Public Safety and Emergency Preparedness) v. Torres*, 2017 FC 918; *Canada (Minister of Public Safety and Emergency Preparedness) v. Karimi-Arshad*, 2010 FC 964, 373 F.T.R. 292; *Fisher-Tennant v. Canada (Minister of Citizenship and Immigration)*, 2018 FCA 132; *Canada (Citizenship and Immigration) v. B386*, 2011 FC 175, [2012] 4 F.C.R. 220; *In Re Storgoff*, [1945] S.C.R. 526; *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350.

By Abella J. (dissenting)

*Chaudhary v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 ONCA 700, 127 O.R. (3d) 401; *R. v. Gamble*, [1988] 2 S.C.R. 595; *R. v. Pearson*, [1992] 3 S.C.R. 665; *Staetter v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2017 BCCA 68; *Pringle v. Fraser*, [1972] S.C.R. 821; *Peiroo v. Canada (Minister of Employment & Immigration)* (1989), 69 O.R. (2d) 253; *Reza v. Canada*, [1994] 2 S.C.R. 394; *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809; *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 839, 55 Imm. L.R. (4th) 220; *In Re Storgoff*, [1945] S.C.R. 526; *R. v. Governor of Pentonville Prison, ex parte Azam*, [1974] A.C. 18, aff'd [1974] A.C. 49; *Reference re Constitution Act, 1867, s. 92(10)(a)* (1988), 64 O.R. (2d) 393; *Sahin v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 214; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1

S.C.R. 350; *Canada (Minister of Citizenship & Immigration) v. Thanabalasingham*, 2004 FCA 4, [2004] 3 F.C.R. 572; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248; *Brown v. Canada (Public Safety)*, 2018 ONCA 14, 420 D.L.R. (4th) 124; *Ali v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 ONSC 2660, 137 O.R. (3d) 498; *Canada (Minister of Citizenship and Immigration) v. Li*, 2009 FCA 85, [2010] 2 F.C.R. 433; *Canada v. Dadzie*, 2016 ONSC 6045; *R. v. Miller*, [1985] 2 S.C.R. 613; *Reza v. Canada* (1992), 11 O.R. (3d) 65; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5.

### **Statutes and Regulations Cited**

*Canadian Bill of Rights*, S.C. 1960, c. 44, s. 2.

*Canadian Charter of Rights and Freedoms*, ss. 7, 9, 10c), 12.

*Code of Civil Procedure*, CQLR, c. C-25.01, art. 82 para. 3.

*Corrections and Conditional Release Act*, S.C. 1992, c. 20.

*Corrections and Conditional Release Regulations*, SOR/92-620.

*Criminal Code*, R.S.C. 1985, c. C-46.

*Criminal Procedure Rules of the Supreme Court of the Northwest Territories*, SI/98-78, rr. 103 to 107.

*Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, rr. 10(1), 11, 13.

*Federal Courts Rules*, SOR/98-106, r. 302.

*Habeas Corpus Act*, R.S.O. 1990, c. H.1, s. 1(1).

*Immigration Act*, R.S.C. 1985, c. I-2.

*Immigration Division Rules*, SOR/2002-229, rr. 9, 20, 21, 23.

*Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 3(1)(h), (3)(d), 57, 58, 72, 74(d), 151, 162(1), 172(2).

*Immigration and Refugee Protection Regulations*, SOR/2002-227, ss. 244 to 249, 248.

*Nova Scotia Civil Procedure Rules*, r. 7.13(1).

*Public Service Employment Act*, S.C. 2003, c. 22.

### **Authors Cited**

Blackstone, William. *Commentaries on the Laws of England*, Book III, by Thomas P. Gallanis, ed. Oxford: Oxford University Press, 2016.

Del Buono, Vincent M. “The Right to Appeal in Indictable Cases; A Legislative History” (1978), 16 *Alta. L.R.* 446.

Farbey, Judith, and Robert J. Sharpe, with and Simon Atrill. *The Law of Habeas Corpus*, 3rd ed. New York: Oxford University Press, 2011.

Sharpe, Robert J. *The Law of Habeas Corpus*. Oxford: Clarendon Press, 1976.

APPEAL from a judgment of the Alberta Court of Appeal (Paperny, O’Ferrall and Greckol J.J.A.), 2017 ABCA 248, 56 *Alta. L.R.* (6th) 1, [2017] 11 *W.W.R.* 637, 25 *Admin L.R.* (6th) 279, 415 *D.L.R.* (4th) 732, [2017] A.J. No. 840 (QL), 2017 *CarswellAlta* 1432 (WL Can.), setting aside a decision of Mahoney J. of the Alberta Court of Queen’s Bench, Number 160576914X1, dated September 2, 2016, dismissing an application for *habeas corpus*. Appeal dismissed, Abella J. dissenting.

*Donnaree Nygard* and *Liliane Bantourakis*, for the appellants.

*Nico G. J. Breed, Barbara Jackman, Chris Reid and Farah Saleem*, for the respondent.

*Swathi Sekhar and Maija Martin*, for the intervener End Immigration Detention Network.

*Jared Will and Joshua Blum*, for the intervener Canadian Association of Refugee Lawyers.

*Farrah Hudani, Jeffrey Wilson and Christina Doris*, for the intervener Defence for Children International-Canada.

*Laila Demirdache and Jamie Liew*, for the intervener Amnesty International Canada (English Branch).

*Subodh Bharati and Suzanne Johnson*, for the intervener Community & Legal Aid Services Programme.

*Erica Olmstead, Molly Joeck and Peter H. Edelmann*, for the intervener Canadian Council for Refugees.

*Nader Hasan, Gillian Moore and Paul Quick*, for the intervener Queen's Prison Law Clinic.

*Michael Battista and Adrienne Smith*, for the intervener Egale Canada Human Rights Trust.

*Frances Mahon*, for the intervener British Columbia Civil Liberties Association.

*Ewa Krajewska* and *Pierre N. Gemson*, for the intervener Canadian Civil Liberties Association.

*Simon Borys* and *Simon Wallace*, for the intervener Canadian Prison Law Association.

The judgment of Wagner C.J. and Moldaver, Karakatsanis, Gascon, Côté and Brown JJ. was delivered by

KARAKATSANIS J. —

I. Overview

[1] The writ of *habeas corpus* is an ancient legal remedy that remains fundamental to individual liberty and the rule of law today. Dating back to the 13th century, this writ guarantees the individual's protection from unlawful deprivations of liberty. Entrenched in s. 10(c) of the *Canadian Charter of Rights and Freedoms*, the right to *habeas corpus* permits those in detention to go before a provincial superior court and demand to know whether the detention is justified in law. If the relevant authority cannot provide sufficient justification, the person must be released.



[2] Despite the importance of *habeas corpus*, this Court has carved out two limited exceptions to its availability. First, a provincial superior court should decline jurisdiction to entertain an application for *habeas corpus* where a prisoner is using the application to attack the legality of their conviction or sentence, as this is properly accomplished through the ordinary appeal mechanisms set out in the *Criminal Code*, R.S.C. 1985, c. C-46 (see *R. v. Gamble*, [1988] 2 S.C.R. 595, at pp. 636-37). Second, a provincial superior court should also decline jurisdiction where the legislator 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” (*May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 40). This second exception has come to be known as the *Peiroo* exception (see *Peiroo v. Canada (Minister of Employment and Immigration)* (1989), 69 O.R. (2d) 253 (C.A.)).

[3] In this case, Mr. Chhina applied for *habeas corpus*, arguing that his immigration detention had become unlawful under the *Charter* because of its length and uncertain duration. He also challenged his detention on the basis that he was being held in inappropriate lockdown conditions at a maximum security unit.

[4] This Court must determine whether the Alberta Court of Queen’s Bench erred in declining its jurisdiction to entertain Mr. Chhina’s application for *habeas corpus* on the basis that the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*) satisfies the second exception.

[5] The parties do not contest that the statutory scheme set out in the *IRPA* provides a complete, comprehensive and expert procedure for the review of immigration matters generally. This was the conclusion reached by the Ontario Court of Appeal in *Peiroo*. What this case emphasizes, however, is that the determination of whether such a scheme is as broad and advantageous as *habeas corpus* must be considered with respect to the *particular basis* upon which the lawfulness of the detention is challenged.

[6] Therefore, the *Peiroo* exception does not bar *habeas corpus* applications with respect to all deprivations of liberty arising from the immigration scheme. Rather the question here is whether the *IRPA* provides a review procedure that is at least as broad and advantageous as *habeas corpus* regarding the specific challenges to the legality of the detention raised by the *habeas corpus* application.

[7] In my view, it does not. Mr. Chhina did not challenge his immigration status, deportation order or detention order as failing to respect the *IRPA*. Rather, he claimed that his continued detention had become unlawful because its length, conditions and uncertain duration violated his *Charter* rights. The *IRPA* does not provide for review that is at least as broad and advantageous as *habeas corpus* for such matters. Mr. Chhina was therefore entitled to have his application for *habeas corpus* heard by a judge of the Alberta Court of Queen's Bench.

## II. Background

[8] The respondent, Tusif Chhina, entered Canada under another name in December 2006 and obtained refugee status approximately two years later. In February 2012, Mr. Chhina's refugee status was vacated and he was declared inadmissible to Canada due to both misrepresentations in his refugee application and his involvement in criminal activity. A deportation order was issued against him.

[9] Following time spent in criminal custody, Mr. Chhina was taken into immigration detention in April 2013. However, in light of delays in obtaining travel documents from Pakistan, Mr. Chhina was released with conditions seven months later. Mr. Chhina failed to respect his conditions and disappeared for a year, but he was eventually taken back into immigration custody in November 2015. He was detained in the Calgary Remand Centre, a maximum security unit which keeps inmates on lockdown 22 and a half hours a day. Pursuant to s. 57 of the *IRPA*, immigration officials reviewed Mr. Chhina's detention on a monthly basis, each time upholding the decision that he should be detained.

[10] Mr. Chhina filed his *habeas corpus* application in May 2016, arguing that his immigration detention had become unlawful both because it had become lengthy and indeterminate and because the conditions of his detention were "inappropriate" (Court of Queen's Bench of Alberta Reasons, No. 160576914X1, September 2, 2016 (unreported), at p. 2). At the time of his application before the Alberta Court of Queen's Bench, he had spent a total of 13 months in immigration detention.

[11] The chambers judge declined jurisdiction to consider Mr. Chhina's application for *habeas corpus*, citing the *IRPA* as a comprehensive legislative framework that would satisfy the *Peiroo* exception.

