

CANADA / JUDGMENT

Leinen v. Mission Institution (Warden)

2025 BCCA 257

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 257 Leinen v. Mission Institution (Warden)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Leinen v. Mission Institution (Warden),

2025 BCCA 257

Date: 20250725

Docket: CA49937

Between:

Jeffrey Leinen

Appellant

(Petitioner)

And

Warden of Mission Institution and Warden of Kent Institution

Respondents

(Respondents)

Before:

The Honourable Chief Justice Marchand

The Honourable Mr. Justice Butler

The Honourable Justice Mayer

On appeal from: An order of the Supreme Court of British Columbia, dated May 23, 2024 (Leinen v. Mission Institution (Warden), 2024 BCSC 887,

Vancouver Docket S241695).

Counsel for the Appellant:

D. Honeyman

Counsel for the Respondent, Warden of Mission Institution:

P.S. Bal

Counsel for the Respondent, Warden of Kent Institution:

S. Flader

Place and Date of Hearing:

Vancouver, British Columbia

April 16, 2025

Place and Date of Judgment:

Vancouver, British Columbia

July 25, 2025

Written Reasons by:

The Honourable Justice Mayer

Concurred in by:

The Honourable Chief Justice Marchand

The Honourable Mr. Justice Butler

Summary:

The appellant, a federal inmate, brought a habeas corpus application in chambers seeking an order that he be restored to his original medium-security classification and returned to a medium-security institution from a high-security institution. The chambers judge found that the inmate's procedural fairness rights had been infringed in the hearing conducted by the warden which resulted in the inmate's security reclassification and involuntary transfer to a high security institution. As a result, the judge found that the inmate's security reclassification and detention at a high security institution was unlawful, but he suspended the effect of his order that the inmate be returned to a medium-security institution for 21 days.

The appellant appeals the judge's order suspending the effect of his order. The respondent warden submits that the appeal is moot, as the appellant has already been returned to a medium-security institution. As well, the warden submits that the suspension was an appropriate exercise of the court's inherent jurisdiction or was authorized by the rules of civil procedure providing that orders may be stayed.

Held: Appeal allowed. The appeal is factually moot, but the relevant factors weigh in favour of deciding the appeal on its merits. The chambers judge erred by suspending his order and characterizing this as an exercise of remedial discretion. The suspension of the order does not align with the established common law of habeas corpus, which requires immediate release of a party once the relevant authority has failed to justify their deprivation of liberty. Although conditions affecting the timing of an inmate's return to a lower security institution could conceivably be placed on an order, it would be through the court's inherent jurisdiction to give effect to its own remedies, rather than any residual discretion. In this case there was no evidence establishing the need for such conditions.

Given the limited scope of submissions on the issue whether a suspension was available under the rules of civil procedure, it is not appropriate to decide this issue.

Reasons for Judgment of the Honourable Justice Mayer:

Background

- [1] The appellant, Jeffrey Leinen, is currently serving a life sentence for second degree murder and aggravated assault. On November 30, 2023, Mr. Leinen was involuntarily transferred, on an emergency basis, from the Mission Institution (a combined minimum- and medium-security prison) to the Kent Institution (a maximum-security prison) in accordance with section 13 of the Corrections and Conditional Release Regulations, SOR/92-620 ["CCRR"]. This transfer and security reclassification from medium security to maximum security followed the discovery of contraband and unauthorized items in Mr. Leinen's cell, including debt sheets which were suggestive of drug dealing.
- [2] Following the emergency transfer, on January 11, 2024, the respondent, warden of the Mission Institution (the "Warden"), made two interrelated decisions after a Warden's Board hearing (the "Warden's Decisions"). The first decision approved a recommendation that the offender security level for Mr. Leinen be increased to maximum. The second decision approved Mr. Leinen's involuntary transfer from the Mission Institution to the Kent Institution.
- [3] On March 13, 2024, Mr. Leinen filed a habeas corpus petition seeking an order that he be returned to the Mission Institution on the basis the Warden's Decisions were unreasonable and the process leading to them was unfair. In an order made May 23, 2024, the chambers judge "set aside" the Warden's Decisions on procedural fairness grounds but suspended the effect of this order for 21 days to allow for a new Warden's Board hearing to be convened. On June 6, 2024, a new Warden's Board hearing was held at the Mission Institution, which

resulted in the Warden deciding Mr. Leinen should remain in maximum security at the Kent Institution.

- [4] On July 2, 2024, Mr. Leinen was reclassified to medium security by the respondent, warden of the Kent Institution, and on July 24, 2024, was voluntarily transferred to the medium-security Bowden Institution in Alberta. As a result, the relief sought in his petition has already been granted, raising the issue of mootness. However, Mr. Leinen asks this Court to hear this appeal to clarify the law and provide guidance to the courts below regarding the jurisdiction of a chambers judge hearing a habeas corpus application to "set aside" a warden's reclassification decision and suspend the effect of an order to return an inmate to a lower-security institution.

