IMMIGRATION DETENTION AND *HABEAS CORPUS*: POSITIVE DEVELOPMENTS AND MISSED OPPORTUNITIES IN *CHHINA*

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A writ of *habeas corpus* is probably the most cherished sacred cow in the British constitution; but the law has never allowed it to graze in all legal pastures.¹

—Lord Justice Lawton, Court of Appeal of England and Wales

INTRODUCTION

Can immigration detainees² access the “great writ”³ of *habeas corpus*? That was the question before the Supreme Court of Canada (SCC) in *Canada (Public Safety and Emergency Preparedness) v Chhina* (“*Chhina*”).⁴ After being convicted of criminal

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¹ *Linnett v Coles*, [1986] 3 All ER 652 at 656 (CA).

² Serious concerns have been raised about Canada’s immigration detention policies. See Efrat Arbel & Ian C Davis, “Immigration Detention and the Problem of Time: Lessons from Solitary Confinement” (2018) 4:4 Intl J Migr & Border Stud 326, DOI: <doi.org/10.1504/IJMB.2018.096775>; Stephanie J Silverman & Petra Molnar, “Everyday Injustices: Barriers to Access to Justice for Immigration Detainees in Canada” (2016) 35:1 Refugee Surv Q 109, DOI: <doi.org/10.1093/rsq/hdv016>; Siena Anstis, Joshua Blum & Jared Will, “Separate but Unequal: Immigration Detention in Canada and the Great Writ of Liberty” (2017) 63:1 McGill LJ 1; Anna Pratt, *Securing Borders: Detention and Deportation in Canada* (Vancouver: UBC Press, 2005); Janet Cleveland, “Not So Short and Sweet: Immigration Detention in Canada” in Amy Nethery & Stephanie J Silverman, eds, *Immigration Detention: The Migration of a Policy and Its Human Impact* (Abingdon, UK: Routledge, 2015) at 79; Arghavan Gerami, “Challenging Prolonged and Indefinite Immigration Detention: Necessary Amendments to the Immigration and Refugee Protection Act” (2016) 10:1 JPPL 205; Stephanie J Silverman, “What *Habeas Corpus* Can (and Cannot) Do for Immigration Detainees: *Scotland v Canada* and the Injustices of Imprisoning Migrants” (2019) 34:1 CJSLS 145, DOI: <doi.org/10.1017/cls.2019.7>; Rayner Thwaites, “Discriminating Against Non-Citizens Under the *Charter*: Charkaoui and Section 15” (2009) 34 Queen’s LJ 669.

³ See Debra Parkes, “The ‘Great Writ’ Reinvigorated? *Habeas Corpus* in Contemporary Canada” (2012) 36:1 Man LJ 351; *May v Ferndale Institution*, 2005 SCC 82 at para 19 [*May*]; *R v Gamble*, [1988] 2 SCR 595 at 645.

⁴ 2019 SCC 29 [*Chhina* (SCC)].

offences and serving his sentence, a foreign national was placed in immigration detention for 28 months as Canadian authorities tried to secure travel documents from his country of origin to deport him. While he was detained, the detention review regime under the *Immigration and Refugee Protection Act* (IRPA)⁵ found his detention lawful. Faced with seemingly indefinite detention,⁶ the foreign national filed a writ of *habeas corpus* in provincial superior court.⁷

The writ of *habeas corpus* is said to be about hearing the “sighs” of prisoners.⁸ The common law has historically celebrated the writ as coming to the rescue of prisoners in the most perilous circumstances.⁹ Against this grand arc of jurisprudence, in a 6–1 decision, Justice Karakatsanis—writing for a majority of the SCC—found that the detention review scheme under the IRPA was not as broad and advantageous as the protections accorded under *habeas corpus*. Hence, the majority ruled that immigration detainees were not barred from filing *habeas corpus* applications to challenge the legality of their lengthy detention.¹⁰ In dissent, Justice Abella found that the IRPA detention review scheme can be interpreted as providing the same robust protection as *habeas corpus*; therefore, immigration detainees should not have access to the writ.¹¹

I argue that *Chhina* is a positive development with some missed opportunities. With a pragmatic eye on how immigration detention is administered, the majority ensured that immigration detainees are not deprived of their constitutionalized right¹² to scrutinize the legality of their detention through *habeas corpus*. Moreover, the majority contextualized the previous case law and articulated appropriate bars to *habeas corpus*.

Notwithstanding the positives, the bulk of this case comment focuses on two missed opportunities. First, the majority is silent on commonly contested issues that arise when detainees in lengthy immigration detention pursue applications for *habeas corpus*.

⁵ SC 2001, c 27 [IRPA].

⁶ I interchangeably use the terms “indeterminate” and “indefinite” detention in this paper. In understanding these terms, I adopt Justice Rothstein’s definition in *Sahin v Canada (Minister of Citizenship and Immigration)*, [1995] 1 FC 214 at para 26 [Sahin], where he stated that “when any number of possible steps may be taken by either side and the times to take each step are unknown, I think it is fair to say that a lengthy detention, at least for practical purposes, approaches what might be reasonably termed ‘indefinite.’”

⁷ See *Chaudhary v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 ONCA 700 at para 41 [Chaudhary]; *R v Miller*, [1985] 2 SCR 613 at 626, 52 OR (2d) 585 (provincial superior courts have natural jurisdiction to hear *habeas corpus* applications).

⁸ See Paul D Halliday, *Habeas Corpus: From England to Empire* (Cambridge: Harvard University Press, 2010) at 8–9 [Halliday].

⁹ *Ibid.*

¹⁰ See *Chhina* (SCC), *supra* note 4 at para 71.

¹¹ *Ibid* at para 72.

¹² See *Canadian Charter of Rights and Freedoms*, s 10(c), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter].

There is conflicting jurisprudence on the following litigated issues: (1) when a detention becomes unduly “lengthy” such that it is unlawful; (2) how the duration of a detention period should be calculated; and (3) what the proper role of detainee cooperation is in a *habeas corpus* application. The lack of guidance on these issues jeopardizes the broader holding in the majority’s decision, since without resolving these debates, *Chhina*’s goal of affording *habeas corpus* protection to immigration detainees may not materialize to its fullest extent.

Second, the majority missed a valuable opportunity in *Chhina* by omitting substantive discussions of the broader context surrounding immigration detention. This is especially unfortunate because in the weeks following *Chhina*, the SCC rendered a judgment¹³ in which it adopted an empirical approach to analyzing the legal issue at bar in conjunction with the troubling underlying circumstances of that case. Had the court taken such an approach in *Chhina*, it could have more fully shone a light on the shortcomings of immigration detention to usher in meaningful change.

This paper is divided into six sections. Section one summarizes the statutory regime that governs immigration detention. Section two outlines the jurisprudence on applying *habeas corpus* to immigration detention. Section three reviews the Alberta courts’ and the SCC’s decisions in *Chhina*. Sections four and five examine the positive developments and the missed opportunities in *Chhina*. And finally, section six considers the consequences of *Chhina* for detainees and decision-makers.

I. STATUTORY FRAMEWORK GOVERNING IMMIGRATION DETENTION

The IRPA and the *Immigration and Refugee Protection Regulations* (Regulations)¹⁴ govern immigration detention in Canada. Non-citizens¹⁵ can be detained under four IRPA provisions: sections 55(1), (2), (3), and 56(2).

Section 55(1) of the IRPA authorizes the Canada Border Services Agency (CBSA) to detain non-citizens—foreign nationals and permanent residents—if it has reasonable grounds to believe that the non-citizens are inadmissible to Canada. Non-citizens may be considered inadmissible if they present a danger to the public or are unlikely to appear for examinations, admissibility hearings, removal, or proceedings that could lead to the making of a removal order.¹⁶ Sections 55(2) and 55(3) stipulate that the

¹³ See *R v Le*, 2019 SCC 34 [*Le* (SCC)].

¹⁴ SOR/2002-227 [Regulations].

¹⁵ Scholars have analyzed the category of “non-citizens” and how it blurs at times with “detainable people.” See Cathryn Costello & Minos Mouzourakis, “EU Law and the Detainability of Asylum-Seekers” (2016) 35:1 *Refugee Surv Q* 47, DOI: <doi.org/10.1093/rsq/hdv020>; Nicholas De Genova, “The Production of Culprits: From Deportability to Detainability in the Aftermath of ‘Homeland Security’” (2007) 11:5 *Citizenship Stud* 421, DOI: <doi.org/10.1080/13621020701605735>.

¹⁶ See IRPA, *supra* note 5, s 55.

CBSA can detain foreign nationals if it deems it necessary to complete examinations; if it has reasonable grounds to believe that such individuals are inadmissible on grounds of security, violating human or international rights, or criminality;¹⁷ or if it is unsatisfied by the foreign nationals' identity.¹⁸ Finally, section 56(2) mandates that "designated foreign nationals"¹⁹—typically those whose arrival is deemed "irregular" by immigration authorities—must be detained upon arrival.²⁰

Once a non-citizen is detained, the Immigration Division²¹ holds periodic detention reviews.²² The Immigration Division must release the detainee, unless it is persuaded that the detainee satisfies one of the grounds for detention under section 58(1) of the IRPA:

- the detainee is a danger to the public;
- the detainee may not appear for immigration proceedings;
- the state is investigating a reasonable suspicion that the detainee is inadmissible based on grounds of security, violating human or international rights, or criminality;
- the state believes that the detainee's identity has not been verified, but it could be if the detainee cooperated; or
- the state believes that the identity of the detainee has not been established.²³

In applying section 58(1), the Immigration Division must be alert to the factors listed in section 248 of the Regulations,²⁴ which include, *inter alia*, the rationale for the

¹⁷ *Ibid*, s 55(3).

¹⁸ *Ibid*, s 55(2).

¹⁹ *Ibid*, s 56(2).

²⁰ See *Chaudhary*, *supra* note 7 at para 30; Luke Taylor, "Designated Inhospitability: The Treatment of Asylum Seekers Who Arrive by Boat in Canada and Australia" (2015) 60:2 McGill LJ 333, DOI: <doi.org/10.7202/1029211ar>.

²¹ See *Chaudhary*, *supra* note 7 at para 36. The Immigration Division comprises public servants. They are not Governor in Council appointees, nor do they need to be lawyers.

²² See IRPA, *supra* note 5, ss 57(1)–(2). The first detention review must be conducted within 48 hours; the second review must occur within seven days; and subsequent detention reviews shall be conducted every 30 days.

