PAROLE COMMITTALS AND HABEAS CORPUS

*Thomas A. Cromwell**

I. INTRODUCTION

The Parole Act,[1] though only twenty-seven sections long, has been the subject of a considerable volume of litigation. Its provisions have been before the Supreme Court of Canada on at least seven occasions in recent months,[2] but this is not surprising in view of the extraordinary terms of the statute and the large number of persons affected by it. The Act creates the National Parole Board and invests it with discretionary power over the liberty of the subject which has been described as "tyrannical" and "without precedent".[3] The Board is given "absolute discretion" to grant and revoke parole, and its decisions are not subject to review or appeal.[4] Penal consequences attach to parole revocation and lengthen the term of imprisonment according to a formula which has no relation to the seriousness of the breach of parole conditions.[5] Since 1970 every person sentenced to penitentiary in Canada is automatically subject to the Board's authority upon his release,[6] so that in the year 1974-1975 there were over five thousand persons subject to this administrative power of detention, recommittal and punishment—a power that was exercised four hundred times in that year.[7]

With the increase in the volume of parole litigation has come a renewed interest in the venerable writ of *habeas corpus ad subjiciendum.* Because it is the traditional remedy for illegal imprisonment and because of its summary nature, priority over other cases on crowded dockets, and immunity

---

* Most of the research for this article was done while the writer was a student in the Correctional Law and Legal Assistance Project, Faculty of Law, Queen's University. The assistance of Professors R. R. Price and H. R. S. Ryan is gratefully acknowledged, though the author's mistakes are his own.

[1] R.S.C. 1970, c. P-2.

[2] Howarth v. Nat'l Parole Bd., 18 C.C.C. (2d) 385, 50 D.L.R. (3d) 349 (S.C.C. 1974); Marcotte v. Deputy Attorney-General of Canada, 19 C.C.C. (2d) 257 (S.C.C. 1974); Mitchell v. The Queen, 24 C.C.C. (2d) 241 (S.C.C. 1975); *Ex parte* Carlson, 26 C.C.C. (2d) 65 (Ont. C.A. 1975) (*leave to appeal refused by* S.C.C. Oct. 8, 1975); *Re* Howley (S.C.C. July 12, 1976); *Re* Beaucage (argued before S.C.C. June 15, 1976); Regina v. Gorog, [1975] 4 W.W.R. 191 (Man.) (*reversed on consent judgment* S.C.C.).

[3] Mitchell v. The Queen, *supra* note 2, at 245 (*per* Laskin, C.J.).

[4] Parole Act, §§ 6, 10(1)(e), 23.

[5] Parole Act, § 20.

[6] Parole Act, § 15.

[7] SOLICITOR GENERAL OF CANADA, ANNUAL REPORT 1974-75, at 49.

to costs, it has become the preferred method of reviewing parole committals. [8] The revival of the writ in the parole cases is perhaps justification enough for a re-examination of the scope of review it affords in committals under the Parole Act, but difficulties of jurisdiction created by the Federal Court Act [9] make such a study even more desirable.

Habeas corpus has traditionally been associated with an ancillary writ of certiorari, often referred to as certiorari in aid of habeas corpus. As a consequence of the constant association of the two writs, the exact scope of review available on habeas corpus alone (*i.e.*, in absence of certiorari in aid) has become obscured. Section 18 of the Federal Court Act vests exclusive jurisdiction in the Federal Court to issue, *inter alia*, writs of certiorari against federal boards, commissions or tribunals, of which the National Parole Board and a director of a federal penitentiary are examples. If, as four members of the Supreme Court of Canada have held in the context of a Manitoba case, [10] the enactment of this section has removed jurisdiction from the Provincial Superior Courts to issue certiorari in aid of habeas corpus to federal agencies, the result is that no court in Canada has jurisdiction to issue both habeas corpus and certiorari in aid thereof in any case involving a committal under the Parole Act. Thus the scope of habeas corpus alone becomes a question of considerable practical significance.

In considering the review of parole committals by the writ of habeas corpus, three questions call for attention. What procedures must be observed to accomplish a lawful suspension or revocation of parole? What formal requirements must the documents which evidence these procedures satisfy? What types of defects in either the procedures or the documents will entitle an applicant for habeas corpus to relief?

