SUPREME COURT OF CANADA

CITATION: May *v.* Ferndale Institution, [2005] 3 S.C.R. 809, 2005 SCC 82

DATE: 20051222
DOCKET: 30083

BETWEEN:

Terry Lee May
Appellant
and
Warden of Ferndale Institution, Warden of Mission Institution, Deputy Commissioner, Pacific Region, Correctional Service of Canada and Attorney General of Canada
Respondents

AND BETWEEN:

David Edward Owen
Appellant
and
Warden of Ferndale Institution, Warden of Matsqui Institution, Deputy Commissioner, Pacific Region, Correctional Service of Canada and Attorney General of Canada
Respondents

AND BETWEEN:

Maurice Yvon Roy, Gareth Wayne Robinson and Segen Uther Speer-Senner
Appellants
and
Warden of Ferndale Institution, Warden of Mission Institution, Deputy Commissioner, Pacific Region, Correctional Service of Canada and Attorney General of Canada
Respondents
and
Canadian Association of Elizabeth Fry Societies, John Howard Society of Canada and British Columbia Civil Liberties Association
Interveners

CORAM: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

REASONS FOR JUDGMENT: (paras. 1 to 121)	LeBel and Fish JJ. (McLachlin C.J. and Binnie, Deschamps and Abella JJ. concurring)
DISSENTING REASONS:	Charron J. (Major and Bastarache JJ. concurring)

(paras. 122 to 140)

May *v.* Ferndale Institution, [2005] 3 S.C.R. 809, 2005 SCC 82

Terry Lee May *Appellant*

v.

Warden of Ferndale Institution, Warden of Mission Institution, Deputy Commissioner, Pacific Region, Correctional Service of Canada and Attorney General of Canada *Respondents*

- and -

David Edward Owen *Appellant*

v.

Warden of Ferndale Institution, Warden of Matsqui Institution, Deputy Commissioner, Pacific Region, Correctional Service of Canada and Attorney General of Canada *Respondents*

- and -

Maurice Yvon Roy, Gareth Wayne Robinson and Segen Uther Speer-Senner *Appellants*

v.

Warden of Ferndale Institution, Warden of Mission Institution, Deputy Commissioner, Pacific Region, Correctional Service of Canada and Attorney General of Canada *Respondents*

- and -

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

Indexed as: May *v.* Ferndale Institution

Neutral citation: 2005 SCC 82.

File No.: 30083.

2005: May 17; 2005: December 22.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

on appeal from the court of appeal for british columbia

Courts — Jurisdiction — Habeas corpus — Transfer of federal inmates from minimum- to medium-security institution — Whether provincial superior court had jurisdiction to review inmates' transfer on application for habeas corpus with certiorari in aid — If so, whether it should have declined habeas corpus jurisdiction in favour of Federal Court jurisdiction on judicial review.

Prisons — Transfer of inmates — Deprivation of residual liberty — Habeas corpus — Transfer of federal inmates from minimum- to medium-security

institution — Whether inmates unlawfully deprived of their residual liberty — Whether inmates' habeas corpus applications should be granted.

Evidence — New evidence — Motion to submit new evidence filed before Supreme Court of Canada — Whether new evidence should be admitted.

Administrative law — Arbitrary decisions — Correctional Service of Canada — Transfer of inmates to higher security institution — Whether transfer decisions initiated by change in policy arbitrary — Whether inmates unlawfully deprived of their liberty.

Administrative law — Procedural fairness — Duty to disclose — Correctional Service of Canada — Transfer of inmates to higher security institution — Correctional Service not making full disclosure of information relied upon in its reclassification of inmates — Whether inmates unlawfully deprived of their liberty — Whether Stinchcombe principles applicable to administrative context — Whether Correctional Service complied with its statutory duty to disclose — Corrections and Conditional Release Act, S.C. 1992, c. 20, s. 27(1).

The appellant inmates are prisoners serving life sentences. Based on a computerized reclassification scale which yielded a medium-security rating, they were each involuntarily transferred from a minimum- to a medium-security institution. There were no allegations of fault or misconduct on the part of these inmates. The transfers were the result of a direction from the Correctional Service of Canada ("CSC") to review the security classifications of all inmates serving life sentences in minimum-security institutions who had not completed their violent offender

programming. CSC used a computer application to assist the classification review process. This application, the Security Reclassification Scale ("SRS"), was developed to help caseworkers determine the most appropriate level of security at key points throughout an offender's sentence. It provides a security rating based on data entered with respect to various factors related to the assessment of risk.

The inmates applied to the provincial superior court for *habeas corpus* with *certiorari* in aid directing correction officials to transfer them back to the minimum-security facility. From the outset, they requested the scoring matrix for the SRS, but were told it was not available. The chambers judge found that a provincial superior court had jurisdiction to review a federal inmate's involuntary transfer on an application for *habeas corpus* with *certiorari* in aid, but that the applications should be dismissed because the inmates' transfers had not been arbitrary and had not been made in the absence of jurisdiction. The Court of Appeal dismissed the inmates' appeal, holding that the chambers judge ought to have declined to exercise *habeas corpus* jurisdiction because no reasonable explanation was given for the inmates' failure to pursue judicial review in Federal Court. Before the hearing in this Court, the inmates filed a motion to submit the cover page of a scored copy of an assessment and a current version of the scoring matrix as new evidence.

Held (Major, Bastarache and Charron JJ. dissenting): The appeal should be allowed. The applications for *habeas corpus* and the motion to adduce new evidence should be granted. The transfer decisions are declared null and void for want of jurisdiction.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Fish and Abella JJ.: Inmates may choose to challenge the legality of a decision affecting their residual liberty either in a provincial superior court by way of *habeas corpus* or in the Federal Court by way of judicial review. As a matter of principle, a provincial superior court should exercise its jurisdiction when it is requested to do so. *Habeas corpus* jurisdiction should not be declined merely because an alternative remedy exists and seems more convenient to the court. Provincial superior courts should decline *habeas corpus* jurisdiction only where (1) 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, or (2) the legislator has put in place complete, comprehensive and expert procedure for review of an administrative decision, such as the scheme created by Parliament for immigration matters. [44-50]

Here, the Court of Appeal erred in barring access to *habeas corpus* as neither of the two recognized exceptions are applicable. First, these cases involve administrative decisions in the prison context, not criminal convictions. Second, Parliament has not enacted a complete, comprehensive and expert procedure for review of a decision affecting inmates' confinements. The language of the *Corrections and Conditional Release Act* ("*CCRA*") and its regulations make it clear that Parliament did not intend to bar federal inmates' access to *habeas corpus*. The scheme of review and appeal which militates against the exercise of *habeas corpus* jurisdiction in the immigration context is substantially different from the grievance procedure provided in the *CCRA*. Moreover, when the *habeas corpus* jurisdiction of provincial superior courts is assessed purposively, the relevant factors favour the concurrent jurisdiction approach. This approach properly recognizes the importance of affording inmates a meaningful and significant access to justice in order to protect their liberty

rights. Timely 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 inmates, and to ensure that the rule of law applies within penitentiary walls. [51-72]

Habeas corpus should not be granted in these cases on the basis of arbitrariness. A transfer decision initiated by a mere change in policy is not, in and of itself, arbitrary. The new policy applied here strikes a proper balance between the interests of inmates deprived of their residual liberty and the state's interest in the protection of the public. It also required that inmates be transferred to higher security institutions only after individual assessment. In each case, there was a concern that the inmate had failed to complete a violent offender program, thereby ensuring that the inmates' liberty interest was limited only to the extent necessary to protect the public. [83-86]

However, *habeas corpus* should be granted because CSC's failure to disclose the scoring matrix for the computerized security classification rating tool unlawfully deprived the inmates of their residual liberty. While the *Stinchcombe* disclosure standard is inapplicable to an administrative context, in that context procedural fairness generally requires that the decision-maker disclose the information relied upon. The individual must know the case he has to meet. If the decision-maker fails to provide sufficient information, his decision is void for lack of jurisdiction. In order to assure the fairness of decisions concerning inmates, s. 27(1) of the *CCRA* requires that CSC give the inmate, at a reasonable period before the decision is to be taken, "all the information to be considered in the taking of the decision or a summary of that information". Here, CSC's failure to disclose the scoring matrix which was

available at the relevant time, despite several requests by the inmates, was a clear breach of procedural fairness and of its statutory duty of disclosure. This information was not a duplication of information already disclosed. Without the scoring matrix which provides information on the numerical values to be assigned to each factor and to the manner in which a final score is generated by the computerized tool, the inmates were deprived of information essential to understanding the computerized system which generated their scores and were prevented from formulating a meaningful response to the reclassification decisions. The inmates knew what the factors were, but did not know how values were assigned to them or how those values factored into the generation of the final score. Since CSC concealed crucial information and violated in doing so its statutory duty of disclosure, the transfer decisions were made improperly. They are, therefore, null and void for want of jurisdiction. The inmates' motion to adduce the "scoring matrix" as new evidence should be granted because the evidence satisfies all the requirements of the *Palmer* test. [91-120]

Per Major, Bastarache and Charron JJ. (dissenting): The provincial superior court properly exercised its *habeas corpus* jurisdiction, and its dismissal of the *habeas corpus* applications must be upheld because the inmates were not unlawfully deprived of their liberty. First, the transfer decisions were not arbitrary. Each decision was based on an individualized assessment of the merits of each case. Second, although the inmates should have been provided with the scoring matrix, which they had specifically requested so that they could check the accuracy of the total SRS score, not every instance of non-disclosure results in a breach of procedural fairness and deprives the decision-maker of jurisdiction. In these cases, the statutory requirement to provide a "summary of the information" in s. 27(1) of the *CCRA* was met. Further, procedural fairness was achieved, because each inmate was provided

with sufficient information to know the case he had to meet. The inmates were advised that the SRS formed part of the basis for the transfer recommendation, and they were provided with a list of the relevant factors considered in computing the score, the personal information relied upon in assessing each factor, and the reclassification score assigned to them. [122-125] [138]

The fresh evidence fails to satisfy the requirements of the *Palmer* test. Although it is clear that instructions on how to compute the SRS existed at the time of the reclassification, the scoring matrix would not have shown that the reclassification was arbitrary or that the total score was inaccurate. Moreover, the SRS score only partially prompted the review of the inmates' classifications; the actual transfer decisions were based on the individual assessments of their respective situations. There was no basis for granting the *habeas corpus* applications with or without this additional information. [133-139]

Cases Cited

By LeBel and Fish JJ.

Applied: *R. v. Miller*, [1985] 2 S.C.R. 613; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662; **disapproved:** *Spindler v. Millhaven Institution* (2003), 15 C.R. (6th) 183; *Hickey v. Kent Institution (Director)* (2003), 176 B.C.A.C. 272, 2003 BCCA 23; **distinguished:** *Pringle v. Fraser*, [1972] S.C.R. 821; *Peiroo v. Canada (Minister of Employment and Immigration)* (1989), 69 O.R. (2d) 253, leave to appeal denied, [1989] 2 S.C.R. x; *R. v. Stinchcombe*, [1991]

3 S.C.R. 326; **referred to:** *Jones v. Cunningham*, 371 U.S. 236 (1962); *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Re Trepanier* (1885), 12 S.C.R. 111; *Re Sproule* (1886), 12 S.C.R. 140; *Goldhar v. The Queen*, [1960] S.C.R. 431; *Morrison v. The Queen*, [1966] S.C.R. 356; *Karchesky v. The Queen*, [1967] S.C.R. 547; *Korponay v. Kulik*, [1980] 2 S.C.R. 265; *R. v. Gamble*, [1988] 2 S.C.R. 595; *Reza v. Canada*, [1994] 2 S.C.R. 394; *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631; *Bernard v. Kent Institution*, [2003] B.C.J. No. 62 (QL), 2003 BCCA 24; *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Re Hay and National Parole Board* (1985), 21 C.C.C. (3d) 408; *Cunningham v. Canada*, [1993] 2 S.C.R. 143; *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75; *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] 2 S.C.R. 3, 2001 SCC 35; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21; *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [2000] 1 S.C.R. 44, 2000 SCC 2.

