TERRY LEE MAY v. WARDEN OF FERNDALE INSTITUTION

FACTUM OF INTERVENER BC CIVIL LIBERTIES ASSOCIATION

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PART I: STATEMENT OF FACTS

1. The British Columbia Civil Liberties Association (hereafter "BCCLA") is the oldest and most active civil liberties group in Canada. The mandate of the BCCLA is to preserve, defend, maintain and extend civil liberties and human rights in British Columbia and across Canada, including the civil and human rights of prisoners.

2. The BCCLA adopts the statement of facts set out in the Appellants' factum.

PART II: QUESTIONS IN ISSUE

3. In their factum the Appellants pose three issues. The BCCLA's intervention is limited to the first of those issues: Must federal prisoners, seeking to challenge the lawfulness of deprivations on their residual liberty, first exhaust alternative remedies, including an application for judicial review to the Federal Court of Canada, as a condition precedent to applying to a provincial superior court for a remedy in the nature of *habeas corpus* or adduce a reasonable explanation of the inadequacy of those alternative remedies.

PART III: ARGUMENT

A. The Role of Judicial Intervention in the Prison

4. This case is one of great importance in the long and continuing struggle to ensure that the Rule of Law runs inside Canadian prisons. The case is about the crucial role of judicial intervention, involving both the jurisdiction of the federal court and provincial superior courts, to ensure that the rights of prisoners are respected and that the Correctional Service of Canada, as an integral part of the administration of criminal justice, adheres to its lawful authority.

B. The Hands - Off Doctrine

5. At common law, the person convicted of felony and sentenced to imprisonment was regarded as being devoid of rights. This view flowed historically from the old

English practices of outlawry and attaint, the consequences of which were that the convicted felon lost all civil and proprietary rights and was regarded in law as dead. The warden of Kingston Penitentiary was properly reflecting the traditional status of the felon when in 1867 he wrote, "so long as a convict is confined here I regard him as dead to all transactions of the outer world".

> M. Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons*, at 47; online at: www.justicebehindthewalls.net

6. Although the concept of civil death was abolished in most common-law jurisdictions by the end of the nineteenth century, the prisoner continued to be viewed in law as a person without rights. It was this view that provided the original rationale for courts in Canada, the United States, and England to refuse to review the internal decision-making of prison officials. The effect of this hands-off approach was to immunize the prison from public scrutiny through the judicial process and to place prison officials in a position of virtual invulnerability and absolute power over the persons committed to their institutions.

> *Justice Behind the Walls*, *supra,* at 49-50

C. The 1977 Parliamentary Sub-Committee Report

7. In Canada by the early 1970s, the insulation of prison justice from public and legal scrutiny was increasingly showing serious fault lines. An unprecedented trilogy of riots in 1976 resulted in the appointment of a House of Commons Sub-Committee to undertake a major inquiry. The Subcommittee's report provided a dramatic account of the crisis that engulfed the Canadian penitentiary system in the mid-1970s.

> *Justice Behind the Walls, supra,* at 50-51

8. In the very first paragraph of the chapter entitled "Justice within the Walls" the Sub-Committee pronounced judgment on the state of prison justice.

> There is a great deal of irony in the fact that imprisonment -- the ultimate product of our system of criminal justice -- itself epitomizes injustice. We have in mind the general absence within penitentiaries of a system of justice that protects the victim as well as punishes the transgressor; a system of justice that provides a rational basis for order in a community -- including a prison community -- according to decent standards and rules known in advance; a system of justice that is manifested

> by fair and impartial procedures that are strictly observed; a system of justice that proceeds from rules that cannot be avoided at will; a system of justice to which all are subject without fear or favour. In other words, we mean justice according to Canadian law. In penitentiaries, some of these constituents of justice simply do not exist. Others are only a matter of degree -- a situation which is hardly consistent with any understandable or coherent concept of justice.
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> House of Commons Sub-Committee on the Penitentiary System in Canada, *Report to Parliament* (1977) at 85

9. To redress this situation, the Sub-Committee advocated that two principles be accepted. The first was that the Rule of Law must prevail inside Canadian penitentiaries.

> The Rule of Law establishes rights and interests under law and protects them against the illicit or illegal use of any power, private or official, by providing recourse to the courts through the legal process. The administrative process, however, may or may not protect these things, or may itself interfere with them, depending on the discretion of those who are given statutory administrative powers. In penitentiaries, almost all elements of the life and experience of inmates are governed by administrative authority rather than law. We have concluded that such a situation is neither necessary for, nor has it resulted in, the protection of society through sound correctional practice. It is essential that the Rule of Law prevail in Canadian penitentiaries.
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> *Report to Parliament, supra,* at 86

10. The second principle was that:

> Justice for inmates is a personal right and also an essential condition of their socialization and personal reformation. It implies both respect for the person and property of others and fairness in treatment. The arbitrariness traditionally associated with prison life must be replaced by clear rules, fair disciplinary procedures and the providing of reasons for all decisions affecting inmates.
>
> *Report to Parliament supra,* at 87

11. To bring the Rule of Law into prison, the Sub-Committee made recommendations for legislative and administrative reforms, notably that independent chairpersons be appointed in all institutions to preside over disciplinary hearings and the establishment of a grievance system. With these reforms in place, the Sub-Committee envisaged a vital but focussed role for the courts.