Since the fourteenth century, writs of habeas corpus have issued directing gaolers to produce the body of a prisoner and the cause of his detention before a Superior Court. [11] The development of habeas corpus parallels Parliament's attempt to limit the Executive's power of commitment and to place that power in the judiciary. [12] Hence the development of the general rule that a judicial commitment, regular on its face, is sufficient authority for a prisoner's detention and constitutes a good return to a writ of habeas corpus.

The review of committal on a writ of habeas corpus goes to two points: the formal sufficiency of the document purporting to authorize the detention

---

[8] Habeas Corpus is brought in chambers by originating notice of motion: *O.R.P.* 209. As to costs, see *Re* Ange, [1970] 3 O.R. 153.

[9] R.S.C. 1970 (2d Supp.), c. 10.

[10] Mitchell v. The Queen, *supra* note 2.

[11] *See* Cohen, *Some Considerations on the Origins of Habeas Corpus*, 16 CAN. B. REV. 92 (1938), and *Habeas Corpus Cum Causa—The Emergence of the Modern Writ*, 18 CAN. B. REV. 10 & 172 (1940). The writ in fact antedates the *Magna Carta*, but it was not particularly associated with relief for illegal imprisonment until the fourteenth century.

[12] *See* the Petition of Right, 3 Car. 1, c. 1(a) (1628), the Habeas Corpus Act, 16 Car. 1, c. 10 (1640), and the Habeas Corpus Act, 31 Car. 2, c. 2 (1679).

and the jurisdiction of the court, tribunal or officer issuing the document. In *In re Trepanier*, Chief Justice Ritchie said:

> We [the judges of the Supreme Court] are to have concurrent jurisdiction with the courts or judges of the several provinces to issue the writ of *habeas corpus ad subjiciendum* for the purpose of inquiry into the cause of commitment in any criminal case under any act of the Parliament of Canada; so soon as we have issued the writ and inquired into the cause of the conviction, and the proceedings show that the prisoner is held on a regular warrant, issued on a regular conviction by a court of competent judicial authority having jurisdiction over the offence alleged against the prisoner and over the person of the prisoner, and no want of jurisdiction is shown or alleged, we have discharged our duty and we are bound to refuse the writ, or remand the prisoner if the writ has been issued. [13]

Similarly in *In re Sproule*:

> [W]hen it appeared by the records of courts of competent criminal jurisdiction, courts having jurisdiction over the person and over the offence with which he was charged that he had been tried, convicted and sentenced and *was held under such sentence*, the learned judge should have refused to grant the writ. [14]

II. Formal Sufficiency of the Document

The document must be free of obvious errors and show that it is issued with proper authority. These propositions were affirmed by the Supreme Court of Canada in *Goldhar v. The Queen (No. 2)*, [15] where in sustaining the adequacy of a Calendar of Sentence returned to a writ of habeas corpus, Chief Justice Kerwin said: "The Calendar of Sentence is *a certificate regular on its face* that the appellant was *convicted by a court of competent criminal jurisdiction* and therefore it is impossible to go behind it on an application for *habeas corpus* . . . ." [16]

Statutory conditions precedent to jurisdiction must be recited on the face of the warrant. For example, imprisonment upon conviction presupposes conviction for an offence; therefore a warrant's failure to disclose an offence known to the law is fatal to its validity. [17]

In *Re Munavish*, [18] a case which considered the validity of a committal under the old Ticket of Leave Act, [19] the warrant under which the applicant had been apprehended recited that the Governor-General had revoked Munavish's permission to be at large, but failed to recite the existence of an order under the hand and seal of the Secretary of State—a condition prece-

---

[13] 12 S.C.R. 111, at 120 (1885).

[14] 12 S.C.R. 140, at 190-91 (1886) (emphasis added).

[15] [1960] S.C.R. 431, 126 C.C.C. 337.

[16] *Id.* at 435, 126 C.C.C. at 341 (emphasis added).

[17] *See* Regina v. McLeod-Henderson, 21 W.W.R. 705, 118 C.C.C. 128 (B.C.S.C. 1957), and *Re* Eustace, 19 W.W.R. 612, 116 C.C.C. 196 (B.C.S.C. 1956).

[18] 26 W.W.R. 175, 121 C.C.C. 299 (B.C.S.C. 1958).