By Charron J. (dissenting)

R. v. Stinchcombe, [1991] 3 S.C.R. 326; *Palmer v. The Queen*, [1980] 1 S.C.R. 759.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 9, 10(*c*).

Constitution Act, 1867, s. 96.

Corrections and Conditional Release Act, S.C. 1992, c. 20, ss. 4(*d*), (*g*), 27(1), (3), 28, 30(1), (2), 90, 91, 96(*u*), 97, 98.

Corrections and Conditional Release Regulations, SOR/92-620, ss. 13, 17, 18, 74 to 82, 74(1), (3), (5), 75, 77(3), 79(3), 80, 81.

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 Act, R.S.C. 1985, c. F-7 [formerly R.S.C. 1970, c. 10 (2nd Supp.)], ss. 2, 18, 18.1(2), (4).

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

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

Immigration Act, 1976, S.C. 1976-77, c. 52 [later *Immigration Act*, R.S.C. 1985, c. I-2], ss. 63 [ad. 1988, c. 35, s. 18], 64 [*idem*], 71.4 to 78 [*idem*], 83.1 to 85.2 [*idem*, s. 19].

Magna Carta (1215).

Authors Cited

Canada. Correctional Service. *Commissioner's Directive 081*, "Offender Complaints and Grievances", 2002.

Canada. Correctional Service. *Security Classification of Offenders: Standard Operating Practices*, 700-14, 2001.

Canada. Correctional Service. *Transfer of Offenders: Standard Operating Practices*, 700-15, 1999.

Duker, William F. *A Constitutional History of Habeas Corpus*. Westport, Conn.: Greenwood Press, 1980.

Jackson, Michael. *Justice Behind the Walls: Human Rights in Canadian Prisons*. Vancouver: Douglas & McIntyre, 2002.

Jackson, Michael. *Prisoners of Isolation: Solitary Confinement in Canada.* Toronto: University of Toronto Press, 1983.

Mullan, David J. *Administrative Law.* Toronto: Irwin Law, 2001.

Sharpe, Robert J. *The Law of Habeas Corpus*, 2nd ed. Oxford: Clarendon Press, 1989.

APPEAL from a judgment of the British Columbia Court of Appeal (Ryan, Mackenzie and Saunders JJ.A.) (2003), 188 B.C.A.C. 23, 308 W.A.C. 23, [2003] B.C.J. No. 2294 (QL), 2003 BCCA 536, affirming a decision of Bauman J., [2001] B.C.J. No. 1939 (QL), 2001 BCSC 1335. Appeal allowed, Major, Bastarache and Charron JJ. dissenting.

Ann H. Pollak, for the appellants Terry Lee May and David Edward Owen.

Donna M. Turko, for the appellants Maurice Yvon Roy, Gareth Wayne Robinson and Segen Uther Speer-Senner.

Roslyn J. Levine, Q.C., and *Donald A. MacIntosh*, for the respondents.

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

Michael Jackson, Q.C., for the intervener the British Columbia Civil Liberties Association.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Fish and Abella JJ. was delivered by

LEBEL AND FISH JJ. —

I. Introduction

1 These cases involve the overlap and potential conflict of jurisdiction between provincial superior courts and the Federal Court. At stake is the right of federal prisoners to challenge the legality of their detention by way of *habeas corpus* in provincial superior courts. The question to be resolved in these cases is whether the Supreme Court of British Columbia should have declined *habeas corpus* jurisdiction in favour of Federal Court jurisdiction on judicial review. If the court properly exercised its jurisdiction, we will also have to assess whether the appellants have been unlawfully deprived of their liberty.

2 In our view, the Supreme Court of British Columbia has properly exercised its *habeas corpus* jurisdiction. This is not one of the limited circumstances pursuant to which a superior court should decline to exercise its jurisdiction: first, these cases do not involve a statute that confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be; and second, Parliament has not put in place a complete, comprehensive and expert procedure for review of an administrative decision.

3 Moreover, we believe that the appellants have been unlawfully deprived of their liberty. The respondents did not comply with their statutory duty to provide all the information or a summary of the information considered in making the transfer decisions. The appeal should therefore be allowed.

II. Facts and Judicial History

4 Each of the appellants are prisoners serving life sentences for murder and/or manslaughter. Terry Lee May was convicted of first-degree murder for killing one adolescent boy so that he could sexually assault another without interference. David Edward Owen was convicted of second-degree murder for beating his ex-wife to death. Maurice Yvon Roy was convicted of second-degree murder for killing his common law wife. Gareth Wayne Robinson was convicted on two counts of manslaughter after he stabbed his girlfriend and then, three years later, struck his wife on the head with a hammer. Segen Uther Speer-Senner was convicted of second-degree murder in circumstances unspecified in the record before us. After varying periods of incarceration, the appellants became residents of Ferndale Institution, a minimum security federal penitentiary located in British Columbia.

5 Between November 2000 and February 2001, all five appellants were involuntarily transferred from Ferndale Institution to medium-security institutions. Mr. May, Mr. Roy, Mr. Robinson and Mr. Speer-Senner were transferred to Mission Institution and Mr. Owen, to Matsqui Institution. It is not in issue that a transfer from a minimum- to a medium-security institution involves a significant deprivation of liberty for inmates. Consequently, the appellants filed grievances and also applied for *habeas corpus* relief with *certiorari* in aid directing the responsible correction officials to transfer them back to Ferndale Institution. Their applications were not joined, but the arguments before the British Columbia Court of Appeal were adopted by all five appellants.

6 The transfers were the result of a direction from the Correctional Service of Canada ("CSC") to review the security classifications of all inmates serving life sentences in minimum-security institutions who had not completed their violent offender programming in the aftermath of a sensational crime committed by a former inmate in another province. CSC used computer applications to assist the classification review process. Mr. Roy, Mr. Robinson, Mr. Speer-Senner and Mr. Owen were advised that their transfers were based on a computerized reclassification scale which yielded a medium-security rating. Mr. May was told that his security rating had been adjusted because the security classification tool could not rate him as minimum-security because he had not completed violent offender programming. There were no allegations of fault or misconduct.

7 The appellants attacked the decision-making process leading to their transfers. They submitted that a change in general policy, embodied in a direction to review the security classification of offenders serving a life sentence at Ferndale Institution using certain classification tools, was the sole factor prompting their transfers. They said that the transfers were arbitrary, made without any "fresh" misconduct on their parts, and made without considering the merits of each case. The appellants also claimed that their right to procedural fairness was breached by the failure to disclose the scoring matrix for one of the classification tools, leaving them unable to challenge the usefulness of that tool in the decision-making process.

8 The Supreme Court of British Columbia dismissed the *habeas corpus* application: [2001] B.C.J. No. 1939 (QL), 2001 BCSC 1335. Bauman J. first considered whether a provincial superior court had jurisdiction to review a federal prisoner's involuntary transfer on an application for *habeas corpus* (with *certiorari* in

aid) and, in the affirmative, whether it should decline to exercise it. The issue arose because the Federal Court is granted *exclusive* jurisdiction in respect of *certiorari* proceedings involving the decisions of federal tribunals by its constituent statute.

9 Bauman J. found that he had jurisdiction to hear the application. He relied on *R. v. Miller*, [1985] 2 S.C.R. 613, which held that provincial superior courts have retained concurrent jurisdiction with the Federal Court to issue *certiorari* in aid of *habeas corpus* to review the validity of a detention authorized or imposed by a federal board, commission or other tribunal as defined by s. 2 of the *Federal Court Act*, R.S.C. 1985, c. F-7 (formerly R.S.C. 1970, c. 10 (2nd Supp.)) ("*FCA*").

10 Bauman J. then dealt with the substantive issues, which he agreed to examine under his *habeas corpus* jurisdiction. He found against the appellants. He held that they had not made out their allegations of failure to disclose relevant information, the computer matrix not being available, and that the transfers had not been arbitrary. In his opinion, although the transfers had been prompted by a general instruction issued to CSC, the decisions had been made after an individualized assessment of all relevant factors. He concluded that they had not been made in the absence or in excess of jurisdiction. The applications for *habeas corpus* and *certiorari* in aid were then dismissed.

11 The British Columbia Court of Appeal dismissed the appeal: (2003), 188 B.C.A.C. 23, 2003 BCCA 536. On the jurisdiction issue, the Court of Appeal had asked for and received written submissions from counsel on the issue raised in *Spindler v. Millhaven Institution* (2003), 15 C.R. (6th) 183 (Ont. C.A.).

12 In *Spindler*, prisoners had been placed in a maximum-security prison as a result of a new policy applicable to convicted murderers. They raised arguments which were similar to the submissions of the appellants in the present appeals. The Ontario Court of Appeal had held that, where a remedy is available in the Federal Court on the exercise of a statutory power granted under a federal statute to a federally appointed individual or tribunal, the provincial superior court should decline to hear an application for *habeas corpus* if no reasonable explanation for the failure to pursue judicial review in the Federal Court was offered by the petitioner. In doing so, the Ontario Court of Appeal agreed with the British Columbia Court of Appeal's decision in *Hickey v. Kent Institution (Director)* (2003), 176 B.C.A.C. 272, 2003 BCCA 23.

13 Ryan J.A. felt that those comments were particularly apt in the case at bar. Although the issues raised in these cases were not identical to those raised in *Spindler*, they all involved policies and procedures adopted by the Commissioner of Corrections in determining the security classifications of the appellants. In her view, these cases should have been heard by the "specialized" Federal Court. The appellants had offered no reasonable explanation for failing to pursue judicial review in the Federal Court, so Ryan J.A. was of the opinion that Bauman J. ought to have declined to hear the applications in these cases, though it is implicit from her reasons that he had jurisdiction to do so. Nevertheless, Ryan J.A. decided to examine the substantive issue, but she found no error in Bauman J.'s conclusion that there were no procedural flaws which would entitle the appellants to an order for *habeas corpus*.

14 Since the Supreme Court of British Columbia heard the application, the record indicates that the situation of most of the appellants has changed. On June 30, 2002, Mr. May was transferred from medium- to minimum-security

confinement at Ferndale Institution. On February 6, 2003, Mr. Speer-Senner was also transferred back to Ferndale Institution. On January 30, 2005, Mr. Owen was released on full parole. The record is silent with respect to the updated situation of Mr. Roy, however, at the hearing, Ms. Pollack, one of the counsel for the appellants, informed us that only Mr. Robinson is still incarcerated in a medium-security institution.

III. Issues and Position of the Parties

15 These cases revolve around two core issues. First, whether the Supreme Court of British Columbia should have declined *habeas corpus* jurisdiction and, second, whether the appellants have been unlawfully deprived of their liberty.

16 The appellants argue that the jurisdiction of provincial superior courts to grant *habeas corpus* is not affected by the fact that the unlawful detention results from a breach of relevant statutory and regulatory rules and of principles of natural justice by a federal authority. The applicant is entitled to choose the forum in which to challenge unlawful restrictions of liberty in the prison context. In addition, the appellants contend that the decisions to transfer them from a minimum-security institution to medium-security institutions were arbitrary and unfair.