²³ *Ibid*, s 58(1).

²⁴ While the indefinite character of detention is considered under s 248 of the Regulations, such ground is not in and of itself "determinative" vis-à-vis releasing a detainee from immigration holding. See *Canada (Minister of Public Safety and Emergency Preparedness) v Okwerom*, 2015 FC 433 at para 8; *Canada (Minister of Citizenship and Immigration) v B147*, 2012 FC 655 at paras 53–56.

detention, its length, whether there are elements that can inform whether the detention is likely to continue, and the existence of alternatives to detention.²⁵

Following the Immigration Division's decision, a detainee may seek leave to commence an application for judicial review at the Federal Court (FC).²⁶

2. THE LAW OF *HABEAS CORPUS* AND IMMIGRATION DETENTION

Before delving into how the courts approached Mr. Chhina's *habeas corpus* application, a brief introduction of *habeas corpus* and its complex relationship with immigration detention is needed.

The writ of *habeas corpus*²⁷ ensures that once a detainee demonstrates that their liberty has been deprived and that legitimate grounds exist to question the legality of that deprivation, the onus shifts onto the state to justify whether the continued deprivation of liberty is lawful.²⁸ Section 10(c) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) entrenches this right to *habeas corpus*.²⁹ The SCC has stated that unless there is "well-defined," "limited," "clear," and "direct statutory language," courts should "rarely" refuse to hear *habeas corpus* petitions.³⁰

Yet for decades, immigration detainees were proscribed from accessing *habeas corpus* relief.³¹ This stems in large part from the 1989 decision of the Ontario Court of Appeal (ONCA) in *Peiroo v Canada (Minister of Employment and Immigration)* ("*Peiroo*").³² In that case, after immigration authorities determined that her case was not credible and issued a deportation order, Ms. Peiroo filed an application for *habeas corpus*

²⁵ See Regulations, *supra* note 14, s 248.

²⁶ See IRPA, *supra* note 5, s 72.

²⁷ Many sources underscore the importance of *habeas corpus* in the common law tradition. See generally Matthew Groves, "Habeas Corpus, Justiciability and Foreign Affairs" (2013) 11:3 NZ J Pub & Intl L 587 (*habeas corpus* is "a cornerstone of liberty" and "a means of judicial control over the arbitrary behaviour of the executive government" at 588); the Honourable Justice Robert Sharpe, Judith Farbey & Simon Atrill, *The Law of Habeas Corpus*, 3rd ed (New York: Oxford University Press, 2011) (*habeas corpus* is "the most significant means of protecting individual liberty" at 1); William Blackstone, *Commentaries on the Laws of England*, Book III, TP Gallanis, ed (Oxford: Oxford University Press, 2016) (*habeas corpus* is "the great and efficacious writ, in all manner of illegal confinement" at 131); William F Duker, *A Constitutional History of Habeas Corpus* (Westport, Connecticut: Greenwood Press, 1980) (by the 17th century, "[t]he writ of *habeas corpus* ... [was] ... the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it" at 54).

²⁸ See *Mission Institution v Khela*, 2014 SCC 24 at para 30 [*Khela*]; *Chhina* (SCC), *supra* note 4 at para 17.

²⁹ *Charter*, *supra* note 12 at s 10(c): "[e]veryone has the right on arrest or detention to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful."

³⁰ See *May*, *supra* note 3 at para 50; *Khela*, *supra* note 28 at para 54.

³¹ See Anstis, Blum & Will, *supra* note 2 at 20.

³² [1989] 69 OR (2d) 253 (CA) [*Peiroo*].

to stop her removal.³³ The ONCA dismissed the appeal, finding that Parliament had created a detailed regime to review and challenge deportation orders before the FC and that “the ambit of [such] review and appeal is as broad as or broader than the traditional scope of review by way of *habeas corpus*.”³⁴

Subsequent SCC decisions³⁵ solidified the holding in *Peiroo*. In *May v Ferndale Institution*³⁶—a case involving prison transfers of federal inmates—the SCC stated, in *obiter dicta*, that there are limited circumstances where a court may refuse to hear a *habeas corpus* petition.³⁷ One of them is the “*Peiroo* exception,” where *habeas corpus* is unavailable “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.”³⁸ Against this backdrop, courts refused to hear *habeas corpus* applications in immigration detention cases.³⁹

The law began to shift in 2015. In *Chaudhary v Canada (Public Safety and Emergency Preparedness)*, the ONCA found that immigration detainees who had been in immigration holding for lengthy and indeterminate periods could file *habeas corpus* applications.⁴⁰ The ONCA stressed that an immigration detention is lawful only if it is “reasonably necessary to further the machinery of immigration control.”⁴¹ In doing so, the ONCA redefined the ambit of the *Peiroo* exception.⁴² The court held that *Peiroo* prohibits collateral attacks on immigration decisions made by administrative actors under

³³ *Ibid* at 256–57.

³⁴ *Ibid* at 257–58.

³⁵ A key case was *Reza v Canada*, [1994] 2 SCR 394 [*Reza* (SCC)]. The Ontario Court of Appeal held that Ontario courts may exercise their *habeas corpus* jurisdiction to hear a writ of *habeas corpus* challenging a deportation order (see *Reza v Canada* (1992), [1993] 11 OR (3d) 65 (CA)). However, the Supreme Court decided to adopt Justice Abella’s reasoning in the Ontario Court of Appeal’s dissent and ruled that it was appropriate to decline *habeas corpus* jurisdiction because “Parliament had created a comprehensive scheme of review of immigration matters and the Federal Court was an effective and appropriate forum” (*Reza* (SCC) at 405).

³⁶ *Supra* note 3.

³⁷ *Ibid* at paras 35–44. One of the exceptions is that *habeas corpus* cannot be used to challenge the legality of a criminal conviction. See also *Goldhar v The Queen*, [1960] SCR 431 at 439; *Karchesky v The Queen*, [1967] SCR 547 at 551; *Korponay v Kulik*, [1980] 2 SCR 265 at 265–66.

³⁸ *May*, *supra* note 3 at para 40.

³⁹ See *Kippax v Canada*, 2014 ONSC 3685 at paras 13–16; *Apaolaza-Sancho c Directeur of Établissement de détention de Rivière-des-Prairies*, 2008 QCCA 1542; *Chaudhary v Canada*, 2015 ONSC 1503 at para 26.

⁴⁰ *Chaudhary*, *supra* note 7 at para 113.

⁴¹ *Ibid* at para 81.

⁴² *Ibid* at para 74.

the IRPA.⁴³ It noted that this was qualitatively different from asking a court to review the legality of one's indefinite detention.⁴⁴

Following *Chaudhary*, immigration detainees brought applications for *habeas corpus* before provincial superior courts.⁴⁵ *Chhina* was one such attempt.⁴⁶ However, the results of these cases were somewhat inconsistent and at times conflicting⁴⁷ (and form the basis for the missed opportunities highlighted in section five of this paper).

III. CHHINA DECISIONS: FROM ALBERTA TO THE SUPREME COURT

Tusif Chhina, a Pakistani national, entered Canada in 2006. Mr. Chhina successfully made a refugee claim in which he misrepresented his identity.⁴⁸ In 2012, his status was vacated due to his misrepresentations and several criminal convictions in Canada.⁴⁹ Mr. Chhina then served roughly three years of a criminal sentence. He was taken into immigration detention in April 2013.⁵⁰

In November 2013, the CBSA released Mr. Chhina.⁵¹ However, he was rearrested in December 2014 for committing additional criminal offences.⁵² Upon serving time for

⁴³ *Ibid* at paras 61, 62.

⁴⁴ *Ibid* at para 63.

⁴⁵ Since *Chaudhary*, it appears that only Ontario and Alberta courts have heard cases where immigration detainees have filed *habeas corpus* applications in provincial superior courts. The cases can be found below in chronological order. See *Ogiamien v Ontario*, 2016 ONSC 3080; *Ogiamien v Ontario (Ministry of Community Safety and Correctional Services)*, 2016 ONSC 3593; *R v Ogiamien*, 2016 ONSC 4126 [*Ogiamien* (ONSC)]; *Canada (Minister of Citizenship and Immigration) v Dadzie*, 2016 ONSC 6045 [*Dadzie*]; *Brown v Canada (Ministry of Public Safety and Emergency Preparedness)*, 2016 ONSC 7760; *Ali v Canada (Minister of Public Safety & Emergency Preparedness)*, 2017 ONSC 2660 [*Ali*]; *Wang v Canada*, 2017 ONSC 2841; *Scotland v Canada (Attorney General)*, 2017 ONSC 4850 [*Scotland*]; *Ebrahim Toure v Minister of Public Safety*, 2017 ONSC 5878 [*Toure* (ONSC)]; *Ogiamien v Ontario (Community Safety and Correctional Services)*, 2017 ONCA 839 [*Ogiamien* (ONCA)]; *Brown v Canada (Public Safety)*, 2018 ONCA 14 [*Brown* (ONCA)]; *Philip v Canada (Attorney General)*, 2018 ABQB 167 [*Philip*]; *Toure v Canada (Public Safety & Emergency Preparedness)*, 2018 ONCA 681 [*Toure* (ONCA)]; *Wang v Canada*, 2018 ONCA 798.

⁴⁶ See *Chhina v Canada (Public Safety and Emergency Preparedness)*, 2017 ABCA 248 at para 1 [*Chhina* (ABCA)].

⁴⁷ See Anstis, Blum & Will, *supra* note 2 at 27.

⁴⁸ See *Chhina* (ABCA), *supra* note 46 at para 9.

⁴⁹ *Ibid*. Mr. Chhina's criminal convictions included the following: "possession of a firearm; unauthorized use of credit card data; uttering a forged document; obtaining or possessing identity information for the purpose of committing an indictable offence; counselling an indictable offence; personation with intent; fraud over \$5,000; and fraud under \$5,000."

⁵⁰ *Ibid*.

⁵¹ *Ibid* at para 10.