[19] R.S.C. 1952, c. 264.

dent to apprehension of the convict. In granting a motion for discharge upon return of a writ of habeas corpus the court said:

> Nowhere in the warrant returned before me is there any mention or recital of the fact that a warrant under the hand and seal of the Secretary of State directed to the commissioner of the Royal Canadian Mounted Police at Ottawa was received by him nor in fact is there anything in the material before me to indicate that such a warrant is or was ever in existence or that such was ever issued.
>
> On applications for *habeas corpus* the general principle is that the court may look only at the warrant under which the prisoner is held to ascertain therefrom whether or not there was jurisdiction in the person issuing the warrant . . . and whether the warrant on its face presents a valid and lawful authority for holding the prisoner. These two essential matters must be apparent on the face of the warrant.[20]

Similarly, where the warrant of committal failed to recite reasons for the order for payment of a fine forthwith, as required by section 722(7) of the Criminal Code, the applicant was discharged from custody.[21]

A formal defect in the warrant of committal may not necessarily result in the discharge of the inmate. The Criminal Code contains curative provisions which may overcome minor defects of form.[22] In addition, at common law a wide range of amendments of the return to a writ of habeas corpus is permissible, provided there appears to be legal justification for the prisoner's detention which the warrant fails to recite.[23] Mr. Justice McInnes indicated in *Munavish* that it was not only the warrant's failure to *recite* a condition precedent to committal, but the apparent absence in fact of such a condition, that moved him to order the discharge of the prisoner. Had the Crown shown that the essential step was taken, the Court would impliedly have allowed a new return to be lodged and the prisoner would have been remanded. A detailed consideration of the power to amend the return and the correlative question of what type of defect will be viewed as one of substance as opposed to one of form, is beyond the scope of this paper. But it may safely be said that only a warrant's failure to recite matters going to the root of jurisdiction is fatal to the validity of the warrant and that proof of the facts necessary to establish such jurisdiction may be allowed even though the warrant is invalid on its face. As Mr. Justice Rinfret (as he then was) said:

> The writ of *habeas corpus* is a prerogative process available when "there is a deprivation of personal liberty without legal justification" . . . . Courts should not permit the use of this great writ to free criminals on mere

---

[20] *Supra* note 18, at 178, 121 C.C.C. at 302.

[21] *Ex parte* Andrews, [1974] 2 W.W.R. 481, 15 C.C.C. (2d) 43 (B.C.S.C. 1973). *See also* Sangster v. The Queen, [1976] 2 W.W.R. 284 (N.W.T.S.C. 1975).

[22] *See Re* Risby (B.C.S.C. Feb. 10, 1975). The leading case on the interpretation of § 710 is Sanders v. The Queen, [1970] S.C.R. 109, 10 D.L.R. (3d) 638 (1969).

[23] *Ex parte* Fong Goey Jow, [1948] S.C.R. 37, [1948] 1 D.L.R. 817 (1947).

> technicalities. It is the spirit of our Criminal Laws . . . that defects and informalities be corrected so as "to prevent a denial of justice" . . . .[24]

The present Parole Act authorizes apprehension or committal (or both) by warrant as follows.

(1) A member of the Board or a person designate may, by warrant, suspend parole and authorize the apprehension of the parolee: section 16(1).
(2) A magistrate may, by warrant, remand the inmate whose parole has been suspended: section 16(2).
(3) When a parole has been revoked or forfeited, the Board may, by warrant, authorize the apprehension of the parolee: section 18(1).
(4) A magistrate may, by warrant, recommit to penitentiary an inmate whose parole has been revoked or forfeited: section 18(2).

A complex chain of documents may be before the court on an application for habeas corpus in which parole is involved. When an accused is convicted and sentenced to penitentiary, his imprisonment is authorized by a Calendar of Sentence or a Warrant of Committal.[25] If he is paroled, he is issued a parole certificate,[26] and so long as his parole remains unrevoked and unforfeited, he is deemed to be serving his sentence and is not liable to be imprisoned on it.[27] Should the inmate be jailed, production of his parole certificate would render the original Warrant of Committal an inadequate return to a writ of habeas corpus.