The Chambers Judge's Reasons for Judgment

- [5] At para. 6 of his reasons for judgement (the "Chambers Reasons") the judge set out his conclusion that the Warden's Decisions must be set aside on the ground of procedural unfairness. He concluded that Mr. Leinen had not been provided with the evidence relied upon by the Warden in determining his elevated security risk (debt sheets suggestive of drug dealing) and was therefore deprived of the opportunity to make full submissions to the Warden.
- [6] At para. 8, the judge set out his conclusion that the law provided him with the discretion to determine a remedy for the breach of Mr. Leinen's right to procedural fairness, referring to the decision of *Mission Institution v. Khela*, 2014 SCC 24 [Khela SCC] at para. 78. He suspended the effect of his order "setting aside" the Warden's Decisions for 21 days, stating that during this time the Warden could conduct a further Warden's Board hearing. If the Warden did not do so, Mr. Leinen was to be returned to the Mission Institution as a medium-security inmate.
- [7] The judge then set out the framework in the Corrections and Conditional Release Act, S.C. 1992, c. 20 [CCRA] governing the placement of inmates in penitentiaries. This framework includes the obligation for the Correctional Service of Canada to take all reasonable steps to confine an inmate in a penitentiary that provides them with the least restrictive environment, while considering what is necessary for the security of the penitentiary. It also requires that the inmate be informed in writing of the reasons for their placement in a particular penitentiary. Finally, it requires that when a transfer is proposed from one institution to another, an inmate must be given written reasons for the proposed transfer and a reasonable opportunity to make representations in advance of the transfer: Chambers Reasons at paras. 18-23.

- [8] At para. 24, the judge explained that the remedy of habeas corpus is available in the case of "any state-sanctioned deprivation of liberty, including the deprivation that occurs when a prisoner is transferred to a higher security institution". He then stated that, when a prison authority does not establish a decision was substantively reasonable and the rules of procedural fairness were adhered to by a warden, the decision should be set aside. The latter comment is one of the errors Mr. Leinen contends was made by the judge.
- [9] The judge explained that habeas corpus is not a discretionary remedy comparable to judicial review, which allows a court to decline relief on the ground there are alternative administrative or judicial remedies and referred to Khela SCC regarding a court's residual discretion in deciding whether to discharge a habeas corpus applicant (Khela SCC at para. 78).
- [10] The judge determined that in Mr. Leinen's case the rules of procedural fairness were not adhered to by the Warden: Chambers Reasons at para. 53. He then considered the repercussions of ordering Mr. Leinen's immediate release from Kent Institution:
- [57] The order sought by Mr. Leinen would not prevent Mission or another medium security institution from immediately invoking s. 13 of the CCRA [sic] again and transferring Mr. Leinen back to Kent on arrival at Mission pursuant to the court's order. The subsequent transfer would then have to be justified at a further Warden's Board hearing. I am advised by counsel that this often occurs. This administrative hopscotch is possible because the CCRR expressly authorize immediate transfer with justification coming only after the fact.
- [58] Mr. Leinen has been at Kent for more than five months now, since November 30, 2023. I have a remedial discretion. The point of substance is that, if Mr. Leinen is to remain at Kent as a maximum security inmate, his classification and placement must be justified following a procedurally fair hearing. That has not yet occurred.
- [59] In my view, it makes most sense that Mission be given an opportunity to justify Mr. Leinen's current classification and placement within 21 days of this Court's order. There is little to be gained by having him moved back and forth between Kent and Mission in the meantime. I do not see that Mr. Leinen would obtain a significant benefit from being transported back to Mission, no doubt under heavy security, for just a day or two. What is crucial is that he have the fair hearing to which he is entitled as quickly as is reasonably possible.

(Emphasis added.)

Issues

- [11] Two issues arise in this appeal. The first is whether this Court should exercise its discretion to hear this appeal despite the absence of a live dispute between the Warden and Mr. Leinen. The second is whether the judge erred in law by suspending the effect of his order that Mr. Leinen be returned to the Mission Institution for 21 days.

Mootness

Position of the Parties

- [12] The Warden submits this appeal is factually moot because Mr. Leinen is presently a medium-security inmate at a medium-security institution and therefore has already achieved the remedy he sought in his habeas corpus application. He notes that the 21-day suspension period of the judge's order has now elapsed. For these reasons, the Warden contends this appeal has become academic and a decision will have no practical effect on Mr. Leinen's rights. Finally, as Mr. Leinen is now incarcerated in Alberta, the Warden submits this Court has no jurisdiction to grant habeas corpus relief affecting or directed to his current incarceration.
- [13] Mr. Leinen submits that although this appeal is factually moot, this Court ought to exercise its discretion to decide this appeal to clarify the law concerning the jurisdiction of a judge to make the orders at issue. He submits the fact he is currently incarcerated in Alberta does not prevent this Court from deciding the issues in this appeal.