[12] The Alberta Court of Appeal (2017 ABCA 248, 56 Alta. L.R. (6th) 1) reversed that decision, holding that the chambers judge should have exercised his discretion to hear Mr. Chhina's *habeas corpus* application. Given the importance of the writ, the court noted that exceptions to the availability of *habeas corpus* must be limited and well-defined. As such, a chambers judge should decline to hear *habeas corpus* applications only in limited circumstances, beyond which the decision to decline jurisdiction constitutes an error of law.

[13] While acknowledging the holding in *Peiroo*, Greckol J.A., writing for the court, concluded that the exception does not bar *habeas corpus* applications in all immigration-related matters. She distinguished Mr. Chhina's challenge noting that, unlike the applicant in *Peiroo*, Mr. Chhina did not contest determinations regarding his inadmissibility or deportation. Instead, he challenged the legality of his detention, incidental to those determinations, on *Charter* grounds. The outcome of Mr. Chhina's *habeas corpus* application would have no effect on his immigration status or deportation order but, if successful, would affect his immediate liberty.

[14] Through this lens, Greckol J.A. saw clear differences between the review and relief available via the *IRPA* process as compared to an application for *habeas corpus*, finding the latter broader and more advantageous where the challenge related

to the length and indeterminate nature of the detention. As such, the *Peiroo* exception did not apply to Mr. Chhina's case and the matter was remitted to the Court of Queen's Bench for a hearing on the merits of the *habeas corpus* application.

[15] Travel documents were subsequently obtained for Mr. Chhina and he was removed from Canada in September 2017. Thus, the arguments regarding his detention are now moot. But as Mr. Chhina's case illustrates, *habeas corpus* applications are often evasive of review, as the shifting factual circumstances frequently render the application moot before appellate review can be obtained (*Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, at para. 14). Given the importance of clearly delineating the exceptions to *habeas corpus*, it is appropriate for this Court to consider the legal issues raised by Mr. Chhina's appeal notwithstanding its mootness. No party has objected to this Court doing so.

### III. Issues

[16] This appeal concerns the scope and application of the *Peiroo* exception, providing the Court with an opportunity to clarify when a complete, comprehensive and expert statutory scheme provides for review that is as broad and advantageous as *habeas corpus* such that an applicant will be precluded from bringing an application for *habeas corpus*.<sup>1</sup>

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<sup>1</sup> Although Mr. Chhina sought to argue before this Court that the common law *Peiroo* exception violates s. 10(c) of the *Charter* and cannot be saved under s. 1, he failed to file a notice of

#### IV. Analysis

[17] Provincial superior courts have inherent jurisdiction to hear *habeas corpus* applications (*May*, at para. 29). An application for *habeas corpus* requires the applicant to establish a deprivation of liberty and to raise a legitimate ground for questioning the legality of that deprivation. If this is accomplished, the onus then shifts to the authority in question to show that the deprivation of liberty is lawful. In order for detention to be lawful, the decision-maker must have authority to order detention, the decision-making process must be fair, and the decision to detain must be both reasonable and compliant with the *Charter* (*May*, at para. 77; *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 72). Changes in conditions or orders leading to further deprivations of liberty may also be challenged in the same manner. Where, as here, the application is brought with *certiorari* in aid, the court hearing the application conducts its review on the basis of the record that resulted in the decision (J. Farbey and R. J. Sharpe, with S. Atrill, *The Law of Habeas Corpus* (3rd ed. 2011), at p. 45; *Mission Institution v. Khela*, at para. 35; *R. v. Miller*, [1985] 2 S.C.R. 613, at p. 624).

[18] The writ of *habeas corpus* is not a discretionary remedy; it issues as of right where the applicant successfully challenges the legality of a detention. A provincial superior court may not decline jurisdiction to hear such an application merely because alternative remedies are available (*May*, at paras. 34 and 44). Such a

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constitutional question within the specified timeline. Accordingly, that argument is not before the Court in this appeal.

court may only decline jurisdiction where the legislator 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” (*May*, at para. 40; *R. v. Bird*, 2019 SCC 7, at para. 65). As Mr. Chhina’s case illustrates, this analysis must be undertaken regarding the nature of the specific challenge to the legality of the detention raised in the *habeas corpus* application.

[19] *Habeas corpus* — which roughly translates to “produce the body” — was a familiar phrase in 13th century English civil procedure; it required the defendant of an action to be brought physically before the court (Farbey, Sharpe and Atrill, at p. 2). During the 15th and 16th centuries, *habeas corpus* took on its modern form, permitting an applicant to demand justification for their detention (at p. 4) and becoming the “great and efficacious writ in all manner of illegal confinement” (W. Blackstone, *Commentaries on the Laws of England*, Book III, by T. P. Gallanis, ed. (2016), at 131). *Habeas corpus* has never been “a static, narrow, formalistic remedy”; rather, over the centuries, it “has grown to achieve its grand purpose — the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty” (*May*, at para. 21, citing *Jones v. Cunningham*, 371 U.S. 236 (1962), at p. 243).

[20] *Habeas corpus* continues to hold a vital and distinguished place in Canada’s modern legal landscape. Before the advent of the *Charter*, s. 2 of the *Canadian Bill of Rights*, S.C. 1960, c. 44, established that no law of Canada would be

construed or applied so as to deprive a person of a determination on the validity of their detention, and provided for release where that detention was found to be unlawful. In 1982, *habeas corpus* became a constitutional right entrenched in s. 10(c) of the *Charter*:

10. Everyone has the right on arrest or detention:

...

(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

[21] The review of legality under *habeas corpus* is broad, often protecting and interacting with other *Charter* rights, including: the right to life, liberty and security of the person, as guaranteed by s. 7; the right not to be arbitrarily detained or imprisoned, as guaranteed by s. 9; and the right not to be subjected to any cruel and unusual treatment or punishment, as guaranteed by s. 12.

[22] The case of *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459, helpfully illustrates different circumstances in which a deprivation of liberty may arise, and thus, different ways in which a detention may be challenged. A deprivation of liberty may relate to (1) the initial decision requiring the detention; or to a further deprivation of liberty based on (2) a change in the conditions of the detention; or (3) the continuation of the detention.



[23] While not exhaustive, this list may be particularly helpful in pinpointing the nature of a challenge to a deprivation of liberty for reasons beyond those underlying an initial order. As I shall explore in more detail below, these three categories can assist in explaining the relevant case-law. For example, in the immigration context, a finding of inadmissibility may lead to a detention order that constitutes an initial deprivation of liberty: this is the first *Dumas* category (*Peiroo*). The transfer of prisoners from a lower to a higher security institution is emblematic of the second type of deprivation: a change in circumstances resulting in an additional deprivation of liberty (*May*). The third type of deprivation outlined in *Dumas* can speak to extended detentions or detentions of uncertain duration, which may engage ss. 7 and 9 of the *Charter*, as was argued here (and in *Chaudhary v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 ONCA 700, 127 O.R. (3d) 401; and *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 839, 55 Imm. L.R. (4th) 220).

[24] Regardless of how a deprivation of liberty arises, the importance of the “great writ of liberty” underlies the general rule that exceptions to the availability of *habeas corpus* must be limited and carefully defined.

[25] To date, this Court has recognized only two instances where a provincial superior court may decline to hear a *habeas corpus* application. The first allows a provincial superior court to decline jurisdiction where a prisoner seeks to attack the legality of their conviction or sentence, determinations properly challenged through

the appeal mechanisms set out in the *Criminal Code* (*Gamble*, at p. 636). The second exception arose in the field of immigration law. In *Peiroo*, the applicant sought issuance of a writ of *habeas corpus* with *certiorari* in aid, contesting a finding that there was no credible basis for her refugee claim and arguing that there was therefore no basis for a removal order issued against her. The Ontario Court of Appeal found that the *Immigration Act*, R.S.C. 1985, c. I-2, then in force established a comprehensive scheme regulating the determination and review of immigration claims in a manner that was “as broad as or broader than the traditional scope of review by way of *habeas corpus* with *certiorari* in aid” (*Peiroo*, at p. 261).

[26] Both of these exceptions acknowledge the development of sophisticated procedural vehicles in our modern legal system and their ability to fully protect fundamental rights such as *habeas corpus*.

[27] Statutory appeals in criminal matters, previously circumscribed by the common law writs of *certiorari* and error, were introduced some 500 years after *habeas corpus* (V. M. Del Buono, “The Right to Appeal in Indictable Cases; A Legislative History” (1978), 16 *Alta. L.R.* 446, at p. 448). Although the Court affirmed the *Criminal Code* exception in the context of a *Charter* challenge in *Gamble*, the rule pre-empting *habeas corpus* applications where a statutory appeal is available long pre-dates the *Charter* (see: *In Re Trepanier* (1885), 12 S.C.R. 111; *In Re Sproule* (1886), 12 S.C.R. 140, at p. 204; *Goldhar v. The Queen*, [1960] S.C.R.

431, at p. 439; *Morrison v. The Queen*, [1966] S.C.R. 356; *Karchesky v. The Queen*, [1967] S.C.R. 547, at p. 551; *Korponay v. Kulik*, [1980] 2 S.C.R. 265).

[28] The *IRPA*, for its part, is a product of the rise of the modern administrative state: a parallel justice system established alongside the courts of law to provide accessible, expert, and expeditious adjudication of a broad spectrum of claims. For example, the decision in *Pringle v. Fraser*, [1972] S.C.R. 821, holding that the *Immigration Act*, R.S.C. 1952, c. 325, ousted provincial superior court jurisdiction to entertain a writ of *certiorari*, was an early recognition of the possibility that a legislature could create alternative avenues of review through administrative bodies.

[29] Both of these exceptions target similar concerns, primarily the “need to restrict the growth of collateral methods of attacking convictions or other deprivations of liberty” (*May*, at para. 35). By affirming such statutory schemes, the standard set out in *May* ensures the constitutional right to *habeas corpus* is protected, while also realizing judicial economy, avoiding duplicative proceedings, and reducing the possibility of inconsistent decisions and forum shopping.

[30] At issue in this appeal is the scope of the *Peiroo* exception and, more specifically, whether that exception precludes *habeas corpus* for *all* determinations made under immigration legislation. The appellant argues that it does, pointing to this Court’s description of the *Peiroo* exception in *May*, where we stated: “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” (*May*, at para. 40).

[31] In my view, this statement was never intended to preclude *habeas corpus* review of *every* detention arising in the immigration context, *whatever* the nature of the challenge to the legality of the detention. I do not see *May* as standing for such a broad proposition. I say this for three reasons.