When parole is suspended under section 16(1), the inmate is arrested with a warrant, taken before a magistrate and remanded in custody for an indefinite period.[28] Should habeas corpus proceedings be taken now, what would constitute an adequate return? The Parole Act does not set out a form for the warrants, but, in accordance with the authorities discussed above, an adequate return would consist of a warrant signed by the magistrate under section 16(2) and reciting the conviction and sentence of the inmate, his release on parole, the suspension of his parole by a person designate or a member of the Board pursuant to section 16(1), his apprehension under the section 16(1) warrant and his production before a magistrate as soon as could conveniently be arranged. Failure to include any of these matters would place the onus on the Crown to seek leave to produce a new return, and the Crown's failure to do so would, subject to the curative provisions discussed above, entitle the prisoner to be discharged.[29]

---

[24] *In re* Henderson, [1930] S.C.R. 45, at 55-56, [1930] 1 D.L.R. 420, at 429. *See also* Regina v. Mabee, 6 C.C.C. (2d) 467 (Man. 1972).

[25] Criminal Code, R.S.C. 1970, c. C-34, Form 18.

[26] Parole Act, R.S.C. 1970, c. P-2, § 12.

[27] Parole Act, § 13.

[28] Parole Act, §§ 16(2) & 10(1)(e).

[29] For a detailed discussion of the recitals essential in parole warrants, see *Re* Lewis, [1975] 6 W.W.R. 104 (B.C.S.C.) and *Re* Dunlop (B.C.S.C. Oct. 22, 1975). *Lewis* goes to the extreme in holding that one or more of the reasons for parole suspension set out in § 16(1) must be recited; it has, however, been reversed on appeal *sub nom.* Regina v. Lewis, [1976] 2 W.W.R. 605 (1975).

When the convict's parole has been suspended, he is committed for an indefinite period to await either the cancellation of the suspension or the revocation of his parole. While on suspension, the sentence continues to run, *but it cannot expire*, for the Board has jurisdiction to keep the inmate in custody on suspension and to revoke his parole notwithstanding that his sentence, in absence of the suspension, would have expired. [30] No time limit is set for dealing with the case of a suspended parolee and delays of several months are not unheard of. Although there is no case on point, it may be assumed that a totally unreasonable delay would result in the Board's losing jurisdiction over the case and the inmate's being entitled to release on habeas corpus. The date of the original suspension must appear on the warrant of committal so that on the hearing of an application for habeas corpus, the time that had passed since the suspension would be apparent on the face of the return to the writ.

The procedural and formal requirements of parole revocation are somewhat unclear. The Parole Act would appear at first reading to contemplate a four-step procedure as outlined in sections 16 and 18. Parole may be suspended for the reasons enumerated in section 16(1), the case being considered at the local level and leading either to the cancellation of the suspension or to the forwarding of the case to the Board. If the case is forwarded to the Board, it is to receive further consideration leading to a decision either to cancel the suspension or revoke the parole. If the parole is revoked, the inmate is to be produced before a magistrate for recommitment. There is authority for the proposition that sections 16 and 18 establish a single, mandatory code of revocation procedure as described above, [31] but the weight of authority supports the view that they prescribe a permissive procedure which is suitable only for certain situations. [32] It has been held, for example, that an inmate who is in custody on a parole suspension at the time his parole is revoked need not be produced before a magistrate for recommitment pursuant to section 18. [33] In such a case the detention is justified by the original conviction, the warrant of committal upon suspension and the order of revocation, the latter usually in the form of a letter from the Parole Board to the director of the institution in which the inmate is imprisoned. It has also been held that the whole suspension procedure may be dispensed with and the parole directly revoked by the Board. [34] As a result, the parolee has neither substantive criteria nor procedural safeguards standing between him and the Board's power of revocation. He is indeed a "puppet on a string", [35] and no matter how unworthy the puppet or

---

[30] *Supra*, note 28.

[31] *Re* Howarth and Nat'l Parole Bd., 14 C.C.C. (2d) 145 (F.C.A. 1974).

[32] *Re* Nat'l Parole Bd. and Edmonds, 18 C.C.C. (2d) 401 (F.C.A. 1975); *Re* Collins (Ont. H.C. Jan. 7, 1976).

[33] *Re* Hanna, 27 C.C.C. (2d) 192 (Ont. C.A. 1975); *Re* MacDonald, [1976] 1 F.C. 532 (C.A.).

[34] *Re* Collins, *supra* note 32.

[35] Mitchell v. The Queen, *supra* note 2, at 245 (*per* Laskin C.J.C.).

benign the puppeteer, a statute creating such a system has no place in a nation espousing the rule of law.

