



SUPREME COURT OF CANADA

CITATION: Mission Institution v. Khela, 2014 SCC 24

DATE: 20140327

DOCKET: 34609

BETWEEN:

**Diane Knopf, Warden of Mission Institution,
and Harold Massey, Warden of Kent Institution**

Appellants

and

Gurkirpal Singh Khela

Respondent

- and -

**Canadian Association of Elizabeth Fry Societies, John Howard Society of
Canada, Canadian Civil Liberties Association and British Columbia Civil
Liberties Association**

Interveners

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver,
Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 99)

LeBel J. (McLachlin C.J. and Abella, Rothstein, Cromwell,
Moldaver, Karakatsanis and Wagner JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final
form in the *Canada Supreme Court Reports*.

MISSION INSTITUTION v. KHELA

**Diane Knopf, Warden of Mission Institution, and
Harold Massey, Warden of Kent Institution**

Appellants

v.

Gurkirpal Singh Khela

Respondent

and

**Canadian Association of Elizabeth Fry Societies,
John Howard Society of Canada, Canadian
Civil Liberties Association and British Columbia
Civil Liberties Association**

Interveners

Indexed as: Mission Institution v. Khela

2014 SCC 24

File No.: 34609.

2013: October 16; 2014: March 27.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver,
Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Courts — Jurisdiction — Habeas corpus — Transfer of federal inmate from medium security institution to maximum security institution on emergency and involuntary basis — Scope of provincial superior court's review power on application for habeas corpus with certiorari in aid in respect of detention in federal penitentiary — Whether on application for habeas corpus a provincial superior court is entitled to examine reasonableness of administrative decision to transfer offender to higher security institution or whether reasonableness of decision must be determined in Federal Court on judicial review.

Administrative law — Prisons — Procedural fairness — Duty to disclose — Scope of duty to disclose — Transfer of federal inmate from medium security institution to maximum security institution on emergency and involuntary basis — Whether transfer decision meeting statutory requirements related to duty of procedural fairness — Corrections and Conditional Release Act, S.C. 1992, c. 20, ss. 27 to 29 — Corrections and Conditional Release Regulations, SOR/92-620, ss. 5 and 13

K is a federal inmate serving a life sentence for first degree murder at Kent Institution in British Columbia. After three years at this maximum security facility, he was transferred to Mission Institution, a medium security facility. In 2009, an inmate was stabbed at Mission Institution. Roughly one week after the stabbing, the Security Intelligence Office at Mission received information implicating K in the incident. A Security Intelligence Report was completed which contained

information that K had hired two other inmates to carry out the stabbing in exchange for three grams of heroin. As a result, K was involuntarily transferred back to the maximum security facility on an emergency basis after the Warden reassessed his security classification. It is this transfer that was the subject of K's initial *habeas corpus* application. He claimed that this transfer to a higher security institution was both unreasonable and procedurally unfair, and therefore unlawful. Both the British Columbia Supreme Court and, on appeal, the British Columbia Court of Appeal agreed K's *habeas corpus* application should be granted.

Held: The appeal should be dismissed.

The question before the Court is whether on an application for *habeas corpus* a provincial superior court may rule on the reasonableness of an administrative decision to transfer an inmate to a higher security institution or whether the reasonableness of the decision must be dealt with by the Federal Court on an application for judicial review. An inmate can choose either to challenge the reasonableness of the decision by applying for judicial review in the Federal Court or to have the decision reviewed for reasonableness by means of an application for *habeas corpus*. "Reasonableness" is therefore a legitimate ground upon which to question the legality of a deprivation of liberty in an application for *habeas corpus*.

Given the flexibility and the importance of the writ of *habeas corpus*, as well as the underlying reasons why the jurisdiction of the provincial superior courts is concurrent with that of the Federal Court, it is clear that a review for lawfulness will

sometimes require an assessment of the decision's reasonableness. Including a reasonableness assessment in the scope of the review is consistent with this Court's case law. In particular, allowing provincial superior courts to assess reasonableness in the review follows logically from how this Court has framed the remedy and from the limits the courts have placed on the avenues through which the remedy can be obtained. This Court has recognized in its decisions that *habeas corpus* should develop over time to ensure that the law remains consistent with the remedy's underlying goals: no one should be deprived of their liberty without lawful authority.

Many of the same principles which weigh in favour of concurrent jurisdiction between provincial superior courts and the Federal Court apply to the determination of the scope of a provincial superior court's review power. First, each applicant should be entitled to choose his or her avenue of relief. If a court hearing a *habeas corpus* application cannot review the reasonableness of the underlying decision, then a prisoner who has been deprived of his or her liberty as a result of an unreasonable decision does not have a choice of avenues through which to obtain redress but must apply to the Federal Court. Second, there is no reason to assume that the Federal Court is more expert than the superior courts in determining whether a deprivation of liberty is lawful. Third, if inmates are not able to obtain review of their potentially unreasonable loss of liberty under an application for *habeas corpus*, they will have to wade through the lengthy grievance procedure available under the statute in order to have their concerns heard. Fourth, the fact that inmates have local access to relief in the form of *habeas corpus* also weighs in favour of including a review for

reasonableness. Fifth, the non-discretionary nature of *habeas corpus* and the traditional onus on an application for that remedy favour an inmate who claims to have been unlawfully deprived of his or her liberty. If the inmate were forced to apply to the Federal Court to determine whether the deprivation was unreasonable, the remedy would be a discretionary one. Further, on an application for judicial review, the onus would be on the applicant to show that the transfer decision was unreasonable. Lastly, requiring inmates to challenge the reasonableness of a transfer decision in the Federal Court could result in a waste of judicial resources.

A transfer decision that does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law will be unlawful. Similarly, a decision that lacks justification, transparency, and intelligibility will be unlawful. For it to be lawful, the reasons for and record of the decision must in fact or in principle support the conclusion reached. A decision will be unreasonable, and therefore unlawful, if an inmate's liberty interests are sacrificed absent any evidence or on the basis of unreliable or irrelevant evidence, or evidence that cannot support the conclusion. Deference will be shown to a determination that evidence is reliable, but the authorities will nonetheless have to explain that determination. A review to determine whether a decision was reasonable, and therefore lawful, necessarily requires deference. An involuntary transfer decision is nonetheless an administrative decision made by a decision maker with expertise in the environment of a particular penitentiary. To apply any standard other than reasonableness in reviewing such a decision could well lead to the micromanagement

of prisons by the courts. The application of a standard of review of reasonableness; however, should not change the basic structure or benefits of the writ of *habeas corpus*. First, the traditional onuses associated with the writ will remain unchanged. Second, the writ remains non-discretionary as far as the decision to review the case is concerned. Third, the ability to challenge a decision on the basis that it is unreasonable does not necessarily change the standard of review that applies to other flaws in the decision or in the decision-making process. For instance, the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be “correctness.”

In this case, it is not necessary to determine whether the decision made by the Warden in the instant case was unlawful on the basis of unreasonableness. The decision was unlawful because it was procedurally unfair. The statute at issue in this case, the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (“CCRA”), outlines the disclosure that is required for a reviewing court to find a transfer decision fair, and therefore lawful. Section 27 of the CCRA guides the decision maker and elaborates on the resulting procedural rights. In order to guarantee fairness in the process leading up to a transfer decision, s. 27(1) provides that the inmate should be given all the information that was considered in the taking of the decision, or a summary of that information. This disclosure must be made within a reasonable time before the final decision is made. The onus is on the decision maker to show that s. 27(1) was complied with.

The statutory scheme allows for some exemptions from the onerous disclosure requirement of s. 27(1) and (2). Section 27(3) provides that where the Commissioner has reasonable grounds to believe that disclosure of information under s. 27(1) or (2) would jeopardize (a) the safety of any person, (b) the security of a penitentiary, or (c) the conduct of a lawful investigation, he or she may authorize the withholding from the inmate of as much information as is strictly necessary in order to protect the interest that would be jeopardized. A decision to withhold information pursuant to s. 27(3) is necessarily reviewable by way of an application for *habeas corpus*. Such a decision is not independent of the transfer decision made under s. 29 of the *CCRA*. If the correctional authorities failed to comply with s. 27 as a whole, a reviewing court may find that the transfer decision was procedurally unfair, and the deprivation of the inmate's liberty will not be lawful. If the Commissioner, or a representative of the Commissioner, chooses to withhold information from the inmate on the basis of s. 27(3), the onus is on the decision maker to invoke the provision and prove that there were reasonable grounds to believe that disclosure of that information would jeopardize one of the listed interests.

Here, it is clear from the record that the Warden, in making the transfer decision, considered information that she did not disclose to K. Nor did she give him an adequate summary of the missing information. The withholding of this information was not justified under s. 27(3). If s. 27(3) is never invoked, pled, or proven, there is no basis to find that the Warden was justified in withholding information that was considered in the transfer decision from the inmate. As a result,

the Warden's decision did not meet the statutory requirements related to the duty of procedural fairness. The decision to transfer K from Mission Institution to Kent Institution was therefore unlawful. The British Columbia Supreme Court properly granted *habeas corpus* and K was properly returned to a medium security institution.

