

# Taking Prisoners' Rights Seriously on Substantive *Habeas Corpus* Review

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*In Mission Institution v Khela, the Supreme Court of Canada held that a detainee on an application for habeas corpus may challenge a deprivation of liberty on grounds of substantive unreasonableness. According to some advocates and scholars, Khela completed an unwelcome fusion of habeas corpus and administrative law that threatens to weaken the strength of habeas corpus and, with it, prisoners' rights. The author argues, however, that the fusion of habeas corpus and administrative law has not been the setback that some have suggested. As the cases reviewed in this article show, correctional authorities routinely disregard prisoner representations in the process of making decisions that deprive prisoners of their liberty. Khela's virtue is that it incorporates into the law of habeas corpus a justificatory standard which condemns such disregard in a manner not previously known to the correctional law context. In short, Khela requires the Correctional Service of Canada to do something seemingly contrary to its ethos: take prisoners' rights seriously.*

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*Dans l'affaire Établissement de Mission c. Khela, la Cour suprême du Canada a statué qu'un détenu qui soumet une demande d'habeas corpus peut alléguer que le fait que la décision de le priver de liberté serait déraisonnable. Selon certains défenseurs des droits et chercheurs universitaires, l'affaire Khela a accompli une fusion déplorable entre l'habeas corpus et le droit administratif, laquelle risque d'éroder la force traditionnelle de cette institution et, du fait, les droits des prisonniers. L'auteur fait toutefois valoir que la fusion de l'habeas corpus et du droit administratif a représenté une évolution positive pour les détenus. Malgré une préoccupation au sujet de l'importance accordée aux décideurs en matière correctionnelle, la jurisprudence récente relative à l'habeas corpus montre que l'examen du caractère raisonnable de cette mesure dévoile et contrebalance positivement le type de respect formel des droits légaux des détenus, et la violation de ces droits dans les faits, par le Service correctionnel du Canada. Autrement dit, l'examen du caractère raisonnable de l'habeas corpus incite le Service correctionnel du Canada à faire quelque chose apparemment contraire à sa philosophie : prendre au sérieux les droits des détenus.*

## I. Introduction

There was a time when the human rights of prisoners were hardly recognized. The law regarded prisoners as “dead”<sup>1</sup> in the sense that, by committing a crime, a prisoner was thought to have forfeited their rights.<sup>2</sup> A nineteenth century court once declared that a prisoner “has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him.”<sup>3</sup> But the law lacked humanity and accorded few rights to prisoners.<sup>4</sup> Thus, judges adopted a “hands-off” approach to the review of correctional decisions: since the courts deal in legal rights, and prisoners effectively had none, correctional decisions were subject to minimal judicial oversight.<sup>5</sup> The effect of this approach, as Michael Jackson explains, “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.”<sup>6</sup> In other words, the rule of law did not extend past the prison gates.

In the 1970s, this began to change following a series of violent prison riots

<sup>1</sup> *May v Ferndale Institution*, 2005 SCC 82 at para 23 [May]. See also, on the notion of “civil death”: Gordon E Kaiser, “The Inmate as Citizen: Imprisonment and the Loss of Civil Rights in Canada” (1971) 2:11 *Queen’s LJ* 208 at 209–11; Michael Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (Toronto: University of Toronto Press, 1983) at 82–84 [Jackson, *Isolation*]; Debra Parkes, “A Prisoners’ Charter? Reflections on Prisoner Litigation Under the Canadian Charter of Rights and Freedoms” (2007) 40:2 *UBC L Rev* 629 at 633–34 [Parkes, “A Prisoners’ Charter?”]; *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at para 43.

<sup>2</sup> See e.g. David Hume, *An Enquiry concerning the Principles of Morals*, ed by Tom L Beauchamp (New York: Oxford University Press, 1998) at 86: “When any man, even in political society, renders himself, by his crimes, obnoxious to the public, he is punished by the laws in his goods and person; that is, the ordinary rules of justice are, with regard to him, suspended for a moment, and it becomes equitable to inflict on him, for the benefit of society, what, otherwise, he could not suffer without wrong or injury” (italics in original). On the philosophical merits of rights forfeiture, see e.g. Christopher Heath Wellman, “The Rights Forfeiture Theory of Punishment” (2012) 122 *Ethics* 371; Christopher W Morris, “Punishment and Loss of Moral Standing” (1991) 21:1 *Can J Philosophy* 53; Richard L Lippke, “Criminal Offenders and Right Forfeiture” (2001) 32:1 *J Social Philosophy* 78; David Boonin, *The Problem of Punishment* (New York: Cambridge University Press, 2008) at 103–19.

<sup>3</sup> *Ruffin v Commonwealth* (1871), 62 Va (21 Gratt) 790 as cited in Jackson, *Isolation*, supra note 1 at 82.

<sup>4</sup> But see e.g. the comments of Justice Henry (dissenting) in *In Re Sproule*, (1886) 12 SCR 140 at 232, 1886 CanLII 51 [Sproule] regarding the Supreme Court of Canada’s *habeas corpus* jurisdiction in 1886: “In a case of doubtful jurisdiction, in the humanity of the law, it might be by some, and I trust the larger number, considered better that the jurisdiction should be assumed than that a life of a human being should be sacrificed when there was no doubt in the mind of the judge that he had been illegally convicted.”

<sup>5</sup> See e.g. on the “hands-off” approach: Michael Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Vancouver: Douglas & McIntyre, 2002) at 47–54 [Jackson, *Justice*]; *May*, supra note 1 at paras 23–24; Lisa Kerr, “Contesting Expertise in Prison Law” (2014) 60:1 *McGill LJ* 43 at 51–64 [Kerr, “Contesting Expertise”]; Parkes, “A Prisoners’ Charter?”, supra note 1 at 633–34. On the American experience, see generally, as cited by Jackson, *Justice* at 49: Note, “Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts” (1963) 72 *Yale LJ* 506; John J Dilulio, ed, *Courts, Corrections, and the Constitution: The Impact of Judicial Intervention on Prisons and Jails* (New York: Oxford University Press, 1990).

<sup>6</sup> Jackson, *Isolation*, supra note 1 at 82 as cited in *May*, supra note 1 at para 24.

across Canada and the penal reform efforts that ensued.<sup>7</sup> In the 1980 decision of *Martineau v Matsqui Institution Disciplinary Board*,<sup>8</sup> the Supreme Court of Canada affirmed that prisoners retain residual liberty rights notwithstanding conviction and incarceration. In *Martineau*, Justice Dickson (as he then was) held that a decision to place an inmate in solitary confinement—a “prison within a prison”—had the effect of “depriving an individual of his liberty.”<sup>9</sup> Later, in 1985, Justice Le Dain affirmed in *R v Miller*, that “a prisoner has the right not to be deprived unlawfully of the relative or residual liberty permitted to the general inmate population of an institution.”<sup>10</sup> Through these decisions, the law became more humane and a new principle came to prevail. As Justice Dickson put it in *Martineau*, “[t]he rule of law must run within penitentiary walls.”<sup>11</sup>

Today, the rule of law runs within penitentiary walls largely through *habeas corpus*. The writ is the primary procedural means by which prisoners challenge unlawful deprivations of their residual liberty. Historically, the writ was not particularly powerful, but it is now a prisoner’s “strongest tool”.<sup>12</sup> In Canada, the right to *habeas corpus* is guaranteed by the constitution. Section 10(c) of the *Canadian Charter of Rights and Freedoms* provides that everyone has the right upon arrest or detention “to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.”<sup>13</sup> Given the constitutional force of the writ, *habeas corpus* is essential to the pursuit of prison justice. In Jackson’s terms, it opens the prison system to public scrutiny and provides a powerful check on the “virtual invulnerability and absolute power” of correctional decision-makers.<sup>14</sup> Thus, the development

<sup>7</sup> See e.g. Jackson, *Justice*, *supra* note 5 at 51–54; Parkes, “A Prisoners’ Charter?”, *supra* note 1 at 633; Canada, Sub-Committee on the Penitentiary System in Canada, *Report to Parliament* (Ottawa: Minister of Supply and Services, 1977), (Chair: Mark MacGuigan).

<sup>8</sup> *Martineau v Matsqui Institution Disciplinary Board*, [1980] 1 SCR 602, 106 DLR (3d) 385 [*Martineau* cited to SCR].