These considerations suggest the importance of the magistrate acting under sections 16 and 18. As the only judicial officer involved in the proceedings of suspension, revocation and recommittal, with their attendant penal consequences, he ought to conduct any inquiries necessary to ensure that the contents of the warrant are true in every respect. If there is doubt, he should refuse to sign the warrant and not, by signing it, attach a presumption of correctness to its recitals and so force the inmate to seek the relief that may be available to him elsewhere. The magistrate should ascertain that the recital of the original conviction is accurate, that the inmate was released on parole and that his sentence had not expired at the time of suspension. [36] It may be necessary for him to see the original warrant of committal upon conviction, the parole certificate, the warrant under section 16(1) and the inmate's sentence calculation, all of which are readily available. The magistrate must take these precautions to avoid placing a judicial gloss on improper administrative action. [37]

III. JURISDICTION

Having examined the procedures of suspension and revocation and the formal requirements of the documents evidencing those procedures, we turn to consider the role of habeas corpus in the review of committals in which the alleged defect is not apparent on the face of the warrant or other document purporting to justify the imprisonment.

It is often said that on an application for habeas corpus the court is confined to an examination of the face of the warrant of committal, but this statement needs refinement. [38] If a warrant, regular on its face to justify the detention of "A.B.", is returned to a writ of habeas corpus, common sense demands that the prisoner should be able to argue that he is not "A.B.", or that he has never been convicted of a criminal offence, or that he had never been released on parole, or that the officer who purported to sign the warrant was not empowered to do so. None of these defects would be apparent on the fact of the warrant, yet all would be fatal to the jurisdiction to suspend or revoke parole and would render the imprisonment illegal. To hold that habeas corpus is not available to a prisoner detained under such circumstances is to make it "[a]n inadequate, ineffectual remedy . . .

---

[36] This occurred in Regina v. Baker, [1968] 1 O.R. 248 (H.C.).

[37] In *Re* Hanna, *supra* note 33, Judge Delisle declined on three occasions to sign a revocation warrant. The effect of the warrant in forcing the inmate to take other proceedings appears to have weighed heavily with the learned judge. For differing views of the magistrate's role see *Re* McKinnon, 24 C.C.C. (2d) 536 (N.B.C.A. 1975) and *Re* Thompson, 25 C.C.C. (2d) 228 (N.S.S.C. 1975).

[38] *In re* Shumiatcher, [1962] S.C.R. 38, 31 D.L.R. (2d) 2 (1961).

a rope thrown out to a drowning man which cannot reach him . . . the offering of baubles to the children of one's family, when they are crying for bread". [39]

Authority, as well as reason, compels a broader view of the court's role in habeas corpus. If the defect alleged is one that, if established, would render the commitment a nullity, the court may inquire into the matter on an application for habeas corpus alone. As Amnon Rubinstein has said:

> From a purely formalistic point of view, habeas corpus must be considered as a collateral method of attack. It is usually directed against the person having the control of the body, such as the governor of the prison, and not against the person ordering the imprisonment . . . . The court does not order the removal of the record of the proceedings and the decision which led to the imprisonment, nor is that decision directly challenged by the application for the writ. The validity of that decision is raised incidentally, and it seems therefore that *unless the decision is a nullity* any power of review should be excluded. [40]

In the early law the propriety of going behind the return in any circumstances was unsettled. Doubts were expressed in the examination of judges before the House of Lords in 1758. [41] For civil committals, the issue was resolved by statute in favour of receipt of such evidence, [42] and, by the nineteenth century, the authorities took a similar view of criminal committals. [43]

The court's ability to go behind an apparently valid committal on a question of jurisdiction has been recognized by the Supreme Court of Canada. In *Trepanier's Case*, Chief Justice Ritchie noted that the prisoner must be remanded if the return is regular on its face and if "no want of jurisdiction is shown *or alleged* . . .". [44] In *Ex parte McCaud*, [45] an application for habeas corpus alone to Mr. Justice Spence in chambers, the learned judge, whose reasons were adopted by the full Court and again approved in *Howarth v. National Parole Board*, [46] said: "Were I of opinion that there had been any action by the [National Parole] Board beyond its jurisdiction, I would not be of the opinion that [section 21] would be effective to bar consideration by any court, or other authority." [47]

On the strength of these authorities, it may be concluded that defects of jurisdiction making the committal void may be the basis of an application

---

[39] Letter from Foster, J., to Parker, C.B., describing the need for a broader view of habeas corpus, quoted in R. HURD, HURD ON HABEAS CORPUS 262 (2d ed. 1876).

