**IN THE SUPREME COURT OF CANADA**
**(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)**

BETWEEN:

**TERRY LEE MAY**

APPELLANT

(Appellant)

AND:

**WARDEN OF FERNDALE INSTITUTION, WARDEN OF MISSION INSTITUTION, DEPUTY COMMISSIONER, PACIFIC REGION, CORRECTIONAL SERVICE OF CANADA and ATTORNEY GENERAL OF CANADA**

RESPONDENTS

(Respondents)

- and -

BETWEEN:

**DAVID EDWARD OWEN**

APPELLANT

(Appellant)

AND:

**WARDEN OF FERNDALE INSTITUTION, WARDEN OF MATSQUI INSTITUTION, DEPUTY COMMISSIONER, PACIFIC REGION, CORRECTIONAL SERVICE OF CANADA and ATTORNEY GENERAL OF CANADA**

RESPONDENTS

(Respondents)

- and -

BETWEEN:

**MAURICE YVON ROY**

**GARETH WAYNE ROBINSON**

**SEGEN UTHER SPEER-SENNER**

APPELLANTS

(Appellants)

AND:

**WARDEN OF FERNDALE INSTITUTION, WARDEN OF MISSION INSTITUTION, DEPUTY COMMISSIONER, PACIFIC REGION, CORRECTIONAL SERVICE OF CANADA and ATTORNEY GENERAL OF CANADA**

RESPONDENTS

(Respondents)

FACTUM OF THE APPELLANTS,

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## PART I: STATEMENT OF FACTS

**Introduction to the Appellants**

1. These matters were heard as a group of five cases all argued before the British Columbia Court of Appeal at the same time. The cases were not joined, but arguments on each issue were adopted by all five appellants.

2. Mr. May is a prisoner serving a life sentence imposed following a conviction for the offence of first degree murder in 1983. He will be eligible for full parole on February 15, 2008. He was classified to minimum security on December 23, 1998, that was affirmed in an Assessment for Decision dated January 17, 2001, and an Offender Security Level document dated January 19, 2001 which noted that the CJIL rated Mr. May at minimum security. An Assessment for Decision dated less than two weeks later revealed a computer-generated score which ranked Mr. May at medium security.

**Appellants' Record, pp. 102, 103, 104,114, 120, and 126**
**(Affidavit of May, dated June 12, 2001, Exhibit "D" is missing from the Appellants' Record)**

3. Mr. Owen is a prisoner serving a life sentence imposed following a conviction for the offence of second degree murder in 1990. He was eligible for full parole on August 15, 2000. He was classified to minimum security on September 9, 1997, and that was affirmed in a Correctional Plan Progress Report dated January 3, 2001. An Assessment for Decision dated one week later revealed a computer-generated score which ranked Mr. Owen at medium security.

**Appellants' Record, pp. 142, 146, 148 and 151**

4. Mr. Roy is a prisoner serving a life sentence imposed following a conviction for the offence of second degree murder in 1991. He was eligible for full parole on June 17, 2002. He was classified to minimum security in 1996. A Notice of Involuntary Transfer Recommendation dated November 23, 2000 referred to a CJIL score which ranked Mr. Roy at medium security, although no score was provided in either that document or the December 6, 2000 Assessment for Decision.

**Appellants' Record, pp. 183-184, 186 and 194-197**

5. Mr. Robinson is a prisoner serving a life sentence imposed following a conviction for two counts of manslaughter in 1987. He was eligible for full parole on June 18, 1993. He was classified to minimum security on March 26, 1999. An Asssessment for Decision dated November 23, 2000 referred to a CJIL score which ranked Mr. Robinson at medium security.

**Appellants' Record, pp. 219, 222-225, 228 and 231**

6. Mr. Speer-Senner is a prisoner serving a life sentence imposed following a conviction for the offence of second degree murder in 1984. He was eligible for full parole on April 29, 1999. He was classified to minimum security on October 9, 1998. An Assessment for Decision dated November 23, 2000 referred to a CJIL score which ranked Mr. Speer-Senner at medium security.

**Appellants' Record, pp. 245, 253 and 256**

**The Original Decisions Challenged**

7. Between November 2000 and January, 2001, all five appellants were involuntarily transferred from a minimum security federal penitentiary to medium security federal penitentiaries. All are located in British Columbia, and operated by the Correctional Service Canada ("CSC").

**Appellants' Record, pp.102, 143, 184, 220, and 246**

8. All of the appellants filed grievances, and were informed that the transfers were as a result of a direction from Regional Headquarters of CSC to review the security classification of minimum security prisoners serving a life sentence and who had not completed a violent offender program to the respondents' satisfaction.

**Appellants' Record, pp. 105, 140, 143, 154, 190, 227, and 255;**
**Leave Book, p. 84**

9. The respondents used a computerised rating tool to review security classifications. The computerised tool could no longer classify these prisoners as minimum security, despite there being no allegations of fault or misconduct on their part.

**Appellants' Record, pp. 105,143, 154, 184, 190, 220, 227, 228, 246, and 255**

10. The appellants requested disclosure of the scoring matrix for the computerised tool, arguing that without this information they were in the impossible position of having to respond to what was essentially a mysterious black box, which had computed a higher security classification with respect to each of them based on unknown criteria. The respondents refused to disclose the scoring matrix, arguing that no such thing existed.

**Appellants' Record, p.135, 274;**
10 **Leave Book pp. 84, 113, 126, and 136**

**The Court Decisions Below**

11. The Supreme Court of British Columbia, sitting in Chambers, heard the appellants' applications for relief in the nature of *habeas corpus.* The appellants argued that their involuntary transfers had been as a result of a policy change, and not as a result of any misconduct on their part. They argued that in upholding their transfer, the respondents violated ss.7 and 9 of the *Charter of Rights and Freedoms*, enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c.11, and had therefore acted in the absence of or in excess of their jurisdiction. The appellants also argued that the
20 respondents' failure to disclose the scoring matrix of the computerised security classification tool offended the principle of *audi alteram partem*.

12. The learned Chambers judge found that he had jurisdiction to hear the application. However, he found that what the appellants were seeking was a judicial review of the transfer decisions on their merits. The Chambers judge noted that such a review was not within his jurisdiction in hearing an application for *habeas corpus*, and dismissed the application. He also found that failure to disclose the scoring matrix was not a breach of procedural fairness, accepting that the scoring matrix was not available.

**Appellants' Record, pp. 52, 53, and 56**

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13. These matters were heard on appeal by the British Columbia Court of Appeal. That Court found that the Chambers judge should have refused to hear the applications,

and dismissed the appeals because the appellants had "offered no reasonable explanation for failing to pursue judicial review in the Federal Court."

**Appellants' Record, p. 78**

**The Legislative Scheme**

14. The liberty rights of the subject, and the right to their enforcement, are enshrined in ss. 7, 9, and 10(c) of the *Canadian Charter of Rights and Freedoms*, enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c.11.

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 9. Everyone has the right not to be arbitrarily detained or imprisoned.
>
> 10. Everyone has the right on arrest or detention
>
> * * *
>
> c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

15. The purpose and the principles of the Correctional Service Canada are set out in ss.3 & 4 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the *"CCRA"*), and include a requirement that CSC use the least restrictive measures consistent with the protection of the public, staff members and prisoners.

***Corrections and Conditional Release Act*, S.C. 1992, c. 20, s.28**

16. Section 27 of the *CCRA* addresses disclosure of information and the limitations of that disclosure of information and the limitation of that disclosure.

17. Section 28 of the *CCRA* provides that prisoners are to be confined in the least restrictive setting appropriate for the individual, and lists criteria for assessing what is appropriate.

> 28. Where a person is, or is to be, confined in a penitentiary, the Service shall take all reasonable steps to ensure that the penitentiary in which the person is confined is one that provides the least restrictive environment for that person, taking into account
>
> (a) the degree and kind of custody and control necessary for
>
> (i) the safety of the public,
>
> (ii) the safety of that person and other persons in the penitentiary, and
>
> (iii) the security of the penitentiary;
>
> (b) accessibility to

(i) the person's home community and family,
(ii) a compatible cultural environment, and
(iii) a compatible linguistic environment; and
(c) the availability of appropriate programs and services and the person's willingness to participate in those programs.

18. Sections 29 and 30 of the *CCRA* deal with transfers and security classification of prisoners.

19. Sections 17 and 18 of the *Corrections and Conditional Release Regulations*, SOR/92-620 (the "*Regulations*") provide the criteria for assessing security classification.

17. The Service shall take the following factors into consideration in determining the security classification to be assigned to an inmate pursuant to section 30 of the Act:
(*a*) the seriousness of the offence committed by the inmate;
(*b*) any outstanding charges against the inmate;
(*c*) the inmate's performance and behaviour while under sentence;
(*d*) the inmate's social, criminal and, where available, young-offender history;
(*e*) any physical or mental illness or disorder suffered by the inmate;
(*f*) the inmate's potential for violent behaviour; and
(*g*) the inmate's continued involvement in criminal activities.