Mootness Analysis

- [14] The doctrine of mootness applies when the decision of the court will have no practical effect on the rights of the parties. The relevant time to consider the application of the doctrine is when the court is called upon to decide a case. If events occur after the initiation of a proceeding, which alter the relationship of the parties so no present live controversy exists, the case is moot: *Staetter v. British Columbia (Adult Forensic Psychiatric Services)*, 2024 BCCA 255 at paras. 14-15 citing *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 1989 CanLII 123 at 353.
- [15] Mr. Leinen has already been voluntarily transferred from maximum security at the Kent Institution to a medium-security facility in Alberta. Accordingly, there is no live controversy between him and the Warden, and the relief he seeks in this appeal will have no practical effect on him. The parties to the appeal do not dispute, and I agree, that this appeal is factually moot. The issue that arises here is whether it is appropriate to exercise the Court's discretion to hear the appeal, notwithstanding a finding of mootness: *Borowski* at 353; *Staetter* at para. 18.
- [16] Considerations to be applied by an appeal court in deciding whether to exercise the discretion to hear a moot appeal were summarized by Justice Winteringham in *Staetter*:
- [18] However, even if an appeal is moot, the court retains discretion to hear the case. In *Borowski*, the Supreme Court of Canada provided guidance on when the court should exercise its discretion to hear a moot appeal. Those considerations were summarized by this Court in *Forjay Management Ltd. v. 625536 B.C. Ltd.*, 2021 BCCA 171 at para. 19, as follows:

1. Whether, despite the disappearance of the concrete dispute, an adversarial context continues to exist, such that there remains an assurance that the case will be fully argued before the court;
 2. Whether judicial economy would be advanced, in some way, by hearing a case notwithstanding that the concrete dispute has been resolved; and,
 3. Whether, in hearing a moot case, the court will be straying into the legislative sphere rather than acting as an adjudicative body.
- [17] As set out in *Borowski*, the application of each of these principles may not all support the same conclusion. A positive answer to one or two may be outweighed by a negative answer to a third: *Borowski* at 363.
- [18] With respect to the first of the *Borowski* principles, in this case both parties have made full arguments on the substantive issues raised on appeal. The Warden suggests this factor can be disregarded because Mr. Leinen has identified no collateral consequences that would affect him. In my view, the fact the parties have fully argued the substantive issues remains a relevant factor here. Unlike in *Moazami v. Kent Institution (Warden)*, 2024 BCCA 71 at para. 33, the question here is not whether this factor is decisive, but simply whether it weighs in favour of hearing an appeal that is factually moot.
- [19] I will next deal with the third *Borowski* principle: that the courts should be reluctant to stray into the legislative sphere in rendering a decision in a moot appeal. As was discussed in *Borowski*, "[i]n considering the exercise of its discretion to hear a moot case, the Court should be sensitive to the extent that it may be departing from its traditional role": *Borowski* at 363. The Warden has not identified how, by ruling on this appeal, this Court will be straying into the legislative sphere. In my view, Mr. Leinen does not seek any ruling with respect to the functions, powers or duties of the Warden under the CCRA or CCRR--a ruling which would arguably constitute straying into the legislative sphere.
- [20] What Mr. Leinen seeks is a ruling on a chambers judge's ability to suspend the effect of an order made after a habeas corpus application, requiring that an inmate be returned to a lower-security institution. In addressing this question, this Court must consider the scope of the jurisdiction of the Supreme Court and the nature of the doctrine of habeas corpus: both issues that fall squarely within the judicial sphere.
- [21] In my view, the second *Borowski* principle is determinative of the question whether this Court should exercise its discretion to hear this appeal. That is, whether judicial economy would be advanced, in some way, by its hearing.

- [22] The Warden concedes the judge's decision to suspend the application of his order that Mr. Leinen be returned to a medium-security institution is capable of repetition. Despite this concession, he submits there is no basis to conclude a similar order is likely to be made on a regular basis, which he says was a consideration identified in *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7.
- [23] *Mazzei* involved an appeal regarding the mandate of the Review Board, and its authority to make orders affecting people found not criminally responsible on account of mental disorder: specifically, the ability of the Review Board to impose conditions on hospital authorities: *Mazzei* at para. 1. The Supreme Court of Canada held that although the issue before the Court remained unresolved and was likely to come before the Court again, it was evasive of review in that, because new orders were continually crafted, "a controversial order may be quickly overtaken by subsequent orders". As a result, the Court exercised its discretion to hear the appeal despite factual mootness: *Mazzei* at para. 15.
- [24] Here, the Warden submits the parties have not identified any other instance where a superior court has previously suspended a release order in a habeas corpus application--that is, the decision of the judge is unique. The Warden says in this case the judge exerted remedial discretion to suspend the effect of his order based on the specific facts of the case before him. He submits, given the standard of review in this appeal is deferential, judicial economy would not be advanced in deciding this appeal.
- [25] Mr. Leinen submits there is a significant possibility other courts, in or outside British Columbia, will rely on the judge's decision to make the same or similar orders. Deciding this issue will provide clarity and ensure consistency in the law going forward. For this reason, he submits judicial economy is best served by deciding the issues in this appeal now.
- [26] As stated by the Supreme Court of Canada in *Khela* SCC:
- [14] The nature of habeas corpus applications involving the transfer and segregation of inmates is such that the factual circumstances of a given application can change quickly, before an appellate court can review the application judge's decision. This means that such cases will often be moot before making it to the appellate level, and are therefore "capable of repetition, yet evasive of review" (*Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342, at p. 364). As was true in *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 14, and *Cardinal v. Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643, at p. 652, the points in issue here are sufficiently important, and they come before appellate courts as "live" issues so rarely, that the law needs to be clarified in the instant case.
- [27] The involuntary transfer procedure is such that the lawfulness of the suspension of an order made in a habeas corpus application for return of an inmate to a lower-security institution may never be a "live" issue by the time an appeal of the order comes on for hearing. As the Warden concedes, this would occur if, upon the return of an inmate to a lower-security institution pursuant to the decision of a chambers judge, a warden made a further