<sup>9</sup> *Ibid* at 622. Note that Mr. Martineau and fellow inmate, one Mr. Butters, were charged with the “flagrant or serious” disciplinary offences of having two inmates in a cell and committing an indecent homosexual act. Mr. Martineau pled guilty to the first charge and, on the second, was convicted of the lesser offence of “being in an indecent position.” He was sentenced to fifteen days administrative segregation, a restricted diet, and loss of privileges. *Ibid* at 608.

<sup>10</sup> *R v Miller*, [1985] 2 SCR 613 at 637, 24 DLR (4th) 9 [*Miller*].

<sup>11</sup> *Martineau*, *supra* note 8 at 622.

<sup>12</sup> *Mission Institution v Khela*, 2014 SCC 24 at para 29 [*Khela* SCC]. In its early incarnations, *habeas corpus* was simply a means by which to compel a person’s appearance in court. It was also used by courts to take from another court jurisdiction over a person or matter. On the historical development of *habeas corpus*, see e.g.: Paul D Halliday, *Habeas Corpus: From England to Empire* (Cambridge, MA: Harvard University Press, 2010); William F Duker, *A Constitutional History of Habeas Corpus* (Westport, CT: Greenwood Press, 1980) [Duker]; Maxwell Cohen, “Some Considerations on the Origins of *Habeas Corpus*” (1938) 16:2 Can Bar Rev 92; Maxwell Cohen, “*Habeas Corpus Cum Causa*—The Emergence of the Modern Writ—I” (1940) 18:1 Can Bar Rev 10; Maxwell Cohen, “*Habeas Corpus Cum Causa*—The Emergence of the Modern Writ—II” (1940) 18:3 Can Bar Rev 172.

<sup>13</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 10(c) [*Charter*].

<sup>14</sup> Jackson, *Isolation*, *supra* note 1 at 82 as cited in *May*, *supra* note 1 at para 24.

of *habeas corpus* law is critical from a human rights perspective.

This paper assesses the impact of a recent development in Canadian *habeas corpus* law through a human rights lens. In the 2014 case, *Mission Institution v Khela*,<sup>15</sup> the Supreme Court of Canada held that the scope of substantive *habeas corpus* review includes review on the administrative law standard of reasonableness.<sup>16</sup> According to some advocates and scholars, *Khela* created an unwelcome fusion between *habeas corpus* and administrative law that threatens to weaken *habeas corpus*, and with it, prisoners' rights.<sup>17</sup> At worst, the concern is that a *habeas corpus* reasonableness review might revive the "hands-off" approach to the review of correctional decisions. The root of these concerns is the indisputable proposition that reasonableness review, according to the seminal case of *Dunsmuir v New Brunswick*,<sup>18</sup> "necessarily requires deference" to administrative decision-makers.<sup>19</sup> Some advocates and scholars argue that correctional decision-makers are not entitled to the deference that *Dunsmuir* necessarily requires.

I argue that *Khela* is not the setback to *habeas corpus* that some have suggested. In section IV, I review the objections to *Khela* and *habeas corpus* reasonableness review. In the first part of section V, I argue that the concerns with *habeas corpus* reasonableness review are not particularly compelling. In my view, these concerns underappreciate the nature of reasonableness review, the scope and standard of *habeas corpus* review prior to *Khela* and the disconnect between the standard of substantive *habeas corpus* review and its application. I suggest that prison scholars and advocates ought to be concerned with how the reasonableness standard of review is applied in *habeas corpus* applications within the correctional context, not that it applies. Through the *habeas corpus* cases reviewed in this article, I attempt to show that *habeas corpus* reasonableness review has the potential to strengthen, rather than weaken, *habeas corpus* and the prisoners' rights that it aims to protect.

In the second part of section V, I argue that the reasonableness standard strengthens *habeas corpus* given how it has been applied to the particular line of cases which I review.<sup>20</sup> These cases indicate a troubling tendency on the part of

<sup>15</sup> *Khela* SCC, *supra* note 12.

<sup>16</sup> *Ibid* at paras 51–80.

<sup>17</sup> See Lisa Kerr, "The Right to Maximum Prison Liberty?" (2016) 26 Crim Reports 245 at 249–50 [Kerr, "Maximum Liberty?"]; Lisa Kerr, "Easy Prisoner Cases" (2015) 71 SCLR 235 at 247–62 [Kerr, "Easy Prisoner Cases"]; *Khela v Mission Institution*, 2014 SCC 24 (Factum of the Interveners the John Howard Society of Canada and the Canadian Association of Elizabeth Fry Societies), online: <[www.scc-csc.ca/WebDocuments-DocumentsWeb/34609/FM040\\_Intervener\\_Canadian-Association-of-Elizabeth-Fry-Societies-et-al.pdf](http://www.scc-csc.ca/WebDocuments-DocumentsWeb/34609/FM040_Intervener_Canadian-Association-of-Elizabeth-Fry-Societies-et-al.pdf)> [perma.cc/3BTU-PXV9] [CAEFS/JHSC Factum].

<sup>18</sup> *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*].

<sup>19</sup> *Khela* SCC, *supra* note 12 at para 75, citing *Dunsmuir*, *ibid* at para 47 ("[r]easonableness is a deferential standard..."); *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 ("[w]here the reasonableness standard applies, it requires deference"); *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 11–12.

<sup>20</sup> The cases discussed in this paper were chosen based on my review of post-*Dunsmuir* *habeas corpus*

correctional authorities to disregard a prisoner's right to make representations with respect to decisions that deprive them of their residual liberty.<sup>21</sup> I posit that *habeas corpus* reasonableness review best explains why this tendency to disregard prisoners' representations gives rise to unlawful correctional decisions. Furthermore, I suggest that *habeas corpus* reasonableness review has imposed a standard of justification on correctional decision-makers that was not explicitly part of *habeas corpus* review prior to *Khela* and *Dunsmuir*. To set the stage for these arguments, a brief discussion on the basics of *habeas corpus* law (section II) and a review of the *Khela* case (section III) are necessary.

## II. *Habeas Corpus* Law: The Basics

The form of review on *habeas corpus* is described by Farbey, Sharpe and Atrill 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 reason given by the party who is exercising restraint over the applicant.<sup>22</sup>

Historically, an applicant was required to establish an arguable case for the writ before it was directed to the person restraining the applicant. The substantive application would then proceed upon return of the writ by the respondent.<sup>23</sup> However, today it is "almost inevitably the case that the hearing of the application for the writ becomes the substantive hearing" on the lawfulness of the detention.<sup>24</sup> This is why the current Canadian practice, subject to certain exceptions,<sup>25</sup> is that the application proceeds at one hearing

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cases and my view of the trends in those cases. I do not claim that the cases reviewed in this article are representative of all *habeas corpus* cases. Rather, I claim that the cases represent evidence of a noteworthy trend. Thanks to an anonymous reviewer for seeking clarification on this point.

<sup>21</sup> See section III(A).

<sup>22</sup> Judith Farbey, RJ Sharpe & Simon Atrill, *The Law of Habeas Corpus*, 3rd ed (New York: Oxford University Press, 2011) at 21, citing *Phillip and others v DPP of Trinidad and Tobago*, [1992] 1 AC 545 at 558A-B [Farbey, Sharpe & Atrill]. See also Duker, *supra* note 12.

<sup>23</sup> See e.g. the Ontario *Habeas Corpus Act*, RSO 1990, c H.1, s 1(1), which provides: "Where a person, other than a person imprisoned for debt, or by process in any action, or by the judgment, conviction or order of the Superior Court of Justice or other court of record is confined or restrained of his or her liberty, a judge of the Superior Court of Justice, upon complaint made by or on behalf of the person so confined or restrained, if it appears by affidavit that there is reasonable and probable ground for the complaint, shall award a writ of *habeas corpus ad subjiciendum* directed to the person in whose custody or power the person so confined or restrained is, returnable immediately before the judge so awarding the writ, or before any judge of the Superior Court of Justice." See also *R v Olson*, [1989] 1 SCR 296, 68 OR (2d) 256.

<sup>24</sup> Farbey, Sharpe & Atrill, *supra* note 22 at 235.