18. For the purposes of section 30 of the Act, an inmate shall be classified as
(*a*) maximum security where the inmate is assessed by the Service as
(i) presenting a high probability of escape and a high risk to the safety of the public in the event of escape, or
(ii) requiring a high degree of supervision and control within the penitentiary;
(*b*) medium security where the inmate is assessed by the Service as
(i) presenting a low to moderate probability of escape and a moderate risk to the safety of the public in the event of escape, or
(ii) requiring a moderate degree of supervision and control within the penitentiary; and
(*c*) minimum security where the inmate is assessed by the Service as
(i) presenting a low probability of escape and a low risk to the safety of the public in the event of escape, and
(ii) requiring a low degree of supervision and control within the penitentiary.

20. For clarity, the duty to act fairly and the requirements of procedural fairness in the transfer process are imported into the respondents' policy in the form of Commissioner's Directive 540, dated 2001-02-20.

## PART II: QUESTIONS IN ISSUE

**A.** Must a federal prisoner exhaust all alternative remedies, or adduce evidence to explain why alternative remedies have not been sought, as a condition precedent to applying for a remedy in the nature of *habeas corpus* before a provincial superior court?

**B.** Is it within the statutory jurisdiction of the respondents to deprive a federal prisoner of liberty because of a change in policy and not because of any fault or misconduct on the part of the prisoner?

**C.** Is the respondents' refusal to disclose to the appellants the scoring matrix for the computerised security classification rating tool a breach of the principles of fundamental justice?

## PART III: ARGUMENT

### A. Alternative Remedies

**Must a federal prisoner exhaust all alternative remedies, or adduce evidence to explain why altemative remedies have not been sought, as a condition precedent to applying for a remedy in the nature of *habeas corpus* before a provincial superior court?**

21. *Habeas corpus* as the most important remedy in pursuit of the most important rights: the right under s.7 of the *Charter* to life, liberty and security of the person and the right not be deprived of that right other than in accordance with the principles of fundamental justice; and the right under s.9 of the *Charter* not to be arbitrarily detained or imprisoned.

> [*Habeas corpus* is] the most effective weapon yet devised for the protection of the liberty of the subject, by providing for a speedy judicial inquiry into the justice of any imprisonment….
>
> **Sir Wm. Holdsworth, *A History of English Law*, 7th ed., vol. 7 (London: Methuen & Co. 1956), p.118**

22. The Normans introduced the underpinning of *habeas corpus* to England in the 11th century with their idea that justice flowed from the King and therefore a centralised administration of justice was desirable.

**William F. Duker, *A Constitutional History of Habeas Corpus*. (London: Greenwood Press, 1980), p. 14**

23. In the 13th and 14th century, *habeas corpus* began to evolve to embody functions that we might recognise in today's Great Writ. Although, the Magna Carta of 1215 makes no explicit mention of the term, it nevertheless expresses a principle very much in accord with that of *habeas corpus*. Section 39 of the Magna Carta states:

> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.

**The British Library, "Text of the Magna Carta"**
**http://www.bl.uk/collections/treasures/magnatranslation.html**

24. In the 14th century, the writ of *habeas corpus cum causa* was used to compel the production of a prisoner along with the cause of the prisoner's arrest and detention.

**William F. Duker, *A Constitutional History of Habeas Corpus*. (London: Greenwood Press, 1980), p. 25**

25. Later the remedy was codified to bring clarity and uniformity to its principles and application in the *Habeas Corpus Act 1679*. The *Act* ensured that prisoners entitled to relief would not be thwarted by procedural inadequacies. In this respect the *Act* aimed to provide that the writ would be available at any time of year from any courts or judges at Westminster, that the writ would be available immediately, that the judges would make a determination quickly, and that, if released, the prisoner would not be rejailed. Another section of the *Act* required the prisoner to be provided with a copy of the warrant so the grounds for the detention would be known to permit an assessment of whether the writ should be applied for in the first place.

**R.J. Sharpe, *The Law of Habeas Corpus*. 2nd ed. (New York: Claredon Press Oxford, 1989), p. 20**

26. In the words of the esteemed jurist Albert Venn Dicey, "the *Habeas Corpus Acts* were for practical purposes worth a hundred constitutional articles guaranteeing individual liberty."

**De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*. (London: Sweet & Maxwell, 1995), p. 637**

27. As a result of the recent line of decisions, the remedy of *habeas corpus* in the provincial superior courts is practically unavailable to federal prisoners. The leading case in British Columbia is *Hickey v. Kent Institution*, [2003] B.C.J. No. 61. It was cited with approval in *Spindler v. Millhaven Institution*, [2003] O.J. No. 3449 in the Ontario Court of Appeal. Both *Hickey* and *Spindler* were cited with approval in the decision of the British Columbia Court of Appeal in the instant case.

28. The appellants submit that recent case law from the provincial superior courts on the availability of the remedy is contrary to decisions in this court in the important trilogy of cases released in 1985: *R. v. Miller*, [1985] 2 SCR 613; *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643; and *Morin v. Canada (National Special Handling Unit Review Committee)*, [1985] 2 S.C.R. 662. Le Dain J. wrote on behalf of the unanimous court:

> … the provisions of the *Federal Court Act* indicate a clear intention on the part of Parliament to leave the jurisdiction by way of *habeas corpus* to review the validity of a detention imposed by federal authority with the provincial superior courts. While s. 18 of the *Federal Court Act* confers an exclusive and very general review jurisdiction over federal authorities by the prerogative and extraordinary remedies, to which specific reference is made, it deliberately omits reference to *habeas corpus*. That this was not an oversight but a well considered decision is indicated by s. 17(5) of the *Act*, which expressly confers exclusive jurisdiction on the Federal Court with respect to an application for *habeas corpus* by a member of the Canadian Forces serving outside Canada. I agree with Laskin C.J. that because of its importance as a safeguard of the liberty of the subject *habeas corpus* jurisdiction can only be affected by express words. One may think of reasons why it was thought advisable to leave the *habeas corpus* jurisdiction with respect to federal authorities with the provincial superior courts, including the importance of the local accessibility of this remedy. The important thing, as I see it, is that the decision to create this exception to the exclusive review jurisdiction of the Federal Court, with whatever problems arising from concurrent or overlapping jurisdiction it might cause, is really determinative of the question of jurisdiction to issue *certiorari* in aid.

***R. v. Miller*, [1985] 2 SCR 613, pp. 624-625**

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.

30. The British Columbia Court of Appeal has held that, "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."

10 ***Hickey v. Kent Institution,* [2003] B.C.J. No. 61 (Q.L.), para. 50**

31. With respect, the court in *Hickey (supra)* provided no authority for that conclusion and the appellants submit that an application for *habeas corpus* in the context of the instant case cannot be so easily turned aside. While *habeas corpus* is not a "writ of course", it must issue *ex debito justitiae* where the machinery of the state acts in the absence of or in excess of jurisdiction to deprive the subject of liberty. The argument below explores the tension between *habeas corpus* as a remedy issued *ex debito justitiae* and as a discretionary remedy in the contexts of criminal law, administrative law generally, and immigration law specifically.

20

**A.1 The criminal context**

32. When this court has concluded that the writ may be refused where there is an alternative remedy, that question has been closely tied to the question of jurisdiction. In *R. v. Goldhar*, [1960] SCR 431, Cartwright J., in minority concurring reaons, concluded,

> The writ of *habeas corpus ad subjiciendum* is a writ of right and is issued *ex debito justitiae*, upon it being shown that there is ground for believing that the applicant is unlawfully held in custody, so that the Court may inquire into the cause of his imprisonment and in a proper case order his immediate release; but it is not a writ of course and may be refused where an alternative remedy by which the validity of the
30 detention can be determined is available to the applicant. In *Ex parte Corke* [[1954] 2 All E.R. 440.], Lord Goddard, delivering the judgment of the Queen's Bench Division in which Slade J. concurred, said that *habeas corpus* is not a means of appeal where an accused has been convicted and sentenced by a court of competent jurisdiction. The remedy in such a case is by way of appeal; for so long as it stands unreversed the sentence of a competent court is a legal justification for imprisoning the applicant.