involuntary transfer order on an emergency basis under s. 13 of the CCRR. The further involuntary transfer order would then have to be justified at a subsequent warden's board hearing, making the original chambers decision moot.

- [28] Counsel has not provided any examples of cases that have considered whether a chambers judge can suspend an order for return of an inmate to a lower-security institution following a successful habeas corpus application, and it may be that this issue has not previously come before the courts. Nevertheless, it is a realistic possibility this type of order may be made again, particularly with the judge's decision serving as a precedent. As well, the ability of the judge to extend the deprivation of Mr. Leinen's liberty rights by suspending the effect of his order is of sufficient importance that it is in the interests of judicial economy to decide this appeal.
- [29] Although I agree with the Warden's submission that this Court lacks the jurisdiction to make an order affecting his current incarceration in Alberta (see *Haug v. Kent Institution (Warden)*, 2013 BCCA 152 at paras. 4-5; *R v. Bonamy*, 1999 BCCA 487 at paras. 3-4), Mr. Leinen does not seek such an order in this appeal.
- [30] In consideration of the Borowski principles, I would conclude that even though Mr. Leinen's appeal is now factually moot, this Court should exercise its discretion to hear it.

The Chambers Judge's Suspension of the Effect of his Order for 21 Days

Positions of the Parties

- [31] Mr. Leinen submits the only remedy available to the judge, upon deciding the Warden's decisions were unlawful, was to make an order returning him to the status quo prior to the Warden's Decisions--that is, to order his return to a medium-security institution and returning his original security classification. He submits the judge, pursuant to the established common law doctrine of habeas corpus, did not have the jurisdiction to suspend the effect of this order for any period of time, and that such a remedy falls within the exclusive jurisdiction of the Federal Court.
- [32] The Warden agrees the sole remedy available to the judge, upon finding Mr. Leinen's procedural fairness rights were breached, was to order his return to a medium-security institution. The Warden also agrees the judge's reliance on *Khela* SCC as authority for his discretion to suspend the terms of his order was misplaced. The Warden argues the judge was nonetheless empowered to do so as an appropriate exercise of the court's inherent jurisdiction and remedial discretion to address "serious safety and security risks", or pursuant to the Supreme Court Civil Rules, B.C. Reg 168/2009 (the "Civil Rules"). He submits the standard of review of the judge's decision is deferential. The Warden concedes, however, an order for release should not be suspended for mere administrative convenience.

- [33] Before addressing the substance of these arguments, I will briefly address the judge's "setting aside" of the Warden's Decisions and review the legal framework of habeas corpus. I will then address the judge's reliance on "residual discretion", as was described at para. 78 of Khela SCC, to suspend the effect of his order and Mr. Leinen's submission that a suspension is within the exclusive jurisdiction of the Federal Court. Next, I will provide my reasons with respect to the primary issue in this appeal: whether the suspension order was warranted for public safety reasons as the Warden contends and therefore within the judge's remedial discretion. Last, I will turn to whether there is a legal basis for the judge's decision to suspend the effect of his order found in the Civil Rules.

Setting aside the Warden's Decisions

- [34] The parties agree that the judge erred by "setting aside" the Warden's Decisions, as this remedy is within the exclusive jurisdiction of the Federal Court. As discussed in Khela v. Mission Institution (Warden), 2011 BCCA 450 [Khela BCCA] at paras. 82, 88, the Federal Court can quash orders made by federal tribunals, but superior courts cannot. In Khela SCC, the Court affirmed that while the Federal Court can grant a wide array of relief in a judicial review, "all a provincial superior court can do is determine that the detention is unlawful and then rule on a motion for discharge": at para. 39.
- [35] The standard of review applicable for this portion of the judge's order is correctness. The judge did not have jurisdiction to set aside the Warden's Decisions and erred in law in doing so. This error alone is largely semantic and of limited practical effect, however, its significance arises from the judge's decision to also suspend the effect of the order, which I address later in these reasons.