[32] First, the *IRPA* was not before the Court in *May*. In that case, a number of federal prisoners who were transferred from minimum to medium-security institutions brought *habeas corpus* applications to challenge this transfer to a more restrictive form of custody. The warden of the institution argued that the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (*CCRA*), set out a comprehensive statutory scheme that provided effective remedies comparable to *habeas corpus* — a proposition this Court did not accept. In that context, the Court compared the *CCRA* not to the *IRPA* (although it was then in force), but rather to the *Immigration Act* considered in *Peiroo*. The Court concluded that, unlike the immigration scheme, the corrections statute did not guarantee impartial review, articulate specific and effective remedies, or even provide clear grounds upon which transfer decisions could be reviewed (*May*, at para. 62).

[33] Second, the jurisprudence relied on by the Court in *May* — *Peiroo*, *Pringle*, and *Reza v. Canada*, [1994] 2 S.C.R. 394, — did not stand for the broad

proposition that *habeas corpus* will never be available where the detention is related to immigration matters. *May* must be understood in light of the cases cited; the Court did not purport to extend their holdings. Neither *Pringle* nor *Reza* dealt specifically with *habeas corpus*. *Pringle* was concerned with *certiorari*, a writ which, unlike *habeas corpus*, is not constitutionally protected. *Reza* did not involve an application for *habeas corpus*, but a challenge to the constitutionality of the *Immigration Act* on other grounds. Even *Peiroo* did not provide that *habeas corpus* could *never* lie in the immigration context. It simply determined that the *Immigration Act* then in force was “as broad as or broader” than *habeas corpus* for “immigration matters” like Ms. Peiroo’s claim. Ms. Peiroo had argued that the adjudicator erred in finding she had no credible basis for her refugee claim and that her detention was therefore ordered illegally.

[34] Finally, *May* itself urges us to interpret exceptions to the availability of *habeas corpus* restrictively:

Given the historical importance of *habeas corpus* in the protection of various liberty interests, jurisprudential developments limiting *habeas corpus* jurisdiction should be carefully evaluated and should not be allowed to expand unchecked. The exceptions to *habeas corpus* jurisdiction and the circumstances under which a superior court may decline jurisdiction should be well defined and limited.

(para. 50)

[35] For these reasons, I do not think *May* should be interpreted as holding that the *Peiroo* exception bars all *habeas corpus* applications that arise in the immigration context, regardless of the grounds raised to challenge detention.

[36] Two recent Ontario Court of Appeal cases — *Chaudhary* and *Ogiamien* — recognized that the *Peiroo* exception does not bar all *habeas corpus* applications targeting a deprivation of liberty that arises from the immigration scheme.

[37] In *Chaudhary*, Rouleau J.A., writing for the court, distinguished the case before him from *Peiroo* by noting that the applicant in *Peiroo* had challenged aspects of her refugee status itself — an immigration determination for which the *IRPA* provided review as broad as *habeas corpus* — whereas the multiple applicants in *Chaudhary* challenged their detentions on the grounds that the extended duration or indeterminacy of detention offended s. 7 of the *Charter*. The Court of Appeal concluded that the *IRPA* was not as broad or advantageous as *habeas corpus* with respect to such queries. Moreover, the applicants challenged only their detention: the outcome of the applications would have no effect on their immigration status. Ultimately, provincial superior court jurisdiction was a necessary complement to the statutory scheme in order to protect the constitutional right to *habeas corpus*.

[38] Sharpe J.A. addressed similar facts in *Ogiamien*, finding that a 25-month detention — on the basis of an outstanding deportation order — was subject to *habeas corpus* review. Although the court found it was unnecessary to consider Mr. Ogiamien's contention that he should have been detained in an immigration

holding centre rather than in a maximum security facility — given that specific complaint had been dealt with in a separate application — it noted that the principle applied in *Chaudhary* was not restricted to situations involving lengthy detentions of uncertain duration. Instead, the principle rested upon the Superior Court’s broad residual jurisdiction to entertain *habeas corpus* applications subject only to the framework set out in *May (Ogiamien)*, at paras. 38-42).

[39] I agree with the *Chaudhary* and *Ogiamien* approach, adopted by the Court of Appeal in this case. This approach properly flows from the principles set out by this Court in *May*.

[40] In sum, the *Peiroo* exception can be more clearly articulated as follows: an application for *habeas corpus* will be precluded only when a complete, comprehensive and expert scheme provides for review that is at least as broad and advantageous as *habeas corpus* with respect to the challenges raised by the *habeas corpus* application. An administrative scheme may be sufficient to safeguard the interests protected by *habeas corpus* with respect to some types of challenges, but may also need to be re-examined with respect to others. It is thus essential to consider how the challenge to the unlawful detention is framed in the *habeas corpus* application.

A. *Determining When the Exception Applies*

[41] How, then, does a court determine whether there is “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” such that an applicant will be precluded from bringing an application for *habeas corpus* (*May*, at para. 40)?

[42] First, it is necessary to ask upon what basis the legality of the detention is being challenged. In other words, what are the grounds in the applicant’s *habeas corpus* application? Reference to the categories in *Dumas* may be helpful to this inquiry. Is the applicant challenging an initial decision that resulted in detention, such as a removal order? Are they challenging the conditions of their detention? Or are they challenging the length and uncertain duration of their detention? Precisely delineating the grounds for the *habeas corpus* application is necessary in order to determine whether there is an effective statutory remedy to address those grounds.

[43] Second, it is necessary to ask whether there is a complete, comprehensive and expert scheme that is as broad and advantageous as *habeas corpus* in relation to the specific grounds in the *habeas corpus* application. Elements of the *IRPA* detention review scheme may speak to whether the scheme is complete, comprehensive and expert. However, the main issue in this case, and the focus of the parties’ submissions, is whether *IRPA* review is as broad and advantageous as *habeas corpus* with respect to the specific basis upon which Mr. Chhina challenged the legality of his detention. In this inquiry, it may be helpful to look at whether a statutory scheme



fails entirely to include the grounds set out in the application for *habeas corpus*. If so, the scheme will not be as broad and advantageous as *habeas corpus*. The scheme will also fail to oust *habeas corpus* if it provides for review on the grounds in the application, but the review process is not as broad and advantageous as that available through *habeas corpus*, considering both the nature of the process and any advantages each procedural vehicle may offer.

[44] As I shall explain, applying this framework to the facts of Mr. Chhina's case reveals that while the statutory scheme set out in the *IRPA*, including judicial review, may provide adequate review with respect to some matters, it is unable to effectively address the challenge raised by Mr. Chhina's application in a manner that is as broad and advantageous as *habeas corpus*.

B. *Identifying the Grounds of Mr. Chhina's Challenge*

[45] The first step is to identify the grounds raised in the *habeas corpus* application. Mr. Chhina challenged the legality of his detention on two grounds: that he was being held in inappropriate conditions and that the duration of his detention had become indeterminate and overly lengthy. Mr. Chhina argued that the length and duration of his detention violated his rights under ss. 7 and 9 of the *Charter* because there was no reasonable prospect that the immigration-related purposes justifying his detention would be achieved within a reasonable time. The courts below proceeded on the basis of this second ground: that the lengthy detention of indeterminate duration violated the *Charter*.

[46] Unlike in *Peiroo*, Mr. Chhina's application for *habeas corpus* had nothing to do with whether his inadmissibility or deportation were rightly or wrongly decided.

### C. *The IRPA Statutory Review Scheme*

[47] In determining whether the scheme provides for review as broad and advantageous as *habeas corpus*, the court should look at the actual alternatives for detention review realistically available to someone in Mr. Chhina's circumstances. As this Court stated in *May*, a "purposive approach . . . requires that we look at the entire context", which in that case included the relative disadvantages of judicial review in the Federal Court (*May*, at para. 65). This examination may include any administrative adjudicators, tribunals, and internal appeal mechanisms, as well as available judicial review or statutory appeal routes. In this case, I consider both the Immigration Division and the judicial review processes in the Federal Courts.

[48] I begin first with a general overview of how the *IRPA* scheme functions before considering whether it offers review as broad and advantageous as *habeas corpus*. The *IRPA* provides a detailed scheme to deal with the review of detention in the immigration context. Just as in the criminal context, a deprivation of liberty ordered pursuant to the *IRPA* must always be justified. Release is the default except where the Minister establishes that: the detainee is a danger to the public or is unlikely to appear at a hearing; the Minister is inquiring as to inadmissibility due to security risks, human rights violations or criminality; or the Minister has concerns

about establishing the person's identity (*IRPA*, s. 58(1)). Each of these grounds of detention is determined in accordance with a list of immigration-specific factors set out in the *Immigration and Refugee Protection Regulations*, SOR/2002-227, ss. 244-49 (*IRPR*).

[49] Once an initial detention order has been made, the *IRPA* review process provides for periodic internal review of detention by members of the Immigration Division of the Immigration and Refugee Board, who are appointed in accordance with the *Public Service Employment Act*, S.C. 2003, c. 22, (*IRPA*, ss. 151 and 172(2)). A member of the Immigration Division must conduct an initial review within 48 hours of an individual being taken into immigration custody, as well as a review within the 7 following days, and additional reviews every 30 days thereafter (*IRPA*, s. 57).

[50] The *IRPA* also explicitly provides for judicial review of those decisions by the Federal Court (*IRPA*, s. 72). An appeal from this judicial review is available to the Federal Court of Appeal on a certified question of general importance (*IRPA*, s. 74(d)). All the review processes are intimately linked, as judicial review is circumscribed by the statutory mandate of the original decision-maker.

[51] Lastly, it should be noted that immigration officials are experts in applying their statutory mandate. Given its role in judicial review, the Federal Court has also developed significant familiarity with the immigration context and contributes an additional layer of immigration-related expertise.

[52] As this examination reveals, the review process set out in the *IRPA* is detailed and clear. The grounds for ordering or continuing detention are clear. Independent review is assured by judicial review through the Federal Courts. Clear remedies, namely release, exist.

[53] However, as I shall explain, *IRPA* proceedings do not provide for review as broad and advantageous as *habeas corpus* with respect to the specific basis upon which Mr. Chhina has challenged the legality of his detention.

D. *Is Review Under the IRPA as Broad and Advantageous as Habeas Corpus?*

[54] The scope of review under the *IRPA* must, of course, actually include the grounds Mr. Chhina has raised.

[55] Once the Minister has established grounds for detention, immigration officers and members of the Immigration Division must consider factors which may weigh in favour of release, set out at s. 248 of the *IRPR*:

- (a) the reason for detention;
- (b) the length of time in detention;
- (c) whether . . . that detention is likely to continue and, if so, [how long];
- (d) any unexplained delays or unexplained lack of diligence caused by the Department, the Canada Border Services Agency, or the person concerned; and
- (e) the existence of alternatives to detention.

[56] To this list, the Federal Court of Appeal has added that the decision-maker must be mindful of the principles applicable to s. 7 of the *Charter* (*Canada (Minister of Citizenship & Immigration) v. Thanabalasingham*, 2004 FCA 4, [2004] F.C.R. 572, at para. 14).