Cases Cited

Applied: *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *R. v. Miller*, [1985] 2 S.C.R. 613; *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662; **referred to:** *Khela v. Mission Institution*, 2011 BCSC 577, 237 C.R.R. (2d) 15; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 9; *Bushell's Case* (1670), Vaughan 135, 124 E.R. 1006; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75; *Mitchell v. The Queen*, [1976] 2 S.C.R. 570; *R. v. Gamble*, [1988] 2 S.C.R. 595; *R. v. J.P.G.* (2000), 130 O.A.C. 343; *Jones v. Cunningham*, 371 U.S. 236 (1962); *Peiroo v. Canada (Minister of Employment and Immigration)* (1989), 69 O.R. (2d) 253; *Libo-on v. Alberta (Fort Saskatchewan Correctional Centre)*, 2004 ABQB 416, 32 Alta. L.R. (4th) 128; *Goldhar v. The Queen*, [1960] S.C.R. 431; *Re Sproule* (1886), 12 S.C.R. 140; *Re Trepanier* (1885), 12 S.C.R. 111; *R. v. Secretary of State for the Home Department, ex parte Cheblak*, [1991] 2 All E.R. 319; *R. v. Secretary of State for the Home Department, Ex parte Muboyayi*, [1992] 1 Q.B. 244; *R. v.*

Governor of Brixton Prison, Ex parte Armah, [1968] A.C. 192; *R. v. Secretary of State for the Home Department, Ex parte Khawaja*, [1984] 1 A.C. 74; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711; *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3; *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 9.

Corrections and Conditional Release Act, S.C. 1992, c. 20, ss. 27, 28, 29.

Corrections and Conditional Release Regulations, SOR/92-620, ss. 5(1)(b), 13.

Criminal Code, R.S.C. 1985, c. C-46.

Criminal Rules of the Supreme Court of British Columbia, SI/97-140, r. 4.

Federal Court Rules, 1998, SOR/98-106, rr. 301 to 314.

Federal Courts Act, R.S.C. 1985, c. F-7, ss. 18, 18.1(2), (3)(b), (4).

Habeas Corpus Act, 1679 (Engl.), 31 Cha. 2, c. 2.

Authors Cited

- Blackstone, William. *Commentaries on the Laws of England*, vol. III. Oxford: Clarendon Press, 1768. Canada.
- Canada. Correctional Service. *Commissioner's Directive 081*, "Offender Complaints and Grievances" (2014).
- Canada. Correctional Service. *Commissioner's Directive 710-2*, "Transfer of Offenders" (2010).
- Cromwell, Thomas. "Habeas Corpus and Correctional Law — An Introduction" (1977), 3 *Queen's L.J.* 295.
- Duker, William F. *A Constitutional History of Habeas Corpus*. Westport, Conn.: Greenwood Press, 1980.
- Dyzenhaus, David. "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law*. Oxford: Hart, 1997, 279.
- Farbey, Judith, Robert J. Sharpe, and Simon Atrill. *The Law of Habeas Corpus*, 3rd ed. New York: Oxford University Press, 2011.
- Ford, Cristie. "Dogs and Tails: Remedies in Administrative Law", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context*, 2nd ed. Toronto: Emond Montgomery, 2013, 85.
- Halliday, Paul D. *Habeas Corpus: From England to Empire*. Cambridge, Mass.: Belknap Press, 2010.
- Harvey, D. A. Cameron. *The Law of Habeas Corpus in Canada*. Toronto: Butterworths, 1974.
- Mullan, David J. *Administrative Law*. Toronto: Irwin Law, 2001.
- Parkes, Debra. "The 'Great Writ' Reinvigorated? *Habeas Corpus* in Contemporary Canada" (2010), 36 *Man. L.J.* 351.
- Sharpe, Robert J. "Habeas Corpus in Canada" (1976), 2 *Dal. L.J.* 241.
- Sharpe, Robert J. *The Law of Habeas Corpus*, 2nd ed. New York: Oxford University Press, 1989.
- Wade, H. W. R. "Habeas Corpus and Judicial Review" (1997), 113 *L.Q.R.* 55.

APPEAL from a judgment of the British Columbia Court of Appeal (Smith, Chiasson and Groberman JJ.A.), 2011 BCCA 450, 312 B.C.A.C. 217, 246 C.R.R. (2d) 277, 27 Admin. L.R. (5th) 41, 90 C.R. (6th) 149, [2011] B.C.J. No. 2111 (QL), 2011 CarswellBC 3095, allowing in part a decision of Bruce J., 2010 BCSC 721, 210 C.R.R. (2d) 251, 19 Admin. L.R. (5th) 173, [2010] B.C.J. No. 971 (QL), 2010 CarswellBC 1288. Appeal dismissed.

Anne M. Turley and Jan Brongers, for the appellants.

Bibhas D. Vaze and Michael S. A. Fox, for the respondent.

Allan Manson and Elizabeth Thomas, for the interveners the Canadian Association of Elizabeth Fry Societies and the John Howard Society of Canada.

D. Lynne Watt, for the intervener the Canadian Civil Liberties Association.

Michael Jackson, Q.C., and *Joana G. Thackeray*, for the intervener the British Columbia Civil Liberties Association.

The judgment of the Court was delivered by

Introduction

[1] This case arises from a decision of correctional authorities to transfer a federal inmate from a medium security institution to a maximum security institution on an emergency and involuntary basis. In response to the transfer decision, the inmate filed an application for relief in the form of *habeas corpus* on the grounds that the decision taken was unreasonable and that it was procedurally unfair.

[2] At issue in this case is the state of the law with respect to the writ of *habeas corpus*. In particular, this Court must clarify the scope of a provincial superior court's review power on an application for *habeas corpus* made by a prison inmate. The first question before the Court is whether on such an application a provincial superior court may rule on the reasonableness of an administrative decision to transfer an inmate to a higher security institution or whether the reasonableness of the decision must be dealt with by the Federal Court on an application for judicial review. The second question concerns the information that must be disclosed to ensure that a transfer decision is procedurally fair.

[3] In my view, superior courts are entitled to review an inmate transfer decision for reasonableness on an application for *habeas corpus* with *certiorari* in aid. If a decision is unreasonable, it will be unlawful. Support for this conclusion can be found in the nature of the writ, in past court decisions regarding the writ, and in the

importance of swift access to justice for those who have been unlawfully deprived of their liberty.

[4] Moreover, it is well established that a superior court hearing a *habeas corpus* application may also review a transfer decision for procedural fairness. The statute at issue in this case, the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (“*CCRA*”), outlines the disclosure that is required for a reviewing court to find such a decision fair, and therefore lawful.

[5] In this case, the correctional authorities did not comply with the statutory disclosure requirements. The breach of the statutory requirements rendered the decision procedurally unfair, and therefore unlawful. Given this finding, I would dismiss the appeal. The judgments of both the British Columbia Supreme Court and the British Columbia Court of Appeal are well founded.

Background Facts

[6] The respondent, Mr. Khela, is a federal inmate. He began serving a life sentence for first degree murder at Kent Institution in British Columbia in 2004. After three years at this maximum security facility, he was transferred to Mission Institution, a medium security facility. In February 2010, however, Mr. Khela was involuntarily transferred back to the maximum security facility on an “emergency basis” after the Warden reassessed his security classification. It is this transfer that was the subject of Mr. Khela’s initial *habeas corpus* application. Mr. Khela claimed

that this transfer to a higher security institution was both unreasonable and procedurally unfair, and therefore unlawful.

[7] The events that led up to the transfer in question are as follows. On September 23, 2009 an inmate was stabbed several times at Mission Institution. Roughly one week after the stabbing, the Security Intelligence Office at Mission received information implicating Mr. Khela in the incident. On February 2, 2010, that office completed a Security Intelligence Report (“Security Report”), which contained information that Mr. Khela had hired two other inmates to carry out the stabbing in exchange for three grams of heroin. As a result of the Security Report, Mr. Khela was immediately transferred back to the maximum security prison.

[8] On February 4, 2010, Mr. Khela received an “Assessment for Decision” (“Assessment”) and a “Notice of Emergency Involuntary Transfer Recommendation” (“Notice”). The Assessment indicated that “[t]he primary reason for Mr. Khela’s emergency transfer [was the] Security Intelligence Report . . . and the culmination of information [it] contained”, including the identification of Mr. Khela as the person responsible for organizing the stabbing. The Assessment stated that the Warden came to this conclusion on the basis of “source” and “kite”, i.e. anonymous, information received from “three separate and distinct sources”. The Assessment did not contain detailed information with respect to the sources’ names, what they said or why they might be considered reliable.