> It should then lie with the courts to ensure that those individuals and agencies involved in the management and administration of the revised system adhere to general standards of natural justice and due process of law as they substantially exist elsewhere in the criminal justice system . . . We suggest that it would be both reasonable and appropriate to proceed in such a way as to allow a much greater scope for judicial control over official activity and the conditions of correction in a reformed penitentiary system than is now feasible. Assuming that the system is definitive in its commitment, clear in its intentions, and effective in its prescription,

> then the nature of the task remaining to be done by the courts in ensuring that the Rule of Law prevails within penitentiaries should not be disproportionate to what they do outside prison walls on an on-going basis. Abuse of power and denial of justice are always possible under any system, no matter how well conceived or organized it may be. These things are felt no less keenly in prisons than elsewhere, and their consequences in a penitentiary setting are often far more severe.
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> *Report to Parliament, supra,* at 87

D. The Demise of the Hands-off Doctrine

12. At the time the House of Commons Sub-Committee report was published, Canadian prisoners who sought redress in the courts faced a conceptual impasse. Under then prevailing principles of administrative law the only decisions subject to judicial review were those the courts classified as "judicial" or "quasi-judicial", as opposed to "administrative". Within this scheme of classification, with very limited exceptions, decisions made by correctional officials were deemed administrative and non-reviewable.

> *Justice Behind the Walls, supra,* at 54

13. Two years after the *Report to Parliament* in 1979 this Court made an historic breakthrough in extending judicial review to prisoners. *Martineau* v. *Matsqui Institution Inmate Disciplinary Board (No. 2)*, provided relief from the conceptual impasse created by the dichotomy between "judicial" and "administrative". Tracing the development of a parallel line of jurisprudence in the English courts, in which a general duty of fairness had been acknowledged, Dickson J., in the particular context of prison disciplinary decisions, laid the groundwork for the modern theory and practice of judicial review of correctional decisions.

> In the case at bar, the Disciplinary Board was not under either an express or implied duty to follow a judicial type of procedure, but the Board was obliged to find the facts affecting the subject and exercise a form of discretion in pronouncing judgment and penalty. Moreover, the Board's decision had the effect of depriving an individual of his liberty by committing him to a "prison within a prison." In these circumstances, elementary justice requires some procedural protection. **The Rule of Law must run within penitentiary walls.**
>
> *Martineau* v. *Matsqui Institution Inmate Disciplinary Board (No. 2)*, [1980] 1 S.C.R. 602, at 622 (emphasis added)

14. *Martineau (No. 2)* marked the beginning of a coherent and principled body of correctional law in Canada. Subsequent decisions of the Court contributed to that evolution. That same year this Court took a significant step in the *Solosky* case, by expressly endorsing the proposition that "a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken away from him by law".

> *Solosky* v. *The Queen*, [1980] 1 S.C.R. 821, at 839

E. The Trilogy

15. This Court laid another important milestone in correctional law in 1985. The trilogy of *Miller, Cardinal and Oswald,* and *Morin*, and the continuing role it plays in the development of a principled and effective law and practice of judicial review of correctional decisions, lies at the heart of this appeal.

> *R.* v. *Miller* [1985] 2 S.C.R. 613; *Cardinal and Oswald* v. *Director of Kent Institution,* [1985] 2 S.C.R. 643; *Morin v. National Special Handling Unit Review Committee,* [1985] 2 S.C.R. 662

16. *Miller, Cardinal and Oswald* and *Morin* involved challenges by prisoners to their confinement in administrative segregation and their transfer to the Special Handling Units, the highest level of security in the federal penitentiary system. This Court ruled that prisoners have a right not to be deprived, unlawfully or unfairly, of the relative or "residual" liberty they retain as members of the general prison population; and that any significant deprivation of that liberty -- such as being placed in administrative segregation or a Special Handling Unit -- could be challenged through *habeas corpus*. LeDain J. observed that *habeas corpus* should not be invoked to question "all conditions of confinement", but does lie in respect of any "distinct form of confinement or detention in which the actual physical constraint or deprivation of liberty . . . is more restrictive or severe than the normal one in an institution", something different from simply the loss of privileges.