[40] Rubinstein, *Habeas Corpus as a Means of Review*, 27 MODERN L. REV. 322, at 323 (1964) (emphasis added). *Accord* HURD, *supra* note 39, at 325.

[41] W. HOLDSWORTH, 9 A HISTORY OF ENGLISH LAW 120 (3d ed. 1944); HURD, *supra* note 39, at 259.

[42] Habeas Corpus Act, 56 Geo. 3, c. 100 (1816).

[43] *Re* Bailey, 3 El. & Bl. 607, 118 E.R. 1269 (Q.B. 1854); *Re* Baker, 2 H. & N. 219, 157 E.R. 219 (Ex. 1857); *Re* Authers, 22 Q.B.D. 345, 60 L.T. 454 (1889).

[44] *Supra* note 13, at 120 (emphasis added).

[45] [1965] 1 C.C.C. 168, 43 C.R. 252 (S.C.C. Chambers 1964).

[46] *Supra* note 2.

[47] *Supra* note 45, at 170.

for a writ of habeas corpus, whether or not the defect is patent. The difficulty, however, is in defining a jurisdictional defect. D. M. Gordon acknowledged the difficulty in these words:

> Anything like serious examination at large of the case law on jurisdiction must convince an open-minded inquirer that there is virtually no proposition so preposterous that some show of authority to support it cannot be found. Moreover, the answers to some jurisdiction puzzles, once satisfactorily solved by the courts, have now been lost in the mist of obscurity and fallacy that veils the whole conception of jurisdiction.[48]

We may begin with the case of *Regina v. Bolton*,[49] which has been described as among the "classic expositions of sound law".[50] Although the case dealt with certiorari, the remarks relied on have been approved by the Supreme Court of Canada[51] and the English Court of Appeal[52] as accurately stating the law relating to habeas corpus:

> [In the present case] the Legislature has trusted . . . the final jurisdiction of the merits to the magistrate below; [and] this Court has no jurisdiction as to the merits either originally or on appeal. All that we can then do . . . is to see that the case *was one within their jurisdiction* and that their proceedings on the face of them are regular and according to law.[53]

A distinction must be drawn between those points going to the essential preconditions of the tribunal's jurisdiction and those points going to the merits of the case. The latter are entrusted to the inferior tribunal; only as regards the former is it open to the court on an application for habeas corpus to go behind the warrant of committal.

This distinction is recognized in *Rex. v. Commanding Officer of Morn Hill Camp.*[54] An Irishman who had obtained temporary work in England was brought before a magistrate for failing to comply with an order calling him up from the reserve for permanent service and was committed to the custody of the military under the Military Service Act, 1916.[55] The prisoner applied for habeas corpus on the ground that the Act did not apply to him. In refusing the writ, Lord Chief Justice Reading said:

> In this case the magistrate has held that the prosecutor was "for the time being ordinarily resident in Great Britain" within the meaning of [the statute]. The prosecutor has sought to question that decision by means of a writ of habeas corpus. If the jurisdiction exercised by the magistrate is a jurisdiction which has been conferred upon him by the statute, then, notwithstanding that he may have come to a wrong decision on the facts or upon the law, it is clear that his decision cannot be questioned by this

---

[48] Gordon, *The Relation of Facts to Jurisdiction*, 45 L.Q.R. 459 (1929).

[49] 1 Q.B. 66, 113 E.R. 1054 (1841).

[50] Gordon, *supra* note 48, at 459, n. 2.

[51] *In re* Trepanier, *supra* note 13, at 115-16.

[52] Rex. v. Commanding Officer of Morn Hill Camp, [1917] 1 K.B. 176, 115 L.T. 927 (C.A. 1916).

[53] *Supra* note 49, at 72, 113 E.R. at 1057 (emphasis added).

[54] *Supra* note 52.

[55] 5 & 6 Geo. 5, c. 104, and 6 & 7 Geo. 5, c. 15.