[9] The Notice confirmed that although his security classification had been determined, on the basis of the Correctional Service of Canada (“CSC”) Security Reclassification Scale (“SRS”), to be “medium security”, his case management team had recommended that this classification be overridden so as to be increased to “maximum security”.

[10] On February 26, 2010, Mr. Khela submitted a written rebuttal in response to his transfer. Mr. Khela asked that the scoring matrix used to determine his ranking in accordance with the SRS be disclosed to him together with the Security Report, and with information on why the “sources” should be considered reliable and how the Warden had determined that they were reliable.

[11] On March 15, 2010, Mr. Khela received a response to his rebuttal in the form of a “Referral Decision Sheet” that informed him that the Warden’s final decision was to transfer him to the maximum security facility. In it, the Warden explained, among other things, why Mr. Khela’s “medium” security rating had been overridden by his case management team. She also noted, in response to Mr. Khela’s questioning of the credibility of the sources, that “the information received and assessed by the [Security Intelligence Officer was] believed reliable despite the Assessment . . . only referring to the information as ‘source’ information” because of the expertise and policies of the security intelligence officers.

[12] On April 27, 2010, Mr. Khela filed a notice that he would be making a *habeas corpus* application in the British Columbia Supreme Court. The application

was heard by Bruce J. on May 11, 2010. Ten days later, Bruce J. granted the writ and ordered that Mr. Khela be returned to the general population of Mission Institution, the medium security facility. This appeal concerns the lawfulness of that transfer decision.

Mootness

[13] It is important to note that this appeal is now factually moot. On July 23, 2010, the Warden of Mission Institution made another decision to reclassify Mr. Khela as requiring maximum security. As a result of that decision, Mr. Khela was transferred back to Kent Institution, the maximum security facility. This second transfer was the subject of another *habeas corpus* application, which was dismissed by a judge of the British Columbia Supreme Court (2011 BCSC 577, at paras. 1, 58 and 89). Mr. Khela did not appeal the dismissal of that application. The lawfulness of his current incarceration is therefore not before this Court.

[14] Despite being moot, this appeal merits a decision in the circumstances of this case. The nature of *habeas corpus* applications involving the transfer and segregation of inmates is such that the factual circumstances of a given application can change quickly, before an appellate court can review the application judge's decision. This means that such cases will often be moot before making it to the appellate level, and are therefore "capable of repetition, yet evasive of review" (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 364). As was true in *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 14, and

Cardinal v. Director of Kent Institution, [1985] 2 S.C.R. 643, at p. 652, the points in issue here are sufficiently important, and they come before appellate courts as “live” issues so rarely, that the law needs to be clarified in the instant case.

Judicial History

British Columbia Supreme Court, 2010 BCSC 721, 210 C.R.R. (2d) 251

[15] The British Columbia Supreme Court granted Mr. Khela *habeas corpus* (para. 64). Bruce J. first determined that on a *habeas corpus* application, a provincial superior court has jurisdiction to review a warden’s transfer decision for reasonableness. Relying on this Court’s decisions in *May* and in the “*Miller* trilogy” (*R. v. Miller*, [1985] 2 S.C.R. 613; *Cardinal*; *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662), she found that provincial superior courts, when hearing *habeas corpus* applications, have concurrent jurisdiction with the Federal Court (para. 37), which means that it is open to a superior court to determine whether the decision in question is reasonable. Bruce J. explained that the discretion to refuse to hear a *habeas corpus* application can only be exercised “where by statute a court of appeal is vested with exclusive authority to hear an appeal or where there is a complete internal process for review of an administrative decision” (para. 38). She found that a challenge based on reasonableness falls into neither of these categories, which means that reasonableness is a legitimate ground for review (paras. 38-40). Ultimately, however, Bruce J. held that it was unnecessary to address

Mr. Khela's argument that the transfer decision was unreasonable, because she had already found the transfer to be unlawful on the basis of insufficient disclosure.

[16] Bruce J. found that the statutory obligation to disclose under s. 27(1) of the *CCRA* is "onerous, substantial and extensive", and that it is "underscored by the common law duty of fairness" (para. 44). In addition, she noted that *Commissioner's Directive 710-2*, "Transfer of Offenders", requires specific disclosure of the details of the incidents and the information that prompted the transfer recommendation. Bruce J. concluded that the Warden had failed to prove that she had fulfilled her obligation to make disclosure "to the greatest extent possible" (paras. 46 and 59). In particular, she found that the Warden had unjustifiably failed to disclose the specific statements made by the anonymous sources, information concerning the reliability of these anonymous sources, and the scoring matrix relied upon for the SRS calculation (paras. 51 and 56).

[17] Bruce J. also held that s. 27(3) of the *CCRA* grants the authority to withhold information only when strictly necessary to protect the safety of a person, the security of the penitentiary, or the conduct of a lawful investigation. She stated that a warden who withholds information for one of these reasons must invoke that provision and present evidence to the court to show that the information was properly withheld. Bruce J. noted that the Warden had failed to invoke s. 27(3) and had presented no evidence to justify the withholding of the information. Thus, Mr. Khela had not been given "all the information to be considered". As a result of this failure to

disclose, Bruce J. declared the Warden's decision "null and void for want of jurisdiction" (para. 64). She ordered Mr. Khela's return to the general population of Mission Institution.

British Columbia Court of Appeal, 2011 BCCA 450, 312 B.C.A.C. 217

[18] The British Columbia Court of Appeal allowed the appeal (at para. 95), but only to the extent of limiting Bruce J.'s order to read that *habeas corpus* was granted and that Mr. Khela should be returned to a medium security institution. Chiasson J.A. found that it was unnecessary and undesirable to state that the transfer was "null and void for want of jurisdiction". In substance, however, the Court of Appeal largely agreed with Bruce J.'s decision.

[19] The Court of Appeal held that an inmate transferred from a medium to a maximum security facility may apply for *habeas corpus* in a provincial superior court on the ground that the transfer decision was unreasonable. In Chiasson J.A.'s view, an unreasonable decision is an unlawful decision, and *habeas corpus* is therefore available (at para. 66). Chiasson J.A. further explained that where a *habeas corpus* application concerns the substance of the underlying decision, the standard of review is reasonableness, with considerable deference to those charged with the administration of penal institutions (paras. 69-70).

[20] The Court of Appeal also addressed the issue of disclosure. Chiasson J.A. held that a warden is statutorily obliged to provide an applicant in Mr. Khela's

position with all the information he or she considered in making the decision, or with a summary of that information (para. 42). However, he did not agree that the warden has to provide the substance and details of the events leading up to the decision “to the greatest extent possible” (para. 43). Rather, Chiasson J.A. found that all that is required is an outline of the basic facts of the incident leading to the transfer that would be sufficient for the inmate to know the case he or she must meet (para. 43). He added that s. 27(3) of the *CCRA* provides a basis for justifying non-compliance. But he noted that it also requires the warden to invoke this provision and establish that he or she had reasonable grounds to believe that withholding the information was necessary in the circumstances.

[21] Applying this statutory standard, Chiasson J.A. determined that Mr. Khela had not been provided with adequate disclosure given the statutory and the common law requirements (para. 55). In particular, he found that Bruce J. had not erred in concluding that Mr. Khela should have been given additional information concerning the sources of information considered by the Warden. Chiasson J.A. accordingly found that the Warden had not met her statutory obligation and that, as a result, the transfer was procedurally unfair and therefore unlawful. He agreed with Bruce J.’s decision to grant *habeas corpus*.

Issues and Positions of the Parties

[22] This case revolves around three core issues:

- a) What is the scope of the review on an application for *habeas corpus* with *certiorari* in aid in respect of detention in a federal penitentiary? In particular, does the scope of the review on such an application include an assessment of reasonableness?
- b) What is the scope of the duty of disclosure under s. 27 of the *CCRA*?
- c) In this case, were there grounds for finding that the decision was unlawful and granting the writ of *habeas corpus*?

[23] With regard to the first issue, the appellants argue that on an application for *habeas corpus* in this context, the scope of a provincial superior court's review is limited to an assessment of whether the decision was "lawful". In the appellants' view, the merits of the underlying decision are irrelevant to that assessment. Only the Federal Court can assess the reasonableness of federal administrative decisions. The respondent argues, on the contrary, that it is open to a superior court on an application for *habeas corpus* to review the reasonableness of a correctional decision which resulted in a deprivation of liberty.

[24] The interveners largely support Mr. Khela on this issue. The British Columbia Civil Liberties Association ("BCCLA") argues that to determine whether a decision was "lawful", a provincial superior court hearing a *habeas corpus* application must be able to conduct a robust review. It nevertheless cautions against allowing a superior court to conduct a "wholesale review for 'reasonableness'".