17 On the other hand, the respondents submit that the Court of Appeal did not err in holding that the lower court should have declined *habeas corpus* jurisdiction in the instant case. *Habeas corpus* jurisdiction should be assessed purposively, in view of the comprehensive statutory schemes that provide effective comparable remedies. In any event, the respondents contend that the transfer decisions were lawfully made.

IV. Analysis

A. *Did the Superior Court of British Columbia Properly Exercise Its Habeas Corpus Jurisdiction?*

18 Should the Supreme Court of British Columbia have declined *habeas corpus* jurisdiction in favour of Federal Court jurisdiction on judicial review? This issue is particularly important in the context of recent jurisprudential and legal developments and to ensure that the rule of law applies inside Canadian prisons. The continuing relevance of *habeas corpus* is also at stake in a changing social and legal environment. In the case of prisons, access to relief in the nature of *habeas corpus* is critical in order to ensure that prisoners' rights are respected. Accordingly, we will review and discuss five subjects: (1) the nature of *habeas corpus*; (2) the *Miller*, *Cardinal* and *Morin* trilogy (*R. v. Miller*, [1985] 2 S.C.R. 613; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662) and the concurrent jurisdiction of the superior courts and of the Federal Court; (3) the rise of a limited discretion of superior courts to decline to exercise their *habeas corpus* jurisdiction; (4) the expansion of the limited discretion to decline *habeas corpus* jurisdiction in the prison context by provincial courts of appeal; and (5) the need for and protection of federal prisoners' access to *habeas corpus*.

(1) The Nature of *Habeas Corpus*

19 The writ of *habeas corpus* is also known as the "Great Writ of Liberty". As early as 1215, the *Magna Carta* entrenched the principle that "[n]o free man shall be seized or imprisoned . . . except by the lawful judgement of his equals or by the law

of the land." In the 14th century, the writ of *habeas corpus* was used to compel the production of a prisoner and the cause of his or her detention: W. F. Duker, *A Constitutional History of Habeas Corpus* (1980), at p. 25.

20 From the 17th to the 20th century, the writ was codified in various *habeas corpus* acts in order to bring clarity and uniformity to its principles and application. The first codification is found in the *Habeas Corpus Act*, 1679 (Engl.), 31 Cha. 2, c. 2. Essentially, the Act ensured that prisoners entitled to relief "would not be thwarted by procedural inadequacy": R. J. Sharpe, *The Law of Habeas Corpus* (2nd ed. 1989), at p. 19.

21 According to Black J. of the United States Supreme Court, *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": *Jones v. Cunningham*, 371 U.S. 236 (1962), at p. 243. In his book, Sharpe, at p. 23, describes the traditional form of review available on *habeas corpus* as follows:

> The writ is directed to the gaoler or person having custody or control of the applicant. It requires that person to return to the court, on the day specified, the body of the applicant and the cause of his detention. The process focuses upon the cause returned. If the return discloses a lawful cause, the prisoner is remanded; if the cause returned is insufficient or unlawful, the prisoner is released. The matter directly at issue is simply the excuse or reason given by the party who is exercising restraint over the applicant. [Emphasis added.]

22 *Habeas corpus* is a crucial remedy in the pursuit of two fundamental rights protected by the *Canadian Charter of Rights and Freedoms*: (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*). Accordingly, the *Charter* guarantees the right to *habeas corpus*:

> **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.

23 However, the right to seek relief in the nature of *habeas corpus* has not always been given to prisoners challenging internal disciplinary decisions. At common law, for a long time, a person convicted of a felony and sentenced to prison was regarded as being devoid of rights. Convicts lost all civil and proprietary rights. The law regarded them as dead. On that basis, courts had traditionally refused to review the internal decision-making process of prison officials: M. Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (2002), at pp. 47-50. By the end of the 19th century, although the concept of civil death had largely disappeared, the prisoner continued to be viewed in law as a person without rights: M. Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (1983), at p. 82.

24 It was this view that provided the original rationale for Canadian courts' refusal to review the internal decisions of prison officials. The "effect of this hands-off approach was to immunize the prison from public scrutiny through the judicial process and to place prison officials in a position of virtual invulnerability and absolute power over the persons committed to their institutions": Jackson, *Prisoners of Isolation*, at p. 82.

25 Shortly after certain serious incidents in federal penitentiaries occurred in the 1970s and reviews of their management took place, this Court abandoned the "hands-off" doctrine and extended judicial review to the decision-making process of prison officials by which prisoners were deprived of their residual liberty. In *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, Dickson J. (as he then was) laid the cornerstone for the modern theory and practice of judicial review of correctional decisions:

> In the case at bar, the disciplinary board was not under either an express or implied duty to follow a judicial type of procedure, but the board was obliged to find facts affecting a subject and to exercise a form of discretion in pronouncing judgment and penalty. Moreover, the board's decision had the effect of depriving an individual of his liberty by committing him to a "prison within a prison". In these circumstances, elementary justice requires some procedural protection. The rule of law must run within penitentiary walls. [Emphasis added; p. 622.]

26 Dickson J. made it clear that "*certiorari* avails as a remedy wherever a public body has power to decide any matter affecting the rights, interest, property, privileges, or liberties of any person", including prisoners (pp. 622-23 (emphasis added)). However, he did not specifically examine whether provincial superior courts have jurisdiction to issue *certiorari* in aid of *habeas corpus* to review the validity of a detention imposed by *federal authority*. The question would certainly arise in the present case because s. 18 of the *FCA* confers on the Federal Court exclusive jurisdiction to issue *certiorari* against any "federal board, commission or other tribunal". A few years later, a trilogy of cases dealt with this important issue.

(2) The *Miller*, *Cardinal* and *Morin* Trilogy and the Concurrent Jurisdiction of the Superior Courts and the Federal Court

27 In 1985, in the trilogy of *Miller*, *Cardinal*, and *Morin*, the Court expanded the scope of *habeas corpus* by making the writ available to free inmates from restrictive forms of custody within an institution, without releasing the inmate. *Habeas corpus* could thus free inmates from a "prison within a prison". Each case involved challenges by prisoners of their confinement in administrative segregation and their transfer to a special handling unit. This unit was reserved for particularly dangerous inmates and was characterized by more restrictive confinement.

28 In *Miller*, Le Dain J., writing for the Court, recognized that confinement in a special handling unit or in administrative segregation is a form of detention that is distinct and separate from that imposed on the general inmate population because it involves a significant reduction in the residual liberty of the inmate. In his view, *habeas corpus* should lie "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" (p. 641).

29 The issue remained, however, whether the remedy should be sought in a provincial superior court or the Federal Court. Le Dain J. pointed out that Parliament had made a conscious decision not to include *habeas corpus* in the list of prerogative remedies over which the Federal Court has exclusive jurisdiction. *Habeas corpus* jurisdiction, as an essential safeguard of the liberty interest, could only be affected by express words, which were not present in s. 18(1) of the *FCA* (pp. 624-25). Therefore, *habeas corpus* remained within the long standing inherent jurisdiction conferred to provincial superior court judges appointed under s. 96 of the *Constitution Act, 1867*. To remove that jurisdiction from the provincial superior courts would require clear and

direct statutory language such as that used in s. 18(2) of the *FCA* referring to members of the Canadian Forces stationed overseas.

30 Le Dain J. specifically addressed the issue, which arises in these cases, of whether jurisdiction for judicial review of federal boards by the Federal Court under s. 18 of the *FCA* trumped the provincial superior courts' *habeas corpus* jurisdiction. He concluded, without any ambiguity, "that a provincial superior court has jurisdiction to issue *certiorari* in aid of *habeas corpus* to review the validity of a detention authorized or imposed by a federal board, commission or other tribunal as defined by s. 2 of the *Federal Court Act*" (p. 626 (emphasis added)).

31 Throughout his analysis, Le Dain J. carefully examined which forum was the most appropriate to review the legality of federal prisoners' detention, with reference to s. 18 of the *FCA*, the importance of local accessibility of the *habeas corpus* remedy, and the problems arising out of concurrent jurisdiction. Dealing with the issue of concurrent jurisdiction, he stated:

> After giving consideration to the two approaches to this issue, I am of the opinion that the better view is that *habeas corpus* should lie to determine the validity of a particular form of confinement in a penitentiary notwithstanding that the same issue may be determined upon *certiorari* in the Federal Court. The proper scope of the availability of *habeas corpus* must be considered first on its own merits, apart from possible problems arising from concurrent or overlapping jurisdiction. The general importance of this remedy as the traditional means of challenging deprivations of liberty is such that its proper development and adaptation to the modern realities of confinement in a prison setting should not be compromised by concerns about conflicting jurisdiction. [Emphasis added; pp. 640-41.]

32 The same reasoning was also applied by this Court in *Cardinal* and *Morin*, the companion cases to *Miller*. In our view, the trilogy supports two distinct

propositions. First and foremost, provincial superior courts have jurisdiction to issue *certiorari* in aid of *habeas corpus* in respect of detention in federal penitentiaries in order to protect residual liberty interests. This principle is crucial in these cases. In the prison context, the applicant is thus entitled to choose the forum in which to challenge an allegedly unlawful restriction of liberty. Under *Miller*, if the applicant chooses *habeas corpus*, his or her claim should be dealt with on its merits, without regard to other potential remedies in the Federal Court. The second proposition, which does not arise in these cases, is that *habeas corpus* will lie to determine the validity of the confinement of an inmate in administrative segregation, and if such confinement is found unlawful, to order his or her release into the general inmate population of the institution.

(3) The Emergence of a Limited Discretion to Decline Jurisdiction

33 As we have seen, the starting point is that a prisoner is free to choose whether to challenge an unlawful restriction of liberty by way of *habeas corpus* in a provincial superior court or by way of judicial review in the Federal Court. Historically, the writ of *habeas corpus* has never been a discretionary remedy. It is issued as of right, where the applicant successfully challenges the legality of the detention:

> In principle, habeas corpus is not a discretionary remedy: it issues *ex debito justitiae* on proper grounds being shown. It is, however, a writ of right rather than a writ of course, and there is a long-established practice of having a preliminary proceeding to determine whether there is sufficient merit in the application to warrant bringing in the other parties.
>
> This means, simply, that it is not a writ which can be had for the asking upon payment of a court fee, but one which will only be issued where it is made to appear that there are proper grounds. While the court has no discretion to refuse relief, it is still for the court to decide whether

> proper grounds have been made out to support the application. The rule that the writ issues *ex debito justitiae* means simply that the court may only properly refuse relief on the grounds that there is no legal basis for the application and that habeas corpus should never be refused on discretionary grounds such as inconvenience. [Emphasis added.]
>
> (Sharpe, at p. 58)

34 Thus, as a matter of general principle, *habeas corpus* jurisdiction should not be declined merely because of the existence of an alternative remedy. Whether the other remedy is still available or whether the applicant has foregone the right to use it, its existence should not preclude or affect the right to apply for *habeas corpus* to the Superior Court of the province: Sharpe, at p. 59.

35 However, given that alternative remedies to *habeas corpus* are often available and in consideration of the development of various forms of judicial review and of rights of appeal in the law of civil and criminal procedure, questions have arisen as to the proper scope of the traditional writ of *habeas corpus* and about the existence of a discretion of superior courts to decline jurisdiction. Courts have sometimes refused to grant relief in the form of *habeas corpus* because an appeal or another statutory route to a court was thought to be more appropriate. The obvious policy reason behind this exception is the need to restrict the growth of collateral methods of attacking convictions or other deprivations of liberty: Sharpe, at pp. 59-60. So far, these situations have primarily arisen in two different contexts.