> procedure. *In the present case there is no doubt as to the jurisdiction of the magistrate. It is not suggested that he was not the proper tribunal to deal with the case.* [56]

It is clear that the term "jurisdiction" is being used in the narrow sense favoured by Lord Reid in *Anisminic Ltd. v. Foreign Compensation Commission* [57] of "being entitled to enter on the inquiry". On an application for habeas corpus, the court may review the conditions precedent to jurisdiction, whether or not the defect is apparent on the face of the warrant, but it may not constitute itself an appellate tribunal. [58]

In deciding what facts are conditions precedent to the tribunal's jurisdiction, the following passage from *Regina v. Governor of Brixton Prison, Ex parte Schtraks* is helpful:

> Proceeding by *habeas corpus* is analogous to that by *certiorari* to remove a conviction . . . . Affidavits are not admissible to controvert facts found by the judgment of a court of competent jurisdiction, though *they may be received to show some extrinsic collateral matter essential to jurisdiction or to show total want or excess of jurisdiction.* [59]

This distinction was recognized by Mr. Justice Judson in *In re Shumiatcher.* [60] Shumiatcher had been indicted, *inter alia*, for unlawfully counselling one Leier, a person authorized by law to make a solemn declaration, to make a false solemn declaration, and he had been committed to stand trial. He applied for habeas corpus on the ground that the indictment failed to disclose an offence known to the law because, as he asserted, Leier was not a person authorized by law to make a solemn declaration. Mr. Justice Judson dismissed the application on the ground that Shumiatcher's argument required a reconsideration of a matter which was entrusted to the trier of fact at the trial and was not an essential preliminary to committal. An argument analogous to Shumiatcher's would be that an indictment charging the murder of a person who is still alive fails to disclose an offence known to the law. This is to confuse facts which must be alleged before the trial judge may begin a trial with facts which must be proved to the satisfaction of the trier of fact before a conviction may be entered. Only the former defect may be considered on an application for habeas corpus. If Mr. Justice Judson had considered Shumiatcher's argument, he would have been considering the *merits* of the case, not an extraneous point going to jurisdiction. The learned judge's assertions that he was confined to the face of the committal must be read in light of the facts of the case.

The distinction between conditions precedent to jurisdiction and questions on the merits was lost on Mr. Justice Ritchie in *Mitchell v. The Queen*,

---

[56] *Supra* note 52, at 179, 115 L.T. at 929 (emphasis added).

[57] [1969] 1 All E.R. 208, [1969] 2 W.L.R. 163 (H.L. 1968).

[58] *See In re* Trepanier, supra note 13; *Re* Richards, 83 C.C.C. 394, [1945] 3 D.L.R. 87 (P.E.I.S.C.); Rex v. Martin, 60 O.L.R. 577, 48 C.C.C. 23 (S.C. Chambers 1927).

[59] [1962] 3 W.L.R. 1013, at 1045 (emphasis added).

[60] *Supra* note 38.

but his misapprehension was not shared by a majority of the Court. [61] The applicant for the writ of habeas corpus alleged by affidavit that he had been improperly arrested under section 16(1) of the Parole Act and that the improper arrest rendered the subsequent warrants under sections 16(2), 18(1) and 18(2) nullities. Four members of the Court, following the distinction drawn above, agreed that the affidavit could be considered, and differed only as to whether the alleged defects were in law fatal to the validity of the committal.

IV. Conclusion

On both reason and authority it may be concluded that the court, on an application for habeas corpus, is not bound by the face of the return if a defect of jurisdiction rendering the committal a nullity is alleged. The position in Ontario is even more clear, since the court is specifically permitted *by statute* to receive evidence in criminal cases to controvert the truth of the return to a writ of habeas corpus obtained in relation to a criminal matter. [62]

Having attempted to define the circumstances under which the court may "go behind" the face of the warrant of committal or other document purporting to justify the imprisonment, it remains to consider some specific situations under the Parole Act in which it may be appropriate for it to do so.