<sup>25</sup> See e.g. the procedure established in *Latham v Her Majesty the Queen*, 2018 ABQB 69 at para 1. In response to an "unusual, if not unprecedented, increase in *habeas corpus* applications from persons detained in Alberta", the Alberta Court of Queen's Bench has implemented what it calls the "Accelerated *Habeas Corpus* Review Procedure". The procedure is engaged where the respondent to an application for *habeas*



on affidavit evidence according to the following test.<sup>26</sup> First, the applicant must show that the respondent has deprived the applicant of his or her liberty. Second, the applicant must raise a legitimate ground upon which to question the lawfulness of the detention. At the third stage, the onus shifts to the respondent to establish the lawfulness of the detention.

In Canada, applications for *habeas corpus* are brought, almost invariably, with *certiorari* in aid. In common administrative law usage, *certiorari* refers to “*certiorari* to quash”. However, strictly speaking, *certiorari* does not quash an administrative decision; it commands that the record of the proceedings resulting in the decision under review be brought before the reviewing court.<sup>27</sup> Upon the return of the writ of *certiorari*, a motion to quash commonly follows whereas, on an application for *habeas corpus*, return of the writ is followed by a motion for discharge.<sup>28</sup> In short, *habeas corpus* “ensures jurisdiction over the person” and *certiorari* “ensures jurisdiction over the cause.”<sup>29</sup> Thus, *certiorari* is in “aid” of *habeas corpus* in the sense that it places more information about the impugned detention before the reviewing court.<sup>30</sup>

Returning to the *habeas corpus* test, the first step is for the applicant to establish a deprivation of his or her liberty. In *Dumas v Leclerc Institute*,<sup>31</sup> Justice Lamer (as he then was) explained that there are three different deprivations of liberty in the correctional context: the initial commitment to a correctional institution; a “substantial change in conditions amounting to a further deprivation of liberty”; and, a “continuation of an initially valid deprivation of liberty”.<sup>32</sup> The first category is self-explanatory. With respect to the second category, a “substantial change in conditions” involves “a distinct

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*corpus* seeks to strike out the application. The court reviews the application materials and renders a “Preliminary Assessment” on whether the application ought to be struck. If there is no basis to strike the application, the respondent may give a written reply of up to 10 pages. If it is determined that the application should be struck in whole or in part, then the applicant may respond with a written reply of up to 10 pages. The court then provides a “Final Assessment” based on the written reply. The application is either struck or set down for hearing.

<sup>26</sup> For the test see *Khela* SCC, *supra* note 12 at para 30.

<sup>27</sup> Thomas Cromwell, “*Habeas Corpus* and Correctional Law – An Introduction” (1977) 3:3 *Queen’s LJ* 295 at 319 [Cromwell, “*Habeas Corpus*”]. As Cromwell explains at 319, historically, upon return of the writ of *certiorari*, “[t]he *certiorari* did not do the quashing, but merely brought the order before the court to be dealt with according to the court’s order.”

<sup>28</sup> *Ibid* at 319–20 (“[j]ust as in *habeas corpus* there is an application for the writ of *habeas corpus* followed, on its return, by a motion for discharge, so in *certiorari* there is an application for the writ followed, on its return, by a motion to quash”).

<sup>29</sup> *Ibid* at 317.

<sup>30</sup> See generally Farbey, Sharpe & Atrill, *supra* note 22 at 45–47. See also *Mooring v Canada (National Parole Board)*, [1996] 1 SCR 75 at para 117, 132 DLR (4th) 56 (“*Certiorari* in aid of *habeas corpus* is the means by which a reviewing court may obtain the evidentiary record for the purpose of determining an application for *habeas corpus*”); *Chambers v Daou*, 2015 BCCA 50 at para 51 (“*certiorari* is used not as an ancillary remedy to deal with illegal detention, but rather as a procedural mechanism to ensure all necessary evidence is available to the reviewing court”).

<sup>31</sup> *Dumas v Leclerc Institute*, [1986] 2 SCR 459, 34 DLR (4th) 427 [*Dumas*].

<sup>32</sup> *Ibid* at paras 11–12.

form of confinement or detention in which the actual physical constraint or deprivation of liberty, as distinct from the mere loss of privileges, is more restrictive or severe than the normal one in an institution."<sup>33</sup> As for the third category, the continuation of an initially valid deprivation of liberty may be challenged by way of *habeas corpus* if the detainee's status has changed in such a way as to render the initially valid deprivation unlawful.<sup>34</sup> In *Dumas*, Justice Lamer provided the example of an inmate who is granted parole. If, for some reason, the parolee is not released, the continuation of the initial detention amounts to a new deprivation of liberty that is subject to *habeas corpus* review.<sup>35</sup>

This article is primarily concerned with deprivations of liberty that fall into the second category. In the correctional context, the decisions most commonly challenged through an application for *habeas corpus* are those to transfer an inmate to a higher security prison or place an inmate in solitary confinement (or administrative segregation). It is well-established law that these types of decisions amount to substantial changes in an inmate's conditions of confinement and a further deprivation of his or her liberty.<sup>36</sup> When these decisions are challenged by way of *habeas corpus*, there is rarely a dispute about whether the prisoner has established a deprivation of liberty; the point is usually conceded.

The second step in a prisoner's application for *habeas corpus* review is to raise a legitimate ground upon which to question the lawfulness of the deprivation of liberty. Except for a possible exception in the immigration detention context,<sup>37</sup> applications for *habeas corpus* rarely fail on the legitimate

<sup>33</sup> *Miller*, *supra* note 10 at 35.

<sup>34</sup> See *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29 [*Chhina*]. This third category has spawned a conflicted jurisprudence on whether a prisoner has established a deprivation of liberty when he or she claims that a correctional decision *not* to transfer the prisoner to lower security is lawful. See *Gogan v Canada (Attorney General)*, 2017 NSCA 4 at paras 47–48, and the cases cited therein. For commentary, see generally Kerr, "Maximum Liberty?", *supra* note 17 at 245–49 (suggesting that a deprivation of liberty under the third category in *Dumas* may be triggered when the prisoner's "Case Management Team makes a recommendation for transfer to lower security" at 248). The third category from *Dumas* is also at issue on *habeas corpus* applications challenging immigration detention of lengthy and uncertain duration: see e.g. *Minister of Public Safety and Emergency Preparedness, et al v Tusif Ur Rehman Chhina*, 2017 ABCA 248 (Factum of the Intervener Canadian Prison Law Association), 2017 CarswellAlta 1873, online: <[www.scc-csc.ca/WebDocuments-DocumentsWeb/37770/FM080\\_Intervener\\_Canadian-Prison-Law-Association.pdf](http://www.scc-csc.ca/WebDocuments-DocumentsWeb/37770/FM080_Intervener_Canadian-Prison-Law-Association.pdf)> [perma.cc/HQ6E-QEMQ].

<sup>35</sup> *Dumas*, *supra* note 31 at para 12: "Thus, if parole is granted effective immediately, he becomes a parolee when the decision is rendered. If, for some reason, the restriction to his liberty continues, he may then have access to *habeas corpus*."

<sup>36</sup> See e.g. *Khela* SCC, *supra* note 12 at para 34 ("[d]ecisions which might affect an offender's liberty include, but are not limited to, administrative segregation, confinement in a special handling unit and, as in the case at bar, a transfer to a higher security institution").

<sup>37</sup> See e.g. *Chhina*, *supra* note 34; *Chaudhary v Canada (Public Safety and Emergency Preparedness)*, 2015 ONCA 700 at para 81; *Brown v Canada (Public Safety)*, 2018 ONCA 14; *Toure v Canada (Public Safety & Emergency Preparedness)*, 2018 ONCA 681; *Ogiamien v Ontario (Community Safety and Emergency Preparedness)*, 2017 ONCA 839; *Philip v Canada (Attorney General)*, 2018 ABQB 167. On *habeas corpus* in the immigration detention context generally, see Siena Anstis, Joshua Blum & Jared Will, "Separate but Unequal: Immigration Detention in Canada and the Great Writ of Liberty" (2017) 63:1 McGill LJ 1.



ground requirement. This is because all that is generally required at this stage is to allege a substantive or procedural flaw in the decision giving rise to the impugned detention. The types of flaws that are recognized as legitimate grounds include the lack of jurisdiction to detain and breaches of various legal duties. For example, these may be duties derived from the *Charter*, statutory duties or common law duties of procedural fairness.<sup>38</sup> As discussed below, one of the main issues raised in *Khela* was whether unreasonableness is a legitimate ground to challenge the lawfulness of a detention.