Legal Framework of Habeas Corpus

- [36] Habeas corpus has been described by the Supreme Court of Canada as an "essential remedy in Canadian law" that is important to the protection of two fundamental rights: ss. 7 and 9 of the Canadian Charter of Rights and Freedoms (the "Charter"): Khela SCC at para. 29. The right to habeas corpus is, itself, enshrined in s. 10(c) of the Charter, which provides that every person who has been arrested or detained has the right "to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful." It requires the immediate release of an individual upon the failure of the relevant authority to justify that person's deprivation of liberty: Canada (Public Safety and Emergency Preparedness) v. Chhina, 2019 SCC 29 at para. 65.
- [37] Habeas corpus is not an intrinsically criminal or civil procedure. Whether an application for habeas corpus is civil or criminal in nature "will depend on the nature of the underlying proceedings giving rise to the detention which is being challenged": Vukelich v. Mission Institution, 2005 BCCA 75 at para. 32.

- [38] Penalties resulting from prison disciplinary proceedings are not criminal in nature but rather align with the objective of facilitating internal prison discipline: Vukelich at paras. 36-37; see also *R. v. Shubley*, [1990] 1 S.C.R. 3, 1990 CanLII 149 at 23. As held by Justice Sharpe, in prison discipline or transfer cases, "the criminal law sentence serves as merely part of the background the reason why the applicant is in the institution and subject to prison discipline": *Canada (Attorney General) v. Samuel*, 2019 ONCA 555 at para. 24.
- [39] Rule 21-3(1) sets out that applications for relief in the nature of habeas corpus (as well as in the nature of mandamus, prohibitions and certiorari) are governed by the Civil Rules, and must be started by petition. Rule 21-3(2) further requires that directions respecting applications referred to in Rule 21-3(1) be made by order, and that no writ of habeas corpus (or mandamus, prohibition and certiorari) be issued.
- [40] The fact that applications for habeas corpus arising in the context of prison disciplinary or transfer proceedings are characterized as civil matters does not lessen their importance. Habeas corpus is the "strongest tool a prisoner has to ensure that the deprivation of his or her liberty is not unlawful", and ensures "the rule of law continues to run within penitentiary walls": *Khela SCC* at para. 29. It is a flexible and important remedy: *Khela SCC* at para. 52.
- [41] The right of an inmate to bring a habeas corpus application with respect to internal disciplinary decisions was not always available at common law--a view that informed Canadian courts' initial refusal to review internal decisions of prison officials: *May v. Ferndale Institution*, 2005 SCC 82 at paras. 23-24. The scope of the remedy was expanded in 1985 by a trio of Supreme Court of Canada decisions, making it available to "free inmates from restrictive forms of custody within an institution, without releasing the inmate": *May* at para. 27. Habeas corpus is not a discretionary remedy but rather is issued as of right on successful challenge of the legality of the detention: *May* at para. 33.

Suspension of Order Analysis

Preliminary Matters

- [42] There is no dispute that, to the extent the trial judge relied on the "residual discretion" referred to at para. 78 of *Khela SCC* as a basis for his authority to suspend the effect of his order, such reliance was misplaced. This residual discretion is the discretion to determine whether, on the whole of the record before a chambers judge in a habeas corpus application, the unlawful nature of the detention has been established: *Khela SCC* at para. 78; *Boone v. Ontario (Community Safety and Correctional Services)*, 2014 ONCA 515 at para. 45.
- [43] As outlined earlier, Mr. Leinen submits the judge lacked the jurisdiction to suspend the effect of his order, on the basis that doing so is within the exclusive jurisdiction of the Federal Court in a judicial review application, pursuant to ss. 18(1) and 18.1(3)(b) of the *Federal Courts Act*, R.S.C. 1985, c. F-7--although he did not explain how these sections apply.

[44] Section 18(1) provides as follows:

Extraordinary remedies, federal tribunals

18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

- (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
- (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

[45] Section 28 sets out the jurisdiction of the Federal Court of Appeal to hear certain applications for judicial review and therefore is not relevant to this appeal.

[46] Section 18.1(3) sets out the powers of the Federal Court on an application for judicial review brought in that court. Mr. Leinen refers to subsection 18.1(3)(b) which provides as follows:

Powers of Federal Court

18.1(3) On an application for judicial review, the Federal Court may

- (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

[47] The judge's suspension of the effect his order for 21 days did not arise in the context of an application or other proceeding for relief described in s. 18(1), which are within the exclusive jurisdiction of the Federal Court. In my view, ss. 18(1) and 18.1(3) are therefore not relevant to this appeal. It is still necessary to consider, however, whether there are alternate legal bases on which the judge could have suspended the effect of his order.