> *Miller, supra,* at 641

17. In subsequent cases, the courts have held that *habeas corpus* is available to review not only placement in segregation or transfer to a Special Handling Unit, but any involuntary transfer to higher security where the regime of confinement is significantly more onerous and restrictive of liberty.

> *Balian* v. *Regional Transfer Board and Warden of Joyceville Institution* (1988), 62 C.R. (3d) 258 (Ont. S.C.); *Ericson* v. *Canada (Deputy Director of Correctional Services)* [1991] B.C.J. No. 3393 (B.C.S.C) (Q.L.); *Fitzgerald* v. *Trono,* [1994] B.C.J. No. 1534 (B.C.S.C.) (Q.L.)

18. The Appellants in the case at bar have invoked the *habeas corpus* jurisdiction of the B.C Supreme Court to challenge their transfers to higher security relying upon the "trilogy" and the tributary of jurisprudence that has flowed from it.

19. The trilogy squarely addressed the issue of whether jurisdiction for judicial review of federal boards by the federal court under s.18 of the *Federal Court Act* trumped the provincial superior court jurisdiction in *habeas corpus*. This Court held that the applicant was entitled to choose the forum in which to challenge unlawful restrictions of liberty in the prison context. As the Appellants accurately state in their factum (para. 29) "In its analysis, this court clearly turned its mind specifically to a consideration of the appropriate venue for a review of the validity of the detention of federal prisoners, with particular reference to s.18 of the *Federal Court Act*, the importance of the local accessibility of the remedy, and the possibility of problems arising out of concurrent or overlapping jurisdiction".

20. Addressing the issue of concurrent jurisdiction LeDain J. stated:

> After giving consideration to the two approaches to this issue, I am of the opinion that the better view is that *habeas corpus* should lie to determine the validity of a particular form of confinement in a penitentiary notwithstanding that the same issue may be determined upon certiorari in the Federal Court. The proper scope of the availability of *habeas corpus* must be considered first on its own merits, apart from possible problems arising from concurrent or overlapping jurisdiction. **The general importance of this remedy as the traditional means of challenging deprivations of liberty is such that its proper development and adaptation to the modern realities of confinement in a prison setting should not be compromised by concerns about conflicting jurisdiction.**
>
> *Miller*, *supra*, at 641 (emphasis added)

F. Concurrent Jurisdiction under Attack

21. From 1985 until recently the judicial review of federal correctional authority has proceeded upon the exercise of the concurrent jurisdiction of provincial superior courts in *habeas corpus* and the federal courts jurisdiction under the *Federal Court Act*.

22. Starting in 2001 a series of cases, culminating in the case at bar, has thrown this state of affairs into question. The chambers judge grounded his jurisdiction to hear the *habeas corpus* applications on this Court's unequivocal affirmation of its continuing vitality in *Miller*. The Court of Appeal, while accepting that jurisdiction existed, in finding that the chambers judge should not have heard the *habeas corpus* applications, made no explicit reference to *Miller*. Instead Ryan J.A. adopted the reasoning of the Ontario Court of Appeal in *Spindler*, that this Court's subsequent jurisprudence, specifically its 1990 decision in *Steele*, had significantly modified the ruling in *Miller*. Doherty J.A. in *Spindler* expressed that modification in this way:

> As I read *Steele*, except in exceptional circumstances, a provincial superior court should decline to exercise its *habeas corpus* jurisdiction where the application is in essence, a challenge to the exercise of a statutory power granted under a federal statute to a federally appointed individual or tribunal. Those challenges are specifically assigned to the Federal Court under the *Federal Court Act* R.S.C. 1985 c. F-7 s. 18, s. 28. By directing such challenges to the Federal Court Parliament has recognized that individuals or tribunals exercising statutory powers under federal authority must exercise those powers across the country. It is important that judicial interpretations as to the nature and scope of those powers be as uniform and consistent as possible. By giving the Federal Court jurisdiction over these challenges, Parliament has provided the means by which uniformity and consistency can be achieved while at the same time, facilitating the development of an expertise over these matters in the Federal Court.
>
> *Spindler v. Millhaven Institution*, [2003] O.J. No.3449 (Q.L.), at para. 19 (Leave to Appeal denied October 28, 2004)

23. Ryan J.A. in her reasons in the case at bar noted that Doherty J.A. in *Spindler* cited with approval her previous judgment for the B.C.C.A. in *Hickey* where she wrote:

> It is trite that the court has a discretion to refuse to entertain an application for *habeas corpus* if there exists a viable alternative to the writ. In the context of prison law the fact that there is in place a complete, comprehensive and expert procedure for review of a decision affecting the prisoner's confinement is a factor which militates against hearing a petition for *habeas corpus*. But there will be exceptions.