If it is established that there was a deprivation of liberty and a legitimate ground upon which to question the deprivation, a writ of *habeas corpus* is said to issue *ex debito justitiae*. This simply means that once a legitimate ground is shown, the court must proceed with determining the lawfulness of the detention.<sup>39</sup> As Farbey, Sharpe and Atrill explain, “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.”<sup>40</sup> According to the Supreme Court of Canada, this is the governing rule: if proper grounds are shown, a provincial superior court should exercise its *habeas corpus* jurisdiction and the burden will shift to the respondent to prove the lawfulness of the impugned detention.<sup>41</sup>

There are, however, exceptions to the governing rule. As Lord Justice Lawton once put it, *habeas corpus* is “probably the most cherished sacred cow in the British constitution; but the law has never allowed it to graze in all legal pastures.”<sup>42</sup> In Canada, there are two legal pastures in which *habeas corpus* is not allowed to graze. Provincial superior courts have the limited discretion to decline *habeas corpus* jurisdiction where a statute such as the *Criminal Code* “confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be”.<sup>43</sup> Jurisdiction may also be declined where

<sup>38</sup> *May*, *supra* note 1 at para 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 CanLII 92 (SCC) at 1078, [1989] 1 S.C.R. 1038. 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...”

<sup>39</sup> See *Khela* SCC, *supra* note 12 at para 41; Farbey, Sharpe & Atrill, *supra* note 22 at 52–53.

<sup>40</sup> Farbey, Sharpe & Atrill, *supra* note 22 at para 53.

<sup>41</sup> *May*, *supra* note 1 at para 50.

<sup>42</sup> *Linnet v Coles*, [1987] QB 555 at 561 (C.A.) as cited in Farbey, Sharpe & Atrill, *supra* note 22 at 163.

<sup>43</sup> *May*, *supra* note 1 at para 50. See also *May* at para 36, citing *Re Trepanier* (1885), 12 SCR 111, 1885 CarswellOnt 15; *Re Sproule*, *supra* note 4 at 204; *Goldhar v The Queen*, [1960] SCR 431 at 439, 25 DLR (2d) 401; *Morrison v The Queen*, [1966] SCR 356, 1965 CarswellOnt 78; *Karchesky v The Queen*, [1967] SCR 547 at 551, 25 DLR (2d) 401; *Korponay v Kulik*, [1980] 2 SCR 265, 1980 CanLII 207 (SCC). See also e.g. *R v Gamble*, [1988] 2 SCR 595 at 67, 31 OAC 81: “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”.

“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”.<sup>44</sup> The latter exception has been considered with respect to the procedures for reviewing decisions relating to inmate grievances,<sup>45</sup> parole,<sup>46</sup> immigration detention<sup>47</sup> and detention under provincial mental health legislation.<sup>48</sup>

### III. *Khela* Revisited

Having set out the basic principles of *habeas corpus* law, I now turn to the application of those principles in *Khela*. First, the law and policy of prison transfers are discussed to provide context. The legal aspects of *Khela* are then discussed. Mr. Khela was transferred on an involuntary emergency basis from the medium security Mission Institution to the maximum-security Kent Institution. The law and policy governing this decision is set out in the *Corrections and Conditional Release Act* (the CCRA),<sup>49</sup> the *Corrections and Conditional Release Regulations* (the CCRR)<sup>50</sup> and certain Correctional Service of Canada (CSC) policies called Commissioner’s Directives (CDs).<sup>51</sup> The CCRA and the CCRR are law whereas CDs are “statements of administrative policy”, not law.<sup>52</sup> Nevertheless, a decision that fails to comply with the requirements of a CD may be unlawful if those requirements restate common law or statutory duties.<sup>53</sup>

<sup>44</sup> *May*, *supra* note 1 at para 40.

<sup>45</sup> *Ibid* at paras 51–64.

<sup>46</sup> For the leading cases in provincial courts of appeal, see e.g. *John v National Parole Board*, 2011 BCCA 188; *Ewanchuck v Canada (Parole Board)*, 2017 ABCA 145; *DG v Bowden Institution*, 2016 ABCA 52; *Meigs v Saskatchewan Penitentiary*, 2016 SKCA 79; *R v Latham*, 2016 SKCA 14; *Chaudhary v Canada (Correctional Services of Canada)*, 2012 ONCA 313; *R v Graham*, 2011 ONCA 138; *Perron v Tremblay*, 2017 QCCA 1407, leave to appeal refused, 2018 CarswellQue 5640; *Lena v Donnacona*, 2011 QCCA 140; *Wilson v Correctional Services Canada*, 2013 NSCA 49; *Blais v Canada (AG)*, 2012 NSCA 109.

<sup>47</sup> See *supra* note 37.

<sup>48</sup> See e.g. *Abbass v The Western Health Care Corporation*, 2017 NLCA 24 at paras 29–48.

<sup>49</sup> *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA];

<sup>50</sup> *Corrections and Conditional Release Regulations*, SOR/92-620 [CCRR];

<sup>51</sup> Canada, “Commissioner’s Directives (CDs)” (12 December 2018), online: *Correctional Service Canada* <[www.csc-scc.gc.ca/politiques-et-lois/005006-0001-en.shtml](http://www.csc-scc.gc.ca/politiques-et-lois/005006-0001-en.shtml)> [perma.cc/B]Q8-XK6C].

<sup>52</sup> *Dearnley v Canada (Attorney General)*, 2007 FC 219 at para 33, citing *Martineau and al v The Matsqui Institution Inmate Disciplinary Board*, [1978] 1 SCR 118, 74 DLR (3d) 1; *Hunter v Canada (Commissioner of Corrections)*, [1997] 3 FC 936, 134 FTR 81. See also e.g. *R v Williamson*, 123 CCC (3d) 540 at para 51, 52 CRR (2d) 277 [Williamson] (“Commissioner’s directives are not law under current Canadian law”); *Williams v Canada (Regional Transfer Board)*, [1993] 1 FC 710, 1993 CanLII 2927 (FCA) (“it is common ground that the Commissioner’s Directive does not have the force of law”); *Foster v Mission Institution (Warden)*, 2010 BCSC 781 at para 40 (“Commissioner’s directives do not have the force of law ...”; Lisa Coleen Kerr, “The Origins of Unlawful Prison Policies” (2015) 4:1 Can J Hum Rts 89 at 98.

<sup>53</sup> See e.g. *Keiros-Meyer Canada (Attorney General)*, 2018 BCSC 1104 (granting *habeas corpus* for breach of a CD); *Dorscheid v Warden of Kent Institution*, [1998] BCJ No 1866 (QL) at para 42, 1998 CanLII 4576 (BC SC) (“if non-compliance with a Commissioner’s Directive amounts to a breach of an inmate’s common law right to procedural fairness in the particular circumstances of the case, then judicial intervention may be warranted”); *Lee v Canada (Deputy Commissioner)*, [1993] 1 FC 15, 17 Admin LR (2d) 271 [Lee]

## A. The Law and Policy of Prison Transfers

Prison transfers are a function of the cascading approach to corrections. This approach is based on the hierarchical system of Canadian correctional institutions. In this system, prisoners may be classified as requiring minimum, medium or maximum (or greater in the Special Handling Unit) security restrictions. The basic principle is that a prisoner is to be held at a security level that is no more restrictive than is commensurate with the prisoner's safety risk, rehabilitative progress and potential, among other factors.<sup>54</sup> Each inmate is assigned a security classification accordingly.<sup>55</sup> Security classifications are assigned based on the CSC's assessment of the degree of supervision and control required by each inmate while incarcerated, as well as each inmate's escape risk and safety risk in the event of escape.<sup>56</sup> These, and other clinical factors, are assessed by the CSC to determine security classifications based on scores generated by an actuarial tool called a Security Reclassification System (SRS).<sup>57</sup> After an inmate is assigned a classification based, at least in part, on the SRS score, the idea is that the inmate will "cascade" down to lower security if they progress with their correctional plan. However, if an inmate regresses, the CSC has the authority to transfer the inmate to higher security (reverse cascading).<sup>58</sup> This is what happened to Mr. Khela.

Certain procedures must be followed in order for the CSC to execute a lawful involuntary<sup>59</sup> transfer. The inmate must be given written notice of a

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("where a directive codifies a principle of common law or, with reference to correctional institutions, applies provisions of the *Canadian Charter of Rights and Freedoms* or other statutes, such codification would, of course, have the force of law, not because of the Commissioner's directive *per se*, but because of the underlying legal force of what is codified").