⁵² *Ibid*.

those offences, Mr. Chhina was placed in immigration detention once again in November 2015.⁵³

The CBSA sought to obtain travel documents for Mr. Chhina from Pakistani officials beginning in 2013, but the officials vacillated on whether he was a Pakistani national.⁵⁴ The record implies that, during at least some portion of his detention, Mr. Chhina was cooperative with the authorities' efforts to secure travel documents.⁵⁵ Meanwhile, he was detained in the Calgary Remand Centre, a maximum-security facility "which keeps inmates on lockdown 22 and a half hours a day."⁵⁶ While detained, Mr. Chhina received monthly detention reviews before the Immigration Division, which deemed his continued detention lawful.⁵⁷

In May 2016, Mr. Chhina filed an application for *habeas corpus* at the Court of Queen's Bench of Alberta (ABQB).⁵⁸ As his case made its way through the courts, the CBSA secured the requisite travel documents and deported Mr. Chhina to Pakistan in September 2017, before the SCC decided his appeal.⁵⁹ Between 2013 and 2017, Mr. Chhina was held in immigration detention for approximately 28 months.⁶⁰

Lower Courts' Decisions in Alberta

In his *habeas corpus* application, Mr. Chhina alleged that his lengthy detention⁶¹ infringed his section 7 and 9 rights under the *Charter*.⁶² The ABQB declined to exercise its *habeas corpus* jurisdiction⁶³ because it found that, among other things, the *Peiroo* exception barred Mr. Chhina from seeking *habeas corpus* relief.⁶⁴

On appeal, a unanimous Alberta Court of Appeal (ABCA) followed the approach in *Chaudhary* and found that Mr. Chhina could file for *habeas corpus*.⁶⁵ The court ruled

⁵³ *Ibid.*

⁵⁴ *Ibid* at paras 11–12.

⁵⁵ See *Chhina* (SCC), *supra* note 4 at para 78.

⁵⁶ *Ibid* at para 9.

⁵⁷ *Ibid.*

⁵⁸ *Ibid* at para 10.

⁵⁹ *Ibid* at para 15.

⁶⁰ See *Chhina* (ABCA), *supra* note 46 at para 2. At the time the ABCA rendered its decision (July, 2017), Mr. Chhina had spent 26 months in detention. Thereafter, he spent two more months in detention and was removed from Canada in September, 2017.

⁶¹ See *Chhina* (SCC), *supra* note 4 at para 45. In his writ of *habeas corpus*, Mr. Chhina also challenged his detention on the basis of being held in "inappropriate conditions." However, the courts below focused solely on the issue of lengthy detention.

⁶² *Ibid.*

⁶³ See *Chhina* (ABCA), *supra* note 46 at para 16.

⁶⁴ *Ibid.*

⁶⁵ *Ibid* at paras 60–62.

that as long as detainees were challenging the legality of their detention—and not a matter related to their immigration status—*habeas corpus* applications were open to them.⁶⁶ The ABCA also found that the IRPA was not as broad and advantageous as *habeas corpus*⁶⁷ since the IRPA review scheme relies on past detention review decisions,⁶⁸ shifts the onus onto detainees,⁶⁹ and does not provide timely remedies.⁷⁰

Supreme Court Decision: Majority Opinion

In a 6–1 decision, a majority of the SCC agreed with the ABCA.⁷¹ The majority judgment, written by Justice Karakatsanis, effectively proceeded in two parts: determining the ambit of the *Peiroo* exception, and undertaking a comparative analysis of the IRPA detention review scheme and *habeas corpus*.

In considering *Peiroo* and its progenies, the majority noted that *Peiroo* does not stand for the proposition that immigration detainees are barred from accessing *habeas corpus* in all circumstances.⁷² Rather, Justice Karakatsanis found that the *Peiroo* exception is best understood as a context-dependent bar and articulated a two-part test for courts assessing whether *habeas corpus* is available to immigration detainees.⁷³

Courts reviewing the *habeas corpus* application must first determine what the detainee is challenging: the initial act of detention, the conditions or treatment during detention, and/or the length of detention.⁷⁴ At the second stage, the reviewing court must ask whether the IRPA scheme is as broad and advantageous as *habeas corpus* regarding the specific grounds raised by the detainee in their *habeas corpus* application.⁷⁵ If the court finds that the IRPA is as broad and advantageous as *habeas corpus* regarding the grounds raised, then the detainee will fall under the *Peiroo* exception and cannot file her *habeas corpus* application.⁷⁶ If not, provincial superior courts may exercise their *habeas corpus* jurisdiction in hearing the application.⁷⁷

Justice Karakatsanis ruled that the IRPA’s detention review scheme is not as broad and advantageous as *habeas corpus* when a detainee raises allegations of a

⁶⁶ *Ibid* at paras 29–33, 44.

⁶⁷ *Ibid* at paras 60–61.

⁶⁸ *Ibid* at para 43.

⁶⁹ *Ibid* at paras 55–56.

⁷⁰ *Ibid* at paras 51–53.

⁷¹ See *Chhina* (SCC), *supra* note 4 at para 7.

⁷² *Ibid* at para 35.

⁷³ *Ibid* at paras 41–43.

⁷⁴ *Ibid* at para 42. See also *Dumas v Leclerc Institute*, [1986] 2 SCR 459.

⁷⁵ See *Chhina* (SCC), *supra* note 4 at para 43.

⁷⁶ *Ibid* at paras 40 and 43.

⁷⁷ *Ibid* at para 43.

detention of lengthy and uncertain duration.⁷⁸ The majority focused on three shortcomings of the IRPA review scheme.⁷⁹

First, the majority found that under the IRPA regime, the state can justify continued detention by satisfying one of the section 58 factors under the IRPA. It can then shift the burden to detainees to demonstrate that their continued detention would be unlawful.⁸⁰ Conversely, on an application for *habeas corpus*, the burden is on the state to demonstrate that continued detention is lawful.⁸¹

Justice Karakatsanis also took issue with the way the state can satisfy its onus.⁸² Under the IRPA, the state can rely on reasons given at prior detention hearings.⁸³ Case law from the Federal Court has found that “if a member chooses to depart from prior decisions to detain, clear and compelling reasons for doing so must be set out.”⁸⁴ According to Justice Karakatsanis, the combined effect was that detention reviews under the IRPA were “susceptible to self-referential reasoning” as opposed to “fresh and independent” examinations of an ongoing detention.⁸⁵ To underscore this point, Justice Karakatsanis noted the “troubling”⁸⁶ *Report of the 2017/2018 External Audit (Detention Review) (Audit Report)*⁸⁷ regarding the Immigration Division, which described, among other things, the issues with placing the onus on detainees and the Immigration Division’s overreliance on its past decisions.⁸⁸

Second, the majority found that the scope of the review under the IRPA is narrower than under *habeas corpus*.⁸⁹ Under *habeas corpus* a court conducts a holistic review of a lengthy detention, whereas judicial review under the IRPA is restricted to a

⁷⁸ *Ibid* at para 59.

⁷⁹ *Ibid*.

⁸⁰ *Ibid* at para 60. See also *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4 at para 16 [*Thanabalasingham*]; *Chaudhary*, *supra* note 7 at para 86; *Canada (Minister of Public Safety and Emergency Preparedness) v Lunyamila*, 2016 FC 1199 at para 31 [*Lunyamila*].

⁸¹ See *Chhina* (SCC), *supra* note 4 at para 60.

⁸² *Ibid* at paras 62–63.

⁸³ *Ibid* at para 62.

⁸⁴ *Thanabalasingham*, *supra* note 80 at para 10. See also *Canada (Public Safety and Emergency Preparedness) v Mehmedovic*, 2018 FC 729 at para 19; *Canada (Public Safety and Emergency Preparedness) v Torres*, 2017 FC 918 at para 20; *Canada (Minister of Public Safety and Emergency Preparedness) v Karimi-Ashad*, 2010 FC 964 at para 16.

⁸⁵ *Chhina* (SCC), *supra* note 4 at para 62.

⁸⁶ *Ibid* at para 69.

⁸⁷ *Report of the 2017/2018 External Audit (Detention Review)* (last modified 20 July 2018), online: <irb-cisr.gc.ca/en/transparency/reviews-audit-evaluations/Pages/ID-external-audit-1718.aspx> [perma.cc/R68D-8ZWU] [*Audit Report*].

⁸⁸ See *Chhina* (SCC), *supra* note 4 at para 63.

⁸⁹ *Ibid* at para 64.

single Immigration Division decision.⁹⁰ The remedies that the FC can grant are also less advantageous than those that a provincial superior court can provide on an application for *habeas corpus*. The FC rarely grants *mandamus*, whereas superior courts can order immediate release from detention.⁹¹

Third, *habeas corpus* is a “swift and imperative remedy.”⁹² By contrast, securing leave for judicial review to challenge one’s detention and perfecting the record is a cumbersome process that can take up to 85 days.⁹³

In short, for the majority, the IRPA detention review scheme may have been adequate to address other grievances associated with immigration detention. However, when it comes to lengthy detention, the IRPA does not provide protections as robust as those afforded under *habeas corpus*.⁹⁴

Justice Abella’s Dissent

Justice Abella found that the IRPA detention review regime must be interpreted purposively to ensure that all aspects of immigration detention are scrutinized.⁹⁵ Otherwise, by creating a carve-out for *habeas corpus* applications, detainees would opt for such a writ as opposed to the IRPA regime, thus contravening Parliament’s intention.⁹⁶

By interpreting the interlocking parts of the IRPA scheme and giving weight to the Immigration Division’s obligations under the *Charter*, Justice Abella ruled that the IRPA may be sufficient in protecting immigration detainees’ liberty interests.⁹⁷ Justice Abella noted that when a detainee argues that ongoing detention violates his or her *Charter* rights, it is incumbent on the Immigration Division to examine the evidence afresh and not rely on previous decisions.⁹⁸

Justice Abella also found that the express requirements of section 248 of the Regulations eliminated many of the majority’s concerns. Section 248 demanded that the Immigration Division consider alternatives to detention,⁹⁹ be alert to delays and a lack of

⁹⁰ *Ibid.*

⁹¹ *Ibid* at para 65.

⁹² *Ibid* at para 67. See also *Khela*, *supra* note 28 at para 3; *In Re Storgoff*, [1945] SCR 526 at 591.

⁹³ See *Chhina* (SCC), *supra* note 4 at para 66.

⁹⁴ *Ibid* at para 70.

⁹⁵ *Ibid* at paras 72–73.

⁹⁶ *Ibid.*

⁹⁷ *Ibid* at para 92.

⁹⁸ *Ibid* at paras 126–27.