[57] Mr. Chhina challenged the length, uncertain duration and conditions of his detention. The conditions in which a person is detained are notably absent from the language of s. 248 of the *IRPR*. Counsel for the appellant conceded as much, adding that the conditions of detention are properly within the ambit of the provincial correctional authorities or the Canadian Border Services Agency, not the Immigration Division (*Brown v. Canada (Citizenship and Immigration)*, 2017 FC 710, 25 Admin. L.R. (6th) 191, at para. 138). The Immigration Division has no explicit power to examine harsh or illegal conditions. This is to be contrasted with *habeas corpus*, which provides for review of any unlawful form of detention. The inability of a scheme to respond to the specific ground raised in an application of *habeas corpus* would mean that the scheme does not preclude *habeas corpus*. However, this ground of Mr. Chhina's *habeas corpus* application was not addressed by the Court of Appeal, nor was it argued before this Court.

[58] In contrast to the absence of conditions, the regulations do provide for consideration of the length and likely duration of detention (*IRPR*, s. 248(c) and (d)). The question thus becomes whether review of the length and duration of detention under the *IRPA* is as broad and advantageous as that available through *habeas corpus*.

This requires consideration of the nature of the review process and any advantages provided by each procedural vehicle.

[59] I conclude that the *IRPA* does not provide for review as broad and advantageous as *habeas corpus* where the applicant alleges their immigration detention is unlawful on the grounds that it is lengthy and of uncertain duration. Taken as a whole, the scheme falls short in at least three important ways. First, the onus in detention review under the *IRPA* is less advantageous to detainees than in *habeas corpus* proceedings. Second, the scope of review before the Federal Courts is narrower than that of a provincial superior court's consideration of a *habeas corpus* application. Third, *habeas corpus* provides a more timely remedy than that afforded by judicial review.

[60] Under the *IRPA*, the Minister need only make out a *prima facie* case for continued detention (e.g., indicate that the detainee is a continued flight risk) in order to shift the onus to the detainee to justify release. While the *IRPA* places the onus on the Minister to demonstrate a ground for detention (*IRPA*, s. 58), the regulations simply state that the length and likely duration of detention (among other factors) "shall be considered before a decision is made on detention or release" (*IRPR*, s. 248). The Federal Court has interpreted the regulations as imposing the onus on the detainees to demonstrate that their continued detention would be unlawful in light of the s. 248 factors (*Thanabalasingham*, at para. 16; *Chaudhary*, at para. 86; *Canada (Public Safety and Emergency Preparedness) v. Lunyamila*, 2016 FC 1199, [2017] 3

F.C.R. 428). This understanding of who bears the onus is consistent with the general principle that a *Charter* applicant bears the onus of establishing a *Charter* infringement. In addition, while s. 248 provides that an Immigration Division member must consider certain factors, the regulations provide no guidance as to *how* the length and duration of detention are to be considered and, crucially, when these factors might be outweighed by others — such as the reason for detention. Thus, as Rouleau J.A. has correctly observed, the *IRPA* does not require the Minister to explain or justify the length and uncertain duration of a detention, because the Minister need only establish one of the grounds at s. 58 of the scheme in order to shift the onus to the detainee (*Chaudhary*, at para. 86). This contrasts sharply with *habeas corpus* where, subject to raising a legitimate ground, the onus is on the Minister to justify the legality of the detention in any respect. As noted by this Court in *Mission Institution v. Khela*, the onus in *habeas corpus* is of particular historical significance:

This particular shift in onus is unique to the writ of *habeas corpus*. Shifting the legal burden on the detaining authorities is compatible with the very foundation of the law of *habeas corpus*, namely that a deprivation of liberty is permissible only if the party effecting the deprivation can demonstrate that it is justified.

(para. 40)

[61] Further, on judicial review to the Federal Court, the onus lies squarely upon the applicant to establish that the decision is unreasonable (*Mission Institution v. Khela*, at para. 40).

[62] Moreover, under the *IRPA* the Minister may satisfy its onus by relying on reasons given at a prior detention hearing. This practice has been encouraged by the Federal Courts, which have held that, while previous detention decisions are not binding, “if a member chooses to depart from prior decisions to detain, clear and compelling reasons for doing so must be set out” (*Thanabalasingham*, at para. 10; see also, among others: *Canada (Public Safety and Emergency Preparedness) v. Mehmedovic*, 2018 FC 729, at para. 19 (CanLII); *Canada (Public Safety and Emergency Preparedness) v. Torres*, 2017 FC 918, at para. 20 (CanLII); *Canada (Minister of Public Safety and Emergency Preparedness) v. Karimi-Arshad*, 2010 FC 964, 373 F.T.R. 292, at para. 16). In other words, immigration officials may rely entirely on reasons given by previous officials to order continued detention and remain fully compliant with the *IRPA* scheme. In practice, the periodic reviews mandated by the *IRPA* are susceptible to self-referential reasoning, instead of constituting a fresh and independent look at a detainee’s circumstances.

[63] Thus, the scheme fails to provide the detainee with the fresh and focussed review provided by *habeas corpus*, where the Minister bears the onus. The fresh evidence filed before this Court emphasizes the above points. An external audit commissioned by the chair of the Immigration and Refugee Board offers a timely, and frankly unfortunate, picture of how the scheme is being administered for those in long-term detention. The 2018 audit highlights how, in practice, detainees do not receive the full benefit of the scheme:



- in principle, the Immigration Division should place the onus on the Minister to continue detention; in practice they often fail to do so (2017/2018, Audit, at p. 18);

- in principle, the Immigration Division should be approaching each detention review afresh; in practice, the Immigration Division is overly reliant on past detention review decisions (2017/2018, Audit, pp. 31-32);

- in principle, the Immigration Division should be impartial and independent from the Canadian Border Services Agency; in practice, the Immigration Division often overly relies on the Canada Border Services Agency's submissions (2017/2018, Audit, pp. 17-18); and

- in principle, the Immigration Division should be reviewing *IRPA* detentions for compliance with ss. 7, 9, and 12 of the *Charter*; in practice, as a result of their failure to consider each detention review afresh, they do not do so (2017/2018, Audit, pp. 31-32).

[64] The second disadvantage of the *IRPA* scheme is the scope of review. As a practical matter, the Immigration Division does not conduct a fresh review of each periodic detention, as discussed above; as such, the scope of review before the Federal Courts is correspondingly narrower than review on *habeas corpus*. The broad review provided by *habeas corpus* grapples with detention as a whole. This case, for

example, required a holistic consideration of Mr. Chhina's *Charter* rights and how they may have been violated — not by an individual decision but by the overall context of his detention. This type of inquiry is closely tied to the expertise of the provincial superior courts (*May*, at para. 68; see also *Mission Institution v. Khela*, at para. 45; *Chaudhary*, at para. 102). Relief through judicial review on the other hand, may be sought only with respect to a single decision, which in the *IRPA* context is generally the most recent 30-day review (*Federal Courts Rules*, SOR/98-106, s. 302).

[65] Further, the remedies available on judicial review are more limited and less advantageous to a detainee than on *habeas corpus*. Although the Federal Courts do have limited powers of *mandamus* — the power to require a decision-maker to take positive action, such as requiring the Immigration Division to release a detainee — I am aware of no cases in which release has been ordered. To the extent that they can exercise this power, the remedy is granted only where “certain relatively rarely occurring prerequisites are met” (*Fisher-Tennant v. Canada (Minister of Citizenship and Immigration)*, 2018 FCA 132, at para. 28 (CanLII)). Instead, a successful judicial review will generally result in an order for redetermination, requiring further hearings to obtain release and thereby extending detention. This is to be contrasted with *habeas corpus*, where release is ordered immediately once the relevant authority has failed to justify the deprivation of liberty.

[66] Lastly, *habeas corpus* provides a more timely remedy than those available through the *IRPA*. Leave is required for judicial review of a detention

decision made under the *IRPA*, and perfecting an application for leave on judicial review can take up to 85 days (*IRPA*, s. 72(2)(b); *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, rr. 10(1), 11 and 13). As the Federal Court has acknowledged, even in the best of circumstances, it is thus impracticable for judicial review to occur before the next 30-day detention review has been held, rendering the outcome of the judicial review moot (*Canada (Citizenship and Immigration) v. B386*, 2011 FC 175, [2012] 4 F.C.R. 220, at para. 13; *Chaudhary*, at para. 94). The remedy of a rehearing restarts the review process, leading to further delays. This cycle of mootness at the judicial review stage acts as a barrier to timely and effective relief.

[67] In contrast, the importance of *habeas corpus* as a “swift and imperative remedy” has long been recognized (*Mission Institution v. Khela*, at para. 3; *In Re Storgoff*, [1945] S.C.R. 526, at p. 591). Courts across the country have acknowledged this by enacting rules that prioritize the hearing of *habeas corpus* applications. *Habeas corpus* writs are “returnable immediately” before a superior court judge in Ontario, and the hearing of *habeas corpus* applications have priority over other business of the court in both Quebec and Nova Scotia (*Habeas Corpus Act*, R.S.O. 1990, c. H.1, s. 1(1); *Code of Civil Procedure*, CQLR, c. C-25.01, art. 82 para. 3; *Nova Scotia Civil Procedure Rules*, Royal Gaz. Nov. 19, 2008, r. 7.13(1); see also *Criminal Procedure Rules of the Supreme Court of the Northwest Territories*, *Canada Gazette*, Part II, vol. 132, No. 10, May 13, 1998, SI/98-78, ss. 103 to 107). The advantages *habeas corpus* offers with respect to timeliness are especially relevant to

an application like Mr. Chhina's, which was primarily concerned with the duration of his detention.

[68] In sum, the *IRPA* fails to provide relief that is as broad and advantageous as *habeas corpus* in response to Mr. Chhina's challenge to the legality of the length and uncertain duration of his detention.

#### V. Motion to Vary the Record

[69] On appeal before this Court, the respondent brought a motion to vary the record and file new evidence. This new evidence included a troubling audit that found examples of maladministration within the *IRPA* scheme, resulting in some detainees being kept in a cycle of long-term detention.

[70] While the evidence was not necessary to resolve this appeal, it is admissible pursuant to *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775. The evidence is new, relevant, credible and confirmatory in that it provides statistical evidence supporting the argument that the *IRPA* scheme is not as broad and advantageous as *habeas corpus* for lengthy detentions, particularly with regards to the onus borne by the applicant at each successive detention review. In this case, even without regard to this evidence, it was clear that the statutory scheme, including judicial review at the Federal Courts, is not as advantageous as *habeas corpus* given the nature of the challenge.