Remedial Discretion

[48] The principal issue in this appeal is the lawfulness of the judge's order suspending the effect of his release order for 21 days and, in particular, as the Warden submits is the case, whether the order does not constitute a remedy but instead was an exercise of the judge's remedial discretion. In support of his submission on this issue the Warden refers to a series of public and private law decisions. These cases include *Ontario (Attorney General) v. G.*, 2020 SCC 38; *Bertrand v. Acho Dene Koe First Nation*, 2021 FC 287; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City of)*, 2002 ABCA 131; *Tchou-San-Da v. Association of Professional Engineers*, 2007 BCSC 1815; and *Lee v. UpMeals Technologies*, 2024 BCSC 888.

[49] Respectfully, none of these decisions support the Warden's submission the judge properly exercised his discretion in suspending the effect of his order for 21 days. Each of the decisions involves the suspension of a declaration of invalidity of an unconstitutional statute or improperly enacted bylaw, which is not equivalent to the suspension of an order to release an inmate whose deprivation of residual liberty was found to be unlawful after a habeas corpus application.

[50] To the extent the suspension of a declaration of invalidity of a statute is like the suspension of the effect of an order that an inmate be returned to a lower security institution--that is, to postpone the effect of the relevant ruling--I note the following set out in the reasons of the majority in G at para. 83:

suspensions of declarations of invalidity should be rare, granted only when an identifiable public interest, grounded in the Constitution, is endangered by an immediate declaration to such an extent that it outweighs the harmful impacts of delaying the declaration's effect. And when declarations are suspended, granting individual exemptions pursuant to s. 24(1) of the Charter will often balance the interests of the litigant, the broader public, and the legislature in a manner that is "appropriate and just".

[51] The dissenting reasons in G provide further helpful commentary regarding circumstances where declarations of invalidity may be warranted such as where there is a threat to the rule of law, including, for example, circumstances where the declaration of invalidity creates a legal vacuum, or a threat to public safety: G, at paras. 225, 245-246.

[52] Here, I note the Warden submits that suspension of the judge's order was warranted for public safety reasons. I will address this submission later in these reasons.

[53] The parties have only put one decision before this Court in which conditions were included in an order for release made after a successful habeas corpus application: *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 839.

[54] In *Ogiamien*, the application judge ordered that Mr. Ogiamien be released from immigration detention on conditions, which initially included a recognizance in the amount of \$30,000, without deposit, but with a named surety who was required to make a deposit of \$1,000, along with other conditions including a curfew: at para. 45. The Court of Appeal for Ontario upheld these conditions, stating in its reasons that some flexibility was warranted in the making of an order after a successful habeas corpus application:

[47] I do not accept the general proposition advanced by the AG that a judge has never had authority to impose conditions when granting habeas corpus. I agree with the submissions of amicus that such a rigid view would unduly impair the inherent powers of the Superior Court to ensure that its orders are effective

[48] It would be inconsistent with the public interest if the judge on habeas corpus lacked the authority to impose appropriate conditions to protect public safety and respect for law .

(Underline emphasis added.)

[55] In this case, the Warden submits the judge's remedial discretion to suspend the effect of his order is grounded in the court's inherent jurisdiction to give full effect to public law remedies. The Warden correctly submits that inherent jurisdiction is an exercise of "the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in [particular] to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them": *Stelco Inc. Re*, 75 O.R. (3d) 5, 2005 CanLII 8671 (Ont. C.A.) [Stelco] at para. 34, referring to Halsbury's Laws of England, 4th ed. (London: LexisNexis UK, 1973), vol. 37 at para. 14.

[56] The appropriate exercise of inherent jurisdiction allows the court to "fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner": *R. v. Caron*, 2011 SCC 5 at para. 24. But, as was noted in *Stelco*, inherent jurisdiction is not limitless, and if a legislative body has not left a functional gap, then inherent jurisdiction should not be invoked: *Stelco* at para. 35, citing *Royal Oak Mines Inc. (Re)*, [1999] O.J. No. 864, 7 C.B.R. (4th) 293 (Gen. Div. (Commercial List)) at para. 4.

[57] The Warden correctly submits the suspension of an order for release should not be granted for administrative convenience. In my view, this is consistent with the "importance" and "grand purpose" of the "great writ of liberty" of habeas corpus, as described in *May* at paras. 19-22 and *R. v. Gamble*, [1988] 2 S.C.R. 595, 1988 CanLII 15 at 645-646.

[58] In their factum, the Warden narrowed the issues with respect to the judge's suspension of the effect of his order as follows:

50. The respondents agree with the appellant's submission that suspending an order for release should not be granted for mere administrative convenience. Nor should this be routine. Suspending a release order would require evidence that release of the prisoner to a lower security level, even in the short term, presents serious safety or security risks, including where such immediate release is unlikely to be of benefit to the applicant due to the likelihood that a further emergency transfer could be required.

The Warden contends that evidence of a serious safety or security risk was before the judge. I disagree.

[59] First, I note that at para. 7 of the Chambers Reasons, the judge specifically declined to decide whether the Warden's Decisions, which involved consideration of the security risk arising from Mr. Leinen's alleged involvement in the drug sub-culture at the Mission Institution, were substantively unreasonable.