***R. v. Goldhar,* [1960] SCR 431, pp. 440-441**

33. This is the distinction Lambert, J.A. made in his dissent in the case of *R. v. Johnson*, [1982] B.C.J.No. 1906 (B.C.C.A.). In that case he contrasted void and voidable convictions:

> An appeal can be taken from a void conviction (made without jurisdiction) as well as from a voidable conviction (wrongly made within jurisdiction). The issue on the appeal in each case is whether the conviction was lawful. On the other hand, *habeas corpus* in relation to jurisdiction can only be brought after a void conviction. The issue is whether the warrant of committal was made without jurisdiction. The appeal and the *habeas corpus* proceedings are not alternative ways of doing the same thing. They do different things. The fact that both may result in achieving the freedom of the wrongly imprisoned person does not, in my opinion, make them alternative remedies.
>
> ***R. v. Johnson*, [1982] B.C.J. No. 1906 (B.C.C.A.) (Q.L.), para. 32**

34. In other words, the remedy of *habeas corpus* is no substitute for a criminal appeal. If there was an appealable error in a lower court, then the court would have jurisdiction to impose the sentence, and the gaoler therefore had legal authority to impose the subject. The applicant's remedy, therefore, would be criminal appeal on the merits.

## A.2 The Administrative Law Context

35. It is a principle of administrative law that applicants for judicial review must first exhaust internal remedies: a principle which furthers judicial economy. In *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, Dickson C.J. for a unanimous court considered the doctrine of alternative remedies in the case of legislated clauses which "explicitly oust judicial review":

> The rights are non-justiciable not because of the independent evaluation by the court of the appropriateness of its intervention, but because Parliament is taken to have expressed its intention that they be nonjusticiable.
>
> ***Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, p. 92**

36. In the case of *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, the court considered the doctrine of alternative remedies in the context of a university student challenging the administration's direction that he discontinue studies. He had sought a remedy in *certiorari* and *mandamus*. The Court of Appeal for Saskatchewan declined the application, noting that absent special circumstances, the applicant should first resort to

the internal remedy of an appeal to the university senate committee, that appeal having been provided for in the university's constituting statute.

***Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, pp. 573-574**

37. Beetz J., writing for the majority of this court in *Harelkin (supra),* traced a thread back to *The King ex rel. Lee v. Workmen's Compensation Board,* [1942] 2 D.L.R. 665, citing with approval the reasoning of the British Columbia Court of Appeal:

> Once it appears a public body has neglected or refused to perform a statutory duty to a person entitled to call for its exercise, then *mandamus* issues *ex debito justitiae*, if there is no other convenient remedy ... If however, there is a convenient alternative remedy, the granting of *mandamus* is discretionary, but to be governed by considerations which tend to the speedy and inexpensive as well as efficacious administration of justice….

***The King ex rel. Lee v. Workmen's Compensation Board* [1942] 2 D.L.R. 665 (Q.L.), pp. 677-678;**
**cited with approval in *Harelkin (supra),* p. 593**

38. Beetz J, went on to provide guidance for the assessment of the adequacy of alternative remedies:

> In order to evaluate whether Appellants' right of appeal to the senate committee constituted an adequate alternative remedy and even a better remedy than a recourse to the courts by way of prerogative writs, several factors should have been taken into consideration among which the procedure on the appeal, the composition of the senate committee, its powers and the manner in which they were probably to be exercised by a body which was not a professional court of appeal and was not bound to act exactly as one nor likely to do so. Other relevant factors include the burden of a previous finding, expeditiousness and costs.

***Harelkin (supra),* p. 588**

39. He then reflected upon the somewhat cloistered nature of universites and their tradition "as a community of scholars and students enjoying substantial internal autonomy." He noted that "[*The University of Regina Act*, 1974, S.S. 1973-74] countenances the domestic autonomy of the university by making provision for the solution of conflicts within the university ...."

***Harelkin (supra),* p. 595**

40. While the relevant sections of *The University of Regina Act* were not expressly privative clauses, the court found that they pointed to a legislative intention to prefer an

internal resolution to "intestine grievances", such that courts should use restraint in exercising their discretion to review the errors of the university administration.

***Harelkin (supra),* p. 595**

41. This court later characterised the contrast between privative clauses and the sort of clauses examined in *Harelkin (supra),* as the "distinction between express ouster (or exclusion) and implied ouster of remedies." The court then concluded that,

> … both the fact that ouster needs to be implied and the fact that an evaluation of adequacy is called for suggest that the alternative remedies bar to discretionary judicial relief entails, in reality, a decision by the courts on the appropriateness of their intervention, and less a clear statement of intention by Parliament.

***Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources) (supra),* at p. 95**

42. Certainly it would be contrary to the values embodied in s.7 of the *Charter of Rights and Freedoms* to grant federal prison authorities "domestic autonomy" in determining their own jurisdiction to deprive prisoners of liberty.

## A.3 The immigration context

43. The discretion of the court to refuse to entertain applications for prerogative relief have been examined in a line of immigration cases. In *Fraser v. Pringle,* [1972] S.C.R. 821 this court considered the creation in statute of the Immigration Appeal Board. Section 22 of the *Immigration Appeal Board Act*, R.S.C. 1970, c. I-3, bestowed upon that tribunal "exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction" within its purview. This court found that the relevant provisions in statute established "a code for the administration of immigration matters and for the review of proceedings in such matters," noting that, "There is no common law of immigration."

***Fraser v. Pringle*, [1972] S.C.R. 821, p. 825**

44. In *Peiroo v. Canada,* the Ontario Court of Appeal concluded that the statutory right of review and appeal as provided in the *Immigration Act* provided clear direction to the court not to exercise its discretion to grant relief in *habeas corpus*.

> Parliament has established in the *Act*, particularly in the recent amendments which specifically address the disposition of claims of persons in the position of the appellant, a comprehensive scheme to regulate the determination of such claims and to provide for review and appeal in the Federal Court of Canada of decisions and orders made under the *Act*, the ambit of which review and appeal is as broad as or broader than the traditional scope of review by way of *habeas corpus* with *certiorari* in aid. In the absence of any showing that the available review and appeal process established by Parliament is inappropriate or less advantageous than the *habeas corpus* jurisdiction of the Supreme Court of Ontario, it is my view that this court should, in the exercise of its discretion, decline to grant relief upon the application for *habeas corpus* in the present case, which clearly falls within the purview of that statutory review and appeal process.
>
> ***Peiroo v. Canada (Minister of Employment and Immigration), (1989)*, 69 O.R. (2d) 253 (Ont. C.A.) (Q.L.)**
>
> **Leave to appeal denied, November 23, 1989. S.C.C. File No. 21602; S.C.C. Bulletin, 1989, p. 2796**

45. However, the reasoning in that case was squarely founded on the combined effect of the *Habeas Corpus Act*, R.S.O. 1980, c. 193, s. 1(1), the *Immigration Act*, R.S.C. 1985, c. I-2, s. 83.3(1), and the *Federal Court Act*, R.S.C. 1985, c. F-7, s. 28. The *Habeas Corpus Act* required the applicant to establish reasonable and probable ground for the complaint, a requirement the court found comparable to the requirement for leave, imposed by s.83.3(1) of the *Immigration Act*. That section created a requirement for leave from the Federal Court of Appeal to consider an appeal based on a claim of error in jurisdiction, fact or law. Section 28 of the *Federal Court Act* provided that "notwithstanding section 18", the Federal Court of Appeal had jurisdiction to hear appeals arising from decisions of federal tribunals with respect to errors of jurisdiction, fact or law. Clearly the Ontario statute does not apply in the instant case, and the other two federal statutes have since been amended, with no cognates to the relevant sections surviving the amendments.

***Peiroo (supra)***

46. The case of *Peiroo (supra)* is still informative for its finding that in matters of immigration detention/deportation there was in place a comprehensive statutory scheme which provided for a review which was at least as broad, if not broader than that available by way of *habeas corpus*, and that it was no less advantageous than *habeas corpus*. However, we should be cautious about extending that reasoning beyond the immigration context and into prison law.

47. Significantly, although *habeas corpus* is often invoked in cases of immigration detention, the real attack is not upon the detention but upon the deportation order. The evil sought to be remedied is not a loss of liberty, but removal from Canada. Should the court exercise its discretion to entertain the application, the deportation order is stayed.

***Shepherd v. Canada (Minister of Employment and Immigration),* [1989] O.J. No. 1752; 9 Imm. L.R. (2d) 9 (Ont. Sup. Ct.) (Q.L.)**

48. In considering the guidance offered by the immigration cases, we must bear in mind that, "The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country."

***Canada (Minister of Employment and Immigration) v. Chiarelli,* [1992] 1 S.C.R. 711, p.733; [1992] S.C.J. No. 27, p. 733**

49. However, in the context of prison law, the principles and values embodied in s.7 of the *Charter of Rights and Freedoms* apply equally to all persons in Canada. Federal prisoners, clearly, do not enjoy the same liberty as other Canadians, but they do enjoy the same right not to be deprived of what liberty they have except in accordance with the principles of fundamental justice. In *Miller (supra)*, Le Dain J. for a unanimous court concluded that,

> In effect, a prisoner has the right not to be deprived unlawfully of the relative or residual liberty permitted to the general inmate population of an institution. Any significant deprivation of that liberty, such as that effected by confinement in a special handling unit meets the first of the traditional requirements for *habeas corpus*, that it must be directed against a deprivation of liberty.
>
> Moreover, the principle that *habeas corpus* will lie only to secure the complete liberty of the subject is not invariably reflected in its application. There are applications of *habeas corpus* in Canadian case law which illustrate its use to release a person from a particular form of detention although the person will lawfully remain under some other restraint of liberty.