## VI. Conclusion

[71] *Habeas corpus* is a fundamental and historic remedy which allows individuals to seek a determination as to the legality of their detention. A provincial superior court should decline its *habeas corpus* jurisdiction only when faced with a complete, comprehensive and expert scheme which provides review that is at least as broad and advantageous as *habeas corpus* with respect to the grounds raised by the applicant. Although our legal system continues to evolve, *habeas corpus* “remains as fundamental to our modern conception of liberty as it was in the days of King John” and any exceptions to its availability must be carefully limited (*Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 28). The *IRPA* has been held to be a complete, comprehensive and expert scheme for immigration matters generally, but it is unable to respond to Mr. Chhina’s challenge in a manner that is as broad and advantageous as *habeas corpus* and the Alberta Court of Queen’s Bench erred in declining to hear Mr. Chhina’s *habeas corpus* application. For these reasons, I would allow the motion to adduce new evidence and dismiss the appeal with costs on the basis agreed by the parties.

The following are the reasons delivered by

ABELLA J. —

[72] I share the majority's view that there should be assertive and rigorous scrutiny of the lawfulness of any deprivation of liberty. That is why, in my respectful view, the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*) should be interpreted in a way that guarantees the fullest possible range of scrutiny for detention, including the conditions of detention. I see nothing in the language of the *Act* that precludes such a comprehensive review. In fact, I think the basis for the entire scheme *requires* it. On the other hand, interpreting it in a way that restricts the contours of the scrutiny unduly interferes with the rights of the detainee and with the legislature's intention that those rights be fully and generously integrated with the purposes of the whole scheme.

[73] Moreover, interpreting the *Act* in a way that excludes the possibility of reviewing *all* aspects of immigration detention, including its conditions and lawfulness, essentially and inappropriately reads out the detention review process in *IRPA*. Why would any detainee settle for a partial review of his or her detention under *IRPA* if they could receive a more expansive one under *habeas corpus*? By narrowing the range of detention review available under *IRPA*, the majority's interpretation has the effect of elevating *habeas corpus* into the only meaningful route offering detainees a full review of their detention. This relegates the *Act* to a second-best role, and creates a two-tier process of detention review whereby those who choose the *Act*'s menu are deemed to be consigned to a lesser remedial buffet.

[74] The better approach is to continue to read the language of *IRPA* in a manner that is as broad and advantageous as *habeas corpus* and ensures the complete, comprehensive and expert review of immigration detention that it was intended to provide, as all of this Court's previous jurisprudence has done. It is far more consistent with the purposes of the scheme to breathe the fullest possible remedial life into the *Act* than to essentially invite detainees to avoid the exclusive scheme and pursue their analogous remedies elsewhere.

#### I. Background

[75] Tusif Ur Rehman Chhina was born in Pakistan. He entered Canada in December 2006 and obtained refugee status under a false name. When the Minister of Citizenship and Immigration discovered Mr. Chhina's misrepresentation, he applied to the Refugee Protection Division of the Immigration and Refugee Board to remove Mr. Chhina's refugee status.

[76] The Refugee Protection Division granted the Minister's application in February 2012. It determined that Mr. Chhina was inadmissible to Canada on the basis of serious criminality, and issued a deportation order against him. In response to the deportation order, the Canadian Border Services Agency began taking steps to obtain the necessary travel documents for Mr. Chhina's return to Pakistan.

[77] Before he could be deported from Canada, Mr. Chhina was convicted of various criminal offences and incarcerated for three years. When he was released in

April 2013, Mr. Chhina was taken immediately into immigration detention on the grounds that he would likely pose a danger to the public and would be unlikely to appear for his removal from Canada if released.

[78] As required by the *Act*, a member of the Immigration Division of the Immigration and Refugee Board reviewed Mr. Chhina's detention within 48 hours of this detention and again within 7 days. Thereafter, the Immigration Division reviewed his detention at least every 30 days. His release was ordered on terms and conditions by Leeann King after a detention review in November 2013. Member King explained:

[I]t will be an indeterminate amount of time before Pakistan issues a travel document if they even ever do because there's no way to know what the holdup is at this point after full cooperation from Mr. Chhina and his family. . . .

So what I have to consider is the Regulations under 248 which are borrowed verbatim from the decision of *Sahin* which relates to section 7 of the Charter and detaining people for lengthy and indeterminate amounts of time when there are alternatives to look at, alternatives to detention that could reduce the risks posed.

(A.R., vol. II, at p. 106)

[79] Mr. Chhina breached the conditions of his release by failing to report to the Canadian Border Services Agency as required. Border Services issued a warrant for his arrest in December 2013, but Mr. Chhina could not be located for a year. He was finally arrested by the police in December 2014 for crimes committed since his release. He was detained on those criminal charges until November 2015, at which point he was again taken directly into immigration detention.



[80] The Immigration Division reviewed his detention the next day and ordered his continued detention on the bases that he was unlikely to appear for removal from Canada and that he posed a danger to the public. The Immigration Division continued to review Mr. Chhina's detention as required by ss. 57 and 58 of *IRPA* and s. 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*Regulations*), which guarantee immigration detainees like Mr. Chhina an opportunity to challenge the lawfulness of their detention before the Immigration Division at least every 30 days.

[81] Border Services continued its efforts to return Mr. Chhina to Pakistan. It requested travel documents from Pakistan on three occasions over three and one half years. Pakistan did not accede to these requests. While Pakistan had at one time acknowledged that Mr. Chhina was a Pakistani citizen, it subsequently resiled from that position and said it would not issue a travel document because it could not verify Mr. Chhina's national status. Border Services learned that Pakistan refused to issue a travel document in December 2015 and then made efforts to establish his true identity.

[82] Mr. Chhina pursued the statutory remedies available to him to challenge the lawfulness of his continued detention under *IRPA*. But he also sought to access the alternative remedy of *habeas corpus* by emphasizing the *constitutional* nature of his challenge based on ss. 7, 9 and 12 of the *Canadian Charter of Rights and Freedoms*.

[83] The application judge in the Court of Queen's Bench, Mahoney J., declined to exercise *habeas corpus* jurisdiction on the basis that the *IRPA* scheme for immigration detention review provides a complete, comprehensive and expert procedure for the review of Immigration Division decisions. He found that the case was an immigration matter within the jurisdiction and expertise of the Federal Court.

[84] The Alberta Court of Appeal held that the application judge erred in declining to exercise *habeas corpus* jurisdiction. In its view, *habeas corpus* review offers greater advantages to detainees like Mr. Chhina than the *IRPA* scheme.

[85] The Alberta Court of Appeal's decision, which followed and endorsed the Court of Appeal for Ontario's decision in *Chaudhary v. Canada (Minister of Public Safety & Emergency Preparedness)* (2015), 127 O.R. (3d) 401 (C.A), departed from settled law. This Court has repeatedly held that the *IRPA* scheme for the review of immigration detention decisions is a complete, comprehensive and expert scheme that is at least as broad as, and no less advantageous than, review by way of *habeas corpus*. I see no reason to depart from it now. If anything, this case presents an opportunity to confirm that the process and substance of detention reviews under *IRPA* should be as advantageous as *habeas corpus*, so that detainees get expeditious access to the fullest possible review of the terms and conditions of their detention.

## II. Analysis

[86] *Habeas corpus*, the traditional route to assessing the lawfulness of deprivations of liberty, has historic roots which have spawned a variety of statutory remedies whose goal is to preserve the same protections. These can be found, among other statutes, in the *Criminal Code*, R.S.C. 1985, c. C-46, which confers jurisdiction on appellate courts to correct the errors of a lower court and release the applicant (see, for example, *R. v. Gamble*, [1988] 2 S.C.R. 595, at pp. 636-37; *R. v. Pearson*, [1992] 3 S.C.R. 665 (bail review); and *Staetter v. British Columbia (Adult Forensic Psychiatric Services)*, 2017 BCCA 68 (Review Board custodial dispositions)).

[87] They are also found in *IRPA*. Their legitimacy as a genuine alternative to *habeas corpus* was judicially considered and endorsed in *Pringle v. Fraser*, [1972] S.C.R. 821; *Peiroo v. Canada (Minister of Employment & Immigration)* (1989), 69 O.R. (2d) 253 (C.A.), leave to appeal refused, [1989] 2 S.C.R. x; *Reza v. Canada*, [1994] 2 S.C.R. 394; *May v. Ferndale Institution*, [2005] 3 S.C.R. 809. Each of these decisions emphasized that the *habeas corpus*-like remedies available in what was intended to be an exclusive statutory scheme, were “as broad as or broader than the traditional scope of review by way of *habeas corpus*” (*Peiroo*, at p. 261).

[88] The issue in this appeal is whether that remains the case, namely, that the immigration scheme is able to continue to provide as fulsome a package of protections as does *habeas corpus*, or whether the scheme no longer provides analogous benefits, thereby justifying a departure from our jurisprudence.

[89] Statutory schemes like *IRPA* that replace *habeas corpus* with equally effective remedies have long been upheld (Judith Farbey and Robert J. Sharpe, with Simon Atrill, *The Law of Habeas Corpus* (3rd ed. 2011), at p. 49). As the Court of Appeal for Ontario recently observed in *Ogiamien v. Ontario (Community Safety and Correctional Services)* (2017), 55 Imm. L.R. (4th) 220 (Ont. C.A.), *habeas corpus* cannot be used to mount a collateral attack on immigration decisions for which a comprehensive review process exists (para. 14).

[90] The statutory scheme for immigration detention review set out in *IRPA*, together with the *Regulations* and the *Immigration Division Rules*, SOR/2002-229, mandates prompt, regular, accessible and *Charter*-compliant review of immigration detention decisions by the Immigration Division of the Immigration and Refugee Board, an independent, quasi-judicial administrative tribunal with specialized knowledge of immigration matters, including immigration detention.

[91] The *IRPA* scheme was intended to provide the same fulsome, *Charter*-compliant review of immigration detention as *habeas corpus*. Section 3(3)(d) of *IRPA* codifies the Immigration Division members' obligation to exercise their discretion in accordance with the *Charter*:

### **Application**

(3) This Act is to be construed and applied in a manner that

...

(d) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada

...

[92] This means that the *Charter* governs the exercise of discretion under the *Act* and informs the interpretation of its provisions in a manner that allows for the fullest possible review of a detainee's loss of liberty. The *Act* must therefore be interpreted in a way that does not circumscribe its purposes but instead gives it the widest possible scope for implementing its objectives through rigorous substantive detention review. The application of the *Charter* to the *IRPA* scheme guarantees the full panoply of rights to detained individuals. This extends to matters of timeliness and access to the statutory remedies, the nature of the review, onus and expertise.