It will always be open to the prisoner to argue that he is not the person referred to in the document. Similarly, he may argue that the document is a forgery, although by virtue of section 24 of the Parole Act he must bear the burden of adducing relevant evidence. Both of these arguments go to the root of jurisdiction, in the first case to jurisdiction over the subject matter and in the second to the authority of the person purporting to order the detention. Although there is no authority on either point, it is submitted that the correctness of these assertions is self-evident when the consequences of acting on the opposite view are considered. There is English Court of Appeal authority supporting the legitimacy of the court "going behind" the return to a writ of habeas corpus if there is reason to suspect that it may be a "mere sham". [63]

It is surely open to the inmate to argue, on an application for habeas corpus alone, that he has never been released on parole at all and thus has never become subject to the Board's authority. Parole is defined as "au-

---

[61] *Supra* note 2. Martland and de Grandpré, though concurring in the result, did not share Ritchie's view of this issue, nor did the three dissenting judges.

[62] The statute governing habeas corpus is the Liberty of the Subject Act, Province of Canada Statutes 1865-66, c. 45, which is in force in Ontario by virtue of § 129 of the B.N.A. Act. *See Ex parte* Johnston, [1959] O.R. 322, 18 D.L.R. (2d) 102, and Regina v. Botting, [1966] 2 O.R. 121, 56 D.L.R. (2d) 25. There can be little doubt that habeas corpus in relation to parole committals is a criminal matter. *See generally In re* Storgoff, [1945] S.C.R. 526, [1945] 3 D.L.R. 673.

[63] Rex v. Chiswick Police Station Superintendent, [1918] 1 K.B. 578, at 586, 589.

thority . . . to be at large"; [64] it is possible that the conditions of an inmate's release could depart so drastically from this definition that the Board would have exceeded its jurisdiction in purporting to release him on such conditions. Such an argument might succeed if the conditions of parole were so restrictive that they constituted a de facto continuation of close custody. [65]

It has been held that the penal consequences of revocation of a full parole as prescribed by section 20 do not attach to the revocation of a day parole. [66] Notwithstanding a recital in the warrant that the inmate had been released on full parole, it is submitted that it would be open to the court, on an application for habeas corpus alone, to receive evidence that the conditions of release had in fact been those of a day parole. [67]

There may be two procedural points of jurisdictional significance that would be reviewable on habeas corpus alone. Following the suspension of parole, inquiries must be made, and within fourteen days the suspension is either to be cancelled or the case referred to the Board. It has been argued that failure to make the inquiries or to forward the case within fourteen days would result in the loss of jurisdiction over the matter. [68] If this is so, then there is no doubt that habeas corpus is an appropriate remedy.

The court may consider a variety of arguments concerning details of sentence calculation on an application for habeas corpus alone. Statutes (further complicated by amendment in 1969) establishing the crediting, forfeiture and recrediting of both statutory and earned remission make the exact computation of the inmate's sentence a sophisticated arithmetical procedure. [69] Errors of calculation will not appear on the face of the return and the exact duration of the sentence cannot be determined without information which is internal to the Penitentiary Service, such as the number of days of earned remission that have been credited and the number of days of statutory remission that have been lost as a result of disciplinary proceedings in Warden's court. The inmate may raise these problems of calculation on an application for habeas corpus alone. His argument is not that the warrant is invalid, but that its effect is spent. Authority may be found in *Sproule's Case*, [70] *Re Featherstone*, [71] and *Ex parte Carlson*. [72]

These are some specific examples of the types of jurisdictional defects for which habeas corpus alone may be an appropriate remedy. While the enactment of section 18 of the Federal Court Act and the judgment of Mr.

---

[64] Parole Act, R.S.C. 1970, c. P-2, § 2.

[65] It is assumed that this sort of argument could be considered on an application for habeas corpus with certiorari in aid: *Re* Kerswill (Ont. H.C. Nov. 17, 1975).

[66] Regina v. Hales, 18 C.C.C. (2d) 240 (Man. 1974); *Ex parte* Carlson, *supra* note 2.

[67] *See* the Liberty of the Subject Act, Province of Canada Statutes 1865-66, c. 45, § 3.

[68] Regina v. Gorog, *supra* note 2.

[69] *See, e.g.*, Marcotte v. Deputy Attorney-General of Canada, *supra* note 2.

[70] *Supra* note 14.

[71] 37 Cr. App. R. 146 (Div'l Ct. 1953).

[72] *Supra* note 2.

Justice Ritchie in *Mitchell v. The Queen*[73] have created uncertainty as to the availability of certiorari in aid of habeas corpus, the "great writ" itself, properly understood, is a powerful instrument of judicial review of committals under the Parole Act.

[73] *Supra* note 2.