***Miller (supra),* pp. 637-638**

## A.4 Alternative remedies in the federal prison context

50. There can be no doubt that *habeas corpus* is available to federal prisoners to challenge an unlawful deprivation of liberty.

> 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. As I have said in connection with the question of jurisdiction to issue *certiorari* in aid of *habeas corpus*, these concerns have their origin in the legislative judgment to leave the *habeas corpus* jurisdiction against federal authorities with the provincial superior courts. There cannot be one definition of the reach of *habeas corpus* in relation to federal authorities and a different one for other authorities.
>
> ***Miller (supra),* pp. 640-641**
>
> **[emphasis added]**

51. It is equally well settled that *habeas corpus* will lie to determine the validity of a deprivation of residual liberty in the prison context.

> Confinement in a special handling unit, or in administrative segregation as in *Cardinal*, is a form of detention that is distinct and separate from that imposed on the general inmate population. It involves a significant reduction in the residual liberty of the inmate. It is in fact a new detention of the inmate, purporting to rest on its own foundation of legal authority. It is that particular form of detention or deprivation of liberty which is the object of the challenge by *habeas corpus*. It is release from that form of detention that is sought. For the reasons indicated above, I can see no sound reason in principle, having to do with the nature and role of *habeas corpus*, why *habeas corpus* should not be available for that purpose. I do not say that *habeas corpus* should lie to challenge any and all conditions of confinement in a penitentiary or prison, including the loss of any privilege enjoyed by the general inmate population. But it should lie in my opinion to challenge the validity of a distinct form of confinement or detention in which the actual physical constraint or deprivation of liberty, as distinct from the mere loss of certain privileges, is more restrictive or severe than the normal one in an institution.
>
> ***Miller (supra),* p. 641**

## A.5 Doctrine of alternative remedies in the instant case

52. In *Hickey (supra)*, *Spindler (supra)*, and the instant case, three lines of reasoning appear to have been conflated:

- the reasoning in the criminal cases which distinguish the availability of *habeas corpus* and a criminal appeal: *Goldhar (supra)*, and *Johnson (supra)*;
- and the more general administrative law cases where the courts have declined to grant declaratory relief, or relief in *mandamus* or *certiorari* because of legislation which either expressly or by implication ousts judicial remedies:

*Harelkin (supra),* and *Auditor General v. Minister of Energy, Mines and Resources (supra).*

- the reasoning in the immigration cases, where *habeas corpus* is declined in favour of judicial review defined by statute: *Fraser v. Pringle (supra), Peiroo (supra),* and *Shepherd (supra)*;

53. Ryan J.A., in her reasons in *Hickey (supra),* found that the court had a discretion to refuse to hear an application for *habeas corpus* where there is a "viable alternative to the writ".

10 ***Hickey (supra),* para. 50**

54. This language, in the appellants' submission, broadens the doctrine of adequate alternative remedies to include "viable alternatives" and also imports this principle of administrative law to a realm where the values embodied in s.7 of the *Charter* must prevail. The alternative remedies doctrine was developed in the administrative law context of applications for *certiorari* and *mandamus*. If it is appropriate at all in consideration of an application for *habeas corpus* it must surely be invoked with caution.

55. In *Hickey (supra),* Ryan J.A. concluded that the balance in the application of the
20 alternative remedies doctrine is tipped in favour of refusing an application for *habeas corpus* "in the context of prison law" because "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.*" In so finding, Ryan J.A. has adopted the wording in *Idziak (supra),* which was used by this court to distinguish the context of the prospective immigrant from the federal prisoners in the *Miller (supra)* trilogy. Her reasoning is not expressly limited to the federal prison context, but certainly those were the facts of the case.

***Hickey (supra),* para. 50**
***Idziak v. Canada (Minister of Justice),* [1992] 3 S.C.R. 631, p.652**

30

56. There is only this bare reference to the "complete, comprehensive and expert procedure for review", but it is reasonable to assume the court intended to refer to the

internal grievance procedure, which is established in the respondents' policy, and the provision for an application to the Federal Court for judicial review in *certiorari.*

**Commissioner's Directive No. 081**
***Federal Court Act,* R.S.C. 1985, c. F-7, s.18 (as it then stood)**

57. With regard to the grievance procedure, the finding that it is "complete, comprehensive and expert" and by implication a "viable alternative" is not in accord with the findings of the Arbour Commission or the annual reports of the Office of the Correctional Investigator since that time. The report of the Arbour Commission noted that the issues addressed in the inquiry had for the most part first been raised in the grievance system, however,

> Some of these grievances were never answered at all. Those that were answered were almost always answered late, in some cases several months after the answers were due. In a number of instances, the grievances were responded to by an inappropriate person: either someone not at the appropriate level to respond, or someone who could not be expected to have access to the relevant facts. There is no system to effectively prioritize those grievances where the only effective response would be one received on an urgent basis.

> However, by far the most troubling aspect of the responses to these grievances, which raised important issues of fundamental inmate rights, was the number of times in which the responses failed to deal properly with the substance of the issues raised. In some cases, the responses failed to appreciate the legal significance of the issues raised by the inmates. In some cases, the responses indicated a failure to properly ascertain the underlying facts. In many instances, one was left with the impression that an inmate's version of events was treated as inherently unreliable, and that to grant a grievance was seen as admitting defeat on the part of the Correctional Service.

**Commission of Inquiry into certain events at the Prison for Women in Kingston, Public Works and Government Services Canada, 1996, Section 2.9.3**

58. The report goes on to note the Correctional Service's failure to positively address the Correctional Investigator's concerns regarding the grievance procedure over a number of years.

> The Correctional Investigator has pointed out for years the chronic untimeliness of the response to the complaints and grievance process in the Correctional Service. … As revealed in this case, the process is highly bureaucratic. Particularly at the appellate level, both Regional and National, responsibility for the disposition of grievances is often given to people with neither the knowledge nor the means of acquiring it and, worse, with no

> real authority to remedy the problem should they be prepared to acknowledge its existence.

***Ibid.*, Section 2.9.4**

59. Similarly, in the years since the Arbour Commission, the Correctional Investigator has continued to report a chronic problem of delay in the Correctional Service responding to grievances and in senior management accepting accountability for the grievance process.

**Annual Report of the Correctional Investigator 1998-1999, Minister of Public Works and Government Services Canada, 1999;**

**Annual Report of the Correctional Investigator 1999-2000, Minister of Public Works and Government Services Canada, 2000;**

**Annual Report of the Correctional Investigator 2000-2001, Public Works and Government Services Canada, 2001;**

**Annual Report of the Correctional Investigator 2001-2002, Public Works and Government Services Canada, 2002;**

**Annual Report of the Correctional Investigator 2002-2003, Minister of Public Works and Government Services Canada 2003;**

**Annual Report of the Correctional Investigator 2003-2004, Ministry of Public Safety and Emergency Preparedness 2004**

60. The other avenue for remedy which is discussed in *Hickey (supra)*, the *Federal Court Act*, does not give the Federal Court jurisdiction over matters of *habeas corpus* with respect to federal prisoners. The Federal Court is given exclusive jurisdiction over the other prerogative remedies, but for a federal prisoner seeking to challenge the authority for his or her detention, *certiorari* would not be the most appropriate remedy. Only *habeas corpus* lies to determine the lawfulness of the authority for a deprivation of liberty. Its value springs from its swiftness and efficiency, for should a person in Canada be deprived of liberty without lawful authority, delay would surely exacerbate the offence to s.7 of the *Charter of Rights and Freedoms.*

61. The Ontario Court of Appeal adopted the alternative remedy analysis as it was crafted in *Hickey (supra)*.

***Spindler v. Millhaven Institution*, [2003] O.J. No. 3449 (Q.L.), para. 24**

62. In the instant case, the British Columbia Court of Appeal referred to its own decision in *Hickey (supra)*, as well as the decision in *Spindler (supra)*, and concluded that,

> The appellants have offered no reasonable explanation for failing to pursue judicial review in the Federal Court. In my view, the Chambers judge in this case ought to have refused to hear the applications in this case.

**Appellants' Record, p. 78**

63. The collective effect of this line of reasoning is that a federal prisoner seeking to challenge the lawfulness of his or her detention must first exhaust not only all internal remedies, but all "alternative" or even "viable" remedies, such that the provincial superior court will only exercise its discretion to hear an application for *habeas corpus* in exceptional cases, and only if the appellant adduces evidence of the inadequacy of those alternative remedies.