36 Strictly speaking, in the criminal context, *habeas corpus* cannot be used to challenge the legality of a conviction. The remedy of *habeas corpus* is not a substitute for the exercise by prisoners of their right of appeal: see *Re Trepanier* (1885), 12 S.C.R. 111; *Re Sproule* (1886), 12 S.C.R. 140, at p. 204; *Goldhar v. The*

Queen, [1960] S.C.R. 431, at p. 439; *Morrison v. The Queen*, [1966] S.C.R. 356; *Karchesky v. The Queen*, [1967] S.C.R. 547, at p. 551; *Korponay v. Kulik*, [1980] 2 S.C.R. 265.

37 Our Court reaffirmed this in *R. v. Gamble*, [1988] 2 S.C.R. 595. In *Gamble*, the Court considered *inter alia* whether a superior court judge should have declined to exercise his *habeas corpus* jurisdiction. The appellant had been denied parole eligibility because of a pre-*Charter* law, the continued application of which was alleged to violate the *Charter*.

38 Wilson J., writing for the majority, found that while superior courts do have the discretion not to exercise their *habeas corpus* jurisdiction, this discretion should "be exercised with due regard to the constitutionally mandated need to provide prompt and effective enforcement of *Charter* rights" (p. 634). Considering the argument that *habeas corpus* jurisdiction should not be asserted because a parallel mechanism already exists in the Federal Court, she held that the assertion of *Charter* rights by way of *habeas corpus* does not create a parallel system and that those who argued that jurisdiction should be declined on this basis did "no credit to that existing system by attempting to place procedural roadblocks in the way of someone like the appellant who is seeking to vindicate one of the citizens' most fundamental rights in the traditional and appropriate forum" (p. 635). However, referring to the criminal process, she ultimately confirmed that:

> 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. [Emphasis added; p. 642.]

39 A second limitation to the scope of *habeas corpus* has gradually developed in the field of immigration law. It is now well established that courts have a limited discretion to refuse to entertain applications for prerogative relief in immigration matters: *Pringle v. Fraser*, [1972] S.C.R. 821; *Peiroo v. Canada (Minister of Employment and Immigration)* (1989), 69 O.R. (2d) 253 (C.A.) (leave to appeal denied, [1989] 2 S.C.R. x). In the words of Catzman J.A. in *Peiroo*:

> Parliament has established in the [*Immigration 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. [Emphasis added; pp. 261-62.]

40 In *Reza v. Canada*, [1994] 2 S.C.R. 394, the trial judge refused to hear a constitutional challenge to the *Immigration Act* brought in provincial superior court. The Court confirmed once again that the trial judge "properly exercised his discretion on the basis that Parliament had created a comprehensive scheme of review of immigration matters and the Federal Court was an effective and appropriate forum" (p. 405 (emphasis added)). Thus, it can be seen from these cases that, in matters of immigration law, because Parliament has put in place a complete, comprehensive and expert statutory scheme which provides for a review at least as broad as that available by way of *habeas corpus* and no less advantageous, *habeas corpus* is precluded.

41 From the two recognized exceptions to the availability of *habeas corpus* — criminal appeals and the "*Peiroo* exception", adopted in *Reza* — we turn now to the decision of this Court in *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385. *Steele* has on occasion been thought, mistakenly in our view, to have established a rule of general application barring access to *habeas corpus* whenever an alternative remedy is available. In light of the unusual circumstances of that case, we think it important to consider more closely its true significance.

42 The issue here is not whether the result in *Steele* was justified in the circumstances — we believe that it was — but whether *Steele* created a fresh and independent exception to the availability of *habeas corpus*. In our view, it did not. *Steele* was the product of a convergent set of unusual facts and can only be understood in that light. Without any discussion of the principles governing access to *habeas corpus*, the Court in *Steele* granted that remedy while questioning its availability. No judicial barrier to the venerable right to *habeas corpus*, now constitutionalized in Canada, can be made to rest on so fragile a jurisprudential foundation.

43 Nor should this Court's decision in *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, be thought to have decided otherwise: the Court did not in that case elevate the result in *Steele* into a principled rule barring access to *habeas corpus* in matters not caught by the two recognized exceptions set out above. The decisive issue in *Idziak* was whether Parliament had created with respect to extradition a comprehensive statutory scheme similar to the scheme created by Parliament for immigration matters. The Court held that it had not. Accordingly, there was no reason for provincial superior courts to decline to exercise their *habeas corpus* jurisdiction where the impugned detention resulted from proceedings in extradition.

44 To sum up therefore, the jurisprudence of this Court establishes that prisoners may choose to challenge the legality of a decision affecting their residual liberty either in a provincial superior court by way of *habeas corpus* or in the Federal Court by way of judicial review. As a matter of principle, a provincial superior court should exercise its jurisdiction when it is requested to do so. *Habeas corpus* jurisdiction should not be declined merely because another alternative remedy exists and would appear as or more convenient in the eyes of the court. The option belongs to the applicant. Only in limited circumstances will it be appropriate for a provincial superior court to decline to exercise its *habeas corpus* jurisdiction. For instance, in criminal law, where a statute confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be, *habeas corpus* will not be available (i.e. *Gamble*). Jurisdiction should also be declined where there is in place a complete, comprehensive and expert procedure for review of an administrative decision (i.e. *Pringle* and *Peiroo*).

(4) The Expansion of the Limited Discretion to Decline *Habeas Corpus* Jurisdiction in the Prison Context by Provincial Courts of Appeal

45 The British Columbia Court of Appeal, in these cases and in *Hickey*, and the Ontario Court of Appeal in *Spindler*, each discussed earlier, have recently restricted access to relief in the form of *habeas corpus* in the provincial superior courts. The respondents rely heavily on this line of decisions to support the position that superior courts should generally decline jurisdiction in favour of statutory judicial review when it is available. If such an approach were to be accepted by our Court, the *habeas corpus* jurisdiction of superior courts might be significantly curtailed. It might evolve into a discretionary residual jurisdiction, available only when everything else

has failed. Such a result would be inconsistent with this Court's jurisprudence. Given their importance in the courts below, we will now review and comment on *Hickey* and *Spindler*.

46 In *Hickey*, an inmate who was serving a life sentence was ordered to be transferred to a special handling unit. The inmate opposed the transfer by way of *habeas corpus* instead of using the internal grievance procedures or applying by way of judicial review to the Federal Court. Ryan J.A., for the British Columbia Court of Appeal, ultimately held that the trial judge had jurisdiction. However, referring to *Steele*, she further stated:

> It is trite that the court has a discretion to refuse to entertain an application for habeas corpus if there exists a viable alternative to the writ. In the context of prison law the fact that there is in place a complete, comprehensive and expert procedure for review of a decision affecting the prisoner's confinement is a factor which militates against hearing a petition for habeas corpus. But there will be exceptions.
>
> . . .
>
> In the case at bar the appellant provided the Supreme Court with no explanation as to why he had not pursued either the grievance procedures or judicial review to the Federal Court. Without any information setting out why these procedures were inadequate to deal with Mr. Hickey's situation, the Chambers judge ought not to have heard the application for habeas corpus. [Emphasis added; paras. 50 and 53.]
>
> (See also the companion case to *Hickey*, *Bernard v. Kent Institution*, [2003] B.C.J. No. 62 (QL), 2003 BCCA 24, at paras. 6-7.)

47 In *Spindler*, the inmates were serving life sentences for murder and were incarcerated in a maximum-security penitentiary. They applied for *habeas corpus* claiming that their detention was illegal and seeking an order directing that they be moved to "a penitentiary of a lower security level". The motions judge stated that he had jurisdiction to consider the *habeas corpus* application but declined to do so

holding that the Federal Court was the more appropriate forum. Doherty J.A. dismissed the appeal. Relying on *Steele* and agreeing with *Hickey*, he said:

> 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. Those challenges are specifically assigned to the Federal Court under the *Federal Court Act* R.S.C. 1985 c. F-7 s. 18, s. 28. By directing such challenges to the Federal Court, Parliament has recognized that individuals or tribunals exercising statutory powers under federal authority must exercise those powers across the country. It is important that judicial interpretations as to the nature and scope of those powers be as uniform and consistent as possible. By giving the Federal Court jurisdiction over these challenges, Parliament has provided the means by which uniformity and consistency can be achieved while at the same time, facilitating the development of an expertise over these matters in the Federal Court. [Emphasis added; para. 19.]

48 Finally, in the case at bar, Ryan J.A., for the British Columbia Court of appeal, relied on *Hickey* and *Spindler* to support her conclusion that the chambers judge ought to have refused to hear the application for *habeas corpus*. She further explained:

> In my view the observations of Doherty, J.A., with regard to the importance of pursuing remedies in the Federal Court are particularly apt in the case at bar. While the issues raised in the cases at bar may not be identical to those raised in *Spindler*, supra, all, like *Spindler*, involve policy and procedure adopted by the Commissioner in determining the security classifications of the appellants. In my view these cases ought to have been heard by that specialized court.
>
> 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. [Emphasis added; paras. 21-22.]

49 The position adopted by the British Columbia Court of Appeal and the Ontario Court of Appeal can be summarized as follows. First, the court has a discretion to refuse to entertain an application for *habeas corpus* if there exists a viable alternative to the writ. Second, in the context of prison law, the existence of 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*. Third, by giving the Federal Court jurisdiction over these challenges, Parliament has provided the means by which uniformity and consistency can be achieved while at the same time facilitating the development of an expertise over these matters in the Federal Court. Fourth, 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 tribunal. And fifth, the applicant has to provide a reasonable explanation as to why he or she has not pursued either the grievance procedures or judicial review to the Federal Court.

50 Given the historical importance of *habeas corpus* in the protection of various liberty interests, jurisprudential developments limiting *habeas corpus* jurisdiction should be carefully evaluated and should not be allowed to expand unchecked. The exceptions to *habeas corpus* jurisdiction and the circumstances under which a superior court may decline jurisdiction should be well defined and limited. In our view, the propositions articulated by the Court of Appeal in these cases, as in *Hickey* and *Spindler*, unduly limit the scope and availability of *habeas corpus* review and are incompatible with this Court's jurisprudence. With respect, we are unable to reconcile this narrow view of superior court jurisdiction with the broad approach adopted by the *Miller* trilogy and confirmed in subsequent cases. In principle, the

governing rule is that provincial superior courts should exercise their jurisdiction. However, in accordance with this Court's decisions, provincial superior courts should decline *habeas corpus* jurisdiction only 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.

(5) Confirming Federal Prisoners' Access to *Habeas Corpus*

51 The British Columbia Court of Appeal erred in barring access to *habeas corpus* in these cases. Neither of the two recognized exceptions to the general rule that the superior courts should exercise *habeas corpus* jurisdiction are applicable here. The first exception has no application in these cases because they do not involve a criminal conviction, but rather administrative decisions in the prison context. The second exception does not apply since, for the reasons explained below, Parliament has not enacted a complete, comprehensive and expert procedure for review of a decision affecting the confinement of prisoners. Moreover, as will be shown below, a purposive approach to the issues that arise here also clearly favours a concurrency of jurisdiction.

52 The respondents argue that the same reasoning that applies to immigration cases should apply to prison law. In their view, Parliament has created a comprehensive statutory scheme, in the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("*CCRA*"), and its regulations, for the resolution of inmate grievances, including those relating to decisions to transfer, segregate or otherwise restrict liberty.