[93] The suggestion that a full review of detention can only occur under *habeas corpus* is a bow to the seductive attraction of the label without recognizing that it unnecessarily fetters the comprehensive review of the lawfulness of detention provided in the *Act*. It also departs from a longstanding jurisprudential consensus: that the *IRPA* scheme for the review of immigration detention decisions provides a remedy to detainees that is at least as broad, and no less advantageous than review by way of *habeas corpus*. In my respectful view, there is no principled reason to abandon the sound logic in *Pringle, Peiroo, Reza* and *May*.

[94] At the time *Pringle* was decided in 1972, the *Immigration Appeal Board Act*, S.C. 1966-67, c. 90, had recently been amended to provide a scheme for the review of deportation orders by the Immigration Appeal Board, an independent administrative tribunal vested with all the powers of a superior court of record. The applicant appealed to the Board after an immigration official issued a deportation order against him. At the same time, he commenced *certiorari* proceedings in the superior court to have the deportation order quashed. His application for *certiorari* was dismissed at first instance but granted on appeal to the Court of Appeal for Ontario. Before this Court, the appeal turned on whether the superior court had *certiorari* jurisdiction to quash a deportation order made pursuant to the *Immigration Act*, R.S.C. 1952, c. 325.

[95] Laskin J. concluded that amendments to the *Immigration Appeal Board Act* establishing the Immigration Appeal Board and conferring certain power to it had “brought into the law a wider avenue for initial appeal from deportation orders than theretofore existed” (p. 825). He wrote:

[The *Immigration Appeal Board Act*] and the *Immigration Act*, and the Regulations promulgated under each of them, constitute a code for the administration of immigration matters and for the review of proceedings in such matters. There is no common law of immigration. Parliament’s authority to establish such a code is not challenged; nor is Parliament’s authority to deny or remove *certiorari* jurisdiction from provincial superior courts over deportation orders. [p. 825]

[96] Laskin J. held that the amended *Immigration Appeal Board Act*, with its new scheme for the administrative review of immigration deportation orders, ousted

the *certiorari* jurisdiction of the superior court. He rejected the contention that Parliament, in enacting the new immigration scheme, had not clearly expressed an intention that the scheme should remove *certiorari* jurisdiction from the provincial superior courts. On the contrary, he saw s. 22 of the scheme as expressly endowing the Immigration Appeal Board with “sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction”. In Laskin J.’s view, the plain meaning of the statute was to exclude any other court or tribunal from entertaining the same proceedings:

The result I would reach goes beyond literal justification in the language of s. 22. The facts of the present case show the incompatibility of the appellate jurisdiction vested in the Board with the survival of *certiorari* in provincial superior courts. It was not suggested that the appeal to the Board would be aborted by proceedings to quash taken in the Supreme Court of Ontario. In fact, Fraser did not abandon his appeal upon taking *certiorari* proceedings. However, I do not propose to deal with this case as if an election of remedies had been made and that this must determine the outcome. Certainly, the likelihood of two conflicting decisions (each ultimately appealable to this Court) has nothing to commend it. The only practical resolution is to recognize the exclusiveness of the special procedure ordained by Parliament. [pp. 825-26]

[97] Laskin J. compared *certiorari* to *habeas corpus*, holding that both are remedial proceedings whose “availability may depend on whether [they are] prescribed as a remedy by the competent legislature” (p. 826, citing *In re Storgoff*, [1945] S.C.R. 526). These remedies have “no necessary ongoing life in relation to all matters for which [they] could be used, if competent excluding legislation is enacted” (pp. 826-27).

[98] The principles articulated in *Pringle* were adopted in *Peiroo*. In *Peiroo*, the applicant made a refugee claim in Canada. The Convention Refugee Determination Division of the Immigration and Refugee Board determined there was no credible basis to her claim and issued a removal order pursuant to the provisions of what was then the *Immigration Act*, R.S.C. 1985, c. I-2. Ms. Peiroo was placed in immigration detention. She sought to contest the finding of no credible basis and the removal order by applying to the provincial superior court for *habeas corpus* with *certiorari* in aid. Her application was dismissed and she appealed to the Court of Appeal for Ontario.

[99] The Court of Appeal considered whether it should decline to exercise its *habeas corpus* jurisdiction to review Ms. Peiroo's detention in favour of the alternative remedies available to her to challenge the impugned immigration decisions. Catzman J.A., writing for the court, noted that *habeas corpus* is an extraordinary remedy that does not generally lie where there is an alternative remedy available (see *Peiroo*, at p. 257, citing Cameron Harvey, *The Law of Habeas Corpus in Canada* (1974), at p. 13; Roger Salhany, *Canadian Criminal Procedure* (4th ed. 1984), at p. 521).

[100] Catzman J.A. compared *habeas corpus* with the available remedies under the *Immigration Act* to challenge removal orders and credible basis findings. The Act expressly provided for an appeal with leave to the Federal Court of Canada. Catzman J.A. observed that the grounds and scope of review set out in the appeal provisions of



the *Federal Court Act*, R.S.C. 1985, c. F-7, “are as broad as, and — in the power to examine erroneous findings of fact — probably broader than, those on which the [superior court] exercises its jurisdiction on applications for *habeas corpus* with *certiorari* in aid” (p. 258).

[101] Catzman J.A. concluded that the review and appeal mechanisms contemplated in the Act were “as broad as or broader than the traditional scope of review by way of *habeas corpus*”. As a result, the statutory scheme did not run afoul of the principle that individuals “should not be refused the ancient remedy of *habeas corpus* on account of the availability of some less expeditious and advantageous alternative remedy” (p. 258, citing *R. v. Governor of Pentonville Prison, ex parte Azam*, [1974] A.C. 18 (C.A.), at p. 758, aff’d [1974] A.C. 49 (H.L.)). He explained:

Parliament has established in the [*Immigration Act*], particularly in the recent amendments which specifically address the disposition of claims of persons in the position of the appellant, a comprehensive scheme to regulate the determination of such claims and to provide for review and appeal in the Federal Court of Canada of decisions and orders made under the Act, the ambit of which review and appeal is as broad as or broader than the traditional scope of review by way of *habeas corpus* with *certiorari* in aid. In the absence of any showing that the available review and appeal process established by Parliament is inappropriate or less advantageous than the *habeas corpus* jurisdiction of the [provincial superior court], it is my view that this court should, in the exercise of its discretion, decline to grant relief upon the application for *habeas corpus* in the present case, which clearly falls within the purview of that statutory review and appeal process.

I am fortified in this conclusion by the observation that similar considerations appear to have moved the Supreme Court of Canada to hold that where there is a legislative initiative purporting to provide a

whole scheme or code for the administration and review of proceedings in a field like immigration (*Pringle v. Fraser* . . . [1972] S.C.R. 821), or human rights (*Board of Governors of Seneca College of Applied Arts & Technology v. Bhadauria* . . . [1981] 2 S.C.R. 181 . . .), such a scheme should not be bypassed, either by evolving a new cause of action (as in *Bhadauria*) or by the use of a prerogative writ (as in *Pringle*). Both jurisprudence and logic would suggest that this Court should leave the review of immigration matters with the Federal Court of Canada, which has review and appeal jurisdiction with respect to many aspects of immigration law and which has geographical jurisdiction throughout Canada, and thus can deal with claims of refugee claimants wherever their point of entry. [pp. 261-62]

[102] This became known as “the *Peiroo* exception”, namely, where Parliament has put in place a complete, comprehensive and expert statutory scheme providing for review of detention that is at least as broad as, and no less advantageous than *habeas corpus* review, superior courts should decline to exercise their *habeas corpus* jurisdiction in favour of that statutory scheme.

[103] This Court applied the *Peiroo* exception in *Reza*. Like *Peiroo*, *Reza* involved a refugee claim. Mr. Reza claimed protection in Canada as a Convention refugee. A tribunal established under the Transitional Provisions of the *Immigration Act*, R.S.C. 1985, c. 28 (4th Supp.), determined that there was no credible basis to his claim and issued a deportation order against him. Mr. Reza was unsuccessful at his review by an immigration officer on humanitarian grounds and sought leave to commence judicial review of the immigration officer’s decision in the Federal Court.

[104] Mr. Reza subsequently challenged the constitutionality of the *Immigration Act* in the superior court. The motion judge stayed the constitutional

challenge because the Federal Court had concurrent jurisdiction and was the more appropriate forum for the challenge. Concluding that he was bound by *Peiroo*, he said:

In the absence of any showing that the available review process and appeal process is inappropriate or less advantageous than the *habeas corpus* jurisdiction of this Court, this Court should, in the exercise of its discretion, decline to grant relief on a *habeas corpus* application. Both jurisprudence and logic would support that this Court should leave the review of the immigration matters with the Federal Court of Canada: *Re Peiroo* (1989), 69 O.R. (2d) 253 (O.C.A.). To the same effect is the C.A. decision in *Sheperd* (1989), 52 C.C.C. (3d) 386. I am of course bound by these decisions.

The case at bar does not involve an application for *habeas corpus* relief, but the relief sought, by way of declaration and injunctive relief, is also discretionary in this Court. The Federal Court has jurisdiction to grant the relief sought in this application and in my view the principles set out by the C.A. in *Peiroo* and in *Sheperd* are applicable to the case at bar. The circumstances described by Campbell in *Bembeneck*, 69 C.C.C. (3d) 34, which influenced the court to take jurisdiction, are not present here.

As to whether the process is less advantageous in the Federal Court, as indicated, the relief is available in that court and in my view the requirement of leave in that court to make a claim for a declaratory judgment does not make the process less advantageous . . . .

Accordingly, it is my view that this proceeding should be stayed and I so order. [pp. 399-400]

[105] A majority in the Court of Appeal for Ontario reversed the motion judge's decision. This Court allowed the appeal on the basis of the comprehensive scheme dealing with the same issues. The *Immigration Act* in force at the time gave the Federal Court an exclusive statutory mandate over immigration matters. As in *Peiroo*, the Court found that Parliament, in enacting the *Immigration Act* and granting

exclusive jurisdiction to the Federal Court, intended the Federal Court to be the appropriate forum for deciding immigration cases. This weighed against the exercise of concurrent jurisdiction, suggesting instead that the statutory grant of exclusive jurisdiction to the Federal Court demonstrated legislative intent to bar individuals from pursuing parallel remedies in the superior courts.

[106] Second, the factors of expertise and experience also favoured the Federal Court's exclusive mandate over immigration matters. The Federal Court has expertise in immigration law, administrative law, and Federal Court procedure. While on the surface Mr. Reza's case appeared to be a constitutional one, at its core the nature of the *Charter* challenge was fundamentally linked with immigration policy and process.