⁹⁹ *Ibid* at para 140.

diligence on the part of the detainee,¹⁰⁰ and anticipate any “future detention,” which, for Justice Abella, means “an estimation of how long detention is likely to continue.”¹⁰¹

IV. POSITIVE DEVELOPMENTS IN *CHHINA*

In *Chhina*, the majority made two vital contributions to the jurisprudence: adopting a pragmatic approach to assessing the IRPA detention scheme and maintaining a careful balancing of the prior case law.

A Pragmatic Assessment of the IRPA’s Review Scheme

A key strength of *Chhina* is the majority’s pragmatic¹⁰² assessment of how the IRPA detention review scheme operates *in practice*. Justice Abella noted that in spirit, the IRPA adequately protects immigration detainees. While that might be true in theory, the majority prioritized—due to the evidence¹⁰³ before it—how the detention review scheme was currently functioning. This pragmatism enabled the majority to be sensitive to the liberty interests at stake and not be mired with how the IRPA scheme *ought* to work.

To understand the depth and value of the majority’s pragmatism, it is worth surveying how previous courts have assessed the IRPA detention scheme. For example, consider *Brown v Canada (Citizenship and Immigration) (Brown)*.¹⁰⁴ Mr. Brown, an immigration detainee, alleged before the FC that the IRPA detention review scheme violated his *Charter* rights and was unconstitutional.¹⁰⁵ In dismissing Mr. Brown’s application, the FC focused on how the scheme ought to operate based on its statutory language. For instance, Mr. Brown argued that the IRPA scheme in effect placed the onus on him to justify his release, rather than on the state to justify his detention.¹⁰⁶ The FC observed that the statutory provisions do not technically place the onus on a detainee and that anything to the contrary is a form of “maladministration.”¹⁰⁷ On that basis, the FC

¹⁰⁰ *Ibid* at paras 138–39.

¹⁰¹ *Ibid* at para 135.

¹⁰² By suggesting that the majority decision in *Chhina* is “pragmatic,” my intention is not to argue that the decision is consistent with or derivative of the broader philosophy of legal pragmatism (see generally Douglas Lind, “The Mismeasurement of Legal Pragmatism” (2012) 4:2 Wash U Juris Rev 213; Richard A Posner, “What Has Pragmatism to Offer Law?” (1990) 63 S Cal L Rev 1653). Rather, I apply “pragmatism” in a more lay sense of the word in this paper: namely, a decision that, among other things, is focused on the practical effects of its outcome.

¹⁰³ The “maladministration” found in the *Audit Report*, *supra* note 87, was arguably the most glaring example of this. See also *Chhina* (SCC), *supra* note 4 at paras 63 and 69.

¹⁰⁴ 2017 FC 710 [*Brown* (FC)].

¹⁰⁵ *Ibid* at para 30. Mr. Brown alleged that his ss 7, 9, and 12 *Charter* rights were breached.

¹⁰⁶ *Ibid* at para 116.

¹⁰⁷ *Ibid* at paras 117–20.

concluded that maladministration is “not an indication that the statutory scheme is itself unconstitutional.”¹⁰⁸

While maladministration does not necessarily render a statute unconstitutional,¹⁰⁹ *Brown* highlights the willingness of previous courts to assess immigration detention through the lens of how it ought to be administered. Justice Abella’s dissent is another illustration of that pattern.

The majority’s approach in *Chhina* stands in sharp contrast. Although *Chhina* was not about the constitutionality of the IRPA detention scheme, the majority’s judgment is imbued with a pragmatism that asks whether immigration detainees are essentially treated fairly. This is best exemplified by the majority’s focus on the disjuncture between how the Immigration Division is meant to operate “in principle” and what it does “in practice” in reviewing the Immigration Division’s *Audit Report*.¹¹⁰ The majority found that an “unfortunate” reality of the Immigration Division is that it, *inter alia*, failed to put the onus on the state to justify ongoing detention and to consider each detention review afresh.¹¹¹ Neither should happen “in principle,” and the majority looked beyond what *ought* to happen to scrutinize what *is* happening.

Put another way, in administrative law, there is a presumption that administrative actors—by their appointments—are “experts.”¹¹² While in recent decisions the SCC has retreated from this idea,¹¹³ the majority in *Chhina* did not hesitate to scrutinize whether the Immigration Division was behaving like an expert administrator in protecting the rights of detainees. The majority did not allow an imagined reality to obscure the truth of the situation.

Limiting *Peiroo*’s Scope

After three decades, the majority placed *Peiroo* in its proper legal context. The significance of this should not go unnoticed. On the one hand, it affords immigration detainees a vital tool—*habeas corpus*—in their fight for liberty. On the other hand, it respects Parliament’s intention and gives administrative delegates time to change their approach.

¹⁰⁸ *Ibid* at para 120.

¹⁰⁹ See *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at para 71; *Canadian Civil Liberties Association v Canada (Attorney General)*, 2019 ONCA 243 at paras 116–19.

¹¹⁰ *Chhina* (SCC), *supra* note 4 at para 63.

¹¹¹ *Ibid*.

¹¹² See *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 32; *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 33.

¹¹³ See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 27–31.

Before the SCC in *Chhina*,¹¹⁴ there were persuasive arguments to dispense with *Peiroo* once and for all. *Peiroo* was decided when immigration detention was not a common practice.¹¹⁵ The decision itself did not pertain to immigration detention: Ms. Peiroo was not detained, and she sought to use *habeas corpus* to stop her removal.¹¹⁶ Recent SCC statements about the *Peiroo* exception to *habeas corpus* were made in *obiter* without careful consideration of the facts of the case.¹¹⁷ Consequently, some wondered whether *Peiroo* should prevent immigration detainees from accessing their constitutional right to *habeas corpus*.¹¹⁸

Although the above argument has merit, it is a positive development that the majority did not accept it, since it is fraught with challenges. The consequence of accepting the argument is to potentially put into effect Justice Abella's primary worry. With *Peiroo* gone, all detainees in all circumstances could access *habeas corpus* relief. While that, in and of itself, is not an issue, such an approach could render moot the comprehensive detention review scheme that Parliament has enacted in the IRPA. Detainees would predominately go to provincial superior courts to challenge the legality of their detention. Such an approach undercuts the authority delegated to administrative actors and the Federal Courts, both of which have built up a unique specialization in immigration matters. Therefore, a wholesale elimination of *Peiroo* may have created more problems than it solved.

Instead, the majority adopted a prudent approach by clarifying the scope of *Peiroo*. As discussed earlier, the majority's solution was to limit the ambit of the *Peiroo* exception and find that it is not a blanket prohibition against immigration detainees seeking *habeas corpus* relief.¹¹⁹ This solution strikes the right balance for the stakeholders involved: detainees, decision-makers, and Parliament.

For detainees, changing the scope of *Peiroo* ensures that immigration detainees' liberty interests are respected and that the legality of their lengthy detention is scrutinized. For decision-makers, such as the Immigration Division, the revised *Peiroo* exception provides room for self-correction. If the Immigration Division can remedy the shortcomings that the majority identified—either on its own or through legislative

¹¹⁴ As an intervener in *Chhina* (SCC), Queen's Prison Law Clinic argued for overturning *Peiroo*. See Queen's Prison Law Clinic's Factum at para 16, n 37, online (pdf): <scc-csc.ca/WebDocuments-DocumentsWeb/37770/FM110_Intervener_Queen's-Prison-Law-Clinic.pdf>. Commentators have also made similar points: see Anstis, Blum & Will, *supra* note 2 at 22–23.

¹¹⁵ See Taylor, *supra* note 20 at 363–64.

¹¹⁶ See *Peiroo*, *supra* note 32 at 256–57.

¹¹⁷ See Anstis, Blum & Will, *supra* note 2 at 22–23.

¹¹⁸ *Ibid.*

¹¹⁹ See *Chhina* (SCC), *supra* note 4 at para 35.

intervention—there could be a time where the review before the Immigration Division could be as broad and advantageous as the review offered under *habeas corpus*.¹²⁰

In other words, it might be wise for reviewing courts to occasionally pierce the presumption of administrative expertise—especially in light of overwhelming evidence of maladministration—to assess whether an administrative delegate is *truly* behaving as an “expert.” However, the occasional departure ought not to have the effect of rendering an administrative actor and its enabling scheme perfunctory, especially when Parliament intended such an actor to be the default decision-maker. A responsive administrative state allows its delegate to learn from its mistakes. In reshaping *Peiroo*, the majority struck that delicate balance: it allowed for the Immigration Division to learn from its shortcomings, while ensuring that detainees’ rights are not disregarded.

V. MISSED OPPORTUNITIES IN *CHHINA*

Despite the positive developments in *Chhina*, the SCC missed several opportunities to ensure that the *Chhina* approach is consistently applied and that the shortcomings of the immigration detention regime under the IRPA are mitigated. In this section, I focus on two such oversights.

Silence on Common Issues in *Habeas Corpus* Applications

Chhina establishes that, at minimum, immigration detainees may pursue *habeas corpus* applications if they are in lengthy detention.¹²¹ Hence, moving forward, it is likely that provincial superior courts may hear more *habeas corpus* applications based on this ground. However, the courts have struggled to resolve three issues that frequently arise in *habeas corpus* cases: (1) how to determine when a lengthy detention is unlawfully lengthy; (2) how the time served by an immigration detainee should be calculated; and (3) what the proper role of detainee cooperation in *habeas corpus* applications ought to be. Against this background, it would have been prudent for the SCC to provide guidance on these issues. Nonetheless, the court opted not to do so in *Chhina*, leaving both detainees and decision-makers in a state of uncertainty.

As a threshold concern, the facts of *Chhina* referenced the above issues. Consequently, had the court decided to adjudicate these concerns, it would not be doing

¹²⁰ There are positive signs that administrative actors are trying to correct their approach to immigration detention: see Canada Border Services Agency (CBSA), “National Immigration Detention Framework” (14 February 2019), online: <cbsa-asfc.gc.ca/security-securite/detent/nidf-cndi-eng.html> [perma.cc/2LV5-VDLX]; Immigration and Refugee Board of Canada, “Chairperson Guideline 2: Detention” (1 April 2019), online: <irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir02.aspx> [perma.cc/Z9CC-JWGA].