<sup>54</sup> See *CCRA*, *supra* note 49, s 28; *CCRR*, *supra* note 50, s 17.

<sup>55</sup> See *CCRA*, *supra* note 49, s 30(1).

<sup>56</sup> See *CCRR*, *supra* note 50, s 18.

<sup>57</sup> See Canada, "Review of Inmate Security Classification" (10 March 2014), online: *Correctional Service Canada* <[www.csc-scc.gc.ca/politiques-et-lois/710-6-cd-eng.shtml](http://www.csc-scc.gc.ca/politiques-et-lois/710-6-cd-eng.shtml)> [perma.cc/DJJ9-YQQJ]. The SRS is explained in *May*, *supra* note 1 at paras 102–03. In short, the CSC assigns scores to certain factors related to an inmate's security risk and then the SRS outputs a total numerical score. The resulting score is, as one judge put it, "virtually indecipherable" without the scoring guide that explains how the score was arrived at: *Cliff v Sandhu*, 2016 BCSC 1525 at para 7. This is why it is so important that the scoring matrix be disclosed. The SRS score is then compared to ranges set for each level of security, including discretionary ranges. If the CSC does not agree with the level of security suggested by the SRS score, that score may be overridden. The SRS, and in particular the CSC's discretion to override, has been the source of much litigation. Recently, the Court of Queen's Bench of New Brunswick in *Antinello v Warden of Dorchester Institution*, 2018 NBQB 9, found the SRS so flawed as to give it little to no weight. The Court noted at para 34 that the CSC's exercise of discretion in overriding the SRS score "almost always" works against the prisoner. The Court concluded at para 35 that the SRS score is part of a system "in which there is, all along, just enough discretion and latitude available to the Institution staff and agents to essentially produce whatever numbers or ratings these people may be looking for to support whatever decision they may have had in mind." On the use of other actuarial risk assessment tools in the correctional context, see *Ewert v Canada*, 2018 SCC 30.

<sup>58</sup> See *CCRA*, *supra* note 49, s 29(a).

<sup>59</sup> An inmate may also request a transfer: see *CCRR*, *supra* note 50, s 15.

proposed transfer, including the reasons for it (the “Assessment for Decision” or “A4D”). The CSC must meet with the inmate to explain those reasons after giving the inmate a “reasonable opportunity” (two working days) to prepare representations (a “rebuttal”).<sup>60</sup> The inmate has the right to contact a lawyer about the proposed transfer.<sup>61</sup> Any inmate representations are forwarded to the relevant decision-maker, usually the warden.<sup>62</sup> CD 710-2 requires that the representations be “considered” or “addressed”.<sup>63</sup> After a final decision regarding the proposed transfer is made, the CSC must give the inmate written notice of the decision, including reasons, by certain deadlines.<sup>64</sup>

These rules are altered in the case of an emergency involuntary transfer, such as Mr. Kehla’s. The CSC has the authority, as invoked in *Khela*, to transfer an inmate immediately if it is necessary for “the security of the penitentiary or the safety of the inmate or any other person.”<sup>65</sup> If an emergency transfer is necessary, the CSC must meet with the inmate no later than two days after the transfer to explain why it occurred and give the inmate an opportunity to make representations in person or in writing.<sup>66</sup> Such representations, if any, are then sent to the relevant decision-maker.<sup>67</sup> These are all requirements of the *CCRR*. The relevant CD, however, adds that the CSC must also meet with the inmate prior to the transfer to explain the reasons for it.<sup>68</sup> Within five working days of making the final transfer decision, the *CCRR* and the relevant CD require that the CSC provide written notice of the decision to the inmate and the reasons for the decision.<sup>69</sup>

Finally, to facilitate the inmate’s right to make representations regarding both emergency and non-emergency involuntary transfers, section 27 of the *CCRA* requires that the CSC disclose certain information to the inmate, subject to exceptions. This duty of disclosure, also imposed by the common law,<sup>70</sup> is

<sup>60</sup> *Ibid*, s 12(a)–(b); Canada, “Inmate Transfer Processes (CD 710-2-3)” (11 July 2018), ss 27(d), 28, online: *Correctional Service Canada* <[www.csc-scc.gc.ca/acts-and-regulations/710-2-3-gl-en.shtml](http://www.csc-scc.gc.ca/acts-and-regulations/710-2-3-gl-en.shtml)> [perma.cc/UW7V-NVYE] [CD 710-2-3]. An extension of up to 10 working days may be granted to the inmate in order to prepare representations: see CD 710-2-3, s 28.

<sup>61</sup> See *CCRR*, *supra* note 50, s 97; CD 710-2-3, *supra* note 60, s 4.

<sup>62</sup> See *CCRR*, *supra* note 50, s 12(c).

<sup>63</sup> Canada, “Transfer of Inmates (CD 710-2)” (07 November 2018), ss 9(e), 19, online: *Correctional Service Canada* <[www.csc-scc.gc.ca/politiques-et-lois/710-2-cd-en.shtml](http://www.csc-scc.gc.ca/politiques-et-lois/710-2-cd-en.shtml)> [perma.cc/8ZN4-TLK8] [CD 710-2].

<sup>64</sup> See *CCRR*, *supra* note 50, s 12(d).

<sup>65</sup> *Ibid*, s 13(1).

<sup>66</sup> See *ibid*, s 13(2)(a).

<sup>67</sup> See *ibid*, s 13(2)(b).

<sup>68</sup> CD 710-2-3, *supra* note 60, s 33.

<sup>69</sup> *CCRR*, *supra* note 50, s. 13(2)(c); *ibid*, s 36.

<sup>70</sup> See generally *Khela* SCC, *supra* note 12 at paras 81–83; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193; *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653, 69 DLR (4th) 489; *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643, 1985 CanLII 23 (SCC); *May*, *supra* note 1 at para 90; Grant Huscroft, “From Natural Justice to Fairness: Thresholds, Content, and the Role of Judicial Review” in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery, 2013) 147.

“onerous”.<sup>71</sup> In the case of non-emergency involuntary transfers, an inmate is to be provided, within “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.”<sup>72</sup> The same applies to emergency involuntary transfers, except the disclosure is to be provided “forthwith” after the final decision is taken.<sup>73</sup> The exceptions to the duty of disclosure are set out in section 27(3) of the *CCRA*, which allows the CSC to withhold information from a prisoner if there are reasonable grounds to believe that disclosing the information would jeopardize safety or security.<sup>74</sup> With this background in mind, I turn now to the legal aspects of *Khela*.

## B. Procedural Unfairness

Mr. Khela received a notice of transfer recommendation and an Assessment for Decision two days after he was transferred to Kent Institution. Eleven days later, he received the warden’s final transfer decision. These documents explained the impetus for Mr. Khela’s transfer. Two inmates at Mission Institution had stabbed a third inmate who was new to the prison. According to confidential information provided to the CSC by anonymous sources, Mr. Khela paid one of the two assailants three grams of heroin to commit the assault. The alleged motive for the attack was retaliation; apparently the victim had orchestrated an earlier assault against Mr. Khela at a different institution.<sup>75</sup> In addition to Mr. Khela’s transfer, the stabbing gave rise to a review of his security classification, which was increased from the “medium” to the “high” security rating for “institutional adjustment”.<sup>76</sup> Although Mr. Khela’s SRS score still suggested medium security, the CSC exercised its discretion to override the score.<sup>77</sup>

After having received the notice of transfer recommendation and Assessment for Decision, Mr. Khela made representations to the warden through counsel, as was his statutory right. However, none of those representations persuaded the warden not to approve the transfer. Ultimately, the arguments Mr. Khela made in his rebuttal were the arguments he made on his application for *habeas corpus*. In addition to arguing that the transfer decision was substantively unreasonable, Mr. Khela argued that the decision was procedurally unfair because the CSC failed to disclose:

1. the specific statements that the confidential sources provided to the

<sup>71</sup> *Khela SCC*, *supra* note 12 at para 84.

<sup>72</sup> *CCRA*, *supra* note 49, s 27(1).

<sup>73</sup> *Ibid*, s 27(2).

<sup>74</sup> *Ibid*, s 27(3).

<sup>75</sup> See *Khela v Mission Institution (Warden)*, 2010 BCSC 721 at paras 13, 15, 21 [*Khela BCSC*].