According to the Canadian Civil Liberties Association (“CCLA”), *habeas corpus*, as a *Canadian Charter of Rights and Freedoms* remedy, should be interpreted in a manner that is responsive to the particular needs of an individual who has been unlawfully deprived of his or her liberty. For this purpose, a superior court must be able to consider the merits of the underlying decision. Finally, the John Howard Society of Canada and the Canadian Association of Elizabeth Fry Societies submit that the appellants’ interpretation of the scope of *habeas corpus* is too restrictive, but that “*Dunsmuir* reasonableness” cannot apply as a standard of review on a *habeas corpus* application (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

[25] As for the second issue, the appellants contend that disclosure will be sufficient when, as a matter of logic and common sense, it enables the inmate to know the case he or she has to meet. They further argue that if information is withheld pursuant to s. 27(3) of the *CCRA*, the decision to withhold it cannot be impugned by means of an application for *habeas corpus*, but must be challenged in the Federal Court on judicial review. The respondent counters that s. 27(1) indicates, in plain language, that the decision maker must disclose all the information considered in the taking of a decision or a summary of that information. He adds that if information is withheld from an inmate pursuant to s. 27(3), the onus is on the warden to demonstrate that there were reasonable grounds to believe that the safety of a person, the security of the institution or the conduct of an investigation would have been jeopardized had the information been disclosed. All four interveners (the CCLA, the

BCCLA, the Canadian Association of Elizabeth Fry Societies together with the John Howard Society of Canada) are in substantial agreement with the respondent.

[26] Finally, on the third issue, the appellants submit that the courts below erred in granting Mr. Khela's *habeas corpus* application. First, they argue that the courts below erred in holding that it is acceptable for a provincial superior court to review the merits of a transfer decision for reasonableness. Second, they argue that the courts below erred in finding that the Warden's disclosure constituted a denial of procedural fairness. In their opinion, the information disclosed to Mr. Khela was sufficient for him to know the case to be met. The respondent contends that the Warden did not disclose all the information she had considered, and that she provided no evidentiary basis for withholding it as she was required to do in the context of s. 27. The decision to transfer Mr. Khela was accordingly unlawful for want of procedural fairness.

Analysis

Habeas Corpus: The History and Nature of the Remedy

[27] W. Blackstone, in his *Commentaries on the Laws of England* (1768), vol. III, c. 8, at p. 131, asserted that *habeas corpus* is "the great and efficacious writ in all manner of illegal confinement" (cited by D. Parkes, "The 'Great Writ' Reinvigorated? *Habeas Corpus* in Contemporary Canada" (2012), 36 *Man. L.J.* 351, at p. 352); *May* at para. 19; W. F. Duker, *A Constitutional History of Habeas Corpus*

(1980), at p. 3). In an earlier incarnation, *habeas corpus* was a means to ensure that the defendant in an action was brought physically before the Court. (Duker, at p. 4; J. Farbey, R. J. Sharpe and S. Atrill, *The Law of Habeas Corpus* (3rd ed. 2011), at p. 16; P. D. Halliday, *Habeas Corpus: From England to Empire* (2010), at p. 2). Over time, however, the writ was transformed into a vehicle for reviewing the justification for a person's imprisonment (Duker, at p. 4). Indeed, by the late 17th century, Vaughan C.J. of the Court of Common Pleas stated that "[t]he Writ of *habeas corpus* is now the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it" (Duker, at p. 54, citing *Bushell's Case* (1670), Vaughan 135, 124 E.R. 1006, at p. 1007).

[28] The first legislation respecting *habeas corpus* was enacted in 1641. The remedy was subsequently codified a second time in the *Habeas Corpus Act* of 1679 (Engl.), 31 Cha. 2, c. 2 (T. Cromwell, "Habeas Corpus and Correctional Law — An Introduction" (1997), 3 *Queen's L.J.* 295, at p. 298), the many purposes of which included addressing problematic delays in obtaining the writ, ensuring that prisoners were provided with copies of their warrants so that they would know the grounds for their detention, and ensuring that prisoners "would not be taken to places beyond the reach of the writ" (Farbey, Sharpe and Atrill, at p. 16; Halliday, at pp. 239-40).

[29] Through both the *Charter* and the common law, Canada has attempted to maintain and uphold many of the goals of the *Habeas Corpus Act*, which embodied the evolving purposes and principles of the writ. *Habeas corpus* has become an

essential remedy in Canadian law. In *May*, this Court emphasized the importance of *habeas corpus* in the protection of two of our fundamental rights:

(1) the right to liberty of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (s. 7 of the *Charter*); and (2) the right not to be arbitrarily detained or imprisoned (s. 9 of the *Charter*). [para. 22]

These rights belong to everyone in Canada, including those serving prison sentences (*May*, at paras. 23-25). *Habeas corpus* is in fact the strongest tool a prisoner has to ensure that the deprivation of his or her liberty is not unlawful. In articulating the scope of the writ both in the *Miller* trilogy and in *May*, the Court has ensured that the rule of law continues to run within penitentiary walls (*Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, at p. 622) and that any deprivation of a prisoner's liberty is justified.

[30] To be successful, an application for *habeas corpus* must satisfy the following criteria. First, the applicant must establish that he or she has been deprived of liberty. Once a deprivation of liberty is proven, the applicant must raise a legitimate ground upon which to question its legality. If the applicant has raised such a ground, the onus shifts to the respondent authorities to show that the deprivation of liberty was lawful (Farbey, Sharpe and Atrill, at pp. 84-85; *May*, at paras. 71 and 74).

Court Oversight of Penal Institutions

[31] Both the Federal Court and provincial superior courts are tasked with reviewing decisions made within federal prison walls. Section 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (“FCA”), confers exclusive original jurisdiction on the Federal Court to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief against any federal board, commission or other tribunal. In *Martineau* this Court held that the writ of *certiorari* is available if an administrative decision was unfair, regardless of whether the decision was “judicial or quasi-judicial” (at pp. 628-29 and 634). Dickson J. (as he then was) stated, in minority concurring reasons, that under s. 18, *certiorari* is available in the Federal Court whenever “a public body has power to decide any matter affecting the rights, interests, property, privileges, or liberties of any person” (pp. 622-23).

[32] However, *habeas corpus* was “deliberately omit[ted]” from the list of writs set out in s. 18 of the *FCA*. This means that although the Federal Court has a general review jurisdiction, it cannot issue the writ of *habeas corpus* (*Miller*, at pp. 624-26). Jurisdiction to grant *habeas corpus* with regard to inmates remains with the provincial superior courts.

[33] The jurisdiction of the provincial superior courts over prisoners in federal institutions was explained by this Court in the 1985 *Miller* trilogy and confirmed more recently in *May*. In the trilogy, Le Dain J. held that a provincial superior court has jurisdiction to hear an application for *habeas corpus* in order to review the

validity of a detention authorized by a federal decision maker, despite the fact that alternative remedies are available in the Federal Court (*Miller*, at pp. 626 and 640-41). Le Dain J. concluded in *Miller*:

[H]abeas 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 the possible problems arising from concurrent or overlapping jurisdiction. The general importance of [habeas corpus] 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. [Emphasis added; pp. 640-41.]

Thus, the availability of the writ is more important than the possibility of hypothetical issues arising as a result of concurrent jurisdiction.

[34] Le Dain J. also held in *Miller* that relief in the form of *habeas corpus* is available in a provincial superior court to an inmate whose “residual liberty” has been reduced by a decision of the prison authorities, and that this relief is distinct from a possible decision to release the inmate entirely from the correctional system (*Miller*, at p. 641). Decisions which might affect an offender’s residual liberty include, but are not limited to, administrative segregation, confinement in a special handling unit and, as in the case at bar, a transfer to a higher security institution.

[35] Finally, *Miller* enhanced the effectiveness of *habeas corpus* by confirming that inmates may apply for *certiorari* in aid of *habeas corpus*. Without

certiorari in aid, a court hearing a *habeas corpus* application would consider only the “facts as they appear[ed] on the face of [the] return” or on the “face” of the decision, as the case may be, in determining whether the deprivation of liberty was lawful (D. A. C. Harvey, *The Law of Habeas Corpus in Canada* (1974), at p. 103). But *certiorari* in aid brings the record before the reviewing judge so that he or she may examine it to determine whether the challenged decision was lawful (*Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75, at para. 117). *Certiorari* in aid therefore operates to make *habeas corpus* more effective by requiring production of the record of the proceedings that resulted in the decision in question (*Miller*, at p. 624; Chief Justice Laskin in *Mitchell v. The Queen*, [1976] 2 S.C.R. 570, at p. 578).

[36] It should be noted that *certiorari* applied for in aid of *habeas corpus* is different from *certiorari* applied for on its own. The latter is often used to quash an order, and it is only available in the Federal Court to an applicant challenging a federal administrative decision. In the context of a *habeas corpus* application, what is in issue is only the writ of *certiorari* employed to “inform the [c]ourt” and assist it in making the correct determination in a specific case, and not the writ of *certiorari* used to bring the record before the decision maker in order to “have it quashed” as would be done on an application for judicial review in the Federal Court (Cromwell, at p. 321).