¹²¹ See *Chhina* (SCC), *supra* note 4 at paras 54–71.

so in a vacuum or without an evidentiary basis. Mr. Chhina was detained for 28 months, thus raising the question of “how long is too long” for *habeas corpus* petitions. Since he served his time non-consecutively, his situation falls under the second contested issue: should the focus be on consecutive months served or cumulative time spent in immigration detention on a *habeas corpus* application? Finally, there were statements¹²² about Mr. Chhina cooperating with the CBSA, which could have grounded the majority’s detainee cooperation analysis.¹²³

*Determining “How Long is Too Long”*¹²⁴

Although *Chhina* turned on the impugned detention being lengthy and of uncertain duration, the majority did not opine on when detention becomes “lengthy” such that it becomes illegal by way of *habeas corpus*. The court’s silence on this point is problematic given the logic of *Chhina* and the divergent approaches adopted in the case law on the question of duration.

Professor Daly argues that there is a logical tension in *Chhina*.¹²⁵ For him, the logic of *Chhina* is this: on the specific ground of indefinite detention, the IRPA is not as broad and advantageous as *habeas corpus*, whereby the latter is available to immigration detainees. Professor Daly maintains that on this logic, detention might be lawful on Day 1 but becomes “unlawful by Day 1+n.”¹²⁶ The majority decision does not provide any guidance on what constitutes “n” and fails to outline factors that can be used to calculate it.¹²⁷

I agree with Professor Daly that not outlining when detention becomes unlawful or providing a set of factors that can be used to guide this analysis is a significant missed opportunity in *Chhina*. The problem reveals itself to be worse when one surveys the case

¹²² *Ibid* at para 78.

¹²³ The other threshold concern is that the three issues pertain to how *habeas corpus* relief is applied by trial courts. The way the majority decided whether *habeas corpus* application should be available to immigration detainees is by assessing how it is applied and the comparative benefits it offers in relation to the IRPA detention regime. Insofar as the line has been blurred between the availability of *habeas corpus* and its application, the majority could have discussed the three contested issues, especially given their potential to jeopardize the overall effectiveness of the *Chhina* approach.

¹²⁴ Stephanie J Silverman, “How Long is Too Long? A Preliminary Examination of the Practice of Protracted Immigration Detention in Canada” (1 January 2011) [unpublished; presented at the Annual Ethnic and Pluralism Studies Graduate Research Conference], online:

<papers.ssrn.com/sol3/papers.cfm?abstract_id=1881790> [perma.cc/7UFE-STYB].

¹²⁵ See Paul Daly, “To Have the Point: *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29” (5 June 2019), online (blog): *Administrative Law Matters* <administrativelawmatters.com/blog/2019/06/05/to-have-the-point-canada-public-safety-and-emergency-preparedness-v-chhina-2019-scc-29> [perma.cc/PKS3-8VAQ].

¹²⁶ *Ibid*.

¹²⁷ *Ibid*.

law addressing the question of duration. Focusing on the post-*Chaudhary* jurisprudence,¹²⁸ where a detainee in immigration detention sought the writ of *habeas corpus*, the case law appears to be conflicting.

In *R v Ogiamien (Ogiamien)*, the Ontario Superior Court of Justice (ONSC) found (and the ONCA upheld¹²⁹) that the detainee's roughly two years of immigration detention was unduly lengthy and provided release based on his *habeas corpus* application.¹³⁰ However, in *Canada (Minister of Citizenship and Immigration) v Dadzie (Dadzie)*, the ONSC held that the detainee's almost two and a half years¹³¹ of immigration detention did not meet the "lengthy detention" threshold established in *Chaudhary* and denied *habeas corpus* relief.¹³² In *Ali v Canada (Attorney General) (Ali)*, the ONSC distinguished the facts from *Dadzie*, and determined that seven years of immigration detention was unlawful and ordered immediate release based on the detainee's *habeas corpus* petition.¹³³ Less than six months later in *Ebrahim Toure v Minister of Public Safety (Toure)*, the ONSC ruled that the applicant's four and a half years of detention in a maximum security provincial jail did not meet the requirements for *habeas corpus* relief.¹³⁴ In yet another twist, the ONSC in *Scotland v Canada (Attorney General) (Scotland)* found that 17 months of (non-consecutive) immigration detention was unduly lengthy and granted the detainee's *habeas corpus* application.¹³⁵

As recognized by the Federal Court of Appeal, "there is no single, simple and satisfactory" answer as to when detention is too long for *habeas corpus* applications.¹³⁶

¹²⁸ It is worth recalling that in *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 [Charkaoui], the SCC held that Mr. Almrei's indeterminate detention of roughly five years was consistent with the *Charter* (see paras 102, 105, 110). Moreover, in *Chaudhary*, 20 months of detention for one of the applicants, Carmelo Bruzzese, was found to be unduly lengthy (*Chaudhary*, *supra* note 7 at paras 8–12, 113–15).

¹²⁹ See *Ogiamien* (ONCA), *supra* note 45.

¹³⁰ See *Ogiamien* (ONSC), *supra* note 45 at paras 95–96.

¹³¹ There is a complicated element to determining how long the detainee had been in immigration detention in *Dadzie* based on his initial lack of cooperation with the CBSA and his turn to cooperation later (*supra* note 45). When his application for *habeas corpus* was heard in September 2016, he had been in immigration detention for roughly two and a half years (at para 17). But because he was found to have cooperated with the CBSA for a total of four months, his detention was increased to read that of six months by the court (at para 46).

¹³² See *Dadzie*, *supra* note 45 at para 46.

¹³³ See *Ali*, *supra* note 45 at paras 22–23, 40.

¹³⁴ See *Toure* (ONSC), *supra* note 45 at paras 17, 44–45. As noted earlier, the ONCA overturned *Toure* (ONSC) in *Toure* (ONCA), *supra* note 45. The ONCA found that the application judge erred in finding that there was a section 12 *Charter* breach (at para 80). The ONCA, however, upheld the application judge's analysis on lengthy detention (at paras 44–49) for which the ONSC decision is cited here.

¹³⁵ See *Scotland*, *supra* note 45 at paras 55, 77.

¹³⁶ *Canada (Minister of Citizenship and Immigration) v Li*, 2009 FCA 85 at para 3.

It is a contextual analysis,¹³⁷ where the length of detention is an important factor but not the determinative factor.¹³⁸ Despite the mixed results, some courts have taken a practical approach to assessing duration by focusing on whether “the detention is too long in view of the purpose it is meant to accomplish and in view of the reason for the detention in the first place.”¹³⁹

Notwithstanding the courts’ best efforts, the varying timelines demonstrate the uncertainty that detainees face concerning when they can seek a writ of *habeas corpus*. By not discussing this issue, the majority in *Chhina* missed a valuable chance to address a significant obstacle facing detainees in securing *habeas corpus* protection.

Before the SCC, many options were available. The court could have adopted hard timelines on the legality of immigration detention. For example, the European Union stipulates that foreign nationals can be detained pending removal for six months, which can be extended to 18 months¹⁴⁰ only if the third country or the foreign nationals refuse to cooperate with removal.¹⁴¹ As evidenced by *R v Jordan*¹⁴²—where Justice Karakatsanis co-authored the majority opinion—adopting a firm timeline to protect liberty interests and serve justice promptly is not novel for the SCC.¹⁴³

Alternatively, the majority could have forgone the hard timeline approach and instead enumerated badges that signal to detainees and decision-makers that an immigration detention is unduly lengthy and could be quashed by way of *habeas corpus*. This would have had the benefit of ensuring that reviewing courts maintain their flexibility in addressing the unique circumstances before them, while making sure that

¹³⁷ *Ibid.*

¹³⁸ See *Philip*, *supra* note 45 at paras 33–34.

¹³⁹ *Scotland*, *supra* note 45 at para 54.

¹⁴⁰ See Silverman and Molnar, *supra* note 2 at 116, n 18. Silverman and Molnar observe that the timeline adopted by particular European states is considerably less than eighteen months: Ireland (30 days), France (32 days), Spain (40 days), and Italy (60 days).

¹⁴¹ Commission Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, [2008] OJ, L 348/98 at Preamble, para 16, arts 15(1)–(6). Commentators note that in *Mahdi* (2014), C-146/14 PPU (ECJ) at paras 68–71, the court ruled that the 18-month restriction applies even if there are security concerns at play (Anstis, Blum & Will, *supra* note 2, at 16, n 52). Interestingly, in *Brown* (ONCA), *supra* note 45, the appellant—an immigration detainee—argued that “international law and principles ... stand for the proposition that any detention exceeding 18 months is to be considered illegal.” The ONCA rejected this argument, finding that the appellant did not lead “any expert evidence that would provide a context and explain how the immigration regimes operate in those various jurisdictions” (at para 37).

¹⁴² 2016 SCC 27.

¹⁴³ I recognize that in the context of Europe, a legislative body, and not the courts, imposed a hard timeline. Moreover, Canadian courts have treated immigration detention as distinct from criminal detention. Nevertheless, to simplify the law of *habeas corpus* when applied to immigration detainees, there was nothing expressly barring the majority for adopting hard timelines.

they are weighing similar considerations in adjudicating *habeas corpus* applications. This would provide greater predictability for everyone involved.

Varied Approaches to Calculating the Duration of Detention

The majority missed an opportunity to opine on how to calculate the length of immigration detention because the jurisprudence is mixed on this point. Since the length of detention could be integral to determining *habeas corpus* applications (especially in the *Chhina* framework), it would have been helpful for litigants and lower courts to gain the SCC's guidance on this issue.

The debate on calculating the duration of detention revolves around two different approaches: a cumulative approach to the months served versus an approach focused on the consecutive months one has been detained.

In *Scotland*, the ONSC reviewed the impugned detention cumulatively and stated that “the government does not get to start over in counting the duration of his detention by simply releasing a detainee for a short time and then re-detaining him.”¹⁴⁴ Therefore, Justice Morgan calculated all months that the applicant spent in immigration detention, which was 17 months (10 of which were served consecutively at the time of his application).¹⁴⁵

Conversely, the ONSC in *Dadzie* focused on the detainee's consecutive months served.¹⁴⁶ Justice Clark reasoned that on *habeas corpus* applications, courts have “limited” jurisdiction and therefore should confine their review to the current detention period and the consecutive months served therein.¹⁴⁷

Neither approach is without its advantages. Implicit in Justice Clark's approach is the idea that if a detainee was released for an extended period, then the former detention period may not have any relevance to the legality of the current detention period. Having said that, Justice Morgan's approach is arguably better as it accords greater weight to the liberty interests at stake¹⁴⁸ and does not risk creating a perverse incentive for the administrative actors overseeing immigration detention.