64. The Ontario Court of Appeal has gone so far as to suggest that federal prisoners seeking *habeas corpus* must first apply to Federal Court for an expedited hearing in order to adduce evidence of unacceptable delay as a precondition to a remedy in the provincial superior court. That requirement was adopted by the British Columbia Court of Appeal in the case below.

***Spindler (supra),* para. 27;**
**Appellants' Record, p. 78**

65. With respect, given the procedural requirements of an application to Federal Court, this is a costly, time-consuming, and unreasonable precondition to filing an application for a remedy which, in British Columbia at least, can be heard on six clear days' notice, under the *Criminal Rules of the Supreme Court of British Columbia,* SI/97-140, s.4. The brief notice period in the *Criminal Rules* is indicative of the importance of a swift determination of the issue.

66. These requirements placed on applicants for *habeas corpus* are contrary to the approach in the trilogy of *Miller (supra),* which confirmed that prisoners retain a residual

right to liberty, and *habeas corpus* will lie to determine the validity of "any significant deprivation of that liberty."

***Miller (supra),* p. 637**

67. The court in *Miller* also concluded that s.18 of the *Federal Court Act* did not give exclusive jurisdiction to the Federal Court in matters of *habeas corpus* respecting federal prisoners, noting,

> … because of its importance as a safeguard of the liberty of the subject *habeas corpus* jurisdiction can only be affected by express words. One may think of reasons why it was thought advisable to leave the *habeas corpus* jurisdiction with respect to federal authorities with the provincial superior courts, including the importance of the local accessibility of this remedy.

***Miller (supra),* pp. 624-625**

68. After surveying common law approaches to *habeas corpus*, this court concluded:

> 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.

***Ibid.*, p. 641**

69. In the case of *R. v. Gamble*, [1988] 2 S.C.R. 595, this court directed:

> where *habeas corpus* is sought as a *Charter* remedy… distinctions which have become uncertain, technical, artificial and, most importantly, non-purposive should be rejected.

***R. v. Gamble,* [1988] 2 S.C.R. 595, p. 640**

70. This court went on to commend the provincial superior courts for their "creativity and flexibility in adapting… *habeas corpus* to its new role" as a *Charter* remedy, and then offered the following *caveat*:

> Under section 24(1) of the *Charter* courts should not allow *habeas corpus* applications to be used to circumvent the appropriate appeal process, but neither should they bind themselves by overly rigid rules about the availability of habeas corpus which may have the effect of denying applicants access to courts to obtain *Charter* relief.

***Gamble (supra),* pp. 641-642**

71. In the recent line of cases, this court's decision in *Steele v. Warden of Mountain Institution*, [1990] 2 S.C.R. 1385 has been, with respect, misinterpreted. Although this court had in *Steele (supra)* extended the remedy of *habeas corpus* to a prisoner who

would otherwise not have had access to that remedy, the case has been read as imposing limitations on access to the remedy.

***Hickey (supra),* para. 51;**
***Spindler (supra),* para. 19;**
**Appellants' Record, pp. 77-78**

72. The passage in *Steele (supra),* which is cited in all three of these cases, contains a cautionary note, as follows:

> 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 unwieldly parallel system for challenging a Parole Board decision.

***Steele v. Warden of Mountain Institution,* [1990] 2 S.C.R. 1385, p. 1418**

73. These comments are particular to an application for *habeas corpus* in a matter relating to the parole review process. It was earlier established by this court in the case of *Dumas v. Leclerc Institute,* [1986] 2 S.C.R. 459 that *habeas corpus* is not available to challenge the continuation of an initially valid deprivation of liberty, as in the denial of an application for parole.

> *Habeas corpus* is available to challenge an unlawful deprivation of liberty. In the context of correctional law, there are three different deprivations of liberty: the initial deprivation of liberty, a substantial change in conditions amounting to a further deprivation of liberty, and a continuation of the deprivation of liberty.
>
> * * * * *
>
> The continuation of an initially valid deprivation of liberty can be challenged by way of *habeas corpus* only if it becomes unlawful. In the context of parole, the continued detention of an inmate will only become unlawful if he has acquired the status of a parolee. … [If] parole is refused, it is obvious that the inmate has not become a parolee and he cannot have recourse to *habeas corpus* to challenge the decision.

***Dumas v. Leclerc Institute,* [1986] 2 S.C.R. 459, pp. 464-465**

74. In *Steele (supra),* the remedy was extended to a prisoner whose continued deprivation of liberty, while initially valid, had continued under circumstances, which amounted to cruel and unusual punishment, such that the deprivation was no longer lawful. Because of the prisoner's age, rather than requiring that he apply anew to the

Federal Court to review the decision of the National Parole Board, this court provided a remedy in *habeas corpus* in order to avoid an injustice.

***Steele (supra),* p. 1419**

75. To accomplish that, this court adopted the approach of Locke J.A. in the British Columbia Court of Appeal, providing a remedy in *habeas corpus* and then considering the case on its merits and imposing a disposition which balanced the prisoner's liberty interest and the public safety interest.

> Locke J.A. noted that because Steele had brought his application outside of the parole review process, the Parole Board and the Correctional Service of Canada had no jurisdiction to impose terms on his release. As a result, it was difficult to ensure that Steele's reintegration into the community would be appropriately supervised. He suggested that as a general rule the Parole Board would be the most appropriate body to determine whether those who come before it should be released on the ground that their continuing detention violates s. 12 of the *Charter*. However, he recognized that this question was not before the Court and held that because of Steele's age and the length of his imprisonment, it would be inequitable to require him to recommence his application by means of judicial review of the National Parole Board decisions. He confirmed that Steele should be released but varied the unconditional release ordered by Paris J. to provide that the Crown could apply to the British Columbia Supreme Court for an order that Steele be returned to custody "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 (supra),* pp. 1407-1408**

76. Although the extension of the remedy in *Steele (supra)* was indeed exceptional, that case in no way limits the remedy to exceptional circumstances. However, in the current line of reasoning in the provincial superior courts, *Steele (supra)* is repeatedly used to that effect, as for example, in the case of *Spindler (supra)*:

> As I read *Steele, supra*, 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.
>
> ***Spindler (supra),* para. 19**

77. This reading of *Steele (supra)* is contrary to the reasoning in *Miller (supra)*, and the appellants respectfully submit this reading cannot be correct. The use remedy in *Steele (supra)* was exceptional because this court had already determined in *Dumas (supra)* that *habeas corpus* was not available to challenge the continued deprivation of an

initially valid detention, in particular, it is not applicable to a denial of parole. It was not exceptional because Steele was a federal prisoner, but because he was a parole applicant.

78. The appellants submit that the reading of *Steele (supra)* which has been imposed by both the British Columbia and the Ontario Courts of Appeal results in the manifestly unfair situation that federal prisoners no longer have the same access to a remedy in *habeas corpus* as do provincial prisoners. Surely there can be no reasonable justification for treating federal prisoners as is their entitlement under s. 10(c) of the Charter were somehow inferior to that of provincial prisoners.

10

79. The conclusions of this court on the availability of *habeas corpus* in the provincial superior courts were once again confirmed in the case of *Idziak (supra*). In that case, a unanimous court directed that, "The rules dealing with the historic writ of *habeas corpus* should always be given a generous and flexible interpretation," and then went on to refer with approval to the trilogy of *Miller (supra), Cardinal (supra),* and *Morin (supra)*.

***Idziak (supra)*, p. 646**

80. The court noted that the applicants in the *Miller (supra)* trilogy each had a choice
20 whether to seek a remedy in the provincial superior courts or in Federal Court, and observed that the court had accepted the choice of the applicants to resort to the provincial superior court for their remedy.

> Each of those cases dealt with an applicant for habeas corpus who had available, as an alternative to the superior court, a review procedure in the Federal Court. In those cases, this Court accepted the decision of the applicant to seek the remedy in the provincial superior courts although it acknowledged that the relief could, as an alternative, be sought in the Federal Court.

***Ibid.*, pp.651-652**

30 81. The court in *Idziak (supra)* went on to distinguish the circumstances in the *Miller (supra)* trilogy from the immigration cases of *Pringle v. Fraser (supra),* and *Peiroo (supra)* in which the choice between alternative remedies should not be left to the applicant. The court referred by example to the immigration cases, in which "the statute provided a complete, comprehensive and expert review" to the Immigration Appeal

Board, with further appeal only by leave to the Supreme Court of Canada. The court also referred to circumstances in which *habeas corpus*, if granted, would affect the ultimate disposition of the case. Such was the case in *Steele (supra),* in which the bare grant of a remedy in *habeas corpus* would have resulted in the applicant's release without supervision to the community after a very lengthy incarceration. The court in *Idziak (supra)* provided the following explanation of *Steele (supra)*:

> 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.
>
> ***Ibid.*, p.652**

82. The instant case falls squarely within the reasoning in the *Miller (supra)* trilogy and the availability of *habeas corpus* to federal prisoners "should not be compromised by concerns about conflicting jurisdiction."