> I agree with the appellant that the Chambers judge erred in law in concluding that the British Columbia Supreme Court lacked the jurisdiction to entertain the application for *habeas corpus* in the circumstances of this case. However, since no evidence was placed before the Chambers judge to demonstrate that the grievance procedures under the *Corrections and Conditional Release Act*, or judicial review to the Federal Court were inadequate, the Chambers judge was bound to exercise her discretion and refuse to consider the application.

Hickey v. Kent Institution, [2003] B.C.J. No. 61 (Q.L.), at paras. 50, 54

24. Ryan J.A. saw this Court's decision in *Steele* as support for the exceptional nature of a *habeas corpus* remedy in a provincial superior court where a remedy was available from the Federal Court and therefore inferentially saw *Steele* as modifying this Court's decision in *Miller* which had endorsed a model of concurrent jurisdictions.

Hickey v. Kent Institution, *supra,* at para. 51

G. A Purposive Analysis of Steele

25. Both the Appellants' factum and that of the Interveners, the Canadian Association of Elizabeth Fry Societies and The John Howard Society of Canada have addressed the proper interpretation of this Court's decision in *Steele*. They have argued that the B.C and Ontario Courts of Appeal have erred in reading into *Steele* limitations on the availability of *habeas corpus* that were never intended by this Court to restrict access to the concurrent jurisdiction of the provincial superior courts in cases challenging the legality of restrictions of prisoners' institutional liberty.

26. This intervener supports that analysis. In addition counsel for this intervener would respectfully provide the Court with the history of the *Steele* case from the distinctive perspective of also being counsel for Mr. Steele at all levels of court proceedings. This history provides a lens through which to better understand the *Steele* judgment and the specific focus of Cory J.'s comments on the appropriate forum for judicial review.

27. Mr. Steele had been sentenced to an indeterminate sentence under the 1948 Criminal Sexual Psychopath provisions of the *Criminal Code*. The designation was changed in 1961 to "dangerous sexual offender". This legislation, together with the 1947 Habitual Criminal provisions was repealed and replaced with the 1977 Dangerous

Offender amendments. The narrower focus and greater procedural protections of the 1977 Dangerous Offender amendments were based upon the recommendations of the Canadian Committee on Corrections which had found that the legislation had been applied to persistent offenders, who while constituting a serious social nuisance, were not dangerous. The 1977 legislation did not provide for the release of these men who had been previously sentenced as habitual criminals or dangerous sexual offenders. Although the Federal Minister of Justice expressed the opinion that these men would be reviewed by the National Parole Board against the new narrower criteria, it became apparent that the Board continued to review these men against the normal criteria of the *Parole Act* under which danger to the public was only one factor.

> *Gallichon v. Canada,* [1995] O.J. No. 2744 (Q.L.) at paras. 39-43

28. In 1980, because of concern that the new criteria were not being applied, a study was conducted by this counsel reviewing the cases of 18 habitual criminals who remained imprisoned in British Columbia. That report, *Sentences That Never End*, concluded that the majority of the men had never been regarded as dangerous in terms of their propensity to commit violence, and that they did not meet the criteria of dangerous offenders under the 1977 legislation. The principal recommendation of the report was that legislation be introduced providing for the judicial review of all habitual criminals to determine whether they were dangerous offenders under the 1977 dangerous offender legislation.

> M. Jackson, *Sentences That Never End* (1982), *cited in Re Mitchell and The Queen* (1983), 6 C.C.C. (3d) 193 (Ont. H.C.) at 210

29. Following the release of *Sentences That Never End*, the Minister of Justice commissioned Judge Stuart Leggatt of the B.C. County Court to review the cases of all habitual offenders, to assess whether they met the criteria for dangerous offenders under the 1977 legislation or otherwise represented a danger to society. Of the 87 men reviewed by Judge Leggatt, 73 were deemed not to be dangerous under the 1977 legislative criteria and were recommended for a full pardon, with the result that they would longer be subject to any form of correctional control or restraint. With some

minor exceptions, the Commission's report was accepted by the federal government and the great majority of the habitual criminals received pardons in May 1984.

> Report of the Inquiry into Habitual Criminals in Canada, (1984), The Honourable Judge Stuart Leggatt; cited in *Gallichon, supra,* at para. 47

30. The federal government declined to appoint a parallel Commission to review the cases of those men who had been sentenced as criminal sexual psychopaths or dangerous sexual offenders under the pre-1977 legislation. As with the former habitual criminals, this counsel interviewed and reviewed the cases of all the offenders who remained imprisoned in British Columbia in these categories and concluded that there were a number of them who, like the habitual criminals, were no longer dangerous and who were being kept in prison because of their attitudes towards authority and supervision unrelated to their risk of sexual re-offending. In the face of the federal government's refusal to appoint a Commission of Inquiry, in December 1988 *habeas corpus* petitions were filed on behalf of two of these men, challenging their continued imprisonment on the grounds that it constituted cruel and unusual punishment in violation of s. 12 of the *Charter of Rights and Freedoms*. Mr. Steele was one of those cases. He had served 37 years.