[37] This being said, there are, from a functional standpoint, many similarities between a proceeding for *habeas corpus* with *certiorari* in aid and a judicial review proceeding in the Federal Court. After all, “judicial review”, “[i]n its broadest sense”,

simply refers to the supervisory role played by the courts to ensure that executive power is exercised in a manner consistent with the rule of law (Farbey, Sharpe and Atrill, at pp. 18 and 56). This is also the purpose of *habeas corpus*, if distilled to its essence (see generally, Farbey, Sharpe and Atrill, at pp. 18 and 52-56).

[38] Despite the functional similarities between *certiorari* applied for in aid of *habeas corpus* in a provincial superior court and *certiorari* applied for on its own under the *FCA*, however, there are major remedial and procedural differences between them. These differences include (a) the remedies available in each forum, (b) the burden of proof and (c) the non-discretionary nature of *habeas corpus*.

[39] In the Federal Court, a wide array of relief can be sought in an application for judicial review of a CSC decision (see s. 18.1(3)(b) of the *FCA*). But all a provincial superior court can do is determine that the detention is unlawful and then rule on a motion for discharge.

[40] Further, on an application for judicial review, it is the applicant who must show that the federal decision maker made an error (*May*, at para. 71, citing to s. 18.1(4) of the *FCA*), whereas, on an application for *habeas corpus*, the legal burden rests with the detaining authorities once the prisoner has established a deprivation of liberty and raised a legitimate ground upon which to challenge its legality (*May*, at para. 71; Farbey, Sharpe and Atrill, at pp. 84-86). This particular shift in onus is unique to the writ of *habeas corpus*. Shifting the legal burden onto the detaining authorities is compatible with the very foundation of the law of *habeas corpus*,

namely that a deprivation of liberty is permissible only if the party effecting the deprivation can demonstrate that it is justified. The shift is particularly understandable in the context of an emergency or involuntary inmate transfer, as an individual who has been deprived of liberty in such a context will not have the requisite resources or the ability to discover why the deprivation has occurred or to build a case that it was unlawful. On an application for judicial review, on the other hand, the onus remains on the individual challenging the impugned decision to show that the decision was unreasonable.

[41] Finally, judicial review is an inherently discretionary remedy (C. Ford, “Dogs and Tails: Remedies in Administrative Law”, in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (2nd ed. 2013), 85, at pp. 107-9). On an application for judicial review, the court has the authority to determine at the beginning of the hearing whether the case should proceed (D. J. Mullan, *Administrative Law* (2001), at p. 481). In contrast, a writ of *habeas corpus* issues as of right if the applicant proves a deprivation of liberty and raises a legitimate ground upon which to question the legality of the deprivation. In other words, the matter *must* proceed to a hearing if the inmate shows some basis for concluding that the detention is unlawful (*May*, at paras. 33 and 71; Farbey, Sharpe and Atrill, at pp. 52-54).

[42] Twenty years after the *Miller* trilogy, in *May*, this Court stressed the importance of having superior courts hear *habeas corpus* applications. The majority in *May* unambiguously upheld the *ratio* of *Miller*: “[h]abeas corpus jurisdiction should not

be declined merely because of the existence of an alternative remedy” (para. 34). In *May*, the Court established that, in light of the historical purposes of the writ, provincial superior courts should decline jurisdiction to hear *habeas corpus* applications in only two very limited circumstances:

. . . where (1) a statute such as the *Criminal Code*, R.S.C. 1985 c. C-46, confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be or (2) the legislator has put in place complete, comprehensive and expert procedure for review of an administrative decision. [para. 50]

As was true in *May*, the first exception does not apply to the instant case. As for the second exception, the appellants have offered no argument to suggest that the transfer and review process of CSC has, since *May*, become “a complete, comprehensive and expert procedure” (paras. 50-51).

[43] The majority in *May* set out five factors that provided further support for the position that provincial superior courts should hear *habeas corpus* applications from federal prisoners regardless of whether relief is available in the Federal Court.

[44] First, given their vulnerability and the realities of confinement in prisons, inmates should, despite concerns about conflicting jurisdiction, have the ability to choose between the forums and remedies available to them, (*May*, at paras. 66-67). As this Court very succinctly put it in *May*, “[t]he [remedial] option belongs to the applicant” (para. 44).

[45] Second, there is no reason to suppose that the Federal Court is more expert than the provincial superior courts when it comes to inmates' fundamental rights. The Federal Court is of course well acquainted with administrative decisions and administrative procedure. The superior courts, on the other hand, are eminently familiar with the application of *Charter* principles and values, which are directly in issue when an inmate claims to have been unlawfully deprived of liberty (*May*, at para. 68).

[46] Third, a hearing of a *habeas corpus* application in a superior court can be obtained more rapidly than a hearing of a judicial review application in the Federal Court. For example, according to Rule 4 of the *Criminal Rules of the Supreme Court of British Columbia*, SI 97/140, a hearing of a *habeas corpus* application requires only six days' notice. This is minimal in comparison with the timeline for having a judicial review application heard in the Federal Court. In that court, if the parties take the full time allotted to them at each step of the procedure, the request that a date be set for the hearing of the application will be filed 160 days after the challenged decision (s. 18.1(2) of the *FCA* and Rules 301 to 314 of the *Federal Court Rules*, 1998, SOR/98-106, cited at para. 69 of *May*).

[47] Fourth, inmates have greater local access to a provincial superior court. This Court recognized the importance of local access in both *Miller* (at pp. 624-26) and *R. v. Gamble*, [1988] 2 S.C.R. 595 (at pp. 634-35), as well as in *May* (para. 70).

[48] Fifth, as I mentioned above, the non-discretionary nature of *habeas corpus* and the burden of proof on an application for this remedy both favour the applicant.

[49] These factors all weigh against acceptance of a bifurcated jurisdiction. The history and nature of the remedy, combined with what this Court has said on this issue in the past, unequivocally support a finding that favours access to justice for prisoners, namely that of concurrent jurisdiction. As the majority stated in *May*, “[t]imely judicial oversight, in which provincial superior courts must play a concurrent if not predominant role, is still necessary to safeguard the human rights and civil liberties of prisoners . . .” (para. 72).

[50] The cases discussed above form the basis for the approach the Court must take to the first issue.

Scope of the Review

[51] In essence, the effect of the *Miller* trilogy and *May* is that an inmate who has been deprived of his or her liberty as a result of an unlawful decision of a federal board, commission, or tribunal can apply to a provincial superior court for relief in the form of *habeas corpus*. What must now be done is to establish the scope of that court’s review power.

[52] As I mentioned above, on an application for *habeas corpus*, the basic question before the court is whether or not the decision was lawful. Thus far, it is clear that a decision will not be lawful if the detention is not lawful, if the decision maker lacks jurisdiction to order the deprivation of liberty (see, for example, *R. v. J.P.G.* (2000), 130 O.A.C. 343), or if there has been a breach of procedural fairness (see *May, Miller and Cardinal*). However, given the flexibility and the importance of the writ, as well as the underlying reasons why the jurisdiction of the provincial superior courts is concurrent with that of the Federal Court, it is clear that a review for lawfulness will sometimes require an assessment of the decision's reasonableness.

[53] Including a reasonableness assessment in the scope of the review is consistent with this Court's case law. In particular, allowing provincial superior courts to assess reasonableness in the review follows logically from how this Court has framed the remedy and from the limits the courts have placed on the avenues through which the remedy can be obtained.

[54] This Court has recognized in its decisions that *habeas corpus* should develop over time to ensure that the law remains consistent with the remedy's underlying goals: no one should be deprived of their liberty without lawful authority. The significance of *habeas corpus* to those who have been deprived of their liberty means that it must be developed in a meaningful way (*Miller*, at pp. 640-41). In *May*, the Court quoted with approval the statement by Black J. of United States Supreme Court that *habeas corpus* is "not now and never has been a static, narrow, formalistic

remedy; its scope has grown to achieve its grand purpose — the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty” (*May*, at para. 21; *Jones v. Cunningham*, 371 U.S. 236 (1962), at p. 243; see also the preface to R. J. Sharpe’s *The Law of Habeas Corpus* (2nd ed. 1989)). This remedy is crucial to those whose residual liberty has been taken from them by the state, and this alone suffices to ensure that it is rarely subject to restrictions.