<sup>76</sup> *Ibid* at paras 13–14.

<sup>77</sup> *Ibid*.



CSC regarding the stabbing;

2. information about why the confidential sources were found to be reliable;
3. the scoring matrix that would allow Mr. Khela to understand how his SRS score was calculated; and
4. the reasons for why Mr. Khela's SRS score was overridden.<sup>78</sup>

On Mr. Khela's application for *habeas corpus*, all courts agreed that the transfer decision was procedurally unfair, and therefore, unlawful. This decision was based on a failure to disclose, required by section 27 of the CCRA. Mr. Khela was not provided with all of the information considered by the CSC in making the transfer decision. The CSC clearly considered the SRS scores and the information provided by the confidential sources, but Mr. Khela was not provided with all of the information considered in relation to these matters. The CSC could have invoked an exception to the duty of disclosure under section 27(3) of the CCRA, but they failed to do so. Thus, there was no justification for the failure to disclose. As a result, the Supreme Court of Canada concluded that Mr. Khela did not have "enough information to know the case to be met".<sup>79</sup> *Habeas corpus* was granted.<sup>80</sup>

### C. Substantive Unreasonableness

In addition to arguing that the transfer decision was procedurally unfair, Mr. Khela argued that the decision was substantively unreasonable pursuant to *Dunsmuir*.<sup>81</sup> Mr. Khela argued that the decision lacked "justification, transparency and intelligibility" and did not fall "within a range of possible, acceptable outcomes which... [were] defensible in respect of the facts and law."<sup>82</sup> Specifically, Mr. Khela maintained that it was unreasonable for the CSC to base the transfer decision on anonymous source information of unknown, and likely questionable, reliability. This was unreasonable because an independent assessment of the reliability of those sources was not conducted. He also argued that it was unreasonable that the CSC did not investigate his

<sup>78</sup> *Ibid* at paras 25–31.

<sup>79</sup> *Khela* SCC, *supra* note 12 at para 94.

<sup>80</sup> However, note the limits of this result. The application judge ordered Mr. Khela "returned to the general population at Mission Institution under the medium security classification": *Khela* BCSC, *supra* note 75 at para 64. Mr. Khela was returned there, but immediately placed in solitary confinement. He stayed there until CSC transferred him again to maximum security. Mr. Khela challenged that decision as well. His application was dismissed. The court found the transfer decision lawful. See *Khela v Mission Institution (Warden)*, 2011 BCSC 577.

<sup>81</sup> See *Khela* BCSC, *supra* note 75 at paras 29–31.

<sup>82</sup> *Dunsmuir*, *supra* note 18 at para 47.



explanation of the stabbing incident, which was that the victim was a friend of his who he would not harm. Finally, Mr. Khela suggested that the delay between the assault and the transfer (four months and ten days) was excessive. The delay was said to demonstrate that there was no real emergency in making the transfer or that the transfer was initiated for undisclosed reasons other than the stabbing incident. Whether these arguments were available to Mr. Khela on his application for *habeas corpus* was the main legal issue throughout the case.<sup>83</sup>

The application judge, Justice Bruce, concluded that the scope of substantive *habeas corpus* review includes reasonableness review.<sup>84</sup> She relied primarily on the Supreme Court of Canada's decision in *May v Ferndale Institution*.<sup>85</sup> In *May*, the Court held that if a person detained by a federal authority chooses to challenge his or her detention by way of *habeas corpus*, rather than by way of judicial review in the Federal Court, "his or her claim should be dealt with *on its merits*".<sup>86</sup> Justice Bruce understood "on its merits" to include reasonableness review.<sup>87</sup> Justice Bruce also noted that *habeas corpus* jurisdiction should only be declined if it engages one of the two exceptions set out in *May* (where there is an appeal process or a "complete, comprehensive and expert" statutory review scheme).<sup>88</sup> Since Mr. Khela's case engaged neither of those exceptions, Justice Bruce concluded that Mr. Khela's substantive arguments were not precluded. Ultimately, Justice Bruce agreed with Justice Gaul in *Cooper v Ferndale Institution (Warden)* that "an administrative decision maker can lose jurisdiction if its decision is unreasonable and that such an examination is open to a court facing a *habeas corpus* application."<sup>89</sup>

Justice Bruce's decision was upheld on appeal, although the Court of Appeal's reasoning was somewhat different. Justice Chiasson for the Court of Appeal stated that the scope of *habeas corpus* review "is to be determined considering the nature and history of the writ and the development of administrative law generally", including how "the concept of jurisdiction has evolved over the years".<sup>90</sup> Taking this approach, Justice Chiasson noted that prior to *Dunsmuir*, "*habeas corpus* was issued on the basis that a decision to deprive a person of liberty was patently unreasonable".<sup>91</sup> An administrative

<sup>83</sup> *Khela* BCSC, *supra* note 75 at paras 25–31.

<sup>84</sup> See *ibid* at paras 37–42.

<sup>85</sup> *May*, *supra* note 1.

<sup>86</sup> *Ibid* at para 32 (emphasis added).

<sup>87</sup> *Khela* BCSC, *supra* note 75 at para 41.

<sup>88</sup> *Ibid* at para 38; *May*, *supra* note 1 at paras 44, 50.

<sup>89</sup> *Khela* BCSC, *supra* note 75 at para 39; *Cooper v Ferndale Institution (Warden)*, 2009 BCSC 1894 at para 40, citing *Mapara v Smith-Black et al*, 2007 BCSC 100 [*Mapara*]; *Lord v Coulter*, 2007 BCSC 1758 [*Lord*]; *Côté c Boily*, 2009 QCCS 1069. See also *Tschritter v Canada (Attorney General)*, 2009 BCSC 1565 at para 25 [*Tschritter*] ("[i]n addition to a loss of jurisdiction for breaches of procedural fairness, the courts have recognized a loss of jurisdiction founded on arbitrary or patently unreasonable decisions").

<sup>90</sup> *Khela v Mission Institution (Warden)*, 2011 BCCA 450 at para 60 [*Khela* BCCA].

<sup>91</sup> *Ibid* at para 32, citing *Mapara*, *supra* note 89; *Fitzgerald v William Head Institution (Warden)*, [1994] B.C.J.

decision-maker was said to have “lost jurisdiction” by making a patently unreasonable decision.<sup>92</sup> However, Justice Chiasson noted that *Dunsmuir* eliminated the patent unreasonableness standard, and with it, the concept of jurisdictional review, thereby leaving reasonableness as the primary substantive standard of review. According to Justice Chiasson, *habeas corpus* should develop accordingly. Since the patent unreasonableness standard of review was eliminated, the primary standard of substantive *habeas corpus* review post-*Dunsmuir* should be reasonableness, which does not relate to jurisdiction.<sup>93</sup>

In addition to drawing from the development of administrative law, Justice Chiasson also relied on the historical development of *habeas corpus* law.<sup>94</sup> The Court drew from leading *habeas corpus* scholars Farbey, Sharpe and Atrill. In their view, there is no principled basis for the scope of substantive *habeas corpus* review to differ from the scope of substantive judicial review generally; *habeas corpus* review is a form of judicial review.<sup>95</sup> Indeed, the authors explain that the law of *habeas corpus*, like administrative law, has abandoned the concept of jurisdictional review in favour of an approach broad enough to capture substantive review for reasonableness:

Rarely if ever in a *habeas corpus* case, where the liberty of the subject was at stake, were the courts prepared to decline to review a legal error. In addition to giving jurisdictional error an almost limitless definition, the courts adopted another technique both in judicial review and in the *habeas corpus* cases which was to abandon the idea that review could only be based on jurisdictional error and to claim that in certain situations, any apparent error would allow for interference by the court. If the error could not be classified as going to jurisdiction but was an error on the face of the material before the court, intervention was possible. In *habeas corpus* cases ... there is a long tradition of review of this nature.<sup>96</sup>

This expansive approach to the scope of substantive *habeas corpus* review

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No. 1534 at para 25, 1994 CanLII 502 (BC SC) [Fitzgerald]; *Lord*, *supra* note 89. See also *ibid* at para 68 (“[p]re-*Dunsmuir*, the court looked at the decisions of prison administrators through the lens of patent unreasonableness, or stated that this was the standard of review for the inquiry”).