31. The application in *Steele* was framed in *habeas corpus* rather than an application for judicial review of decisions of the Parole Board for several reasons. First, as this history reveals, judicial proceedings in the nature of *habeas corpus* were a last resort to secure for Mr. Steele, on the basis that expert evidence demonstrated that he did not present a danger to society, relief from the indeterminate sentence equivalent to the relief that the habitual offenders had received through pardons; second, the Parole Board viewed its mandate as limited by the *Parole Act* and maintained that legal arguments based on cruel and unusual punishment under the *Charter* were outside the Board's legal mandate and within the exclusive purview of the courts. Finally, the availability of *habeas corpus* to challenge the continuation of an indeterminate sentence under the *Charter* on the basis of its gross disproportionality, had been endorsed in *Re Mitchell and The Queen*, a decision of Linden J., then of the Ontario High Court of Justice.

> *Re Mitchell and The Queen*, *supra*

32. In *Steele* Paris J., in following *Mitchell* and ordering Mr. Steele's unconditional release, accepted that the case was not a review of how the Parole Board had performed its statutory duties. He stated:

> Within the framework of their statutory duties, what they have done may not seem unreasonable. It is certainly not their function, and they are not called upon by their mandate under the *Parole Act*, to judge whether or not an inmate's continued detention constitutes a breach of the Charter of Rights as being cruel and unusual punishment. But the court is called upon to so judge.
>
> *Steele v Mountain Institution,* [1989] B.C.J. No. 1352; 72 C.R. (2d) 58, (B.C.S.C.) at p. 106

33. On appeal Locke J.A. writing for the B.C.C.A. stated:

> While agreeing with much of what Paris, J. said, I am not prepared to say that the Parole Board is without jurisdiction to consider the right of those who come before it to be spared imprisonment of such duration as has become "cruel and unusual treatment or punishment" under s. 12 of the Charter... But the issue was not argued before us, and this is not a case in which it could be raised, since we are not sitting in review of a decision of the Board. I do not think it right that this man be required to go before the Parole Board and seek parole and then have to seek judicial review of the Board's decision if it goes against him. In view of his age, the length of his imprisonment and the substantial further delay which would be involved in re-litigating essentially similar issues, should parole be denied, I think his Charter right could well be rendered meaningless were he submitted now to that protracted process. On the other hand, I do not think it appropriate that his release should be absolute and unconditional.
>
> *Steele v. Warden of Mountain Institution,* (1990) 54 C.C.C. (3d) 334, 76 C.R. (3d) 307 (B.C.C.A.), at p. 327

34. After the oral hearing of the Crown's appeal the Court of Appeal had requested from counsel supplementary submissions on the appropriateness of and the available mechanisms for supervising Mr. Steele in the community outside of the framework of the *Parole Act*. The Court's concern with the implications of unconditional release was reflected in its judgment varying the order for release of Mr. Steele.

> In the case of persons subject to an indeterminate sentence who have spent many years in prison, it is highly desirable that their release, if and when it occurs, should be conditional, should be subject to supervision by those experienced in the parole or probation fields… Under the present statutory and administrative arrangements it seems that this can be achieved only in association with release by the Parole Board …
>
> I would therefore vary the order under appeal by declaring that the sentence of indeterminate imprisonment remains in effect and that the Crown is entitled to apply to the trial court at any time, … for an order that the respondent be returned to custody,

> and continue to be imprisoned in accordance with his sentence, should his conduct after release be such as to demonstrate that he does, in fact, represent so clear a danger of such serious harm as to render resumption of incarceration under the indeterminate sentence justifiable.
>
> *Steele v. Warden of Mountain Institution, supra,* at pp. 326, 328

35. On appeal to this Court, Cory J., conceptualised the issue differently from the courts below to accord with this Court's decision in *Lyons* where the Court had held that the existence of mandatory parole reviews provided the tailoring necessary to save the indeterminate sentence regime from violating s. 12:

> It will be remembered that it was determined by Paris J., and upheld by the Court of Appeal, that although the indeterminate continuing detention of a dangerous offender had been held in *Lyons*, to be constitutional, nevertheless, in certain rare cases such as this one, the continuing detention of an offender would constitute cruel and unusual punishment in violation of s. 12 of the Charter. If this position is correct it would mean that while the parole review process would work effectively in the vast majority of cases, there would be the occasional case in which even the most responsible and careful application of the parole review process could not prevent a continuing detention from becoming cruel and unusual punishment.
>
> I must, with respect, differ from that conclusion. It seems to me to fly in the face of the decision of this Court in *Lyons*… In my view the unlawful incarceration of Steele was caused, not by any structural flaw in the dangerous offender provisions, but rather by errors committed by the National Parole Board. These errors are apparent upon a review of the record of Steele's treatment by the Board over the long years of his detention.
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> *Steele v. Warden of Mountain Institution* [1990] 2 S.C.R. 1385, at 1410-11, paras. 62-63