[55] This Court has been reluctant to place limits on the avenues through which an individual may apply for the remedy. As I mentioned above, the Court confirmed in *Miller* that *habeas corpus* will remain available to federal inmates in the superior courts regardless of the existence of other avenues for redress (pp. 640-41). Similarly, Wilson J. stated in *Gamble* that courts have not bound themselves, nor should they do so, to limited categories or definitions of review where the review concerns the subject’s liberty (pp. 639-40). In *May*, the Court confirmed that there are in fact only two instances in which a provincial superior court should decline to hear a *habeas corpus* application: (1) where the *Peiroo* exception applies (that is, where the legislature has put in place a complete, comprehensive and expert procedure) (*Peiroo v. Canada (Minister of Employment and Immigration)* (1989), 69 O.R. (2d) 253), and (2) where a statute such as the *Criminal Code*, R.S.C. 1985, c. C-46, confers jurisdiction on a court of appeal to correct errors of a lower court and release the applicant if need be (*May*, at paras. 44 and 50). Reviews of decisions of correctional authorities for reasonableness do not fall into either of these exceptions,

and in accordance with *May*, they therefore can and should be considered by a provincial superior court.

[56] Many of the same principles which weighed in favour of concurrent jurisdiction in *May* apply to the determination of the scope of a provincial superior court's review power. First, each applicant should be entitled to choose his or her avenue of relief. If a court hearing a *habeas corpus* application cannot review the reasonableness of the underlying decision, then a prisoner who has been deprived of his or her liberty as a result of an unreasonable decision does not have a choice of avenues through which to obtain redress but must apply to the Federal Court.

[57] Second, there is no reason to assume that the Federal Court is more expert than the superior courts in determining whether a deprivation of liberty is lawful. While it is true that the Federal Court may regularly be asked to determine whether decisions regarding a "mere loss of privileges" are reasonable, when a loss of liberty is involved, the superior courts are well versed in the *Charter* rights that apply when an inmate is transferred to a higher security facility (s. 7 and s. 9).

[58] Third, if inmates are not able to obtain review of their potentially unreasonable loss of liberty under an application for *habeas corpus*, they will have to wade through the lengthy grievance procedure available under the statute in order to have their concerns heard. If, for example, an inmate has lost his or her liberty as a result of a decision that was made on the basis of irrelevant evidence or was

completely unsupported by the evidence, he or she is entitled to apply for and obtain a speedy remedy.

[59] In the instant case, the appellants have filed an affidavit suggesting that *habeas corpus* proceedings are becoming increasingly time-consuming as superior court judges review the records of prison decision makers. There is a difficulty, however, with accepting this affidavit as convincing evidence that a *habeas corpus* application in a superior court no longer provides quicker relief than an application for judicial review in the Federal Court. Although the affidavit outlines how long it has taken to obtain decisions on *habeas corpus* applications in *certain* circumstances, it does not compare this with the length of time it takes to obtain decisions from the Federal Court on applications for judicial review in similar circumstances.

[60] The case at bar itself provides compelling evidence against the proposition advanced in the appellants' affidavit. Mr. Khela, after receiving the final decision with respect to his transfer on March 15, 2010, filed a notice of application in the British Columbia Supreme Court on April 27, 2010. The notice stated that the application would be made on May 11, 2010. A decision was rendered only ten days later by Bruce J. of that court.

[61] Moreover, the affidavit failed to take into account the structure of the grievance procedure provided for in the *Corrections and Conditional Release Regulations*, SOR/92-620 ("*CCRR*"). Mr. Khela could not have challenged the decision in the Federal Court for want of procedural fairness and for

unreasonableness without first going through an internal review process required by the statutory scheme. According to the statutory scheme, Mr. Khela would have had to submit a complaint. According to *Commissioner's Directive 081*, "Offender Complaints and Grievances", such complaints have multiple levels. The Directive indicates that grievors who are dissatisfied with the "decision rendered at the final level . . . may seek judicial review of the decision at the Federal Court" (s. 15 (emphasis added)). However, even if an inmate's complaint is designated as a high priority, it can take as long as 90 days after the complaint was made before the inmate receives the final decision. Mr. Khela would not have been able to apply for judicial review until after he had received a decision at that level. Given the structure of this grievance procedure, an application for *habeas corpus* in a provincial superior court remains the more timely remedy.

[62] The appellants argue to allow the provincial superior courts to review CSC transfer decisions for reasonableness would lengthen the duration of applications, increase their cost and cause a shift in the allocation of judicial resources. However, as Wilson J. stated in *Gamble*, "[r]elief in the form of *habeas corpus* should not be withheld for reasons of mere convenience" (p. 635).

[63] Fourth, the fact that inmates have local access to relief in the form of *habeas corpus* also weighs in favour of including a review for reasonableness. In *May*, this Court noted that "it would be unfair if federal prisoners did not have the same access to *habeas corpus* as do provincial prisoners" (*May*, at para. 70). If the

appellants' position were accepted, whereas provincial prisoners can apply to their provincial superior court for *habeas corpus* on procedural or jurisdictional grounds while also having that same court review the decision which resulted in their loss of liberty for reasonableness on an application for judicial review (see, for example, *Libo-on v. Alberta (Fort Saskatchewan Correctional Centre)*, 2004 ABQB 416, 32 Alta. L.R. (4th) 128, at para. 1), federal inmates would be required to apply to two different courts for redress flowing from a single impugned decision with the exact same record. It seems inconsistent to force the latter to do so solely because they are in federal prisons.

[64] Fifth, the non-discretionary nature of *habeas corpus* and the traditional onus on an application for that remedy favour an inmate who claims to have been unlawfully deprived of his or her liberty. If the inmate were forced to apply to the Federal Court to determine whether the deprivation was unreasonable, the remedy would be a discretionary one. Further, on an application for judicial review, the onus would be on the applicant to show that the transfer decision was unreasonable. As Farbey, Sharpe and Atrill state, “[i]t would be wrong . . . to deny [the benefits of the writ] by forcing the applicant to pursue some alternative remedy (p. 54).

[65] Ultimately, weighing these factors together leads to the conclusion that allowing a provincial superior court to conduct a review for reasonableness in deciding an application for *habeas corpus* would lead to greater access to a more

effective remedy. Reasonableness should therefore be regarded as one element of lawfulness.

[66] Whether a decision is “lawful” cannot relate to jurisdiction alone. The appellants suggest that a review on a *habeas corpus* application is “limited to an analysis of whether there is jurisdiction to make a decision”, as opposed to a review of the reasonableness of the underlying decision. For this proposition, the appellants rely on Le Dain J.’s conclusions in *Miller* (1) that *certiorari* in aid cannot be employed to convert an application for *habeas corpus* into an appeal on the merits (p. 632), and (2) that an application for *habeas corpus* addresses issues going to jurisdiction rather than issues going to the merits (p. 630). However, the appellants misread the context of Le Dain J.’s comments, which were made in reference to the earlier cases of *Goldhar v. The Queen*, [1960] S.C.R. 431, *Re Sproule* (1886), 12 S.C.R. 140, and *Re Trepanier* (1885), 12 S.C.R. 111. Le Dain J. was simply echoing earlier decisions in which this Court had held that *habeas corpus* is not to be used to appeal a *conviction*. Thus, he was saying in that case what the Court subsequently clarified in *May*, namely that “provincial superior courts should decline *habeas corpus* jurisdiction . . . where . . . a statute such as the *Criminal Code* . . . confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be” (para. 50). This cannot be interpreted as a statement that a provincial superior court may not rule on the reasonableness of an administrative decision in the context of an application for *habeas corpus* with *certiorari* in aid.

[67] Nor does *May* prohibit a provincial superior court from examining the reasonableness of an underlying transfer decision in the context of an application for *habeas corpus* with *certiorari* in aid. In *May*, this Court confirmed that “[a] deprivation of liberty will only be lawful where it is within the jurisdiction of the decision maker” (para. 77). This cannot be read as a signal that *only* decisions outside the decision maker’s jurisdiction will be unlawful. On the contrary, it simply means that jurisdiction is one requirement to be met for a decision to be lawful. On its own, however, this requirement is not sufficient to make a decision lawful. A decision that is within the decision maker’s jurisdiction but that lacks the safeguards of procedural fairness will not be lawful. Likewise, a decision that lacks an evidentiary foundation or that is arbitrary or unreasonable cannot be lawful, regardless of whether the decision maker had jurisdiction to make it.

[68] It is true that there is a line of United Kingdom cases that suggests that a decision is unlawful only if it is outside the decision maker’s jurisdiction. In *R. v. Secretary of State for the Home Department, Ex parte Cheblak*, [1991] 2 All E.R. 319, for example, Lord Donaldson of the Court of Appeal stated:

A writ of *habeas corpus* will issue where someone is detained without any authority or the purported authority is beyond the powers of the person authorizing the detention and so is unlawful. *The remedy of judicial review* is available where the decision or action sought to be impugned is within the powers of the person taking it but, due to procedural error, a misappreciation of the law, a failure to take account of relevant matters, a taking account of irrelevant matters or the fundamental unreasonableness of the decision or action, it should never have been taken. In such a case the decision or action is lawful, unless and until it is

set aside by a court of competent jurisdiction. [Emphasis in original; pp. 322-23.]