<sup>92</sup> See e.g. *Canada (Attorney general) v Public Service Alliance of Canada*, [1993] 1 SCR 941 at 955, 101 DLR (4th) 673 (“[t]he result of the CUPE decision is that when an administrative tribunal is acting within its jurisdiction it will lose jurisdiction only if it acts in a patently unreasonable manner”) referring to *CUPE v NB Liquor Corporation*, [1979] 2 SCR 227, 97 DLR (3d) 417.

<sup>93</sup> See *Khela BCCA*, *supra* note 90 at paras 66, 68.

<sup>94</sup> See *ibid* at paras 59–79.

<sup>95</sup> See Farbey, Sharpe & Atrill, *supra* note 22 at 56–64. See also HWR Wade, “Habeas Corpus and Judicial Review” (1997) 113 Law Q Rev 55 at 62: “All the accepted grounds for judicial review, *i.e.* for claiming that some administrative act or decision is unlawful, ought to be equally available on habeas corpus if they affect the prisoner’s right to his liberty. Instead of making the expansion of judicial review into a pretext for restricting the right to habeas corpus, the grounds for seeking both remedies should expand in parallel, since exactly the same principle of legality is in issue in both. Whether there is an “underlying administrative decision” is quite irrelevant. The question is whether the prisoner’s detention is lawful or unlawful. The prisoner ought to be able to rely on any ground, which, if made good, would entitle him to his release. To this he is entitled as of right, as has been clear law for centuries.”

<sup>96</sup> Farbey, Sharpe & Atrill, *supra* note 22 at 20.

was adopted by the Supreme Court of Canada in *Khela*. Justice Lebel wrote, for a unanimous Court, that “[w]hether a decision is ‘lawful’ cannot relate to jurisdiction alone.”<sup>97</sup> Justice Lebel noted that in *May* the Court found that “[a] deprivation of liberty will only be lawful where it is within the jurisdiction of the decision-maker.”<sup>98</sup> However, in *Khela* the Court clarified that this statement “cannot be read as a signal that *only* decisions outside the decision maker’s jurisdiction will be unlawful.”<sup>99</sup> Rather, a decision may be unlawful on substantive grounds, even if the decision-maker has the authority to make the decision, if the decision “lacks an evidentiary foundation” or is “arbitrary” or “unreasonable”.<sup>100</sup> Justice Lebel concluded that “a decision will be unreasonable, and therefore unlawful, if an inmate’s liberty interests are sacrificed absent any evidence or on the basis of unreliable or irrelevant evidence, or evidence that cannot support the conclusion”.<sup>101</sup> In making this determination, a court is to accord due deference to the correctional decision-maker’s expertise in prison matters.<sup>102</sup>

The Supreme Court in *Khela* also set out a number of more practical points in support of reasonableness as a legitimate ground of *habeas corpus* review.<sup>103</sup> The strength of these points can be appreciated if one considers a federal inmate who seeks to challenge a transfer decision on the grounds that it is both unreasonable and procedurally unfair. If reasonableness review is not available on an application for *habeas corpus* then the inmate is required to pursue his or her substantive argument in the Federal Court. This is because the Federal Court has “exclusive original jurisdiction” over the review of decisions made by the CSC.<sup>104</sup> So, the inmate would have to bring two applications: one for judicial review in the Federal Court seeking to quash the transfer decision on the grounds that it is unreasonable, and another for *habeas corpus* in a provincial superior court seeking discharge on the grounds that the decision is procedurally unfair.

<sup>97</sup> *Khela* SCC, *supra* note 12 at para 66.

<sup>98</sup> *May*, *supra* note 1 at para 77.

<sup>99</sup> *Khela* SCC, *supra* note 12 at para 67 (emphasis in original).

<sup>100</sup> *Ibid* at para 67.

<sup>101</sup> *Ibid* at para 74.

<sup>102</sup> See *ibid* at para 75: “An involuntary transfer decision is nonetheless an administrative decision made by a decision maker with expertise in the environment of a particular penitentiary. To apply any standard other than reasonableness in reviewing such a decision could well lead to the micromanagement of prisons by the courts.”

<sup>103</sup> *Ibid* at paras 51–65, 70–72.

<sup>104</sup> *Federal Courts Act*, RSC 1985, c F-7, s 18(1): “Subject to section 28, the Federal Court has exclusive original jurisdiction (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.” On federal court jurisdiction in relation to *habeas corpus*, see e.g. Nicolas Lambert, “Death by a Thousand Cuts: Federal Court Jurisdiction and the Constitution” (2018) 31:2 Can J Admin L & Prac 115.

This bifurcation is obviously inefficient and duplicative. In addition, it risks inconsistent findings and results. Of course, this bifurcation could be avoided if the inmate simply made both arguments under one application for judicial review in the Federal Court. But the inmate need not do so. In *May and Miller*, the Supreme Court held that the inmate has a “choice” of remedy, regardless of “concerns about conflicting jurisdiction”.<sup>105</sup> Given the advantages of *habeas corpus* over judicial review – the former is speedier, more local and provides a more favourable burden than the latter – it is unsurprising that *habeas corpus* would often be the preferred path. The problem of bifurcation is even more pronounced in the case of provincial inmates, who are not subject to federal decision-making or the jurisdiction of the Federal Court. If *habeas corpus* reasonableness review were precluded, a provincial inmate would have to bring two different applications in the very same court in order to benefit from the advantages of *habeas corpus*: one application for judicial review challenging the reasonableness of the liberty-depriving decision, and another application for *habeas corpus* challenging the procedural fairness of the decision. Surely, this cannot be right. One application for *habeas corpus* is simpler, more efficient and better aligned with the constitutional guarantee of access to the writ.

#### IV. Concerns about *Khela*

Despite the apparent advantages of *habeas corpus* reasonableness review set out in *Khela*, some scholars and advocates have argued that *habeas corpus* reasonableness review is not a welcome development for prisoners. Consider, for example, the position of the Canadian Association of Elizabeth Fry Societies and the John Howard Society of Canada (CAEFS/JHSC), who were interveners in *Khela*. In their view, incorporating reasonableness review into *habeas corpus* would be “tantamount to erasing the distinctions” between *habeas corpus* and judicial review.<sup>106</sup> In particular, CAEFS/JHSC emphasized the non-discretionary nature of *habeas corpus* and the favourable burden. CAEFS/JHSC argued that the reasonableness standard is inconsistent with the strict burden of proof that *habeas corpus* places on the detaining authority. Because there are only two possible outcomes on an application for *habeas corpus* – grant the writ or not – CAEFS/JHSC argued that *Dunsmuir* reasonableness is inapplicable. There is “no ‘range of possible acceptable outcomes’” on an application for *habeas corpus*, it is “either or.”<sup>107</sup>

Lisa Kerr has also expressed concerns about the impact of *Khela*. In her view, correctional decision makers are not deserving of the deference that

<sup>105</sup> *May*, *supra* note 1 at para 67, citing *Miller*, *supra* note 10 at 641.

<sup>106</sup> CAEFS/JHSC Factum, *supra* note 17 at para 11.

<sup>107</sup> *Ibid* at para 9.

reasonableness review necessarily requires. Kerr notes that correctional decision makers are generally not well-trained in the law and, to the extent that they are, their training is limited to prison law and policy, not the law applicable to the protection of constitutional rights. As such, “[p]rison officials are not likely to impress when they make decisions that implicate Charter rights.”<sup>108</sup> Thus, to guard against the potential abuse of rights in prison, Kerr argues that the “judiciary is a necessary player in prison legality, rather than a necessarily amateur outsider” at risk of micromanaging prisons.<sup>109</sup> Kerr concludes that if the *Khela* court adopted *habeas corpus* reasonableness review “because of a fantasy of prisons as *legally* expert institutions that would be weakened by judicial scrutiny, the judgment seems deeply misguided.”<sup>110</sup>

Another point raised by Kerr is that it is unclear from *Khela* what *habeas corpus* reasonableness review means.<sup>111</sup> Reasonableness review was never conducted in *Khela*, so no guidance was provided in that regard. This causes Kerr to worry about how *habeas corpus* reasonableness review might be applied. She provides the example of section 27(3) of the *CCRA*, which allows the CSC to withhold relevant information from prisoners if it is believed, on reasonable grounds, that disclosing the information would jeopardize safety or security. Kerr worries that “[f]uture courts might find that the question of whether the warden found objectively ‘reasonable grounds’ should itself be reviewed on a deferential reasonableness standard.”<sup>112</sup> If this was not how the courts approached the question prior to *Khela*, Kerr suggests that “the level of constitutional protection for prisoners stands to be lower than the conception of ‘lawfulness’ in *May* that required adherence to statutory criteria.”<sup>113</sup>

Kerr’s concern about the uncertain meaning of reasonableness in the *habeas corpus* context is all the more serious given the precarious state of reasonableness review in administrative law generally. Off the bench, the Honourable Justice David Stratas of the Federal Court of Appeal has written that reasonableness review “is a mash of inconsistency and incoherence.”<sup>114</sup> The problematic consequence of this mash for Canadian prisoners is that it permits challenges to liberty-depriving decisions to be adjudicated on a standard that, as Justice Stratas puts it, “means entirely different things in different cases but we know not why.”<sup>115</sup> Justice Stratas is not alone in his concerns. Matthew Lewans writes that “despite all the rhetoric concerning the

<sup>108</sup> Kerr, “Easy Prisoner Cases” *supra* note 17 at 260.