36. As to those errors that had prevented the Board from tailoring the indeterminate sentence to the particular circumstances of Mr. Steele's situation, Cory J. stated:

> In my view the evidence presented demonstrates that the National Parole Board has erred in its application of the criteria set out in s. 16(1)(a) of the *Parole Act*. The Board appears to have based its decision to deny parole upon relatively minor and apparently explicable breaches of discipline committed by Steele, rather than focussing upon the crucial issue of whether granting him parole would constitute an undue risk to society. As a result of these errors, the parole review process has failed to ensure that Steele's sentence has been tailored to fit his circumstances. The inordinate length of his incarceration has long since become grossly disproportionate to the circumstances of this case….
>
> *Steele, supra,* at 1417, para. 79

37. It is in the context of this history that the rationale underlying the following final paragraphs of Cory J's reasons becomes evident.

> It is necessary to make a further comment. As I have made clear above, the continuing detention of a dangerous offender sentenced pursuant to the constitutionally valid provisions of the Criminal Code will only violate s. 12 of the Charter when the National Parole Board errs in the execution of its vital duties of tailoring the indeterminate sentence to the circumstances of the offender. This tailoring is performed by applying the criteria set out in s. 16(1) of the *Parole Act.* Since any error that may be committed occurs in the parole review process itself, an application challenging the decision should be made by means of judicial review from the National Parole Board decision, not by means of an application for *habeas corpus*. It would be wrong to sanction the establishment of a costly and unwieldy parallel system for challenging a Parole Board decision. As well, it is important that the release of a long term inmate should be supervised by those who are experts in this field….
>
> *Steele, supra,* at 1418, para. 84

38. It is submitted that the principles articulated by Cory J. in *Steele* are limited to these:

(a) Having regard to the Court's decision in *Lyons* the Parole Board in its review of a prisoner serving an indeterminate sentence must tailor the sentence to the individual circumstances of the offender;

(b) That tailoring by the Parole Board must ensure that the indeterminate sentence has not become so unfit having regard to the offence and the risk posed by the offender as to be grossly disproportionate;

(c) Any future challenge that an indeterminate sentence has become grossly disproportionate must be by way of judicial review in the federal court of the decision of the Parole Board and not an application for *habeas corpus*.

39. These principles have as their primary purpose to ensure that the Parole Board discharges its duties having regard to its legislative mandate and constitutional principles and that the release of those serving indeterminate sentences, if and when it occurs, should be conditional and subject to supervision by those experienced in the parole field. Clearly allowing a parallel review outside the parole process through *habeas corpus* would undermine this purposive analysis.

40. That this purposive analysis informed the judgment in *Steele* was affirmed by Cory J. in *Idziak*.

> In *Steele*, the Court was concerned with an application for a writ of *habeas corpus* brought by an inmate who had been repeatedly denied parole. The Court again stated that the applicant should have proceeded by means of the judicial review, provided by the statute (the Parole Act, R.S.C., 1985, c. P-2), rather than by prerogative writ. If the applicant had sought judicial review of the National Parole Board's decision and succeeded, the Board could still have maintained, through the parole system, supervision over the inmate. In contrast, if he was successful in obtaining a writ of *habeas corpus*, the inmate would have to be released without any supervision. It was only in light of the very lengthy period of Steele's incarceration that the Court agreed to grant a writ of *habeas corpus.* However, the order fixed special conditions to his release.
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> *Idziak v. Canada (Minister of Justice),* [1992] 3 S.C.R. 631 at 652

H. The Case for Concurrent Jurisdiction

41. The underlying premise of the judgments of Ryan J.A. in both *Hickey* and the case at bar and Doherty J. A. in *Spindler* is that, notwithstanding what this Court may have stated in 1985 in *Miller* about concurrent jurisdiction in cases involving restrictions on prisoners' residual liberty, subsequent developments have shifted the balance in favour of the primacy of the federal court, such that provincial superior courts should refuse to hear *habeas corpus* applications except in exceptional circumstances, and only if the applicant provides a reasonable explanation for failure to pursue judicial review in the federal court.