Lord Donaldson subsequently clarified this statement in *R. v. Secretary of State for the Home Department, Ex parte Muboyayi*, [1992] 1 Q.B. 244, holding that a claim for *habeas corpus* should be denied because

there was no challenge to jurisdiction but only to a prior underlying administrative decision. This is a quite different challenge and, unless and until it succeeds, there are no grounds for impugning the legality of his detention. [p. 255]

In other words, a decision cannot be unlawful for reasons other than jurisdiction unless it is deemed unlawful by a “proper” reviewing court (Farbey, Sharpe and Atrill, at p. 58).

[69] These decisions do not reflect the state of the law in Canada. First, if the *Cheblak/Muboyayi* line of cases were accepted in Canada, it would result in the bifurcated jurisdiction this Court explicitly rejected both in the *Miller* trilogy and in *May* (*May*, at para. 72; *Miller*, at pp. 624-26). Second, the conclusion that jurisdictional error alone is determinative of “lawfulness” contradicts a higher line of authority from the United Kingdom (see, for example, *R. v. Governor of Brixton Prison, Ex parte Armah*, [1968] A.C. 192; *R. v. Secretary of State for the Home Department, Ex parte Khawaja*, [1984] 1 A.C. 74; for further criticism of the *Cheblak/Muboyayi* line of cases see H. W. R. Wade, “Habeas Corpus and Judicial Review” (1997), 113 *L.Q.R.* 55, and Farbey, Sharpe and Atrill, at pp. 56-63).

[70] Finally, requiring inmates to challenge the reasonableness of a CSC transfer decision in the Federal Court could also result in a waste of judicial resources. For example, an inmate may take issue with both the process and the reasonableness of such a decision. Were we to accept the appellants' position, it would be possible for the inmate to first challenge that decision for want of procedural fairness by applying for *habeas corpus* with *certiorari* in aid in a provincial superior court and then, should that application fail, challenge the reasonableness of the same decision by seeking *certiorari* in the Federal Court. This bifurcation makes little sense given that *certiorari* in aid is available, and it would undoubtedly lead to a duplication of proceedings and have a negative impact on judicial economy.

[71] In an earlier article, Robert Sharpe had written that "the scope of review on *habeas corpus* depends upon the material which may be looked at by the court" (R. J. Sharpe, "Habeas Corpus in Canada" (1976), 2 *Dal. L.J.* 241, at p. 262; Chiasson J.A., at para. 72). If this is correct, which I believe it is, and the scope of the review is inextricably related to the material before the reviewing court, it is only logical on an application for *habeas corpus* to include an assessment of reasonableness in a review for lawfulness. Given that it is now well settled that on an application for *habeas corpus* with *certiorari* in aid the court will have before it "the complete record of inferior proceedings", the court has the power to review that record to ensure that the record supports the decision (Farbey, Sharpe and Atrill, at pp. 45-46). This will also aid in the conservation of scarce judicial resources.

[72] The above reasoning leads to the conclusion that an inmate may challenge the reasonableness of his or her deprivation of liberty by means of an application for *habeas corpus*. Ultimately, then, where a deprivation of liberty results from a federal administrative decision, that decision can be subject to either of two forms of review, and the inmate may choose the forum he or she prefers. An inmate can choose either to challenge the reasonableness of the decision by applying for judicial review under s. 18 of the *FCA* or to have the decision reviewed for reasonableness by means of an application for *habeas corpus*. “Reasonableness” is therefore a “legitimate ground” upon which to question the legality of a deprivation of liberty in an application for *habeas corpus*.

[73] A transfer decision that does not fall within the “range of possible, acceptable outcomes which are defensible in respect of the facts and law” will be unlawful (*Dunsmuir*, at para. 47). Similarly, a decision that lacks “justification, transparency and intelligibility” will be unlawful (*ibid.*). For it to be lawful, the reasons for and record of the decision must “in fact or in principle support the conclusion reached” (*Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 12, quoting with approval D. Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy”, in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304).

[74] As things stand, a decision will be unreasonable, and therefore unlawful, if an inmate's liberty interests are sacrificed absent any evidence or on the basis of unreliable or irrelevant evidence, or evidence that cannot support the conclusion, although I do not foreclose the possibility that it may also be unreasonable on other grounds. Deference will be shown to a determination that evidence is reliable, but the authorities will nonetheless have to explain that determination.

[75] A review to determine whether a decision was reasonable, and therefore lawful, necessarily requires deference (*Dunsmuir*, at para. 47; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59; *Newfoundland and Labrador Nurses' Union*, at paras. 11-12). An involuntary transfer decision is nonetheless an administrative decision made by a decision maker with expertise in the environment of a particular penitentiary. To apply any standard other than reasonableness in reviewing such a decision could well lead to the micromanagement of prisons by the courts.

[76] Like the decision at issue in *Lake*, a transfer decision requires a "fact-driven inquiry involving the weighing of various factors and possessing a 'negligible legal dimension'" (*Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, at paras. 38 and 41). The statute outlines a number of factors to which a warden must adhere when transferring an inmate: the inmate must be placed in the least restrictive environment that will still assure the safety of the public, penitentiary staff and other inmates, should have access to his or her home community, and should

be transferred to a compatible cultural and linguistic environment (s. 28 CCRA). Determining whether an inmate poses a threat to the security of the penitentiary or of the individuals who live and work in it requires intimate knowledge of that penitentiary's culture and of the behaviour of the individuals inside its walls. Wardens and the Commissioner possess this knowledge, and related practical experience, to a greater degree than a provincial superior court judge.

[77] The intervener the BCCLA argues that the application of a standard of review of reasonableness should not change the basic structure or benefits of the writ. I agree. First, the traditional onuses associated with the writ will remain unchanged. Once the inmate has demonstrated that there was a deprivation of liberty and casts doubt on the reasonableness of the deprivation, the onus shifts to the respondent authorities to prove that the transfer was reasonable in light of all the circumstances.

[78] Second, the writ remains non-discretionary as far as the decision to review the case is concerned. If the applicant raises a legitimate doubt as to the reasonableness of the detention, the provincial superior court judge is required to examine the substance of the decision and determine whether the evidence presented by the detaining authorities is reliable and supports their decision. Unlike the Federal Court in the context of an application for judicial review, a provincial superior court hearing a *habeas corpus* application has no inherent discretion to refuse to review the case (see Farbey, Sharpe and Atrill, at pp. 52-56). However, a residual discretion will

come into play at the second stage of the *habeas corpus* proceeding, at which the judge, after reviewing the record, must decide whether to discharge the applicant.

[79] Third, the ability to challenge a decision on the basis that it is unreasonable does not necessarily change the standard of review that applies to other flaws in the decision or in the decision-making process. For instance, the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be “correctness”.

[80] It will not be necessary to determine whether the decision made by the Warden in the instant case was unlawful on the basis of unreasonableness. As I will explain below, the decision was unlawful because it was procedurally unfair.

Discipline and Disclosure

[81] Section 29 of the *CCRA* authorizes inmate transfers, and ss. 5(1)(b) and 13 of the *CCRR* outline how this authority is exercised where an immediate transfer is necessary. Section 29 of the *CCRA* provides that the Commissioner may authorize the transfer of an inmate from one penitentiary to another in accordance with the regulations on condition that the penitentiary to which the inmate is transferred provides him or her with an environment that contains only the necessary restrictions, taking into account the safety of the public and persons in the penitentiary, and the security of the penitentiary (ss. 28 and 29). According to s. 13(2)(a) of the *CCRR*, if the Commissioner or a designated staff member determines that an inmate must be

transferred immediately on an emergency and involuntary basis, the inmate is nonetheless entitled to make representations regarding the transfer. Section 27(1) of the *CCRA* provides that where an inmate is entitled by the regulations to make such representations, the decision maker must give him or her “all the information” to be considered in taking a final decision regarding the transfer, subject only to s. 27(3). Even inmates transferred on an emergency and involuntary basis are therefore entitled to all the information considered in the Warden’s decision-making process, or a summary thereof, except where s. 27(3) applies. The requirement that the inmate be provided with “all the information” can be satisfied by providing him or her with a summary of the information.

[82] As this Court put it in *Cardinal*, one of the cases in the *Miller* trilogy, “there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual” (p. 653). Section 27 of the *CCRA* guides the decision maker and elaborates on the resulting procedural rights (*May*, at para. 94). In order to guarantee fairness in the process leading up to a transfer decision, s. 27(1) provides that the inmate should be given all the information that was considered in the taking of the decision, or a summary of that information. This disclosure must be made within a reasonable time before the final decision is made. The onus is on the decision maker to show that s. 27(1) was complied with.