53 The respondents contend that the scheme dovetails with Parliament's intention that review of such matters generally occurs in the Federal Court. The scheme is specifically tailored to individuals who are incarcerated and provides internal grievances or appeals for decisions that have an impact upon the liberty of inmates. Many of the decisions made by correction officers require the application of policy developed in the specialized circumstances of the federal prison system. According to the respondents, the Federal Court has acquired considerable expertise in reviewing the decisions of grievance boards.

54 We must therefore examine the legal and regulatory framework of inmate classification in the federal penitentiary system in order to determine whether Parliament has put in place a complete statutory code for the administration and review of inmates' grievances. The starting point is the administrative decision by which inmates are classified for security purposes. By virtue of s. 30(1) of the *CCRA*, CSC "shall assign a security classification of maximum, medium or minimum to each inmate". Security classifications are made pursuant to the statutory factors provided for in ss. 17 and 18 of the *Corrections and Conditional Release Regulations*, SOR/92-620 ("*Regulations*").

55 As a matter of principle, CSC must use the "least restrictive measures consistent with the protection of the public, staff members and offenders": s. 4(*d*) of the *CCRA*. Where a person is to be confined in a penitentiary, CSC must provide the "least restrictive environment for that person" taking into account specific criteria: s. 28 of the *CCRA*. Section 30(2) of the *CCRA* further provides that CSC "shall give each inmate reasons, in writing, for assigning a particular security classification or for

changing that classification". Of course, correctional decisions, including security classifications, must "be made in a forthright and fair manner, with access by the offender to an effective grievance procedure": s. 4(*g*) of the *CCRA*.

56 Inmates who are dissatisfied with transfer decisions can grieve the decisions through the correction system. Sections 90 and 91 of the *CCRA* establish the general framework for the inmate grievance procedure. The *CCRA* requires that inmates have access to a fair and expeditious grievance procedure, to be prescribed by regulation and Commissioner's Directives: ss. 96(*u*), 97 and 98. The nuts and bolts of the procedure are found in ss. 74 to 82 of the *Regulations*. The process allows inmates to pursue any complaint up the successive administrative rungs of CSC so that supervisors are reviewing the actions of their subordinates. Pursuant to s. 74(1) of the *Regulations*, when an inmate is unhappy with an action or a decision of a staff member, the inmate may submit a complaint to the staff member's supervisor. Written complaints by offenders are to be resolved informally if at all possible. If complaints are not resolved to the satisfaction of the inmate, he or she has access to the grievance procedure.

57 The grievance procedure has essentially three levels. At the first level, if the inmate is dissatisfied with the resolution of a complaint by the staff member's supervisor, the inmate can grieve to the Warden of the institution: s. 75(*a*) of the *Regulations*. At the second level, if the inmate is dissatisfied with the Warden's decision, or if the Warden is the origin of the complaint, the inmate may bring a grievance to the Regional Head: ss. 75(*b*) and 80(1) of the *Regulations*. At the third level, if the inmate is dissatisfied with the Regional Head's response, the inmate may grieve directly to the Commissioner of Corrections: s. 80(2) of the *Regulations*. The

Commissioner has delegated his or her authority as the final decision-maker with respect to grievances to the Assistant Commissioner: ss. 18 and 19 of the *Commissioner's Directive 081*, "Offender Complaints and Grievances", March 4, 2002 ("*CD 081*"). Ultimately, by virtue of ss. 2 and 18 of the *FCA*, the inmate may challenge the fairness and *Charter* compliance of the decision at the third level by way of judicial review before the Federal Court.

58 As mentioned earlier, the law requires that inmates have access to an effective, fair and expeditious grievance procedure. As a result, the inmate is entitled to written reasons at all levels of the grievance procedure: ss. 74(3), 74(5), 77(3), 79(3) and 80(3) of the *Regulations*. Naturally, the inmate is required to participate in the resolution process and *CD 081* requires that confidentiality of complaints and grievances be preserved "to the greatest possible extent" (ss. 6(c) and 6(e)). The *Regulations* also prescribe that decisions on complaints and grievances must be issued "as soon as practicable": ss. 74(3), 74(5), 77(3), 79(3) and 80(3); see also ss. 6(d), 7 and 8 of *CD 081* for a more precise timetable. Finally, the institution must show that corrective action is taken when a grievance is upheld: s. 10 of *CD 081*.

59 The question before us is whether the grievance procedure is a complete, comprehensive and expert procedure for review of an inmate's security classification. In *Pringle*, Laskin J. (as he then was), writing for the Court, held:

> I am satisfied that in the context of the overall scheme for the administration of immigration policy the words in s. 22 ("sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction") are adequate not only to endow the Board with the stated authority but to exclude any other court or tribunal from entertaining any type of proceedings, be they by way of *certiorari* or otherwise, in relation to the matters so confided exclusively to the Board. [Emphasis added; p. 826.]

60 The decisive issue for Laskin J. therefore was the intention of the legislature to grant exclusive jurisdiction to the Board. However, there is no such language in the *CCRA* or in the *Regulations*. In fact, it is clear that it was not the intention of the Governor-in-Council, the regulator, to grant paramountcy to the grievance procedure over the superior courts' *habeas corpus* jurisdiction. Section 81(1) of the *Regulations* provides:

> 81. (1) Where an offender decides to pursue a legal remedy for the offender's complaint or grievance in addition to the complaint and grievance procedure referred to in these Regulations, the review of the complaint or grievance pursuant to these Regulations shall be deferred until a decision on the alternate remedy is rendered or the offender decides to abandon the alternate remedy.

61 Section 81(1) makes it clear that the regulator contemplated the possibility that an inmate may choose to pursue a legal remedy, such as an application for *habeas corpus*, in addition to filing an administrative grievance under the *Regulations*. The legal remedy supersedes the grievance procedure. The regulator did not intend to bar federal prisoners' access to *habeas corpus*. But there is more.

62 In our view, the grievance procedure can and should be distinguished from the immigration context for several other reasons. The scheme of review which militated against the exercise of *habeas corpus* jurisdiction in *Pringle* and *Peiroo* is substantially different than the grievance procedure provided in the *CCRA*. The *Immigration Act* in force at the time of *Peiroo* provided for an appeal from decisions of immigration authorities to an independent administrative tribunal, the Immigration Appeal Division, vested with all the powers of a superior court of record including jurisdiction to issue summons, administer oaths and enforce its orders: S.C. 1976-77, c. 52 (am. S.C. 1988, c. 35), s. 71.4(2). It was a process wherein the impartiality of

the adjudicator was statutorily assured, the grounds for review were articulated, and the process for review was clearly laid out: ss. 63, 64 and 71.4 to 78. A detailed procedure was also provided for the manner in which applications and appeals were to be brought before the Federal Court: ss. 83.1 to 85.2.

63 In contrast, the internal grievance process set out in the *CCRA* prescribes the review of decisions made by *prison authorities by other prison authorities*. Thus, in a case where the legality of a Commissioner's policy is contested, it cannot be reasonably expected that the decision-maker, who is subordinate to the Commissioner, could fairly and impartially decide the issue. It is also noteworthy that there are no remedies set out in the *CCRA* and its regulations and no articulated grounds upon which grievances may be reviewed. Lastly, the decisions with respect to grievances are not legally enforceable. In *Peiroo*, the Ontario Court of Appeal emphasized that Parliament had put in place a complete, comprehensive and expert statutory scheme that provided for a review at least as broad as *habeas corpus* and no less advantageous. That is clearly not the case in this appeal.

64 Therefore, in view of the structural weaknesses of the grievance procedure, there is no justification for importing the line of reasoning adopted in the immigration law context. In the prison context, Parliament has not yet enacted a comprehensive scheme of review and appeal similar to the immigration scheme. The same conclusion was previously reached in *Idziak* with regard to extradition (pp. 652-53).

65 As we have seen, these cases do not fall within the recognized exceptions where a provincial superior court should decline to exercise its *habeas corpus* jurisdiction. The respondents submit that this Court should assess the *habeas corpus*

jurisdiction of the superior courts purposively by acknowledging that the statutory scheme provides for effective and comparable remedies. A purposive approach, however, also requires that we look at the entire context. In our view, the following five factors militate in favour of concurrent jurisdiction and provide additional support for the position that a provincial superior court should hear *habeas corpus* applications from federal prisoners: (1) the choice of remedies and forum; (2) the expertise of provincial superior courts; (3) the timeliness of the remedy; (4) local access to the remedy; and (5) the nature of the remedy and the burden of proof.

66 First, in the prison context, the applicant may choose either to seek relief in the provincial superior courts or in the Federal Court. In *Idziak*, this Court noted that the applicants in the *Miller, Cardinal* and *Morin* trilogy each had a choice of whether to seek a remedy in the provincial superior courts or in Federal Court. The applicants' decision to resort to the provincial superior courts for their remedy was accepted (pp. 651-52).

67 Furthermore and as noted previously, this Court recognized in *Miller* that 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" (p. 641).

68 Second, the greater expertise of the Federal Court in correctional matters is not conclusively established. The Federal Court has considerable familiarity in

federal administrative law and procedure and deservedly enjoys a strong reputation in these parts of the law as in other federal matters. On the other hand, prison law revolves around the application of *Charter* principles in respect of which provincial superior courts are equally well versed. Moreover, prison law and life in the penal institution remain closely connected with the administration of criminal justice, in which the superior courts play a critical role on a daily basis. In this context, we find no strong grounds for the adoption of a policy of deference in favour of judicial review in the Federal Court.

69 Third, a hearing on a *habeas corpus* application in the Supreme Court of British Columbia can be obtained more rapidly than a hearing on a judicial review application in the Federal Court. Rule 4 of the *Criminal Rules of the Supreme Court of British Columbia*, SI/97-140, provides for a hearing of a *habeas corpus* application on six days notice. In contrast, the request for hearing a judicial review application in the Federal Court is filed at day 160 following the impugned decision, if all time limits have run completely: s. 18.1(2) of the *FCA* and Rules 301 to 314 of the *Federal Court Rules, 1998*, SOR/98-106. This is a matter of great significance for prisoners unlawfully deprived of their liberty. It is also relevant if counsel is acting *pro bono* or on limited legal aid funding or if the prisoner is representing himself. The importance of the interests at stake militates in favour of a quick resolution of the issues.

70 Fourth, relief in the form of *habeas corpus* is locally accessible to prisoners in provincial superior courts. Access to justice is closely linked to timeliness of relief. Moreover, it would be unfair if federal prisoners did not have the same access to *habeas corpus* as do provincial prisoners. Section 10(*c*) of the *Charter* does not

support such a distinction. In *Gamble*, Wilson J. recognized the importance of access by federal prisoners to the superior courts of the province where they are incarcerated:

> This Court has previously recognized "the importance of the local accessibility of this remedy" of *habeas corpus* because of the traditional role of the court as "a safeguard of the liberty of the subject": *R. v. Miller*, [1985] 2 S.C.R. 613, at pp. 624-25. Relief in the form of *habeas corpus* should not be withheld for reasons of mere convenience. [Emphasis added; p. 635.]

71 Finally, a writ of *habeas corpus* is issued as of right where the applicant shows that there is cause to doubt the legality of his detention: Sharpe, at p. 58. In contrast, on judicial review, the Federal Court can deny relief on discretionary grounds: D. J. Mullan, *Administrative Law* (2001), at p. 481. Also, on *habeas corpus*, so long as the prisoner has raised a legitimate ground upon which to question the legality of the deprivation of liberty, the onus is on the respondent to justify the lawfulness of the detention: Sharpe, at pp. 86-88. However, on judicial review, the onus is on the applicant to demonstrate that the "federal board, commission or other tribunal" has made an error: s. 18.1(4) of the *FCA*.