[107] Third, superior courts should decline to exercise jurisdiction in immigration cases where the Federal Court has concurrent jurisdiction to avoid issues of forum-shopping, inconsistent decision making and multiplicity of proceedings (see also *Reference re Constitution Act, 1867, s. 92(10)(a)* (1988), 64 O.R. (2d) 393 (C.A.)).

[108] The motion judge had therefore rightly declined to exercise jurisdiction 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.

[109] This Court considered *Pringle*, *Peiroo* and *Reza* in *May*. In *May*, we confirmed two exceptions to the availability of *habeas corpus*: it is not available to

challenge the legality of a criminal conviction where a statute provides for a right of appeal; and it is not available “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”, namely the *Peiroo* exception (para. 40).

[110] The grievance procedures under s. 81(1) of the *Corrections and Conditional Release Regulations*, SOR/92-620, were at issue in *May*:

**81 (1)** Where an offender decides to pursue a legal remedy for the offender’s complaint or grievance in addition to the complaint and grievance procedure referred to in these Regulations, the review of the complaint or grievance pursuant to these Regulations shall be deferred until a decision on the alternate remedy is rendered or the offender decides to abandon the alternate remedy.

[111] The Court concluded that this language did not reveal a legislative intention to oust the superior courts’ *habeas corpus* jurisdiction (para. 60). Instead, the statute was found to contemplate that an inmate may *choose* to pursue a remedy like *habeas corpus* in addition to filing an administrative grievance. The language reflected a legislative intent that the statutory scheme operate *in conjunction with* the superior courts’ *habeas corpus* jurisdiction.

[112] The Court held that for immigration detainees seeking to challenge their continued detention as a violation of their *Charter* rights, the *IRPA* scheme governing matters of immigration law was a complete, comprehensive and expert scheme that is

at least as broad as, and no less advantageous than review by way of *habeas corpus* in terms of expertise, onus, the nature of the remedy, and timeliness. Provincial superior courts should, as a result, decline to exercise their concurrent jurisdiction to review immigration detention by way of *habeas corpus* in favour of review before the Immigration Division and the Federal Court under the *IRPA* scheme.

[113] Section 162(1) of *IRPA* confirms the clear legislative intent to grant exclusive original jurisdiction to the Immigration Division over immigration matters:

**Sole and exclusive jurisdiction**

**162 (1)** Each Division of the Board has, in respect of proceedings brought before it under this Act, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction.

In *Pringle*, Laskin J. found that this language barred courts from entertaining the types of immigration proceedings over which the Board had been granted exclusive statutory authority. This specialized and exclusive expertise underlies the *Peiroo* exception to the availability of *habeas corpus* review in immigration matters.

[114] This Court has consistently endorsed the *Peiroo* exception limiting the availability of *habeas corpus* review for immigration matters. In the absence of evidence that the “complete, comprehensive and expert statutory scheme” does not provide for a review at least as broad and no less advantageous than *habeas corpus*, I see no reason to disturb the Court’s jurisprudence by opening an alternative route, one

that will lead to the forum shopping, inconsistent decision making, and multiplicity of proceedings the Court warned against in *Reza*. There is nothing in the language of the statutory scheme that restricts the scope of *IRPA* detention review to a partial review which must be supplemented by *habeas corpus*. On the contrary, the *IRPA* scheme is structured to provide detainees with at least the same rights they would receive on *habeas corpus* review.

[115] To begin, the *IRPA* scheme for immigration detention review provides that all detentions must be reviewed regularly. Individuals detained for immigration purposes have the right to appear before the Immigration Division within 48 hours following their initial detention (s. 57(1)). A second review must take place during the next seven days, and regular reviews at least once every 30 days thereafter (s. 57(2)). The detainee may make an application to the Immigration Division requesting a detention review before the expiry of the seven or 30-day period (*Immigration Division Rules*, r. 9). Review hearings are structured to be expeditious and accessible, and they must be dealt with as informally and quickly as the circumstances and considerations of fairness and natural justice permit.

[116] The *IRPA* scheme provides that immigration officers are responsible for bringing the detainee before the Immigration Division for all review hearings (s. 57(3)). The Immigration Division has a corresponding power to order immigration officials to bring the detainee to a location specified by the Division (*Immigration Division Rules*, r. 23). The Immigration Division can also facilitate access to the

remedy by requiring the parties to appear at a conference to discuss any matter that would make the proceedings more fair and efficient, or to participate in scheduling the proceedings (*Immigration Division Rules*, rr. 20(1) and 21).

[117] Upon conducting a detention review, the Immigration Division may order the continued detention of a detainee, their unconditional release, or their release on any conditions the Immigration Division considers necessary. The Immigration Division makes its decisions in furtherance of the purposes of *IRPA*, which include protecting public safety and maintaining the security of Canadian society (s. 3(1)(h)).

[118] While the majority of detention review hearings occur before the Immigration Division, a detainee who is dissatisfied with the Immigration Division's decision, whether on *Charter* grounds or otherwise, may apply for leave and judicial review to the Federal Court (*IRPA*, s. 72(1)). I agree with the comments of Catzman J.A. in *Peiroo*, rejecting the argument that the requirement for leave to appeal immigration decisions to the Federal Court rendered that remedy less advantageous than *habeas corpus*, where leave is not required. Catzman J.A. wrote:

I consider the suggested distinction to be more apparent than real. In order to succeed on an application for *habeas corpus*, an applicant must show reasonable and probable ground for his complaint: *Habeas Corpus Act*, R.S.O. 1980, c. 193, s. 1(1). The requirement for leave imposed by s. 83.1(1) is clearly intended to be one of a series of screening mechanisms created by the Act to discour[a]ge the assertion of spurious or meritless claims. I have difficulty accepting that an applicant who is in a position to show reasonable and probable ground for complaint regarding the decision or order in respect of which he seeks review would fail to be accorded the requisite leave to bring an application for such review.



Indeed, counsel have advised that such leave was granted in the present case . . . [p. 259]

[119] Mr. Chhina's application for judicial review before the Federal Court was, in fact, expedited. It took one week less to be heard and decided than his application for *habeas corpus* before the Alberta Court of Queen's Bench.

[120] In any event, the requirement for leave to appeal to the Federal Court does not change the nature of the comprehensive detention review process under *IRPA*, which is governed by s. 58 of *IRPA* and s. 248 of the *Regulations*. The Immigration Division *must* order the release of a detainee unless the Minister has satisfied the Immigration Division that one or more of the grounds in s. 58(1) of *IRPA* are met:

- (a) The detainee is a danger to the public;
- (b) The detainee is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister;
- (c) The Minister is taking necessary steps to inquire into a reasonable suspicion that the detainee is inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality;
- (d) The detainee's identity has not been, but may be, established; or
- (e) If the detainee is a designated foreign national, the Minister is of the opinion that the identity of the detainee has not been established.

[121] If s. 58 grounds are established, s. 248 of the *Regulations* requires the Immigration Division to consider the following additional factors to determine if detention should continue:

- (a) The reason for detention;
- (b) Length of time in detention;
- (c) Factors that may assist in determining how long detention is likely to continue;
- (d) Delays or lack of diligence on the detainee or the government's part;  
and
- (e) Alternatives to detention.

[122] The factors in s. 248 of the *Regulations* codify the factors articulated by Rothstein J. in *Sahin v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 214 (T.D.). The s. 248 factors were endorsed by this Court in *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350. They ensure that extended periods of detention do not violate the *Charter*.

[123] As Rothstein J. noted in *Sahin*, through *IRPA*, “Parliament has dealt with the right of society to be protected from those who pose a danger to society and the right of Canada to control who enters and remains in this country” (p. 229). To achieve these purposes, the *IRPA* scheme confers upon members of the Immigration Division the power to detain individuals in anticipation of their likely danger to the public or likely failure to appear for removal from Canada.

[124] When making a decision as to whether to detain or release an individual under *IRPA*, Immigration Division members *must* always exercise their discretion in a way that accords with the *Charter* (see *IRPA*, s. 3(3)(d)). There is a statutory presumption in favour of release before the Immigration Division, which “shall order the release” of a detainee unless it is satisfied that at least one of the grounds set out in s. 58 of *IRPA* is met, taking into account the factors in s. 248 of the *Regulations*.

[125] Significantly, the mandatory s. 248 inquiry on review before the Immigration Division requires the Division to assess the lawfulness of ongoing immigration detention without placing any onus on the detainee. Unlike *habeas corpus* applications, where the detainee must raise a legitimate ground upon which to question the lawfulness of his or her detention, the Minister bears the onus throughout of justifying the detention before the Immigration Division. The detainee bears no onus to produce evidence as to any of the factors enunciated in s. 58 of *IRPA* or s. 248 of the *Regulations*.

[126] To the extent that the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, [2004] 3 F.C.R. 572, and the Court of Appeal for Ontario in *Chaudhary* reached the contrary conclusion, they were, in my respectful view, wrongly decided. Moreover, the holding in *Chaudhary* that the Minister can satisfy his or her onus before the Immigration Division “simply by relying on the reasons given at prior detention hearings” (para. 87) is inconsistent with the Immigration Division’s obligation to conduct a fresh inquiry into the

lawfulness of detention at each review. At each Immigration Division hearing, detainees are entitled to the same fresh review of their detention as they would be on *habeas corpus* review. In cases like Mr. Chhina's, the Immigration Division must always reassess the prior evidence in light of the detainee's *Charter* arguments.

[127] In particular, where a detainee challenges their detention as a violation of the *Charter*, the time between the prior and present review hearing will constitute new evidence that must inform the Immigration Division's application of s. 58 of *IRPA* and s. 248 of the *Regulations*. It is not enough for the Minister to rely on previous Immigration Division decisions to satisfy the Immigration Division on the s. 58 and s. 248 inquiry. The integrity of the *IRPA* process is dependent on a fulsome review of the lawfulness of detention, including its *Charter* compliance, at every review hearing.

[128] The *Charter* both guides the exercise of discretionary administrative decision making under *IRPA* and informs our interpretation of the scheme itself. The *IRPA* scheme must therefore be interpreted harmoniously with the *Charter* values that shape the contours of its application. As Justices Iacobucci and Arbour stated in *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248:

The modern approach [to statutory interpretation] recognizes the multi-faceted nature of statutory interpretation. Textual considerations must be read in concert with legislative intent and established legal norms.

Underlying this approach is the presumption that legislation is enacted to comply with constitutional norms, including the rights and freedoms enshrined in the *Charter* . . . . This presumption acknowledges the centrality of constitutional values in the legislative process, and more broadly, in the political and legal culture of Canada. [paras. 34-35]

[129] Importing *Charter* principles into the exercise of administrative discretion under *IRPA* requires that Immigration Division members apply the scheme in a manner that is at least as rigorous and fair as *habeas corpus* review. It is not enough that a statutory scheme is as broad and advantageous on paper as *habeas corpus* review, the scheme must also be *applied* in a manner that preserves the rights of detainees and the integrity of the process in the most comprehensive way possible.