Irrespective of which approach the SCC preferred, the majority decision in *Chhina* ought to have said something about calculating the duration of the detention period. Given that a few months may make the difference between a legal versus an illegal detention on a *habeas corpus* application, reviewing courts should adopt a similar

¹⁴⁴ *Scotland*, *supra* note 45 at para 55. See also *Shariff v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 640 at para 38; *Philip*, *supra* note 45 at para 32.

¹⁴⁵ See *Scotland*, *supra* note 45 at para 55.

¹⁴⁶ See *Dadzie*, *supra* note 45 at para 35.

¹⁴⁷ *Ibid.*

¹⁴⁸ See *Scotland*, *supra* note 45 at paras 64–71.

approach to calculating the time spent in immigration detention. Otherwise, justice becomes contingent on the idiosyncratic arithmetic of judges.

Clarifying the Proper Role of Detainee Cooperation

The third contested issue when an immigration detainee seeks the writ of *habeas corpus* is about detainee cooperation. In cases of lengthy immigration detention, there is often a narrative that the prolonged detention is the detainee's own doing because they failed to cooperate with the authorities.¹⁴⁹ Courts have divergent approaches when assessing the import of cooperation¹⁵⁰ in determining *habeas corpus* applications. In *Chhina*, the majority made no attempt to resolve this conflict.

One line of case law suggests that detainee cooperation can be determinative in *habeas corpus* applications since uncooperative conduct may make a lengthy and *prima facie* illegal detention lawful. In *Toure* (ONSC), the court found that the detainee on multiple occasions was uncooperative—from misrepresenting his country of origin to refusing to take a DNA test—and that behaviour significantly contributed to his lengthy detention. As a result, the ONSC opted not to exercise its *habeas corpus* jurisdiction.¹⁵¹ The ABQB in *Philip* adopted a similar logic.¹⁵²

Commentators have noted that the reasoning underpinning these cases is an apparent general principle articulated by the FC in *Lunyamila*.¹⁵³ In that case, the FC—while assessing the continued detention of a violent detainee—stated that “the scheme of the IRPA and the Regulations ... requires resolving a stalemate that has been produced by the detainee's failure to fully cooperate with the Minister's removal efforts, in favour of continued detention.”¹⁵⁴ Hence, the lack of cooperation can be a significant adverse inference for some courts.

Some cases have gone further where a lack of cooperation is used to calculate the duration of one's detention. For the period a detainee has not been cooperative, some courts have deducted that time from the detainee's time spent in detention facilities on *habeas corpus* applications. For example, in *Dadzie*, while the CBSA detained the

¹⁴⁹ See Anstis, Blum & Will, *supra* note 2 at 39.

¹⁵⁰ While not directly on the issue of cooperation, there are some underlying principles on delay that courts often resort to when grappling with problems of cooperation. *Sahin*, *supra* note 6 at 231, and *Charkaoui*, *supra* note 128 at para 114, stand for the proposition that unexplained delay or lack of diligence should count against the offending party. However, as evidenced by the conflicting jurisprudence, such a broad statement has not been overly instructive when *habeas corpus* is applied to immigration detention.

¹⁵¹ See *Toure* (ONSC), *supra* note 45 at paras 28–31, 43–45.

¹⁵² See *Philip*, *supra* note 45 at paras 35–39.

¹⁵³ See Anstis, Blum & Will, *supra* note 2 at 37.

¹⁵⁴ *Lunyamila*, *supra* note 80 at para 95.

applicant for roughly two and a half years, when his *habeas corpus* application was heard, the ONSC deducted time from his detention period for the phase he was allegedly uncooperative.¹⁵⁵ On that basis (and taking into account that he was detained in a maximum security facility), the court found that the detainee was in holding for *six months*, which the court viewed as not unduly lengthy to warrant *habeas corpus* relief.¹⁵⁶

The other line of case law doubts the significance of cooperation in determining *habeas corpus* applications. In *Ali*, the state argued that the detainee's lack of cooperation was the "single most important factor" in assessing his seven years of immigration detention.¹⁵⁷ The ONSC rejected that argument and noted that citing uncooperative behaviour as a factor causing prolonged detention "could justify the continued detention of a person forever."¹⁵⁸

Courts have also questioned the practice of deducting the length of detention due to uncooperative conduct. For instance, the ONSC in *Ogiamien* found that it was "unreasonable" to "ignore or discount" 25 months of detention because the detainee did not cooperate with the CBSA in establishing his identity and nationality.¹⁵⁹ On appeal, the ONCA found that it was not a palpable and overriding error for the application judge to make this finding on deducting detention time, although the ONCA did not opine on the broader legal merits of such an approach.¹⁶⁰

While it is sensible to consider the significance of cooperation on a case-by-case basis, it would have nevertheless been instructive for the SCC to provide some directions on cooperation. Specifically, it would have been helpful to learn under what kind of factual matrix cooperation is a salient variable and under what conditions courts should not place significant weight on it. Given that *Chhina* opens the door for those in lengthy detention to seek *habeas corpus* applications, and in such cases the question of cooperation is a perennial issue, it would have been best for everyone—detainees, lawyers, and the courts—if the proper place of cooperation had been indicated in the *Chhina* analysis.

Ultimately, the majority's silence on the three issues is problematic because a core function of the SCC is to clarify confusion in the case law and encourage uniform application of the law.¹⁶¹ This concern is heightened in a case like *Chhina*: varied and

¹⁵⁵ See *Dadzie*, *supra* note 45 at paras 17, 46.

¹⁵⁶ *Ibid* at para 46.

¹⁵⁷ See *Ali*, *supra* note 45 at para 18.

¹⁵⁸ *Ibid* at para 26.

¹⁵⁹ See *Ogiamien* (ONSC), *supra* note 130 at para 63.

¹⁶⁰ See *Ogiamien* (ONCA), *supra* note 45 at paras 22, 24–25.

¹⁶¹ *R v Shea*, 2010 SCC 26 (in explaining the jurisdiction of the Supreme Court, the court observed as follows: "[t]he function of this Court is precisely that, to settle questions of law of national importance in the interests of promoting uniformity in the application of the law across the country, especially with respect to matters of federal competence" at para 8). See also *Burnet v Coronado Oil & Gas Co*, 285 US

conflicting approaches to applying principles of *habeas corpus* in immigration detention may increase the risk of indeterminate detention and allow for rights violations to continue in detention. Therefore, the lack of clarity on the three issues that commonly arise when *habeas corpus* is applied to immigration detention may hinder the overall effectiveness of *Chhina*. These issues will likely appear as more detainees seek *habeas corpus* protection. The result is that the *habeas corpus* protection that may have been achieved through *Chhina* might not be fully realized.

Omitting the Broader Context of Immigration Detention

Justice Brandeis observed that for “social and industrial diseases ... [s]unlight is said to be the best of disinfectants.”¹⁶² The SCC arguably has the brightest judicial light to shine on any issue. In *Chhina*, the majority missed an opportunity to turn that light fully on immigration detention and the concerning practices that underpin it. This omission is especially puzzling because of a judgment that the SCC rendered three weeks after *Chhina*—*R v Le*¹⁶³ (*Le*)—where the court looked to the broader context and adopted an empirical approach that holistically examined the legal issue at bar in conjunction with the troubling underlying circumstances. It would have been preferable for the majority to do in *Chhina* what it did in *Le*. However, in foregoing such an approach, the majority potentially did not “disinfect” immigration detention to the extent it has other issues that risk tarnishing the administration of justice.

Even though *Le*, a criminal law case on reasonable search and seizure, does differ from *Chhina*, I compare the two cases because of their temporal and structural connections. As noted above, *Le* was rendered three weeks after *Chhina*. Structurally, the two cases pertain to systemic concerns—over-policing in racialized communities versus indeterminate detention of foreign nationals—where the context underpinning these concerns helps situate the discrete legal questions raised at bar. Therefore, a comparative review of how the SCC relied on the *context* in determining allegations of systematic flaws in the two cases is instructive.¹⁶⁴

393, 52 S Ct 443, 76 L Ed 815 [1932] (in exalting the virtues of *stare decisis*, Justice Brandeis of the Supreme Court of the United States stated that “in most matters it is more important that the applicable rule of law be settled than that it be settled right”).

¹⁶² See Louis D Brandeis, *Other People's Money and How the Bankers Use It* (Fairfield, NJ: Augustus M Kelley, 1986) at 92.

¹⁶³ *Le* (SCC), *supra* note 13.

¹⁶⁴ I recognize that immigration law has generally been cautious about importing criminal law concepts. My comparative review of the two cases does not breach this general rule. I focus on how the SCC used the underlying context in deciding *Le*. In doing so, my focus is on methodology writ large, and not on any particular criminal law doctrine.

To unpack how *Le*'s contextual approach could have enriched *Chhina*'s largely acontextual methodology, it is first important to understand the SCC's reasoning in *Le*. In that case, five racialized men gathered in a backyard in a low-income neighbourhood and did not appear to be doing anything unlawful.¹⁶⁵ Police officers entered the fenced backyard—without a warrant or consent—and questioned the appellant, Mr. Le, about his identity and the contents of his bag.¹⁶⁶ In response, Mr. Le fled.¹⁶⁷ The officers pursued Mr. Le, and upon arresting him, they discovered that he had a firearm, cash, and drugs in his possession.¹⁶⁸ The issue before the SCC was whether law enforcement violated Mr. Le's section 9 *Charter* right to be free from arbitrary detention.¹⁶⁹

A majority of the SCC, including Justice Karakatsanis, found that the officers breached Mr. Le's section 9 right.¹⁷⁰ The way the majority arrived at the section 9 breach arguably makes *Le* a watershed moment in *Charter* litigation.¹⁷¹

For the majority, the operative question in *Le* was whether the detention¹⁷² began when the officers entered the backyard or when they inquired about Mr. Le's bag.¹⁷³ To answer this, the majority turned to three non-exhaustive factors¹⁷⁴ to analyze whether an individual is detained,¹⁷⁵ including the “particular characteristics” of Mr. Le to assess how a reasonable person in his shoes may have perceived the officers.¹⁷⁶ In probing the personal circumstances, the majority painstakingly reviewed the nexus between race and policing and made two key moves.

¹⁶⁵ See *Le* (SCC), *supra* note 13 at para 1.

¹⁶⁶ *Ibid* at para 14.

¹⁶⁷ *Ibid*.