72 Our review of the relevant factors favours the concurrent jurisdiction approach. This approach properly recognizes the importance of affording prisoners a meaningful and significant access to justice in order to protect their liberty rights, a *Charter* value. Timely 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, and to ensure that the rule of law applies within penitentiary walls.

B. *Have the Appellants Been Unlawfully Deprived of Their Liberty?*

73 Having concluded that the British Columbia Court of Appeal erred in finding that the chambers judge should have declined to exercise his *habeas corpus* jurisdiction, we must now consider whether the chambers judge erred in denying the appellants' *habeas corpus* application on its merit.

74 A successful application for *habeas corpus* requires two elements: (1) a deprivation of liberty and (2) that the deprivation be unlawful. The onus of making out a deprivation of liberty rests on the applicant. The onus of establishing the lawfulness of that deprivation rests on the detaining authority.

75 With respect to the first element of *habeas corpus*, the appellants claim that transfer to a more restrictive institutional setting deprives them of their residual liberty. With respect to the second element of *habeas corpus*, the appellants contend that the deprivation of their residual liberty was unlawful because it was arbitrary and violated CSC's statutory duty to disclose entrenched in s. 27(1) of the *CCRA*.

(1) Deprivation of Liberty

76 The decision to transfer an inmate to a more restrictive institutional setting constitutes a deprivation of his or her residual liberty: *Miller*, at p. 637; *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459, at p. 464. As a result, there is no question that the appellants have discharged their burden of making out a deprivation of liberty. We must therefore go on to consider whether that deprivation was lawful.

(2) Lawfulness of the Deprivation of Liberty

77 A deprivation of liberty will only be lawful where it is within the jurisdiction of the decision-maker. Absent express provision to the contrary, administrative decisions must be made in accordance with the *Charter*. Administrative decisions that violate the *Charter* are null and void for lack of jurisdiction: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078. Section 7 of the *Charter* provides that an individual's liberty cannot be impinged upon except in accordance with the principles of fundamental justice. Administrative decisions must also be made in accordance with the common law duty of procedural fairness and requisite statutory duties. Transfer decisions engaging inmates' liberty interest must therefore respect those requirements.

78 The appellants raise two arguments with respect to the lawfulness of the deprivation in these cases. First, they argue that the transfer decisions were arbitrary because they were solely based on a change in policy, in the absence of any "fresh" misconduct on their part. Second, they submit that the respondents did not comply with their duty of disclosure by withholding a relevant scoring matrix. We will consider each argument in turn.

(a) *Whether Deprivation of Liberty Due to a Change in Policy Was Lawful*

79 The appellants claim that their security classification was changed as a result of a new policy from CSC requiring that prisoners serving life sentences must complete a violent offender program in order to be classified as a minimum-security risk. A transfer decision made solely pursuant to a change in policy, they say, is arbitrary and, as a consequence, offends the principles of fundamental justice.

80 The appellants rely on *Re Hay and National Parole Board* (1985), 21 C.C.C. (3d) 408 (F.C.T.D.). In that case, Muldoon J. held that a transfer decision made in the absence of any fault or misconduct on the part of the inmate is arbitrary and unfair, whether or not it was made in good faith (p. 415).

81 The respondents, however, stress that while the change in policy may have prompted the review of the appellants' security classifications, an individualized assessment was conducted of each inmate. The decisions were not arbitrary, they argue, since they were clearly effected in consideration of each inmate's personal circumstances and characteristics.

82 We agree with the respondents. In *Cunningham v. Canada*, [1993] 2 S.C.R. 143, this Court held that correctional authorities may change how a sentence is served, including transferring an inmate to a higher security institution, without necessarily violating the principles of fundamental justice. McLachlin J. (as she then was) noted that "[a] change in the form in which a sentence is served, whether it be favourable or unfavourable to the prisoner, is not, in itself, contrary to any principle of fundamental justice" (p. 152). In order to support her position, she relied mainly on the need for punctual reforms in correctional law:

> [O]ur system of justice has always permitted correctional authorities to make appropriate changes in how a sentence is served, whether the changes relate to place, conditions, training facilities, or treatment. Many changes in the conditions under which sentences are served occur on an administrative basis in response to the prisoner's immediate needs or behaviour. Other changes are more general. From time to time, for example, new approaches in correctional law are introduced by legislation or regulation. These initiatives change the manner in which some of the prisoners in the system serve their sentences. [pp. 152-53]

83 Consequently, CSC had the authority to transfer the appellants because of a change in policy as long as the transfer decisions were not arbitrary. A transfer decision initiated by a mere change in policy is not, in and of itself, arbitrary. The acceptance of the appellants' argument would undermine CSC's ability to properly administer the *CCRA*. A fair balance must be reached between the interest of inmates deprived of their residual liberty and the interest of the state in the protection of the public (pp. 151-52).

84 In our view, the new policy strikes the proper balance between these two interests. Its purpose is to protect society. Public safety is an important factor CSC must consider in the course of inmate placement and transfer decisions: s. 28 of the *CCRA*. It is also worthy of note that the policy requires that inmates be transferred to higher security institutions only after an individual assessment of their file has been conducted.

85 In these cases, the reviewing officers determined that each of the appellants posed a risk to public safety and, as a result, should not be incarcerated in a minimum-security institution. In every case, there was a concern that the inmate had failed to complete a violent offender program and this led to the conclusion that the risk presented by the inmate could not be managed at Ferndale Institution. Thus, the prisoner's liberty interest was limited pursuant to the policy only to the extent that it was shown to be necessary for the protection of the public.

86 For the foregoing reasons, *habeas corpus* should not be granted on the basis of arbitrariness. There is no evidence of any blanket application of the policy that would render the process arbitrary.

(b) *Whether Deprivation of Liberty Absent Disclosure of the Scoring Matrix Was Lawful*

87 The appellants submit that CSC did not make full disclosure of the information relied upon in their reclassification. A computerized tool was used in the reclassification process. CSC did not disclose the so-called "scoring matrix" for this computerized tool. This failure to disclose, they suggest, ran afoul of the disclosure requirements imposed by the *Charter* and the *CCRA* itself. As a result, they say, the decision was unlawful.

88 The appellants' claim raises the issue of procedural fairness. We will begin by examining whether the disclosure requirements imposed by the *Charter* in the criminal context, as recognized in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, apply in the instant case. We will then consider whether the duty of procedural fairness recognized at common law, which is acknowledged and fleshed out in the disclosure requirements of the *CCRA*, mandates the disclosure of the scoring matrix.

(i) Whether the *Stinchcombe* Rules of Disclosure Apply

89 The appellants contend that the disclosure requirements set out in *Stinchcombe* apply to the present case because the transfer decisions involved the loss of liberty. On the other hand, the respondents argue that the proper context in which to deal with involuntary transfers is administrative law and not criminal law. The *Stinchcombe* disclosure standard is fair and justified when innocence is at stake but not in situations like this one.

90 We share the respondents' view. The requirements of procedural fairness must be assessed contextually in every circumstance: *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, 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] 2 S.C.R. 3, 2001 SCC 35, at para. 82.

91 It is important to bear in mind that the *Stinchcombe* principles were enunciated in the particular context of criminal proceedings where the innocence of the accused was at stake. Given the severity of the potential consequences the appropriate level of disclosure was quite high. In these cases, the impugned decisions are purely administrative. These cases do not involve a criminal trial and innocence is not at stake. The *Stinchcombe* principles do not apply in the administrative context.

92 In the administrative context, the duty of procedural fairness generally requires that the decision-maker discloses the information he or she relied upon. The requirement is that the individual must know the case he or she has to meet. If the decision-maker fails to provide sufficient information, his or her decision is void for lack of jurisdiction. As Arbour J. held in *Ruby*, at para. 40:

> As a general rule, a fair hearing must include an opportunity for the parties to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position . . . .

93 Therefore, the fact that *Stinchcombe* does not apply does not mean that the respondents have met their disclosure obligations. As we have seen, in the

administrative law context, statutory obligations and procedural fairness may impose an informational burden on the respondents.

(ii) The Applicable Statutory Duty of Disclosure

94 A duty of procedural fairness rests on every public authority making administrative decisions affecting the rights, privileges or interests of an individual: *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Cardinal*; *Baker*, at para. 20. These privileges are reflected in and bolstered by the disclosure requirements imposed by the *CCRA*.

95 In order to assure the fairness of decisions concerning prison inmates, s. 27(1) of the *CCRA* imposes an onerous disclosure obligation on CSC. It requires that CSC give the offender, at a reasonable period before the decision is to be taken, "all the information to be considered in the taking of the decision or a summary of that information".

96 The extensive scope of disclosure which is required under s. 27(1) is confirmed by the fact that Parliament has specifically identified the circumstances in which CSC can refuse to disclose information:

> **27.** . . .
>
> (3) Except in relation to decisions on disciplinary offences, where the Commissioner has reasonable grounds to believe that disclosure of information under subsection (1) or (2) would jeopardize
>
> (*a*) the safety of any person,
>
> (*b*) the security of a penitentiary, or

(*c*) the conduct of any lawful investigation,

the Commissioner may authorize the withholding from the offender of as much information as is strictly necessary in order to protect the interest identified in paragraph (*a*), (*b*) or (*c*).

97 The *Regulations* adopted pursuant to the *CCRA* shed additional light on the duties imposed upon prison authorities. Section 13 of the *Regulations*, which applies to involuntary transfers on an emergency basis, provides a right of information to inmates after their transfer to a new facility. The Institutional Head of the penitentiary to which an inmate is being transferred must meet with the inmate within two days in order to explain the reasons for the transfer. An opportunity to make representations must also be given to the inmate. Finally, written notice of the final transfer decision must be provided.

98 Other specific provisions in the Standard Operating Practices ("SOP") directives further clarify the duty to disclose. The Security Classification of Offenders directive, SOP 700-14, sets out the security classification procedures for inmates. In all cases where a security classification is assigned or revised, a notice must be provided to the offender. The notice must contain reasons as well as the information considered in making the decision (para. 26).

99 The Transfer of Offenders directive, SOP 700-15, sets out the criteria for the transfer of prisoners and indicates the extent to which disclosure should be made. An Assessment for Decision must be completed at the earliest possible time within two days following an offender's emergency transfer. The offender shall be provided with written notification of a recommendation for a transfer. The directive is very specific in this regard:

> The Notice of Involuntary Transfer Recommendation . . . must contain enough information to allow the offender to know the case against him or her. The offender must be in a position to be able to respond to the recommendation for an involuntary transfer. To meet this standard, the details of the incident(s) which prompted the transfer recommendation must be provided to the greatest extent possible. This may include providing the offender with the following information regarding the incident(s): where it occurred, when it occurred, against whom it occurred, the extent of injury or damage which resulted, the evidence or proof of its occurrence, and any further relevant information which may elaborate on the incident(s). In cases where sensitive information exists which cannot fully be shared, the offender shall be provided with a gist.

100 Having determined that the applicable statutory duty of disclosure in respect of the transfer decisions is substantial and extensive, we must now go on to consider whether it was respected in these cases. If it was not, the transfer decisions will have been unlawful.

(iii) Whether the Applicable Duties of Disclosure Were Respected

101 The appellants submit that the respondents' refusal to disclose the scoring matrix for a computerized security classification rating tool is a breach of s. 27(1) of the *CCRA*. We agree. Considering the legislative scheme, the nature of the undisclosed information and the importance of the decision for the appellants, there was a clear breach of the statutory duty to disclose "all the information to be considered in the taking of the decision or a summary of that information".