[130] That means that in carrying out their duties under the *IRPA* scheme, members of the Immigration Division must ensure the fullest possible review of immigration detention. This includes, and has always included, an obligation to weigh the purposes served by immigration detention against the detained individual's ss. 7, 9 and 12 *Charter* rights. The Immigration Division's inquiry into the lawfulness of detention must take into account the detained individual's s. 7 *Charter* right not to be deprived of liberty except in accordance with the principles of fundamental justice, his or her s. 9 right not to be arbitrarily detained or imprisoned, and the s. 12 right not to be subjected to cruel and unusual treatment or punishment. As Rothstein J. observed in *Sahin*, "it is not the words of [*IRPA*] that vest adjudicators with such jurisdiction, but rather, the application of *Charter* principles to the exercise of discretion under [the scheme]" (p. 230).

[131] That, in my respectful view, necessarily includes the Immigration Division's ability to consider the conditions of detention. A comprehensive, *Charter*-infused analysis of immigration detention may reveal that the length *or conditions* of detention are such that continued detention is not in accordance with the principles of fundamental justice (s. 7), is arbitrary because it is no longer reasonably furthering the state objective (s. 9) and/or amounts to cruel and unusual punishment (s. 12). The application of ss. 7, 9 and 12 of the *Charter* to the *IRPA* scheme brings to light the Immigration Division's obligation to assess the length, future duration and *conditions of detention* when balancing the state's objectives against the detained individual's rights.

[132] The *IRPA* scheme therefore ensures the protection of other *Charter* rights by calling on the Immigration Division to consider whether detentions have become unlawful because of their length, uncertain duration and conditions. There is no principled reason to interpret the review provisions in a way that precludes scrutiny of conditions. Why apply a narrow, constrictive interpretation of a remedial statute when a wider, more protective interpretation is not only available, it is mandated by the purposes underlying the scheme. As these reasons seek to clarify, the s. 248 factors guide the Immigration Division in assessing whether ongoing detention is justified pursuant to the *Charter* based on:

- (a) The reason for detention;
- (b) Length of time in detention;

(c) Factors that may assist in determining how long detention is likely to continue;

(d) Delays or lack of diligence on the detainee or the government's part; and

(e) Alternatives to detention.

[133] Section 248(a) requires the Immigration Division to weigh the state's immigration objectives against the detained individual's right to be free from arbitrary or indefinite restraints on liberty. As in *habeas corpus* review assessing compliance with the *Charter*, the Immigration Division must assess the strength of the reason for detention. A prior, fact-driven Immigration Division determination that the individual constitutes a flight risk or a danger to the public is entitled to deference on both *IRPA* and *habeas corpus* review (see *Thanabalasingham*, at para. 10 (*IRPA* review) and *Brown v. Canada (Public Safety)* (2018), 420 D.L.R. (4th) 124 (Ont. C.A.), at para. 29 (*habeas corpus* review)). The greater the danger posed to the public, the stronger the justification for ongoing detention (*Sahin*, at p. 231 (*IRPA* review); *Ali v. Canada (Minister of Public Safety and Emergency Preparedness)* (2017), 137 O.R. (3d) 498 (C.A.), at para. 24 (*habeas corpus* review)).

[134] As for s. 248(b), the justification for continued detention decreases as the length of time in detention increases. The Immigration Division must accord "significant weight" to the length of detention (see *Sahin*, at pp. 231-32). The strength of an immigration detainee's argument that his ongoing detention has become a violation of the *Charter* increases with each subsequent review hearing. The detaining

authorities bear a correlative onus to justify continued detention in the face of a continually solidifying *Charter* claim. A longer period of detention signifies that immigration authorities have had more time to effect removal, which they are expected to do as soon as reasonably possible. Accordingly, the evidentiary burden on the detaining authority to justify continued immigration detention increases as the length of detention increases. This approach to the length of detention is no different from *habeas corpus* (see *Chaudhary, Ali and Brown*).

[135] The anticipated future length of detention in s. 248(c) of the *Regulations* requires an estimation of how long detention is likely to continue. A detention that is lawful for the purpose of removal may become arbitrary and in violation of s. 9 of the *Charter* when it becomes unhinged from its immigration-related purpose. Where removal appears unlikely and the future duration of detention cannot be ascertained, this is a factor that weighs in favour of release (*Sahin*, at p. 231; *Charkaoui*, at para. 115).

[136] That is the same inquiry as in *habeas corpus* review. As Rouleau J.A. noted in *Chaudhary*:

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. [para. 81]



[137] The Immigration Division is, moreover, better positioned to assess and address the future duration of detention than the superior courts on *habeas corpus* review. As Létourneau J.A. held for the court in *Canada (Minister of Citizenship and Immigration) v. Li*, [2010] 2 F.C.R. 433 (C.A.), the short 30-day period between each Immigration Division review “allows for an estimation based on actual facts and pending proceedings instead of an estimation based on speculation as to potential facts and proceedings” (para. 66). The Immigration Division obtains an accurate picture of the detention every 30 days. It can assess progress over time by reviewing past proceedings and anticipating pending proceedings to guard against a violation of the detainee’s *Charter* rights.

[138] Section 248(d) requires a consideration of delays or lack of diligence on the part of the detained individual or the immigration authorities. As Rothstein J. held in *Sahin* and this Court held in *Charkaoui*, unexplained delay or lack of diligence should count against the offending party (*Sahin*, at p. 231; *Charkaoui*, at para. 114). Superior courts reviewing immigration detention for compliance with ss. 7, 9 and 12 of the *Charter* undertake the same inquiry. They look to the complexity of effecting the applicant’s removal from Canada, the reasonableness of the steps taken by immigration authorities to effect removal, and the extent to which the applicant has prolonged their detention by failing to cooperate with immigration authorities’ removal efforts (see *Brown*, at para. 36; *Canada v. Dadzie*, 2016 ONSC 6045, at para. 46).

[139] In *Dadzie*, a foreign national detained under *IRPA* applied to be released by way of *habeas corpus*. Clark J. applied the *Charkaoui* and *Sahin* principles about delay and diligence in immigration review in the *habeas corpus* context (para. 36). Mr. Dadzie’s lack of cooperation led Clark J. to conclude that Mr. Dadzie had not met his onus of showing that his detention had been exceptionally lengthy.

[140] Finally, s. 248(e) of the *Regulations* requires the Immigration Division to consider alternatives to detention. Alternatives to detention include outright release; a bond or guarantee; reporting requirements; confinement to a specific geographic area; and detention in a less restrictive form (*Sahin*, at para. 30). An assessment of the conditions of detention is a vital component of the inquiry into alternatives to detention under s. 248(e). Given the Immigration Division’s statutory mandate to assess alternatives to detention; the requirement to make *Charter*-compliant decisions; and its ability to exercise discretion as to the terms of release, the Division’s power to release a detainee on conditions must include an ability to modify the conditions of detention. Like the provincial superior courts on *habeas corpus* review, Immigration Division members must be taken to have the power to release the detainee from a “prison within a prison” pursuant to s. 58(3) (see *R. v. Miller*, [1985] 2 S.C.R. 613, at p. 637, per Le Dain J.; Robert J. Sharpe, *The Law of Habeas Corpus* (1976), at p. 149).

[141] In sum, the process of review before the Immigration Division governed by s. 58 of *IRPA* and s. 248 of the *Regulations* demands that the Division consider the

reasons for detention; the length of time in detention; the anticipated future length of detention; delays or lack of diligence; and the availability, effectiveness and appropriateness of alternatives to detention, including changes in the conditions of detention. These are the same considerations that superior courts weigh to assess whether ongoing immigration detention violates ss. 7, 9 or 12 of the *Charter* on *habeas corpus* review.

[142] The Immigration Division has the same constitutional mandate as well as an overarching duty to give effect to “a legislative initiative purporting to provide a whole scheme . . . for the administration and review of proceedings in . . . immigration” (*Peiroo*, at p. 262; see also *Reza v. Canada* (1992), 11 O.R. (3d) 65 (C.A.), at p. 80). Mr. Chhina is attempting to ignore the body explicitly and exclusively tasked with carrying out the purposes of *IRPA* by wrapping his immigration detention with a *Charter* ribbon.

[143] This Court in *Reza* rejected the applicant’s similar attempt to bypass the immigration scheme in search of a favourable constitutional disposition. In so doing, we acknowledged that the expertise of the Immigration Division in immigration matters extends to the *constitutional* aspects of immigration matters. As La Forest J. wrote in *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5:

It must be emphasized that the process of *Charter* decision making is not confined to abstract ruminations on constitutional theory. In the case of *Charter* matters which arise in a particular regulatory context, the ability of the decision maker to analyze competing policy concerns is critical . . .

...

It is apparent, then, that an expert tribunal . . . can bring its specialized expertise to bear in a very functional and productive way in the determination of *Charter* issues which make demands on such expertise. [pp. 18-19]

[144] Despite Mr. Reza's attempt to recast his challenge as a constitutional one, the Court recognized that his *Charter* arguments were fundamentally grounded in immigration policy. The same is true of Mr. Chhina's *Charter* complaints, which arose in relation to the Immigration Division's decisions to continue his detention. These are matters which lie at the heart of immigration policy. The Immigration Division is the most appropriate forum to integrate *Charter* rights within the overall scheme and purposes of *IRPA*.

[145] Properly interpreted, it is clear from the preceding review that the *IRPA* scheme for the review of immigration detention offers a remedy to detainees that is at least as broad, and no less advantageous than review by way of *habeas corpus*. It provides for the fullest possible review of the merits of a challenge to immigration detention. And where an individual is subject to an immigration detention that is said to violate his or her ss. 7, 9 and 12 *Charter* rights, the Immigration Division's review process, guided by s. 58 of *IRPA* and s. 248 of the *Regulations*, allows for at least the same substantive assessment as that undertaken by superior courts on *habeas corpus* review.

[146] This Court has repeatedly affirmed that *habeas corpus* will not lie if the statutory alternative provides a remedy that is at least as favourable. In my respectful view, it does. Mr. Chhina's case is therefore captured by the *Peiroo* exception to the availability of *habeas corpus* review. The superior court properly declined to exercise its *habeas corpus* jurisdiction in favour of the complete, comprehensive and expert scheme to which Mr. Chhina was entitled under the *Act*.

[147] I would allow the appeal.

*Appeal dismissed, ABELLA J. dissenting.*

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