42. The justification for this shift has been expressed in several ways.

> In the context of prison law the fact that there is in place a complete, comprehensive and expert procedure for review of a decision affecting the prisoner's confinement is a factor which militates against hearing a petition for *habeas corpus.*
>
> *Hickey, supra,* at para. 50
>
> By directing such challenges to the Federal Court Parliament has recognized that individuals or tribunals exercising statutory powers under federal authority must exercise those powers across the country. It is important that judicial interpretations as to the nature and scope of those powers be as uniform and consistent as possible. By giving the Federal Court jurisdiction over these challenges, Parliament has provided the means by which uniformity and consistency can be achieved while at the same time, facilitating the development of an expertise over these matters in the Federal Court.
>
> *Spindler, supra*, at para. 19

43. The Respondents further point to "countervailing policy rationales" justifying the restriction interpretation on *habeas corpus*.(para 104). The experience with almost 20 years of operational concurrency since *Miller* does not support any of these rationales for now restricting the choice of forum unequivocally affirmed in *Miller*. In particular the jurisprudence built up **both** federal and provincial courts in the area of corrections has not produced different standards to guide federally regulated bodies nor divergent streams causing duplication of law over the same issue; neither is there is any evidence of forum shopping nor end runs through artful pleading.

44. The assumption of greater expertise in prison matters in the federal court is overstated. While in other areas of federal court jurisdiction, such as admiralty and patent law, the court has developed an expertise in a distinctive and specialized body of law, in prison cases the great majority of cases revolve around the application of principles of administrative law, the duty to act fairly and *Charter* principles, particularly under s. 7 of the *Charter*. The provincial superior courts have always played, and continue to play, an important role in the development of this body of law in both correctional and other fields. Far from justifying deference to the federal court, expertise favours the concurrency explicitly endorsed in *Miller*.

45. In balancing the scales of jurisdiction to promote both the Rule of Law and consistency in the application of federal correctional powers there are powerful arguments in favour of **strengthening** not **attenuating** the role of provincial superior courts. Even though since this Court's decisions in *Miller* there have been legislative changes, there remains a great distance between the rhetoric of a *Charter* culture of rights inside the walls and the reality of prisoners' lives. Provincial superior court judges, in conjunction with those on the federal court, must play a vital role in the remedial toolbox to entrench that culture of rights.

46. The most authoritative recent example of this distance is found in the Report of Justice Arbour in the 1996 Commission of Inquiry into Certain Events at the Prison for Women in Kingston. The Arbour Report is a critical document in the history of Canadian corrections, opening a window into correctional practices and attitudes beyond the narrow view provided by individual judicial challenges by prisoners. In

many respects, it provides for the 1990s what the report of the House of Commons Sub-committee on the Penitentiary System in Canada did for the 1970s.

> Commission of Inquiry into Certain Events at the Prison for Women in Kingston 1996, (The Honourable Louise Arbour Commissioner) ("Commission of Inquiry"); online at: http://www.justicebehindthewalls.net/resources/arbour_report/arbour_rpt.htm

47. Based on her examination of the Correctional Service of Canada's application of federal correctional powers, including the strip searches of female prisoners by a male emergency response team and the prisoners subsequent long term segregation, Justice Arbour found that the evidence at the inquiry demonstrated that "The Rule of Law is absent, although rules are everywhere". In finding "little evidence of the will to yield pragmatic concerns to the dictates of the legal order", Justice Arbour concluded that the absence of the Rule of Law was not something confined to line staff at the Prison for Women but was "most noticeable at the management level, both within the prison and at the Regional and National levels".

> Commission of Inquiry, *supra,* at 180 - 181

48. Justice Arbour concluded that the enactment of the *Corrections and Conditional Release Act* 1992, the existence of internal grievance mechanisms, and the existing forms of judicial review had not been successful in developing a culture of rights within the Correctional Service of Canada. She also expressed deep skepticism that the Service was able to put its own house in order.

> The Rule of Law has to be imported and integrated . . .from the other partners in the criminal justice enterprise, as there is no evidence that it will emerge spontaneously…effort must be made to bring home to all the participants in the correctional enterprise the need to yield to the external power of Parliament and of the courts, and to join in the legal order that binds the other branches of the criminal justice system.

> Commission of Inquiry, *supra,* at 180-181

49. Justice Arbour made specific recommendations to bring the federal correctional authorities into the orbit of the Rule of Law:

> In light of the obvious difficulty at all levels of the Correctional Service to appreciate the need to *obey* both the spirit and the letter of the law, I suggest that there should be more cross-fertilization between the Correctional Service and the other branches of the criminal justice system…

> Through the National Judicial Institute, I would like to see programs developed that would render judges more conscious of the need to **maintain some owners hip of the integrity of their sentence after it is imposed**, and of their right, under s.72 of the CCRA, to visit penitentiaries, which very few exercise.