102 The Security Reclassification Scale ("SRS") is a computer application that provides a security rating based on data entered with respect to various factors related to the assessment of risk: (1) the seriousness of the offence committed by the offender; (2) the existence of outstanding charges against the offender; (3) the offender's

performance and behaviour while under sentence; (4) the offender's social, criminal and, if applicable, young-offender history; (5) any physical or mental illness or disorder suffered; (6) the offender's potential for violent behaviour; and (7) the offender's continued involvement in criminal activities. The SRS scale has been developed to assist caseworkers to determine the most appropriate level of security at key points throughout the offender's sentence: SOP 700-14, at paras. 18-19.

103 The SRS is completed by assigning scores to several factors assessing the offender's security risk and custody performance. The SRS provides numerical "cut-off levels" which determine a security rating. If the officer completing the review does not agree with the results provided by the SRS, he or she may override the results and give a different security classification. The override provisions are incorporated in the SRS as a means to address factors that may compel the transfer of an offender to a security level that is different from the one obtained through the computer application: SOP 700-14, at para. 20.

104 The appellants acted diligently in requesting more information on the SRS including its scoring matrix. The matrix contains the information that would allow them to understand how the numerical results were arrived at. This tool is necessary in order to determine if there had been an error in assigning scores to the various factors and to evaluate the accuracy of the final computerized score that was generated.

105 In the courts below, the respondents claimed that the scoring matrix was not available. The chambers judge accepted this claim. In addition, the respondents insisted that SRS was simply a preliminary assessment tool, the results of which were not entirely determinative of the security rating since reviewing officers may override

the results. The transfer decisions provided the appellants with the questions and answers used in the SRS along with the computerized score and classification. After the SRS assessment was completed, CSC would undergo a case-by-case review to ensure that the reclassification was justified. The transfer decisions, they say, could stand on their own apart from the SRS. Hence, the appellants were given all the available information used in making the transfer decisions.

106 Before the hearing, the appellants filed a motion to submit new evidence. The evidence sought to be admitted consists of two documents. The first is the cover page of a scored copy of an SRS assessment. The second is the *Security Reclassification Scale: Functional Specification*, Version 4.0.3 ("SRSFS"), produced by CSC and updated as of June 2001. It explains the grading of each factor and how the factors should be applied in computing the SRS score. Strictly speaking, the SRSFS is the "scoring matrix" requested by the appellants.

107 When deciding whether the new evidence should be admitted in an appeal, discretion must be exercised on the basis of the criteria of due diligence, relevance, credibility and decisiveness: *Palmer v. The Queen*, [1980] 1 S.C.R. 759. This test applies in non-criminal matters such as the instant case: *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21, at para. 44; *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [2000] 1 S.C.R. 44, 2000 SCC 2.

108 After consideration of the parties' submissions, we believe that the motion to adduce new evidence should be granted. In our view, the evidence satisfies all the requirements of the *Palmer* test. The fact that the appellants have repeatedly requested the information and that it was discovered only after the Court of Appeal rendered its

decision shows that they acted with due diligence. In addition, the new evidence goes to the heart of a fundamental issue in these cases: procedural fairness. The respondents do not contest the credibility of the information. In addition, they were less than forthcoming in the courts below and even in our Court in their explanations and information about the existence and function of the scoring matrix. Finally, the information would likely have affected the result of the chambers judge's decision because it clearly demonstrates that the scoring matrix was available.

109 The transfer decisions were made between November 2000 and February 2001. However, the cover sheet of the scoring matrix ("SRSFS") filed by the appellants as new evidence indicates that it is version 4.0.3 updated "As of June, 2001" including "Version 4 enhancements". Therefore, while the transfer decisions predate version 4.0.3 of the SRSFS, this evidence also suggests that earlier versions of the document as well as the requested information existed at the time of the transfer decisions. Its content is not in issue. Our only concern is whether the scoring matrix was available at the relevant time.

110 In our view, the information provided by the respondents to the courts below as to the nature and role of the matrix was misleading. At the hearing before this Court, counsel for the respondents indicated that, at the time of the reclassifications, the scoring matrix was not available because *it was the practice not to produce it.* Counsel explained that it was thought to be a duplication of information already disclosed.

111 The new evidence clearly provides information on the numerical values to be assigned to each factor and to the manner in which a final score is generated by the

computerized tool. Given that the appellants had repeatedly requested this information — and not solely the factors used to establish their security classification — it is disingenuous to suggest that the information was believed to be duplicative. This behaviour is highly objectionable. The chambers judge was falsely led to believe that the scoring matrix was not available when, in fact, it was.

112 The new evidence confirmed that the scoring matrix existed. The duty to disclose information used in making transfer decisions is substantial. Therefore, if the scores generated by the computerized tool played a role in the transfer decisions, its scoring matrix should have been disclosed. In fact, it does appear that the scores generated by the computerized tool played an important role. As a result, the transfer decisions were unlawful.

113 An analysis of SOP directives reveals that inmates were presumptively reclassified through the use of the SRS. SOP 700-14 states that security reclassification shall be determined primarily by using the SRS (paras. 1-18). The SRS classification is only subject to variation in limited situations. Discretion is provided when the score is within 5 percent of the sanctioned cut-off values: SRSFS, at pp. 9-10. In other cases, no discretion is allowed. The SRS classification may not be modified unless an override security classification is relied upon.

114 The procedure applicable to the override classification confirms the presumptive nature of the SRS rather than invalidating it. SOP 700-14 makes it clear that the override is not normally relied upon and requires a detailed justification for bypassing the SRS score:

> Normally there will be no overrides above or below the rating produced by the Custody Rating Scale or the Security Reclassification Scale. Where the caseworker believes that it is necessary to override or underride the results of the Custody Rating Scale or the Security Reclassification Scale, he/she shall include a detailed justification in the *Assessment for Decision* in conformity with section 18 of the *Corrections and Conditional Release Regulations*, by setting out the analysis under the three headings of institutional adjustment, escape risk and risk to public safety. [para. 23]

115 The override must also be approved by a supervisor or, in some cases, by the Assistant Commissioner, Correctional Operations and Programs (para. 25). It is noteworthy that the override function was not used in the instant cases. This suggests that the computer application ultimately fixed the security classification of each appellant.

116 Based on the evidence, we cannot accept the respondents' argument that the SRS was only a preliminary assessment tool. Although it is true that an individual assessment of each inmate's security classification is made subsequently to the SRS assessment, in our view, the SRS presumptively classifies inmates and constitutes an important aspect of the classification process.

117 Considering the nature of the scoring matrix and its role in the SRS, its non-disclosure constituted a major breach of the duty to disclose inherent in the requirement of procedural fairness. The appellants were deprived of information essential to understanding the computerized system which generated their scores. The appellants were not given the formula used to weigh the factors or the documents used for scoring questions and answers. The appellants knew what the factors were, but did not know how values were assigned to them or how those values factored into the generation of the final score.

118 How can there be a meaningful response to a reclassification decision without information explaining how the security rating is determined? As a matter of logic and common sense, the scoring tabulation and methodology associated with the SRS classification score should have been made available. The importance of making that information available stems from the fact that inmates may want to rebut the evidence relied upon for the calculation of the SRS score and security classification. This information may be critical in circumstances where a security classification depends on the weight attributed to one specific factor.

119 Hence, given the importance of the information contained in the scoring matrix, the presumptive validity of the score and its potential effect on the determination of security classification, it should have been disclosed. The respondents had a duty to do so under s. 27(1) of the *CCRA*.

120 In conclusion, the respondents failed to disclose all the relevant information or a summary of the information used in making the transfer decisions despite several requests by the appellants. The respondents concealed crucial information. In doing so, they violated their statutory duty. The transfer decisions were made improperly and, therefore, they are null and void for want of jurisdiction. It follows that the appellants were unlawfully deprived of their liberty.

V. Conclusion

121 For the foregoing reasons, the appeal should be allowed. The applications for *habeas corpus* and the motion to adduce new evidence are granted. The transfer decisions are declared null and void for want of jurisdiction. The appellant still

incarcerated in a medium-security institution pursuant to the impugned decision is thus to be returned to minimum-security institutions.

The reasons of Major, Bastarache and Charron JJ. were delivered by

CHARRON J. (dissenting) —

I. Introduction

122 I have considered the reasons of LeBel and Fish JJ. and agree that the Supreme Court of British Columbia has properly exercised its *habeas corpus* jurisdiction in this matter. I also agree with their analysis on the limited circumstances in which a superior court should decline to exercise its jurisdiction in *habeas corpus* matters. However, I do not agree with their conclusion that the appellants have been unlawfully deprived of their liberty and therefore I would not interfere with the chambers judge's dismissal of their applications for *habeas corpus*.

123 The appellants raise two grounds in support of their contention that the deprivation of their residual liberty was unlawful. First, they argue that the transfer decisions were arbitrary. Second, they contend that the respondents breached their duty of procedural fairness by failing to disclose the "scoring matrix" that explained how the Security Reclassification Scale ("SRS") score used in each of their cases was computed.

124 For the reasons of LeBel and Fish JJ., I agree that the first ground fails. It is clear on the evidence that the transfer decisions were not the result of an arbitrary

"blanket" application of a change in policy. Rather, each decision was based on an individualized assessment of the merits of each case.

125 On the procedural fairness issue, my colleagues aptly reject the appellants' contention that *Stinchcombe* disclosure requirements apply (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326). They describe the applicable statutory duty of disclosure in this administrative context. I agree with this analysis. I also agree in the circumstances of these cases that the "scoring matrix", utilized to compute the SRS score, should have been disclosed to the appellants. However, I respectfully disagree with my colleagues' conclusion that the failure to provide this information constituted a breach of statutory duty rendering the transfer decisions null and void for want of jurisdiction. It is not every instance of non-disclosure that deprives the decision-maker of its jurisdiction. As I will explain, in these cases, each appellant was provided with sufficient information to know the case he had to meet. Hence, procedural fairness was achieved. On the motion to introduce the scoring matrix as fresh evidence, I conclude that the evidence would have had no impact on the dismissal of the *habeas corpus* applications. Hence, I would dismiss the motion and the appeal.

II. Disclosure Requirements

126 As described by LeBel and Fish JJ., the applicable duty of disclosure is that set out in the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("*CCRA*"), the *Corrections and Conditional Release Regulations*, SOR/92-620 ("*Regulations*"), and the Standard Operating Practices directives ("SOPs"). Pursuant to s. 27(1) of the *CCRA*, Correctional Service of Canada has the duty to provide the prisoner with "all the information to be considered in the taking of the decision or a

summary of that information". My colleagues describe the relevant regulations and SOPs in detail and there is no need to repeat their review here. None of the provisions deals specifically with the scoring matrix in issue and the adequacy of disclosure falls to be determined according to general principles of procedural fairness. The decision-maker is required to disclose the information he or she relied upon so as to enable the inmate to know the case he or she has to meet. The failure to provide sufficient information to meet that purpose will result in a breach of the rules of procedural fairness. As I will explain, it is my view that the appellants were provided with sufficient information to know the case they each had to meet.

III. The Contents of the Disclosure

127 Each appellant received a Notice of Involuntary Transfer Recommendation advising him that his case was going to be studied for involuntary transfer to a medium-security institution and informing him of the basis for the recommendation. In Mr. May's case, the notice identified the need for completion of a particular treatment program. In the case of each other appellant, the notice stated that the recommendation was based on the results of two classification tools:

(1) the Security Reclassification Scale, which yielded a medium-security rating; and

(2) the Offender Security Classification, which was also consistent with a medium-security offender.