- [60] As well, the judge's reasons do not set out any evidence or make any findings that returning Mr. Leinen to the Mission Institution would result in a serious safety or security risk. Rather, the judge suggested that returning Mr. Leinen to this institution might result in his immediate return to the Kent Institution if the Warden invoked the emergency involuntary transfer procedure set out in s. 13 of the CCRR, which the judge described as "administrative hopscotch": Chambers Reasons at para. 57.
- [61] The judge explained his reason for suspending the effect of his order stating "[t]here would be little to be gained by having [Mr. Leinen] moved back and forth between Kent and Mission " and that he did not "see that Mr. Leinen would obtain a significant benefit from being transported back to Mission, no doubt under heavy security, for just a day or two": Chambers Reasons at para. 59. It is clear from these comments the judge suspended the terms of his order to avoid potential administrative inconvenience and not, as the Warden submits, due to a concern regarding serious safety or security risks.
- [62] I agree with the submission of Mr. Leinen that the inconvenience which the judge sought to avoid--that correctional officials may still be of the view that he remained unmanageable in medium security--was speculative. Additionally, I agree with Mr. Leinen's submission that inmate security classifications are highly fact-specific and that superior court judges hearing habeas corpus applications may not have the information or the expertise required to make findings about what correctional authorities are likely to do after an inmate is ordered returned to a lower-security institution.
- [63] Even if a serious safety or security risk manifested as a result of Mr. Leinen's immediate return to the Mission Institution, no functional gap in the statutory regime under the CCRA or CCRR was identified, justifying the exercise of discretion by the judge to suspend the effect of his order pursuant to the court's inherent jurisdiction. Again, as the judge noted at para. 57 of his reasons, nothing prevented the Warden (or the warden of another medium-security institution, if Mr. Leinen was sent somewhere else) from immediately invoking s. 13 of the CCRR again and transferring Mr. Leinen back to the Kent Institution, if the circumstances warranted doing so.
- [64] In my view, suspending an order for release arising from an application for habeas corpus for reasons of administrative convenience, including the potential that a warden may invoke s.13 of the CCRR, does not align with inmate rights under the established doctrine of habeas corpus. Doing so weakens the effectiveness of the remedy that an inmate be returned to the status quo prior to an impugned decision.
- [65] I note again that the Warden has not provided any authorities in which an order for release arising from a successful habeas corpus application has been suspended or stayed. This accords with the established common law of the doctrine, which specifies that a successful habeas corpus application leads to the immediate release of the applicant: Chhina at para. 65. I further note the Supreme Court of Canada has affirmed that habeas corpus is not a discretionary remedy but rather is issued as of right on successful challenge of the legality

of the detention: May at para. 71.

- [66] As was found in Ogiamien at paras. 47-48, I do not accept the general proposition that a judge never has the authority to impose conditions when granting habeas corpus as such a finding would be inconsistent with the public interest that a judge has the authority to ensure their orders are effective, including where it is necessary to impose conditions to protect public safety and respect for law.
- [67] I would not foreclose the possibility of an order arising from habeas corpus being suspended, in effect as a form of "condition". As I have set out earlier, prisoner security classifications and transfers are highly fact specific. There may be circumstances where it is necessary to suspend the effect of an order that an inmate be returned to a lower-security institution, essentially setting a schedule for the inmate's return. I decline to set out examples of situations where this may be appropriate: such issues are best addressed if and when they arise.
- [68] For the reasons set out above, in the particular circumstances of this case, the judge's decision to suspend the effect of his order for 21 days to allow the Warden to undertake a fresh Warden's Board review process was not an appropriate exercise of the court's remedial discretion.

Application of the Civil Rules

- [69] At the hearing of this appeal, the Warden raised Rule 13-2(31) of the Civil Rules as a basis for the judge's jurisdiction to suspend the effect of his order for 21 days. Rule 13-2(31) reads:

Stay of execution

- (31) The court may, at or after the time of making an order,
- (a) stay the execution of the order until such time as it thinks fit, or
 - (b) provide that an order for the payment of money be payable by instalments.
- [70] I agree with the Warden's submission that on their face, the Civil Rules appear to permit any order, including an order granting a writ of habeas corpus, to be stayed. Specifically, the Warden's argument is a product of three rules: Rule 21-3(1), which requires that a habeas corpus application must be started by petition, Rule 21-3(2), which requires that directions respecting applications under sub-rule (1) must be made by order, and Rule 13-2(31)(a).
- [71] As this argument was raised for the first time by the Warden in oral submissions, Mr. Leinen's response was limited. Mr. Leinen submits that although his petition was filed in the civil registry, this should not be determinative of whether the proceeding is characterized as civil or criminal in nature. In summary, he takes the position that the relief he sought in his petition is properly considered criminal in nature and therefore submits, in my understanding, that the court's power to stay an order pursuant to Rule 13-2 does not apply. I disagree.