***Miller (supra),* p.641**

83. The appellants suffered a loss of their residual liberty when they were transferred from a minimum to a medium security institution. They submit that deprivation of liberty was without lawful authority, as it was contrary to the principles of fundamental justice, an error which went to the jurisdiction of the decision maker.

84. These are not circumstances in which a successful application will result in the ultimate disposition of the appellants' cases, and so the concern in *Steele (supra)* does not arise. It was that concern which prompted the court in *Steele (supra)* to craft an exceptional remedy. No such exception need be made in this case. A successful application would result in the return of the appellants to minimum security, not the alteration or termination of their sentences. Neither are these circumstances in which there is a statutory scheme directing the appellants to a particular court in pursuit of their remedy.

85. The learned judge sitting in Chambers in the decision below referred to *Miller (supra)* to ground the court's jurisdiction to hear the original application for *habeas corpus*. He reproduced at length this court's explication of the relationship between s.18 of the *Federal Court Act* and the jurisdiction of the provincial superior courts to hear applications for relief in the nature of *habeas corpus*, including the conclusion that s.18 of the *Act* "deliberately omits reference to *habeas corpus*", and that "because of its importance as a safeguard of the liberty of the subject *habeas corpus* jurisdiction can only be affected by express words." This court in *Miller (supra)* spoke of the "clear intention to leave the *habeas corpus* jurisdiction over federal authorities with the provincial superior courts…," but then clarified that jurisdiction is limited only to determine jurisdictional issues, and does not extend to a review of the merits of the impugned decision.

**Appellants' Record, p. 48, ff**
***Miller (supra)*, pp. 629-630**

86. At present the British Columbia Court of Appeal is reading *Steele (supra)* as if it had reversed the earlier decision in *Miller (supra)*. An application to Federal Court for an expedited hearing is a costly, time-consuming, and unreasonable precondition to filing an application for *habeas corpus* in the provincial superior courts.

**Appellants' Record, p.78**

87. The *Criminal Rules of the Supreme Court of British Columbia,* SI/97-140 provides for a hearing of a *habeas corpus* application on six clear days' notice. The hearing is conducted on affidavit evidence, and the notice period can be abbreviated with leave. In short, practically speaking, the greatest time concern is how long it takes to draft, file, and serve an affidavit.

***Criminal Rules of the Supreme Court of British Columbia*, SI/97-140, Rule 4**

88. The *Federal Court Rules, 1998* provide for an application for judicial review upon the following documentary requirements having been met: a Notice of Application to be served and filed along with Proof of Service, a Notice of Appearance, transmittal of

Tribunal's Materials, service and filing of Applicant's Affidavits and Respondent's Affidavits, completion of all Cross-examination within 20 days of filing of Respondent's Affidavits, service and filing of Applicant's Record and Respondent's Record, service and filing of Requisition for Hearing. If all time limits are run completely, the Requisition for Hearing is filed at day 160 following the impugned decision.

***Federal Court Rules, 1998*, (SOR/98-106), Rules 301, 304-310, 312, 314, 317, and 318**

89. There is no public interest or efficiency in having issues properly subject to *habeas corpus* which arise in the case of federal prisoners determined by the Federal Court only because those prisoners are under federal jurisdiction. With respect, that court, contrary to the suggestions made in *Spindler (supra)* and the court below, is possessed of no particular specialty or expertise in determining the lawfulness of a deprivation of liberty with respect to prisoners. Indeed, with their criminal jurisdiction, surely the provincial superior courts are the "experts" in determining issues of liberty.

***Spindler (supra)*, para.19**

**B. Deprivation of Liberty Due to a Change in Policy**

**Is it within the statutory jurisdiction of the respondents to deprive a federal prisoner of liberty because of a change in policy and not because of any fault or misconduct on the part of the prisoner?**

90. The appellants submit that they were transferred from a minimum security penitentiary to medium security penitentiaries, on an emergency basis, because of a policy change, and not because of any fault or misconduct on their part, contrary to ss.7 and 9 of the *Canadian Charter of Rights and Freedoms*, and the requirements of procedural fairness.

91. The appellants submit that their involuntary transfers to higher security were based upon file reviews following instructions received from CSC (Pacific Region) to review the security classifications of all prisoners at Ferndale Minimum who were

serving a life sentence and who had not completed the Violent Offender Program ("VOP").

**Appellants' Record, pp. 104, 140, 143, 154, 190, 227, and 255;**
**Leave Book, p. 84**

92. Section 28 of the *CCRA* provides that prisoners are to be confined in the least restrictive setting possible for the individual, and lists criteria for assessing what is appropriate, taking into account issues of safety, accessibility, rehabilitation and community reintegration.

10 ***CCRA (supra)***

93. The only change affecting the appellants' security classification was a change in policy requiring prisoners serving life sentences to complete a particular program in order to be rated minimum security. The appellants submit that these were precisely the circumstances considered by the Federal Court in the case of *Hay v. Canada (National Parole Board)*, [1985] F.C.J. No. 610; 21 C.C.C. (3d) 408. In that case, a number of federal prisoners had been transferred to the Saskatchewan Farm Institution, a minimum security federal penitentiary, on the basis of their participation in a program of escorted temporary absences. A subsequent policy change resulted in those prisoners no longer
20 meeting the criteria for participation in that program, as they were not close to their eligibility dates for conditional release. The Federal Court held that,

> Whether or not it was made in good faith, the decision to transfer the applicant from the Saskatchewan Farm Institution back to the penitentiary was arbitrary and unfair. In light of the well-founded notion of "a prison within a prison", transfers from open to close or closer custody can certainly engage the provisions of sections 7 and 9 of the *Canadian Charter of Rights and Freedoms*. The decision to effect such an involuntary transfer, without any fault or misconduct on the part of the inmate, as it is abundantly clear was done in the applicant's case is the quintessence of unfairness and arbitrariness.

30 > It may be that the policy change invoked by the respondents affects a contemplated class of inmates, but that, in the absence of fault, cannot prevail over the inmate's individually guaranteed legal rights. If, despite the applicant's excellent record in prison, the policy had been invoked to prevent his being lodged at the farm annex in the first instance, it might well be regrettable, but it would probably have been unassailable.
>
> That is not the circumstance here. It does seem, as the applicant suggests, that he has been caught in the crossfire of competing exertions of authority by the respondents.

> However, having clearly earned the privilege of being placed in the farm annex, this applicant despite his serious crimes in 1977, is not to be moved about like cordwood, simply because he is in a class of inmates contemplated by the change of policy in 1984. The applicant has been deprived of his right to the qualified liberty and security of the person which he possessed at the farm annex in derogation of the principles of natural justice for no fault has been found in his prison record. He has been arbitrarily subjected to intensified imprisonment because he committed no misconduct to warrant such unusual treatment or punishment. The detriment imposed upon the applicant's class of inmate by administrative policy cannot in these circumstances deprive him of the rights conferred upon him as an individual by constitutional imperative.

***Hay v. Canada (National Parole Board),* [1985] F.C.J. No. 610; 21 C.C.C. (3d) 408., (Q.L.) at 415-416**

94. The appellants submit that the situation in *Hay (supra)* is precisely apposite the circumstances in the instant case. The respondents' decision to transfer the appellants to higher security because of a change in policy, as reflected in the computerised classification tool, is the very essence of arbitrariness, having been made without evidence to support it, and it offends the principles of fundamental justice.

95. It is well settled that a transfer of a prisoner to higher security is a deprivation of residual liberty which invokes s.7 of the *Charter* and must therefore be made in accordance with the principles of fundamental justice.

***Miller (supra),* pp.637-638;**
***Gallant v. Canada (Deputy Commissioner, Correctional Service Canada),* [1989] 3 F.C. 329 (C.A.), (Q.L.), p. 337, para. 13;**
***Lee v. Canada (Deputy Commissioner, Correctional Service, Pacific Region),* [1994] 1 F.C. 15; [1993] F.C.J. No. 759 (T.D.), (Q.L.) para. 1**

96. The right to liberty is surely at the very base of the rule of law and our rights in a democracy. Although the appellants suffered a loss of liberty in an administrative law context, they are no less entitled to a full expression of their rights under ss.7 and 9 of the *Charter.* Where fundamental rights are violated, principles of curial deference cannot be invoked. As this court concluded in *Sauvé v. Canada (Chief Electoral Officer),* [2002] 3 S.C.R. 519, limits on fundamental rights "require not deference, but careful examination."