Commission of Inquiry, *supra,* at 181-182 (emphasis added)

50. Most significantly for the purposes of this case, Justice Arbour addressed the need for greater judicial supervision by those members of the judiciary involved in the criminal justice process:

> In terms of general correctional issues, the facts of this inquiry have revealed a disturbing lack of commitment to the ideals of justice on the part of the Correctional Service. I firmly believe that increased judicial supervision is required. The two areas in which the Service has been the most delinquent are the management of segregation and the administration of the grievance process. In both areas, the deficiencies that the facts have revealed were serious and detrimental to prisoners in every respect, including in undermining their rehabilitative prospects. There is nothing to suggest that the Service is either willing or able to reform without judicial guidance and control.

Commission of Inquiry, *supra,* at 198

51. Self evidently it is the judges of the provincial superior courts, not those of the federal court, who are directly involved in the criminal justice system and the sentencing of prisoners to imprisonment in federal penitentiaries. Equally self-evident is that decisions by correctional authorities made under the federal *Corrections and Conditional Release Act*, are all about imprisonment, the very subject matter of the great writ of *habeas corpus*. Given that ensuring that the Rule of Law is entrenched in federal prisons and correctional decision-making, as reality rather than rhetoric, is dependant on judges playing a larger role in maintaining "some ownership of the integrity of their sentence", balancing the scales of jurisdiction argues compellingly against provincial superior courts deferring in the exercise of their *habeas corpus* jurisdiction to the federal court except in exceptional circumstances.

I. The Adequacy of the Grievance System

52. In their factum the Respondents rely on the "comprehensive statutory scheme for the resolution for all inmate grievances, including those relating to decisions to transfer, segregate or otherwise restrict liberty [that] is specifically tailored to individuals who are incarcerated and provides internal grievances or appeals for

decisions that have an impact upon the liberty of the inmate" (para. 91). The grievance system is the best documented example of the vast distance between correctional rhetoric and reality. As the Appellants have pointed out, more so than any other aspect of federal correctional authority, it has been the subject of a consistent critique, by both the Correctional Investigator and the Arbour Commission, for its systemic, excessive and chronic delays and unresponsiveness. To borrow the language of the 1977 Parliamentary Sub-Committee, from the perspective of justice for prisoners, there is a great deal of irony in holding up the existence of the grievance system as a reason for revisiting and recalibrating the *Miller* view of concurrency.

Justice Behind the Walls, supra, Sector 6, The Remedial Toolbox

J. Access to Justice

53. Concurrency, rather than deferral to the federal court, is further reinforced from the important perspective of access to justice. Prisoners' access to the courts for the vindication of their rights behind the walls are already circumscribed by the very small number of lawyers interested in the work and the non-existent or low level of legal aid coverage -- the latter contributing to the former. For the reasons described in the Appellants' factum, (paras. 87-8) the procedural prerequisites for filing in the federal court are more onerous than those required for *habeas corpus* applications under provincial superior court rules, a matter of great practical significance if counsel is acting *pro bono* or on limited legal aid funding or if the prisoner is acting *pro se*.

Justice Behind the Walls, supra, at 277

54. Access to justice is closely associated with timeliness of relief. In cases where, as in the case at bar, a prisoner challenges the legality of involuntary transfer to higher security, every day represents a continuing and significant deprivation of institutional liberty, one that to use Justice Arbour's words, "interferes with the integrity" of the sentence of the court. A remedy that is delayed because of a combination of filing requirements, lengthier timelines and the more limited local availability of a judge, is from the cell of a prison, justice denied.

Justice Behind the Walls, supra, Sector 5, ch.1 and Sector 6

55. From that same prison cell, from the perspective of prisoners' claims to justice, the case in favour of primacy of federal court jurisdiction, based on expertise and consistency in interpretation of correctional legislation, with its corollary of shutting off access to *habeas corpus*, sounds hollow; particularly in the face of the record, documented by Arbour and others, of the federal correctional authorities lack of commitment to uphold the Rule of Law. Even with the benefit of operational concurrency in the years since the *Miller* trilogy, the Rule of Law has struggled for a foothold in the harsh landscape of the Canadian penitentiary. Now is not the time to forego a vital and complementary part of judicial intervention. The work of the great writ has hardly begun in our prisons. This Court got it right in *Miller* and the years have not dulled its important message. Timely judicial oversight, in which provincial superior courts must play a co-ordinate, and not subordinate role to the federal court, is necessary to safeguard the human rights and civil liberties of "citizen lawbreakers" who are sentenced to imprisonment, and to ensure that, in the resonant words of the late Chief Justice Dickson, "The Rule of Law must run within penitentiary walls".

PART IV: SUBMISSIONS ON COSTS

56. This intervener does not seek an order for costs.

PART V: NATURE OF ORDER SOUGHT

57. This intervener requests that these appeals be allowed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated this 11th day of April, 2005

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PART VI: TABLE OF AUTHORITIES

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