¹⁶⁸ *Ibid* at paras 14–15.

¹⁶⁹ *Ibid* at para 4.

¹⁷⁰ *Ibid* at para 5.

¹⁷¹ One reason why *Le* (SCC) could be seen as a watershed moment pertains to the court's reliance on critical race theory and its direct discussion of race in the criminal justice system. The relative absence of both was previously criticized in the literature. See David M Tanovich, “The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System” (2008) 40 SCLR 655.

¹⁷² In *R v Mann*, 2004 SCC 52 at para 19, the court defined “detention” as a “significant physical or psychological restraint”; see also *R v Grant*, 2009 SCC 32 at para 26 [*Grant*].

¹⁷³ See *Le* (SCC), *supra* note 13 at para 29.

¹⁷⁴ See *Grant*, *supra* note 172 at para 44, where the factors were outlined and include the following: “(a) [t]he circumstances giving rise to the encounter as they would reasonably be perceived by the individual[:]; ... (b) [t]he nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter[:]; (c) [t]he particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.”

¹⁷⁵ See *Le* (SCC), *supra* note 13 at para 31.

¹⁷⁶ *Ibid* at paras 31, 69–71.

First, the majority accounted for race in the section 9 analysis, even though there was a factual finding¹⁷⁷ by the trial judge that there was no racial profiling at bar.¹⁷⁸ To do this, the majority drew a distinction between racial profiling being about the officers' motivations¹⁷⁹ and the need to focus on race in a case like *Le*—where section 9 is raised. The distinction was drawn because decision-makers must determine “the relational aspect between the police and racialized communities in order to discern what a reasonable person in the circumstances would perceive.”¹⁸⁰

Second, based on the “relational aspect,” the majority took judicial notice¹⁸¹ of a wide swath of social science and empirical research on over-policing in racialized communities. This ranged from human rights reports from the 1970s¹⁸² to 2018,¹⁸³ a 2018 report on carding by Justice Tulloch,¹⁸⁴ and academic scholarship on policing in racialized neighbourhoods.¹⁸⁵

In analyzing these materials, the majority discussed the wide-ranging effects of over-policing in racialized areas, including harming people's physical and mental health, adverse effects on their employment and educational opportunities, social exclusion, and a loss of faith in the administration of justice.¹⁸⁶ The court noted a chronic pattern of “disproportionate policing of racialized and low-income communities.”¹⁸⁷ The result for the court was that a reasonable person in Mr. Le's shoes would have felt detained when three officers, late at night, without consent, entered his or her backyard and began asking questions.¹⁸⁸

For our purposes, one way to interpret the majority's decision in *Le* is this: while it was open to the majority to omit a substantive discussion of race under section 9—like the ONCA's majority decision¹⁸⁹—the majority devised a way by drawing a nuanced distinction. The majority took judicial notice of sources on race and law enforcement and

¹⁷⁷ Whether an encounter with law enforcement constitutes racial profiling is a finding of fact. See *Peart v Peel Regional Police Services Board* (2006), 217 OAC 269 at para 104 (CA).

¹⁷⁸ See *R v Le*, 2014 ONSC 2033 at para 117.

¹⁷⁹ See *Le* (SCC), *supra* note 13 at para 76.

¹⁸⁰ *Ibid* at para 81.

¹⁸¹ See *ibid* at para 84 where the majority explained that courts may take judicial notice of social science findings when such “facts ... are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.” See also *R v Spence*, 2005 SCC 71.

¹⁸² See *Le* (SCC), *supra* note 13 at para 90.

¹⁸³ *Ibid* at paras 91–93.

¹⁸⁴ *Ibid* at paras 94–95.

¹⁸⁵ *Ibid* at paras 90, 95, 97.

¹⁸⁶ *Ibid* at para 95.

¹⁸⁷ *Ibid* at para 97.

¹⁸⁸ See *ibid*.

¹⁸⁹ See *R v Le*, 2018 ONCA 56 at paras 59–64.

used such research to conclude that someone like Mr. Le would have perceived himself to be detained, thereby answering the legal question at bar. The majority in *Le* may have found a section 9 breach without describing and relying on this broader narrative of race and policing.¹⁹⁰ Instead, the court examined the larger context of race and law enforcement and made it an integral part of its reasoning in *Le*.

In *Chhina*, the SCC was silent about the broader context of immigration detention. By “context,” I mean the court exploring, as it did in *Le*, questions such as who is detained, where they are detained, the nature of their detention, and the effects of such detention. *Chhina* was fertile ground for these questions and for the court to make the two choices (discussed above) that distinguished *Le*.

As in *Le*, the court in *Chhina* could have discussed the underlying circumstances concerning immigration detention by drawing a distinction. The court could have stated that while *Chhina* is not about the constitutionality of the broader immigration detention framework, it is necessary to survey the underlying circumstances of immigration detention to discern what type of situations *habeas corpus* would be addressing. Here, the facts of *Chhina* could have enabled the majority to draw this distinction. *Chhina* involved a foreign citizen who was in a maximum-security detention facility, in part because his country of origin was reluctant to recognize his nationality. This is a common challenge¹⁹¹ in lengthy immigration detention cases, which some courts have described as Kafkaesque.¹⁹² If the majority was keen to probe the underlying circumstances, it could have said that reviewing the broader context of immigration detention helps determine why *habeas corpus* relief is needed in immigration detention cases.

After making the above distinction, the majority could have taken judicial notice¹⁹³ of the immigration detention literature. The 11 interveners in *Chhina* had put these materials before the court.¹⁹⁴ Similar to the sources relied on in *Le*, these materials

¹⁹⁰ Because the SCC was relying on “non-exhaustive” factors from *Grant*, it could have placed more weight on an alternative factor and found a breach on the basis of that. In other words, *Le* is not a case where the settled law or the governing test required the court to opine on the broader context of policing and race.

¹⁹¹ See Silverman, *supra* note 2 at 154.

¹⁹² See *Scotland*, *supra* note 45 at para 2.

¹⁹³ While it is outside the focus of this paper to extensively discuss judicial notice, suffice it to say that if the SCC can judicially notice the relationship between race and policing, it can also apply those rules to similarly authoritative research on the context surrounding immigration detention. There is no qualitative difference between the research on immigration detention and race and policing.

¹⁹⁴ The interveners in *Chhina* included 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.

are authoritative, comprising works by scholars¹⁹⁵ and reputable human rights organizations.¹⁹⁶ The picture that these materials paint is troubling.

Some conclusions that scholars frequently draw and of which the SCC could have taken judicial notice include the following. Even brief immigration detention, in comparatively less harsh settings (such as an Immigration Holding Centre [IHC]), is associated with increased psychiatric illness¹⁹⁷ for detainees and is a public health concern.¹⁹⁸ Children have been detained in IHCs, including those who are two years old or younger.¹⁹⁹ To make matters worse, immigration detainees serve 66 percent of their time in provincial detention centres.²⁰⁰ There, they are subject to “lockdowns, segregation, limited access to health care ... [and] the same abuses and deprivations as the criminal remand,” even though at law they are not criminals.²⁰¹ Only six percent of

¹⁹⁵ Interveners cited these articles in their written submissions: Shana Tabak & Rachel Levitan, “LGBTI Migrants in Immigration Detention: A Global Perspective” (2014) 37:1 Harv JL & Gender 1; Janet Cleveland & Cecile Rousseau, “Psychiatric Symptoms Associated with Brief Detention of Adult Asylum Seekers in Canada” (2013) 58:7 Can J Psychiatry 409; Rachel Kronick, Cécile Rousseau & Janet Cleveland, “Mandatory Detention of Refugee Children: A Public Health Issue?” (2011) 16:8 Pediatrics & Child Health 292. The majority also could have taken judicial notice of the expansive literature on immigration detention and its shortcomings: see articles cited *supra* at note 2.

¹⁹⁶ See Hanna Gros & Yolanda Song, “No Life for a Child: A Roadmap to End Immigration Detention of Children and Family Separation” (2016) at 1, online (pdf): *University of Toronto Faculty of Law International Human Rights Program Report* <ihrp.law.utoronto.ca/sites/default/files/PUBLICATIONS/Report-NoLifeForAChild.pdf> [perma.cc/GK6V-VU2T]. The majority could have taken judicial notice of other reports published by the International Human Rights Program on immigration detention: Hanna Gros & Paloma van Groll, “‘We Have No Rights’: Arbitrary Imprisonment and Cruel Treatment of Migrants with Mental Health Issues in Canada” (2015) at 1, online (pdf): *University of Toronto Faculty of Law International Human Rights Program Report* <ihrp.law.utoronto.ca/sites/ihrp.law.utoronto.ca/files/PUBLICATIONS/IHRP%20We%20Have%20No%20Rights%20Report%20web%20170615.pdf> [perma.cc/GU78-WF8Y]; Hanna Gros, “Invisible Citizens: Canadian Children in Immigration Detention” (2017) at 1, online (pdf): *University of Toronto Faculty of Law International Human Rights Program Report* <ihrp.law.utoronto.ca/utfl_file/count/PUBLICATIONS/Report-InvisibleCitizens.pdf> [perma.cc/GK6V-VU2T].

¹⁹⁷ See Cleveland & Rousseau, *supra* note 195 at 415.

¹⁹⁸ See Kronick, Rousseau & Cleveland, *supra* note 195.

¹⁹⁹ See Gros, *supra* note 196 at 16, 18.

²⁰⁰ See Anstis, Blum & Will, *supra* note 2 at 13.

²⁰¹ *Ibid* at 14.

immigration detainees are detained because they constitute a “danger to the public.”²⁰² The *Audit Report* that was before the court underscored similar difficulties.²⁰³

Yet none of this context is found in *Chhina*. The closest the majority came to discussing the larger context regarding immigration detention was reviewing the *Audit Report*. While its pragmatic assessment of the *Audit Report* was commendable, the majority omitted discussions of the systemic shortcomings of immigration detention and the troubling context surrounding it that the *Audit Report* either expressly explored or implied.²⁰⁴

The reason why it would have been preferable for the majority to discuss the context surrounding immigration detention in its judgment pertains to its role as the highest court in the country and the power of its words. As the final arbiter of the law that “guards” and “advises,”²⁰⁵ the SCC’s mere description of the environment in which immigration detention takes place may have motivated administrative actors to revise their conduct, if not invite legislative change. This is because it is one thing for activists and human rights organizations to describe the circumstances underpinning immigration detention. It is quite another for the highest court in Canada to also describe that environment using similar language and tone. The legal and normative weight that the SCC carries in its words could have ushered in an improved detention regime.²⁰⁶

Not every case necessitates that the SCC shine a light on the broader context that envelops the legal issue at bar. It might be prudent to opine on the larger circumstances when the continuation of those circumstances (e.g., indefinite detention of foreign nationals) can tarnish the administration of justice, the legal issue is connected to those circumstances, and there are reliable sources that illuminate the troubling circumstances

²⁰² *Ibid* at n 44.