***Sauvé v. Canada (Chief Electoral Officer),* [2002] 3 S.C.R. 519, (Q.L.) at p.535, para.9**

97. In *Sauvé (supra)*, this court considered federal prisoners' right to vote, and examined the appropriateness of exercising deference to Parliament, concluding, "Deference may be appropriate on a decision involving competing social and political policies. It is not appropriate, however, on a decision to limit fundamental rights."

***Sauvé (supra)*, pp. 536-537, (Q.L.) para.13**

98. The learned Chambers judge below found that the respondents had considered each of the appellants' cases on its merits and had transferred them to higher security based on concerns specific to each, and not because of arbitrary application of a general policy.

**Appellants' Record, p. 55**

99. With respect, the respondents' reference in each case to a "file review", and in some cases to particular circumstances of an individual appellant appear to be perfunctory. The decisions to transfer of all five of the appellants were made within the same few weeks between November 2000 and January 2001, with reference to a regional and/or national directive to re-assess each appellants' security level using the computerised tool after that tool had been recalibrated to reflect a policy change so that prisones serving life sentences who had not completed a particular program could no longer be classified as minimum. The overwhelming coincidence of these decisions after the appellants had been classified as minimum security prisoners for between 20 months and four years, and without any fresh information of misconduct on the part of the appellants, reveals that the so-called "file review" was a *pro forma* endeavour to give effect to a policy change.

100. The British Columbia Court of Appeal did not consider this question, having found that the Chambers judge ought to have exercised his discretion to refuse to hear the application.

**Appellants' Record, p. 78**

## C. Respondents' Refusal to Disclose Scoring Matrix

**Principles of Disclosure in Administrative Tribunals**

101. Disclosure of information relied upon by the decision-maker is fundamental to the Appellants' common law rights, statutory rights and constitutional rights to a fair hearing in an administrative proceeding dealing with liberty issues.

102. As with criminal proceedings, the appellants cannot properly make full answer and defence in an administrative hearing without receiving the particulars that the decision-maker relied upon.

10

103. Further, it is submitted that relevant information, not relied upon, but in possession of the respondents should also be disclosed, as it may be of value to the appellants in formulating their defence or rebuttal.

104. In *Wigglesworth v. Her Majesty the Queen* [1987] 2 S.C.R. 541, the court set out a two-part test to determine whether an administrative proceeding has true penal consequences and thus subject to the protection the *Charter*.

***Wigglesworth v. Her Majesty the Queen* [1987] 2 S.C.R. 541**

20 105. It is submitted that s.7 of the *Charter*, the "highest procedural protection known to our law", as it was phrased in *R. v. Stinchcombe [1991]* 3 S.C.R. 326, should apply to prisoners when they are subject to proceedings that may result in a loss of a level of liberty.

***R. v. Stinchcombe* [1991] 3 S.C.R. 326**

106. The court in *Stinchcombe* (supra) made some observations worthy of note pertaining to disclosure of information in civil and criminal matters:

> Production and discovery were foreign to the adversary process of adjudication in its earlier history when the element of surprise was one of the accepted weapons in the
30 arsenal of the adversaries. This applied to both criminal and civil proceedings. Significantly, in civil proceedings this aspect of the adversary process has long disappeared, and full discovery of documents and oral examination of parties and even witnesses are familiar features of the practice. This change resulted from acceptance of the principle that justice was better served when the element of surprise was eliminated

> from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met.
>
> *****
>
> This review of the pros and cons with respect to disclosure by the Crown shows that there is no valid practical reason to support the position of the opponents of a broad duty of disclosure. Apart from the practical advantage to which I have referred, there is the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defense. This common law right has acquired new vigor by virtue of its inclusion of s.7 of the *Canadian Charter of Rights and Freedoms* as one of the principles of fundamental justice.

***Stinchcombe (supra)*, pp. 332 and 336**

107. Since the pronouncement of *Stinchcombe (supra)*, there has been a line of cases in administrative law which have favoured fuller disclosure than the traditional approach, including disclosure of information that was not before the decision-maker and that which would allow the party to test the validity of that evidence.

**Robert W. MacCaulay and James L.H. Sprague, *Practice and Procedure before Administrative Tribunals* (Toronto: Thomson Carswell, 2004), pp. 12.40.4-12.40.5**

**Obligations of Prison Authorities to Disclose**

108. Unlike criminal law, disclosure requirements for federal prison proceedings, and some other administrative proceedings have been codified in part.

109. In addition to the *Charter* legislation pertaining to the legal requirements of disclosure in prison proceedings are contained in the *CCRA, Regulations,* Standard Operating Procedures (the "SOP"), Commissioners Directives (the "CD").

110. Pursuant to s. 30 of the *CCRA*, prisoners must be given reasons, in writing, for the changing of their security classification.

***CCRA (supra)*, s. 30**

111. Pursuant s. 27(1) of the *CCRA*, correctional authorities are required to provide prisoners with all information to be considered upon in the taking of a decision where the prisoner is entitled to make representations. Section 27(3) of the *CCRA* sets out the limited situations under which prison authorities can refuse to disclose relevant

information: (a) the safety of person, (b) security of the penitentiary and (c) the conduct of any lawful investigation.

***CCRA (supra),* ss. 27(1) (3)**

112. Prisoners are entitled to submit a rebuttal to challenge a transfer to higher security, according to s. 29 of the *CCRA* and s.13 of the *Regulations.*

***CCRA (supra)* s. 29;**
***Regulations (supra),* s. 13**

10 113. The appellants were involuntarily transferred on an emergency basis pursuant to s. 13 of the *Regulations.* Prisoners are entitled to disclosure of the information which was relied upon by the authorities within two days after the emergency transfer. Prisoners must also be advised that they can make representations to challenge the transfer.

***Regulations (supra),* s. 13**

114. SOP 700-14 sets out the procedures and criteria for the re-classification of prisoners into the security levels of minimum, medium and maximum.

**SOP 700-14 *(supra)***

20 115. Paragraph 13-26 of SOP 700-14 requires that a staff person complete a reclassification scale questionnaire by selecting answers with corresponding numerical values.

**SOP 700-14 *(supra)***

116. SOP 700-15 sets out the procedures and criteria for the transfer of prisoners from one institution to another. The prisoner's Custody Rating Scale is relied upon to determine the most appropriate level of security for a prison placement.

**SOP 700-15 *(supra)***

30 117. SOP 700-15 sets out the recommended scope of the disclosure:

> The Notice of Involuntary Transfer Recommendation, which is provided to an offender, must contain enough information to allow the offender to know the case against him or her...the details of the incident(s) which prompted the transfer recommendation must be provided to the greatest extent possible.

**SOP 700-15 *(supra)***

118. CD 540 para. 10 -14 specifically addresses the requirements on prison authorities regarding the duty to act fairly and information sharing.

**CD 540 *(supra)***

119. It is submitted that the extensive statutory referencing in prison legislation to disclosure requirements indicates the recognition by government of the need to protect this important right for this unique group of citizens.

**Breach of Duty to the Appellants**

120. The appellants submit that the information sharing by the authorities in the cases at bar falls short of the statutory and common law requirements.

121. It is submitted that the respondents did not provide to the appellants all information as contemplated by *CCRA* s. 27(1). It is argued that the security classification test scores are directly relied upon by authorities as they accepted the determination and accuracy of those results. The respondents claim the CJIL is an objective test. However, it is submitted the CJIL is a subjective test with standardized answers.

***CCRA (supra)*, s. 27(1)**

122. In the alternative, if the court regards the scoring data as not relied upon by the decision-maker, then the appellants submit that disclosure of the scoring information is necessary pursuant to disclosure principles stated in *Stinchcombe (supra)*:

> If the information is of some use then it is relevant and the determination as to whether it is sufficiently useful to put into evidence should be made by the defence and not the prosecution.

***Stinchcombe (supra), p. 345***

123. It is also arguable that SOP 700-15 extends a broader disclosure requirement than s. 27(1) indicating the prisoner should receive enough information to allow him to know the case to meet and that the details of the incident which prompted the transfer be

provided to the greatest extent possible. Previously, the courts have regarded only the *Acts* and *Regulations* as imposing legal requirements upon authorities, while considering the SOP and CD as providing further guidance, yet not to be disregarded.

***Leprette v. Edmonton Institution (Warden),* [1992] F.T.J. No. 1023, p. 5**
***Williams v. Canada (Regional Transfer Board, Prairie Region)* (1992) 15 Admin. L.R. (2d) 83, p. 93**

124. Disclosure of the security classification scoring details or matrix was requested in writing by the appellants' counsel. Written inquires were also made pertaining to the application of the CJIL. Counsel indicated the that the scoring data or matrix was needed to ensure 1) there was no error in calculation and 2) to determine fairness of the answers and questions.