[83] This disclosure is not tantamount to the disclosure required by *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. As the Court stated in *May*, “[t]he requirements of procedural fairness must be assessed contextually” (at para. 90, citing *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3, at para. 39; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 21; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 743; *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3, at para. 82). In this context, the inmate’s residual liberty is at stake, but his or her innocence is not in issue. *Stinchcombe* requires that the Crown disclose all relevant information, including “not only that which the Crown intends to introduce into evidence, but also that which it does not” (p. 343). Section 27 does not require the authorities to produce evidence in their possession that was not taken into account in the transfer decision; they are only required to disclose the evidence that was *considered*. Further, whereas *Stinchcombe* requires the Crown to disclose *all* relevant information, s. 27 of the *CCRA* provides that a summary of that information will suffice.

[84] The statutory scheme allows for some exemptions from the onerous disclosure requirement of s. 27(1) and (2). Section 27(3) provides that where the Commissioner has reasonable grounds to believe that disclosure of information under s. 27(1) or (2) would jeopardize (a) the safety of any person, (b) the security of a penitentiary, or (c) the conduct of a lawful investigation, he or she may authorize the

withholding from the inmate of as much information as is strictly necessary in order to protect the interest that would be jeopardized.

[85] A decision to withhold information pursuant to s. 27(3) is necessarily reviewable by way of an application for *habeas corpus*. Such a decision is not independent of the transfer decision made under s. 29. Rather, s. 27 serves as a statutory guide to procedural protections that have been adopted to ensure that decisions under s. 29 and other provisions are taken fairly. When a transfer decision is made under s. 29 and an inmate is entitled to make representations pursuant to the *CCRR*, s. 27 is engaged and decisions made under it are reviewable. If the correctional authorities failed to comply with s. 27 as a whole, a reviewing court may find that the transfer decision was procedurally unfair, and the deprivation of the inmate's liberty will not be lawful. This is certainly a "legitimate ground" upon which an inmate may apply for *habeas corpus*.

[86] *Habeas corpus* is structured in such a way that so long as the inmate has raised a legitimate ground upon which to question the legality of the deprivation, the onus is on the authorities to justify the lawfulness of the detention (*May*, at para. 71). If the Commissioner, or a representative of the Commissioner, chooses to withhold information from the inmate on the basis of s. 27(3), the onus is on the decision maker to invoke the provision and prove that there were reasonable grounds to believe that disclosure of that information would jeopardize one of the listed interests.

[87] Where, pursuant to s. 27(3), the correctional authorities do not disclose to the inmate *all* the information considered in their transfer decision or a summary thereof, they should generally, if challenged on an application for *habeas corpus*, submit to the judge of the reviewing court a sealed affidavit that contains both the information that has been withheld from the inmate compared with the information that was disclosed and the reasons why disclosure of that information might jeopardize the security of the penitentiary, the safety of any person or the conduct of a lawful investigation.

[88] When the prison authorities rely on kites or anonymous tips to justify a transfer, they should also explain in the sealed affidavit why those tips are considered to be reliable. When liberty interests are at stake, procedural fairness also includes measures to verify the evidence being relied upon. If an individual is to suffer a form of deprivation of liberty, “procedural fairness includes a procedure for verifying the evidence adduced against him or her” (*Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326, at para. 56).

[89] Section 27(3) authorizes the withholding of information when the Commissioner has “reasonable grounds to believe” that should the information be released, it might threaten the security of the prison, the safety of any person or the conduct of an investigation. The Commissioner, or his or her representative, is in the best position to determine whether such a risk could in fact materialize. As a result, the Commissioner, or the warden, is entitled to a margin of deference on this point.

Similarly, the warden and the Commissioner are in the best position to determine whether a given source or informant is reliable. Some deference is accordingly owed on this point as well. If, however, certain information is withheld without invoking s. 27(3), deference will not be warranted, and the decision will be procedurally unfair and therefore unlawful.

[90] I should point out that not all breaches of the *CCRA* or the *CCRR* will be unfair. It will be up to the reviewing judge to determine whether a given breach has resulted in procedural unfairness. For instance, if s. 27(3) has been invoked erroneously or if there was a strictly technical breach of the statute, the reviewing judge must determine whether that error or that technicality rendered the decision procedurally unfair.

Lawfulness of the Deprivation of Liberty

[91] As I mentioned above, the writ of *habeas corpus* will issue if (1) the applicant has been deprived of his or her liberty and (2) that deprivation was unlawful. No one has contested the fact that the transfer of Mr. Khela to Kent Institution was a deprivation of his liberty. However, the parties disagree on whether that deprivation was lawful.

[92] It is clear from the record that the Warden, in making the transfer decision, considered information that she did not disclose to Mr. Khela. Nor did she give him an adequate summary of the missing information. The withholding of this

information was not justified under s. 27(3). As a result, the Warden's decision did not meet the statutory requirements related to the duty of procedural fairness.

[93] In this case, the application judge noted that the Warden had failed to disclose information about the reliability of the sources (at para. 47), the specific statements made by the sources (at para. 51), and the scoring matrix that informed Mr. Khela's security classification (para. 56). She found that the failure to disclose this information had rendered the transfer decision procedurally unfair (para. 59). I agree with that finding.

[94] The specific statements made by the sources and information concerning the reliability of the sources should have been disclosed to Mr. Khela. The appellants submit that information on the reliability of sources and substantial details about the incident that led to Mr. Khela's transfer were in fact disclosed. The only information in the Assessment regarding the sources was that "[s]ource information was received by the Security Intelligence Department implicating Mr. Khela as the contractor for the stabbing assault" (A.R., at p. 88) in October 2009 and January 2010, and that "three separate and distinct sources" implicated Mr. Khela in the incidents which led up to his transfer (A.R., at p. 90). The Assessment also states that the information so received "corroborates previous claims and lends credence to [existing] suspicions" (*ibid.*). These statements do not provide Mr. Khela with enough information to know the case to be met. It is unclear from the Assessment what each of the three separate and distinct sources said, or why the new information "corroborated" previous claims.

Vague statements regarding source information and corroboration do not satisfy the statutory requirement that all the information to be considered, or a summary of that information, be disclosed to the inmate within a reasonable time before the decision is taken.

[95] Although some of this information may have been justifiably withheld under s. 27(3) of the *CCRA*, the appellants did not invoke s. 27(3) or lead any evidence (including a sealed affidavit) to suggest that their withholding of information related to concerns arising from the interests protected by s. 27(3). If s. 27(3) is never invoked, pled, or proven, there is no basis for this Court to find that the Warden was justified in withholding information that was considered in the transfer decision from the inmate.

[96] Further, I agree with the determination of the application judge and the Court of Appeal that the Warden's failure to disclose the scoring matrix for the SRS was procedurally unfair. The appellants argue that the courts below should not have taken issue with the Warden's failure to disclose the scoring matrix, because, unlike in *May*, the decision to transfer Mr. Khela was not based on the SRS alone, given that the Commissioner overrode the security classification. Whether the decision was based on that scale alone is irrelevant, however. What is instead of concern is whether the Warden *considered* the scoring matrix, on which the SRS calculation was based, in taking her decision (s. 27).

[97] An override of the SRS calculation does not eliminate the Warden's obligation to disclose the scoring matrix. The scoring matrix is used to calculate the inmate's security classification. That classification is then reviewed and can be overridden. Even if it is overridden, however, the security classification (and thereby, indirectly, the scoring matrix) is nonetheless "considered" within the meaning of s. 27 of the *CCRA*. The Warden or the Commissioner must review the calculation before it can be overridden. Without access to the scoring matrix and information on the methodology used to calculate the total score, Mr. Khela was not in a position to challenge the information relied upon for the calculation or the method by which the total score was arrived at, and therefore could not properly challenge the override decision.

[98] To be lawful, a decision to transfer an inmate to a higher security penitentiary must, among other requirements, be procedurally fair. To ensure that it is, the correctional authorities must meet the statutory disclosure requirements. In this case, these statutory requirements were not met, and the decision to transfer Mr. Khela from Mission Institution to Kent Institution was therefore unlawful. The British Columbia Supreme Court properly granted *habeas corpus*. Mr. Khela was properly returned to a medium security institution (para. 95).

Conclusion

[99] For the foregoing reasons, I would dismiss the appeal without costs. The original transfer decision was unlawful. However, Mr. Khela is now lawfully

incarcerated in Kent Institution and is not, therefore, to be returned to a medium security facility at this time.

Appeal dismissed without costs.

Solicitor for the appellants: Attorney General of Canada, Ottawa and Vancouver.

Solicitors for the respondent: Conroy & Company, Abbotsford.

Solicitor for the interveners the Canadian Association of Elizabeth Fry Societies and the John Howard Society of Canada: Queen's University, Kingston.

Solicitors for the intervener the Canadian Civil Liberties Association: Gowling Lafleur Henderson, Ottawa.

Solicitors for the intervener the British Columbia Civil Liberties Association: University of British Columbia, Vancouver.