²⁰³ See *Audit Report*, *supra* note 87: see sections “Fairness Issues for Detained Persons with Mental Health Problems”; “Barriers to Participation of the Detained Person in the Hearing”; “Need for Active Adjudication in Consideration of Alternatives to Detention.”

²⁰⁴ For example, the *Audit Report* expressly discusses detainees with significant mental health issues who have been detained for lengthy periods and the fairness issues that arise therein. *Ibid* at section “Fairness Issues for Detained Persons with Mental Health.”

²⁰⁵ See Kate Glover, “The Supreme Court in a Pluralistic World: Four Readings of a Reference” (2015) 60:4 McGill LJ 839 at 849–50, DOI: <doi.org/10.7202/1034055ar>.

²⁰⁶ Some may argue that discussing the context surrounding immigration detention could be perceived as the SCC engaging in policy discussions, whereby it would be overstepping its institutional role. Such concerns are misplaced, given the modest nature of my suggestion. My criticism is that the majority in *Chhina* could have simply described the context of immigration detention and surveyed the accepted effects that emanated from it. This is no different than the court describing the context surrounding race and policing or people who may pursue medical assistance in dying (see *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 12–18). In other words, describing the context does not generally require the court to overstep its institutional role or venture into novel legal arguments. It is something that the court often does in its judgments.

to which the rules of judicial notice can be appropriately applied. *Le* and *Chhina* were rare instances that met the above restrictions. Regrettably, in *Chhina* the majority decided not to delve into the broader context and missed an opportunity to address the systemic flaws of immigration detention.

VI. WHERE TO GO FROM HERE: CONSEQUENCES FOR DETAINEES AND DECISION-MAKERS

The post-*Chhina* legal landscape may look different for detainees and decision-makers. Although it is beyond the scope of this paper to provide extensive predictions, I outline here some changes that may result based on the majority's decision.

Immigration detainees in lengthy detentions will likely have strong cases to pursue *habeas corpus* relief before provincial superior courts. It remains a live question whether detainees will be able to pursue *habeas corpus* applications if they raise alternative “specific grounds” in alleging that their detention is illegal. For example, imagine a situation where a detainee alleges that their detention is unlawful because as a result of their mental health issues, they were deemed a “high-risk detainee” and were transferred to a provincial jail as opposed to an IHC.²⁰⁷ Pursuing a writ of *habeas corpus* in such a situation will invite courts to assess whether the IRPA can be as advantageous as *habeas corpus*.

For decision-makers, *Chhina* requires significant reflection. The Immigration Division may need to fundamentally reassess its approach to detention review—from its overreliance on the CBSA's representations to conducting *de novo* review in each hearing.²⁰⁸ A modest change that the Immigration Division can make, which may have important benefits, is providing proper and advanced disclosure to detainees.²⁰⁹ While not addressed in *Chhina*, commentators have noted the need for detailed disclosure.²¹⁰ This would ensure that all parties are equally informed of the issues and may result in greater fairness in detention hearings.

For provincial superior courts, a key challenge will be developing a coherent framework for addressing the three contested issues—discussed in section V on missed opportunities—that often arise in lengthy detention cases. Compounding that challenge

²⁰⁷ This situation is not purely hypothetical. See Silverman & Molnar, *supra* note 2 at 119 where the authors note that “[i]f IHC detainees exhibit certain behavioural problems—such as ... mental illness [or] ... suicidal tendencies—they are often transferred to prisons as ‘high-risk detainees.’ This ... transfer compounds detainees’ isolation and there is ‘no established criteria in law to determine when a detainee can or should be transferred from an IHC to a provincial jail.’” See also Gros & Song, Gros & van Groll, and Gros, *supra* note 196.

²⁰⁸ *Chhina* (SCC), *supra* note 4 at para 63.

²⁰⁹ See Anstis, Blum & Will, *supra* note 2 at 10–11.

²¹⁰ See *ibid.* See also Brown (FC), *supra* note 104 at paras 126–27.

will be the need for superior courts to develop a principled basis for departing from their past *habeas corpus* applications. As Professor Daly noted, superior courts, like the Immigration Division, may encounter scenarios where detainees file additional *habeas corpus* applications upon receiving negative results in their initial applications.²¹¹ The courts will require a set of principles to know when to uphold former decisions and when to diverge from them so that there is greater certainty and fairness for the litigants.

Finally, *Chhina* suggests changes for the FC, which appear to be underway.²¹² First, the FC may need to reassess its views on *mandamus*. In *Chhina*, the majority found that the FC's hesitance to issue such relief contributed to *habeas corpus* applications being more advantageous than pursuing judicial review under the IRPA.²¹³ There is jurisprudence from the Federal Court of Appeal where it held that even though *mandamus* is an exceptional form of relief, it could be granted "where there has been substantial delay and the additional delay caused by remitting the matter to the administrative decision-maker for re-decision threatens to bring the administration of justice into disrepute."²¹⁴ Lengthy immigration detentions may fit this rule on granting *mandamus*.

Second, the majority found that the FC had difficulties hearing an application for judicial review within 30 days. By that point, the Immigration Division generally conducts another detention hearing, thus rendering the decision under review before the FC moot.²¹⁵ Although the majority is right to highlight this difficulty, it overlooked the fact that the FC can expedite applications for judicial review²¹⁶ and does so in immigration detention cases.²¹⁷ Moving forward, it may make sense for the FC to implement a court-wide protocol requiring all immigration detention cases to be expedited.

²¹¹ See Daly, *supra* note 125.

²¹² See e.g. *Canada (Public Safety and Emergency Preparedness) v Baniashkar*, 2019 FC 729 (following *Chhina*, the FC noted that there is "a clear indication that certain aspects of our Court's case law [on immigration detention] must be reviewed" at para 14) [*Baniashkar*].

²¹³ See *Chhina* (SCC), *supra* note 4 at paras 65–67.

²¹⁴ *D'Errico v Canada (Attorney General)*, 2014 FCA 95 at para 16. See also *Pointon v British Columbia (Superintendent of Motor Vehicles)*, 2002 BCCA 516 at para 27; *Norgard v Anmore (Village)*, 2009 BCSC 823 at para 46; *Canada (Public Safety and Emergency Preparedness) v LeBon*, 2013 FCA 55 at para 14; Daly, *supra* note 125.

²¹⁵ See *Chhina* (SCC), *supra* note 4 at para 66.

²¹⁶ Federal Courts Citizenship, Immigration and Refugee Protection Rules, SOR/2015-93-22, r 4(1); Federal Courts Rules, SOR/2019-98-106, rr 3, 8.

²¹⁷ See *Canada (Public Safety and Emergency Preparedness) v Sigar*, 2016 FC 1014 at para 3, no 1; *Canada (Public Safety and Emergency Preparedness) v Mukenge*, 2016 FC 331 at paras 1–3; *Ahmed v Canada (Citizenship and Immigration)*, 2015 FC 876 at paras 9–10; *Odosashvili v Canada (Citizenship and Immigration)*, 2014 FC 308 at para 1; *Canada (Citizenship and Immigration) v B072*, 2012 FC 563 at para 1; *Tursunbayev v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 504 at paras 10–13.

Third, although the majority did not provide direct analysis on the jurisprudential shifts needed at the FC in reviewing immigration detention cases, one point that both Justice Karakatsanis²¹⁸ and the ABCA²¹⁹ highlighted was the holding in *Canada (Minister of Citizenship and Immigration) v Thanabalasingham* (*Thanabalasingham*): namely, if the Immigration Division wished to depart from its previous decisions upholding the detention, it needed to provide “clear and compelling reasons.”²²⁰ Given the majority’s concerns about overreliance on past decisions, the *Thanabalasingham* standard has likely run its course.²²¹ The Federal Court may need to articulate a different standard for how and when the Immigration Division can order the release of immigration detainees.

CONCLUSION

The SCC in *Chhina* answered the question of whether immigration detainees can avail themselves of *habeas corpus* protection in the affirmative. It found that the *Peiroo* exception does not proscribe all forms of *habeas corpus* petitions. Rather, if a detainee challenges the legality of their detention on the grounds of length and uncertain duration, then the IRPA detention review scheme is not as broad and advantageous as *habeas corpus*, whereby the latter relief is available.

The majority in *Chhina* made positive contributions to the jurisprudence by reshaping *Peiroo*’s ambit and pragmatically assessing the IRPA detention review regime. However, the majority missed two significant opportunities. The majority did not opine on the context surrounding immigration detention, and thus failed to disinfect the troubling practices that underpin immigration detention. The majority was also silent on three frequently contested issues that arise when *habeas corpus* is applied to immigration detention: namely, determining when detention becomes unduly long such that it is unlawful, adopting a singular approach to calculating the duration of detention, and establishing the proper role of detainee cooperation. Because it did not resolve these tensions, *Chhina*’s ability to accord wide *habeas corpus* protection to immigration detainees might be impeded.

As early as the seventeenth century, common law courts found *habeas corpus* integral to challenging detention to such an extent that they allowed foreign “spies” and “enemies” to access this writ.²²² From this perspective, the SCC laudably followed the grand arc of *habeas corpus* and guaranteed in *Chhina* that a vulnerable group of people—

²¹⁸ See *Chhina* (SCC), *supra* note 4 at para 62.

²¹⁹ See *Chhina* (ABCA), *supra* note 46 at para 55.

²²⁰ See *Thanabalasingham*, *supra* note 80 at para 10.

²²¹ See *Baniashkar*, *supra* note 212 (the Federal Court also implies this point at para 20).

²²² Halliday, *supra* note 8 at 6, 28–29.

immigration detainees—can access such relief. It is hoped that in interpreting and applying *Chhina*, especially on the contested issues that the decision is silent on, the courts below do not lose sight of the broader spirit and tradition of *habeas corpus*. In doing so, *habeas corpus* may come to help other people in difficult circumstances.