**Appellants' Record, pp. 135, 260, 233, and 202**

125. It cannot be said that the appellants requested material of a sensitive nature. The appellants merely wanted a copy of the answers selected by the administrator of the questionnaire and scoring tabulation details.

126. In *Balian v. Ontario (Regional Transfer Board )* [1988] O.J. No. 87 (Ont.H.C.J.), an involuntary transfer case, the court stated that, at a minimum, the rules of natural justice require that prisoners receive sufficient information to enable themselves to effectively defend against potential arbitrariness or suspicion of arbitrariness in the decision-making process.

***Balian v. Ontario (Regional Transfer Board )* (1988), 62 C.R (3d) 258 (Ont.H.C.J.), p. 6**

127. In the case at bar, it is submitted that there is the potential for an arbitrary determination since the appellants and their counsel are unable to examine for inadvertent errors, misinformation or unfairness in the design or results.

128. Without further details on the scoring, the appellants are advised only of a single computer generated numerical total. Thus, answer data from the prison worker goes into

a figurative black box, and a total score is produced. The appellants have no ability to ensure the accuracy of the answer selections or the calculation total.

129. In the case of Appellant May, the new security classification score changed by one point, yet the answers remained constant from the previous security classification rating from only a few weeks ago.

**Appellants' Record, pp. 120 and 126**

130. The appellants are left wondering whether the unexplained scoring total of the extra one point is an indication of an alteration of the scoring methodology, or an inadvertent error.

131. Evident from appellant Robinson's material is that the questions differ in the former and later security rating tool with computed SR scores respectively of 13.74524 and 19.

**Appellants' Record, pp.224 and 231**

132. The other appellants' material does not include the earlier CJIL and thus they are less able to address these concerns to the limited extent afforded to appellants May and Robinson.

133. As evident in the filed material, disclosure has been inconsistent in the transfer matters before the court. It is noted that there is no policy setting out what documents transfer applicants ought to receive from the authorities. The appellants note that the relevant SOP at the time of *Williams (supra)* did include a list of required documents for disclosure in transfer matters.

***Williams (supra)*, p. 91**

134. The court in *Williams v. Canada (Regional Transfer Board, Prairie Region)* (1992) 15 Admin. L.R. (2d) 83, at para. 21, a prison transfer case, not only applied *Stinchcombe (supra)* but entrusted the prison authorities with a higher duty of care regarding a prisoner's access to such information.

> The materials which would advance the Appellants' case were under the the exclusive control and direction of the penitentiary authorities and it is simply not in accordance with the dictates of fundamental justice for them not only to withhold such materials from him but to refuse to consider them at all.
>
> **Williams v. Canada (Regional Transfer Board, Prairie Region) (1992) 15 Admin. L.R. (2d) 83, p. 94**

135. It is respectfully submitted that the Respondent's claim that the scoring matrix does not exist cannot be true. Clearly, a prison staff person answers the questions indicated in SOP 700-15 and some sort of scoring matrix is created which is then tabulated by computer to find a security custody rating. Further, the Respondents should also disclose the methodology applied in the computed CJIL. The applicants are unaware whether the computer SCR is a mean, median, mode or another tool of statistical analysis. Prisoners may wish to employ a statistical expert to challenge the computed score in some cases.

136. As stated by the Federal Court in *Demaria V. Regional Classification Board and Payne* [1987], 1 F.C. 74 (C.A.), the duty is always on the prison authorities to justify withholding of any information.

> The burden is always on the authorities to demonstrate that they have withheld only such information as is strictly necessary for [the purpose of protecting confidential sources of information]. A blanket claim, such as is made here, that "all preventive security information " is "confidential and (cannot) be released", quite apart from its inherent improbability…is simply too broad to be accepted by a court charged with the duty of protecting the subject's right to fair treatment. In the final analysis, the test must be not whether there exist good grounds for withholding information but rather whether enough information has been revealed to allow the person concerned to answer the case against him.
>
> ***Demaria v. Regional Classification Board and Payne* [1987], 1 F.C. 74 (C.A.), p. 4**

**D. If the respondents' decision to transfer the appellants was in violation of s.7 of the *Charter*, can it be saved by s.1?**

137. Section 1 of the *Charter* states:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

138. Where a right under s.7 of the *Charter* is limited, the threshold under s.1 will be set exceptionally high. A deprivation of liberty attracts an extra duty of procedural fairness. In *Ref. re s.94(2) of the B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, Lamer J. commented on a justification of administrative expediency as follows:

> … exceptional, in my view, will be the case where the liberty or even the security of the person guaranteed under s.7 should be sacrificed to administrative expediency. Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s.7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.

10 ***Ref. re s.94(2) of the B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, p. 518**

139. In her concurring reasons, Wilson J. provided an analysis which imported a s.1 style enquiry to her s.7 analysis, concluding that where

> … the limit on the s.7 right has been effected through a violation of the principles of fundamental justice, the enquiry, in my view, ends there and the limit cannot be sustained under s.1. I say this because I do not believe that a limit on the s.7 right which has been imposed in violation of the principles of fundamental justice can be either "reasonable" or "demonstrably justified in a free and democratic society."

***Ibid*., p. 523**

20

**The *Oakes* test**

140. If a s.1 enquiry is appropriate in this case, then the standard has been set in the case of *R. v. Oakes*, [1986] 1 S.C.R. 103.

***Free and democratic society***

141. Section 1 is to be interpreted in the context of a "free and democratic society," the essential principles of which include "respect for the inherent dignity of the human person," and "commitment to social justice and equality," among other principles which are the "ultimate standard against which a limit on a right or freedom must be shown,

30 despite its effect, to be reasonable and demonstrably justified."

***R. v. Oakes*, [1986] 1 S.C.R. 103, p. 136**

***Sufficiently important objective***

142. The objective of the respondents' policy or directive to reclassify prisoners serving a life sentence who have not completed particular programming is presumably to protect public safety. The appellants concede that public safety is a sufficiently important

objective to impose limits on the s.7 right to liberty, if indeed it is appropriate to embark upon a s.1 analysis.

143. The objective of the respondents' refusal to disclose the scoring matrix for the computerised reclassification tool is presumably either administrative convenience at best, or at worst obstruction of the appellants' in responding to the case against them. In the appellants' submission, neither of these objectives comes close to being sufficiently important to justify overriding a principle of fundamental justice in the procedure of involuntarily transferring federal prisoners to higher security.

10 ***Ref. re s.94(2) of the B.C. Motor Vehicle Act (supra),* p. 523;**
***Oakes (supra),* p. 138**

***Proportionality test***

***a. Rational connection***

144. The appellants submit that the policy or directive to reclassify the appellants is "arbitrary, unfair, [and] based on irrational considerations" in that it deprives a certain class of prisoners of liberty on the presumption that they present a danger to the public, with no evidence of misconduct, and in the face of the appellants' significant history of good conduct at minimum security.

20 ***Oakes (supra),* p. 139**

145. If the respondents' objectives in refusing to disclose the scoring matrix to the appellants are as stated above, then the method chosen is certainly rationally connected to either or both of those objectives.

***b. Minimal impairment***

146. The decision to transfer the appellants to higher security cannot be said to impair their s.7 liberty rights as little as possible. The policy was applied arbitrarily to all the appellants, regardless of their particular need for or suitability for the type of
30 programming required. The blanket application of this policy to prisoners who had already demonstrated their lower security risk is unconscionable in a free and democratic society.

147. Similarly, refusing to disclose relevant information to the appellants in the context of a decision affecting their s.7 rights, if done for the purposes of either administrative convenience or to obstruct procedural fairness is also unconscionable in a free and democratic society.

***Oakes (supra),* p. 139**

***c. Proportionality between objective and effects***

148. The appellants submit that the deleterious effect of a violation of s.7 of the *Charter* is always serious, and therefore can only be justified by clear and substantial public necessity. The respondents cannot meet that test in the absence of cogent and persuasive evidence that the appellants' risk to public safety has in fact increased such that new restrictions on their liberty are justified.

***Oakes (supra),* pp. 139-140**

## PART IV: SUBMISSIONS IN SUPPORT OF ORDER FOR COSTS

149. The appellants do not seek costs against the respondents.

## PART V: NATURE OF ORDER SOUGHT

150. The appellants seek an order transferring the appellants from medium to minimum security forthwith.

151. Such other relief as this honourable court deems fit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

| | |
|---|---|
| **ANN H. POLLAK** | **DONNA M. TURKO** |
| Counsel for the Appellants May and Owen | Counsel for the Appellants Roy, Robinson, and Speer-Senner |

Dated: January 25, 2005
Vancouver, British Columbia

## TABLE OF AUTHORITIES

**Case Law**

**Texts**



**Legislation:**

**Policy:**