- [72] This petition proceeding is properly considered civil in nature. I base this not on the fact that Mr. Leinen's petition was filed in the civil registry as the Civil Rules require, but on the well-established law delineating between criminal and civil applications for habeas corpus. As this Court set out in *Vukelich*, whether an application for habeas corpus is civil or criminal in nature "will depend on the nature of the underlying proceedings giving rise to the detention which is being challenged": at para. 32. The issue raised in Mr. Leinen's petition proceeding--that is, the lawfulness of his inter-prison transfer and security reclassification--are comparable to those in *Vukelich*, *Shubley* and *Samuel*, in which the proceedings were classified as civil.
- [73] The Warden was unable to identify any case in which an order of habeas corpus has been stayed or suspended, in any Canadian jurisdiction--pursuant to rules of civil procedure, or otherwise. To the contrary, at common law, a hallmark of a writ or order of habeas corpus is that it provides for the immediate release of the applicant: see e.g., *Chhina* at para. 65. In this way, there appears to be tension inherent in the interaction of Rule 13-2(31)(a) with the established doctrine of habeas corpus and the right set out at s. 10(c) of the Charter.
- [74] The Warden points to *Ogiamien* as an authority for the proposition that conditions can be placed on an order. As I have already discussed, in *Ogiamien*, the respondent's release pursuant to habeas corpus was made with conditions--namely, a recognizance with a named surety, a curfew, and reporting requirements--and the Court addressed the importance of maintaining habeas corpus as a flexible remedy by allowing conditions to be attached to it: *Ogiamien* at paras. 45, 47.
- [75] The Warden submits the judge's suspension of the effect of his order is a condition akin to those discussed above, albeit a novel one, and is thus not contrary to the established common law. He submits, based on this interpretation, granting a stay under the Civil Rules would not be inconsistent with the common law.
- [76] Although Rule 13-2(31) provides broad discretion to judges to stay the execution of an order, this discretion "must be exercised judiciously, and generally only where special circumstances exist or where there are material facts that now exist that were not before the court when the initial order was made": *Claxton v Claxton*, 2023 BCSC 2417 at para. 20, citing *Canada (Attorney General) v. Lau*, 2002 BCSC 87. The factors to be considered under Rule 13-2(31) overlap with those that must be considered under the test for a stay granted pursuant to the court's inherent jurisdiction, as articulated in *RJR - MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117; *Claxton* at para. 63.
- [77] In this case, the judge framed his decision as a suspension, rather than a stay, although in my view this is effectively a semantic distinction. He did not refer to the Civil Rules as the legal basis for his decision to suspend the effect of his order but, as discussed earlier, appears to have relied upon the residual discretion discussed at para. 78 of *Khela SCC*, which I have found was misplaced.

- [78] Understandably, given that the application of the Civil Rules does not appear to have been put before him, the judge did not identify or apply the appropriate factors to be considered for a stay under Rule 13-2(31)(a). In my view, there was no evidence on the record before the judge of special circumstances justifying a stay as a judicious exercise of discretion under this rule.
- [79] In this appeal, the parties' submissions regarding the applicability of the Civil Rules were limited. Neither party made submissions regarding any potential constitutional implications, including with respect to s. 10(c) of the Charter. These reasons should not be taken as holding that the Civil Rules do properly give rise to the interpretation advocated for by the Warden--that is, that they enable an order of habeas corpus to be stayed. Given the limited scope of submissions on this point by the parties, the potential for conflict with the common law and the Charter, and the fact it is unclear whether the judge even intended to rely on the Civil Rules in this proceeding, it would be inappropriate to make such a determination in this appeal.

Appropriate Terms of Habeas Corpus Order

- [80] In closing, I note there is no dispute the judge's order that Mr. Leinen be returned to Mission Institution "or another medium-security institution in British Columbia" should not have been made, as this had the effect of fettering the discretion of correctional authorities to select the medium-security institution to which Mr. Leinen would be sent. In *Khela BCCA*, this Court stated as follows (at para. 86):

The object of an order for release in the context of a case such as this is to return the prisoner to the status quo prior to the decision that deprived him or her of liberty. In my view, the appropriate order in this case would have been to order that Mr. Khela be returned to a medium security institution. This is consonant with the order made by the Supreme Court of Canada in *May*.

[Emphasis added.]

- [81] Mr. Leinen acknowledges he led the judge into error on this point. The judge's order reflects what Mr. Leinen sought, improperly, in his petition seeking habeas corpus relief, namely that he be returned to Mission Institution or another medium-security institution in British Columbia.

Disposition

- [82] For the reasons set out above, I would allow Mr. Leinen's appeal. The order of the judge should be corrected to reflect that the petition for habeas corpus is granted, and that Mr. Leinen be released from custody in the Kent Institution and transferred to a medium-security institution.

"The Honourable Justice Mayer"

I AGREE:

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Mr. Justice Butler"

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