128 Each appellant also received an Assessment for Decision which described in considerable detail the basis for the recommendation. In respect of the SRS, the Assessment for Decision in each case (including Mr. May's) disclosed the information particular to the inmate relied upon to evaluate each of the factors set out on the SRS (the factors are mandated by s. 17 of the *Regulations*) and gave the total score and resulting classification. The Assessment for Decision next provided detailed information, specific to each individual, identifying the particular areas of concern — such as Institutional Adjustment, Escape Risk and Public Safety — that led to the medium Offender Security Classification. There is no suggestion that any of the latter category of information was insufficient. The appellants' complaints relate solely to the disclosure provided in respect of the SRS score.

129 As the disclosure in respect of the SRS lies at the heart of this appeal, I reproduce here, by way of example, the information provided to Mr. Roy with respect to the computation of the SRS score:

> FPS Number: 572727A
> Name: ROY, MAURICE YVON
> Date of SR calculation: 2000-11-15
> Completed By: FORTIER, DANIELLE
> Completing Office: FERNDALE INSTITUTION
> OMS Decision Number: 22
>
> Question # 1 Serious Disciplinary Offences
> Answer: None
>
> Question # 2 Minor Disciplinary Offences
> Answer: None
>
> Question # 3 Recorded Incidents
> Answer: No Record
>
> Question # 4 Pay Grade
> Answer: Level A

Question # 5 Segregation Period
Answer: None

Question # 6 Detention Referral
Answer: Life or Indeterminate Sentence

Question # 7 Correctional Plan Progress
Answer: Has partially addressed factors

Question # 8 Correctional Plan Motivation
Answer: Partially motivated, active in programs to address contributing & other factors in the C.P.

Question # 9 Drug and Alcohol Rating
Answer: Identified as a contributing factor, but has no evidence of substance abuse during the review period.

Question # 10 Successful ETA Releases
Answer: Three or more ETAs

Question # 11 Successful UTA/Work Releases
Answer: None

Question # 12 Age at Review
Answer: 36 or Older

Question # 13 Psychological Concerns
Answer: Psychological Concerns Noted

Question # 14 CRS Escape History
Answer: Score of 0

Question # 15 CRS Incident History
Answer: Score of 0

Computed SR Score: 17.5
Computed Security Classification: MEDIUM

130 Mr. Roy, as did each other appellant, took the position that this disclosure was insufficient. The appellants submit that, without additional information explaining the numerical rating system — what appears the appellants are referring to as the "scoring matrix" —, they were unable to challenge the case against them in two respects. First, they were not in a position to check the accuracy of the total score.

Second, without knowing the distribution of points per factor, they were unable to evaluate the fairness or arbitrariness of the new classification process.

131 The appellants requested the scoring matrix from the prison authorities and were advised that it was "not available". Again by way of example, Diane Knopf, Deputy-Warden at Ferndale Institution, in a letter to Mr. May's counsel dated December 21, 2000, stated as follows:

> I have made inquiries at both CSC Regional Headquarters in Abbotsford, B.C. and through Ms. Anne Kelly at CSC National Headquarters in Ottawa. I have been advised that the CJIL is a computerized tool and that a scoring matrix is not available.

In a further letter dated February 9, 2001, she explained the respondents' position as follows:

> Your second questions (*sic*) in regards to how the SR scores are calculated. It should be noted that the Security Rating Scale is an evolving instrument and its application is only a tool. This tool was never intended to be a substitute for the professional judgement of staff who are involved with the offender's case and the decision making process. The tool is only meant to serve as a guideline using an offender's personal information as it relates to risk. A "score" is automatically computed by the program with an associated analysis of what that relates to with regards to a security classification. The decision on the actual security classification assigned to an offender is made by the institutional head or delegate.

132 The appellants contested their transfer to a medium-security institution without the scoring matrix and they were unsuccessful. They again raised the issue of non-disclosure before the chambers judge on their *habeas corpus* applications. Counsel for the respondents advised the judge that the scoring matrix was "not available". The chambers judge accepted this representation and held that "there has

not been a non-disclosure of available information which might assist the applicants in their submissions": [2001] B.C.J. No. 1939 (QL), 2001 BCSC 1335, at para. 17 (emphasis added). As I will explain, I see no reason to interfere with this conclusion.

IV. The Motion to Introduce Fresh Evidence

133 The appellants bring a motion to introduce fresh evidence before this Court and invite the Court to infer on the basis of that evidence that the scoring matrix did exist and that the respondents simply refused to produce it. The appellants argue further that this non-disclosure resulted in a breach of procedural fairness. LeBel and Fish JJ. are of the view that the fresh evidence satisfies all the requirements of the *Palmer* test (*Palmer v. The Queen*, [1980] 1 S.C.R. 759) and, on the basis of its admission, they accept the appellants' argument and conclude that there has been a breach of procedural fairness. I respectfully disagree.

134 As indicated earlier, it remains unclear what the appellants call the "scoring matrix". In their motion material they refer to two computer printouts as the scoring matrices. However, these documents are not explained, they do not in any way refer to the SRS, and do not appear to contain any information of value. Although not identified as such, as my colleagues conclude at para. 106, it would appear rather that the "scoring matrix" in question is a second document called the *Security Reclassification Scale: Functional Specification* which explains the grading of each factor and how the factors should be applied in computing the SRS score. I will therefore refer to the set of instructions on how to compute the SRS score as the "scoring matrix".

135 I have no difficulty drawing the inference that a scoring matrix, in one form or another, did exist at the time of the reclassification. In my view, regardless of the fresh evidence, this inference can be drawn from the disclosure material itself. It is plain to see on the basis of the summary provided in the Assessment for Decision that the SRS numerical score was based on an assessment of the listed factors. As the appellants insisted all along, I come to the inescapable conclusion that the classification officer had to have some set of instructions to know how to compute the score. Whatever label was used to describe this material, I understand that it was this set of instructions that the appellants were asking for in their request for further disclosure. I am also prepared to draw the inference that the scoring matrix used for the appellants' reclassification was an earlier version of the *Security Reclassification Scale* presented on the fresh evidence motion. It lists the same factors set out in the Assessment for Decision, identifies the numerical score attached to each possible value attributed to each factor, and gives some guidance on how to choose the appropriate value. To illustrate, I reproduce here the instructions for the first two factors:

SERIOUS DISCIPLINARY OFFENCES

Possible Value	Score
None	0.5
One	1.0
Two	1.5
Three or more	2.0

- During the review period only count the institutional disciplinary offences that resulted in a conviction for a serious offence as defined by the court.

- Count all the "Institutional charges" (Institutional_Charges) where the "offence date" (inst_charge_offence_date) is within the review period and the "court finding" (court_finding_code) is convicted (i.e. 0001) and the "offence category" (charge_category_code) is serious (i.e. 0001).

- This field is automatically calculated by the application and cannot be modified by the user.

MINOR DISCIPLINARY OFFENCES

Possible Value	Score
None	0.5
One	0.5
Two	0.5
Three or more	1.0

- During the review period only count the institutional disciplinary offences that resulted in a conviction for a minor offence as defined by the court.
- Count all the "Institutional charges" (Institutional_Charges) where the "offence date" (inst_charge_offence_date) is within the review period and the "court finding" (court_finding_code) is convicted (i.e. 0001) and the "offence category" (charge_category_code) is minor (i.e. 0002).
- This field is automatically calculated by the application and cannot be modified by the user.

136 As it turns out, the numerical values shown on the *Security Reclassification Scale* add up to the total scores indicated on each appellant's Assessment for Decision. Hence, the inference that this document, albeit perhaps in an earlier form, was the scoring matrix used in computing their SRS score can readily be made. I therefore join LeBel and Fish JJ. in drawing the inference that a scoring matrix was available. It is on that basis that my colleagues conclude that the fresh evidence is decisive. They state: "Finally, the information would likely have affected the result of the chambers judge's decision because it clearly demonstrates that the scoring matrix was available" (para. 108). With respect, the inquiry cannot end there. The relevant question is whether the chambers judge, knowing that the scoring matrix was available, would have come to a different conclusion on the *habeas corpus* applications. In my view, he would not.

137 As noted earlier, the appellants raised two grounds in support of their *habeas corpus* applications, arbitrariness and breach of procedural fairness. On the first ground, the appellants wanted the scoring matrix so they could use the distribution of points per factor to support their argument that the new classification process was arbitrary. In my view, the scoring matrix was of no consequence on the issue of arbitrariness. Regardless of the distribution of points per factor, as my colleagues correctly note: "[The Correctional Service of Canada] had the authority to transfer the appellants because of a change in policy as long as the transfer decisions were not arbitrary" (para. 83). And, as every court below has held, my colleagues conclude that "[t]here is no evidence of any blanket application of the policy that would render the process arbitrary" (para. 86). I agree with this conclusion. In each case, it is clear that the transfers were effected in consideration of each appellants' personal circumstances and characteristics, not on the basis of any particular distribution of points on the SRS score.

138 On the second ground, the relevant question is whether the non-disclosure of the scoring matrix deprived the appellants of their right to know the case they had to meet. Only if it did can we conclude that there has been a breach of the rules of procedural fairness. In my view, it did not. The appellants were advised that the SRS score formed part of the basis for the transfer recommendation. In the Assessment for Decision, they were provided with the list of relevant factors considered in computing the score. They were provided with the personal information that was relied upon in assessing each factor and it was open to them to dispute the accuracy of that information. They were provided with the reclassification score assigned to them. It is true, as contended, that without the scoring matrix, they could not check the

accuracy of the total score. It is on that basis that I conclude that the scoring matrix should have been provided. Although the disclosure met the requirement under s. 27(1) of the *CCRA* that the prisoner be provided with "all the information to be considered in the taking of the decision or a summary of that information", detailed information beyond the summary was specifically requested in these cases and the respondents have not advanced any reason why it should not have been disclosed. However, I would not conclude that its non-disclosure resulted in a breach of procedural fairness in the context of these cases. The appellants had sufficient information to know the case they had to meet.

V. Conclusion

139 Hence, I conclude that the fresh evidence would not have affected the result on the *habeas corpus* applications and should not be admitted. As stated earlier, this additional information would not have assisted the appellants on the main issue in respect of which they wanted it, to show arbitrariness. Further, it is readily apparent from the proposed fresh evidence that the scoring matrix would not have assisted the appellants in challenging the accuracy of the total score, which was the other reason why they wanted the information. In any event, even if there had been some error in calculation, the SRS score was only part of the basis for prompting the review of the appellants' classification. The actual transfer decisions were based on the individual assessments of their respective situations.

140 For these reasons, I would dismiss the motion to introduce fresh evidence and the appeal.

Appeal allowed, MAJOR, BASTARACHE *and* CHARRON JJ. *dissenting.*

Solicitor for the appellants Terry Lee May and David Edward Owen: Ann H. Pollak, Vancouver.

Solicitor for the appellants Maurice Yvon Roy, Gareth Wayne Robinson and Segen Uther Speer-Senner: Donna M. Turko, Vancouver.

Solicitor for the respondents: Justice Canada, Toronto.

Solicitor for the interveners the Canadian Association of Elizabeth Fry Societies and the John Howard Society of Canada: Elizabeth Thomas, Kingston.

Solicitor for the intervener the British Columbia Civil Liberties Association: Michael Jackson, Vancouver.