<sup>109</sup> *Ibid* at 260.

<sup>110</sup> *Ibid* (emphasis in original); See also Kerr, “Contesting Expertise”, *supra* note 5.

<sup>111</sup> Kerr, “Easy Prisoner Cases”, *supra* note 17 at 255–56.

<sup>112</sup> *Ibid* at 256.

<sup>113</sup> *Ibid*.

<sup>114</sup> Honourable Justice David Stratas, “The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency” (2016) 42:1 *Queen’s LJ* 27 at 35 [Stratas, “A Plea”].

<sup>115</sup> *Ibid*.



purposes of reasonableness review, the Supreme Court has generally failed to apply the reasonableness standard in a consistent or principled fashion."<sup>116</sup> Paul Daly adds that, rather than clarifying the law, recent Supreme Court cases "have had the unfortunate effect of increasing the uncertainty about the scope and meaning of reasonableness review."<sup>117</sup> These comments confirm Kerr's concern. Prisoners' substantive arguments may be at the mercy of an amorphous standard inconsistently applied.

Kerr expands upon her concerns in an analysis of the 2015 Ontario Superior Court of Justice decision in *White v The Attorney General of Canada*.<sup>118</sup> Mr. White was convicted of second-degree murder for the death of his wife, but maintained his innocence. He was classified as medium security when he sought to be reclassified as minimum security. A psychological report supported Mr. White's reclassification request and when the CSC administered the SRS, Mr. White was found to be "at the high end for minimum security and ... within the 5% discretionary range for medium security."<sup>119</sup> Mr. White's case management team recommended that he be transferred to minimum security. However, a manager of assessment intervention and the warden disagreed. In their view, the fact that Mr. White maintained his innocence increased his safety risk. They found that Mr. White lacked insight into his offence and failed to take responsibility for it. Mr. White brought an application for *habeas corpus* which was dismissed. Justice Vallee agreed with the warden, reasoning as follows:

I find that the warden's decision was reasonable. Mr. White's denial of responsibility for the offence means that it will never be possible to determine why he committed the offence. His reason for committing the offence is directly related to any analysis of whether he is a risk to public safety and if so the degree of the risk. Because the paramount consideration of the *CCRA* is the protection of society, the warden's decision to confirm Mr. White's security rating as medium was justified and responsible. Therefore, his decision was lawful.<sup>120</sup>

In Kerr's analysis, *White* is an example of deference gone wrong. She notes that maintaining innocence is nowhere to be found in the provisions of the *CCRA*, *CCRR* and *CDs* as a factor relevant to the review of security classifications. Kerr also questions the view put forward by the CSC, and accepted by the court, that maintaining innocence makes Mr. White more dangerous. Kerr acknowledges that maintaining innocence may make it more difficult for the CSC to manage an offender if he or she fails to enrol in correctional treatment and programs. However, Kerr notes that this was not the

<sup>116</sup> Matthew Lewans, "Deference and Reasonableness Since *Dunsmuir*" (2012) 38:1 Queen's LJ 59 at 63.

<sup>117</sup> Paul Daly, "The Scope and Meaning of Reasonableness Review" (2015) 52:4 Alta L Rev 799 at 800.

<sup>118</sup> *White v The Attorney General of Canada*, 2015 ONSC 6994 [*White*]. See Kerr, "Maximum Liberty?", *supra* note 17.

<sup>119</sup> *White*, *supra* note 118 at para 7.

<sup>120</sup> *Ibid* at para 27.



case with Mr. White; his “participation in prison life was at the ideal end of the spectrum.”<sup>121</sup> Ultimately, Kerr concludes that the degree of deference offered to the warden in *White* “does not seem warranted by either the governing law or the full evidentiary record.”<sup>122</sup> Thus, she suggests that reasonableness review may be “serving to erode what has traditionally been a commitment to review the ‘legality’ of decisions under *habeas corpus*.”<sup>123</sup> Again, based on *White*, *Khela* seems to have been a setback for prisoners.

To summarize, some prison advocates and scholars have considered *Khela* damaging to prisoners’ rights and the law of *habeas corpus* generally. According to the *Khela* interveners, CAEFS/JHSC, reasonableness review is conceptually incompatible with *habeas corpus*. CAEFS/JHSC suggests that *habeas corpus* is best left to develop apart from the doctrinal mess that is administrative law reasonableness review. Further, Lisa Kerr argues that *habeas corpus* reasonableness review may grant undue deference to correctional decision makers. She worries that the meaning of reasonableness in the *habeas corpus* context is too uncertain to properly protect prisoners’ rights. She sees these issues as having materialized in *White*, where the court’s review was so deferential to the CSC as to effectively relieve it of strict compliance with statutory requirements.

## V. *Khela*'s Promise

### A. Deference, Reasonableness and the Intensity of Review

Despite the concerns raised by Kerr and others, my view is that *Khela*'s impact has not been entirely negative. *Khela* has promise. In this section, I advance several arguments in support of *Khela* and *habeas corpus* reasonableness review. The first is that reasonableness review does not erase the distinctions between *habeas corpus* and judicial review, as suggested by CAEFS/JHSC. Justice Lebel made it clear in *Khela* that the traditional onuses and non-discretionary nature of *habeas corpus* remain unchanged.<sup>124</sup> Further, the practical advantages of *habeas corpus* over judicial review remain. *Habeas corpus* in provincial courts provides local access to justice and tends to be much speedier than judicial review in the Federal Court. There are meaningful

<sup>121</sup> Kerr, “Maximum Liberty?”, *supra* note 17 at 250.

<sup>122</sup> *Ibid* at 250.

<sup>123</sup> *Ibid*.

<sup>124</sup> *Khela* SCC, *supra* note 12 at paras 77–79. Note that in the hearing before the Supreme Court, Justice Moldaver expressed concern about preserving the traditional *habeas corpus* onuses. Why, one might ask, should the detaining party bear the onus of establishing the reasonableness of detention (particularly if the detention is lawful on all other grounds) when the onus would be on the detainee on judicial review in the Federal Court? Counsel for Mr. Khela emphasized that the relevant difference is that *habeas corpus* is uniquely concerned with matters of liberty. On the significance of the burden of proof on *habeas corpus* generally, see Robert J Sharpe, “Habeas Corpus, Extradition and the Burden of Proof: The Case of the Man Who Escaped from Devil’s Island” (1990) 49:3 Cambridge LJ 422.

distinctions between *habeas corpus* and judicial review, even if both operate under the same substantive standard of review.

Secondly, the argument made by CAEFS/JHSC that reasonableness review is incompatible with the binary nature of the outcomes on an application for *habeas corpus* does not accord with the Supreme Court of Canada's understanding of reasonableness review. For example, in *Wilson v Atomic Energy of Canada Ltd*,<sup>125</sup> the issue before the Supreme Court was whether it was unjust, pursuant to section 240(1) of the *Canada Labour Code*,<sup>126</sup> to dismiss an employee without cause (but with a generous severance package). Despite there being only two possible outcomes – that dismissal without cause is unjust or it is not – a majority of the Supreme Court held that the reasonableness standard of review applied.<sup>127</sup> In *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*,<sup>128</sup> the issue was whether an inquiry of the Alberta Information and Privacy Commissioner was automatically terminated due to a lapse of statutory timelines.<sup>129</sup> Despite there being only two possible outcomes – either the inquiry automatically terminated or it did not – the Supreme Court held that the standard of review was reasonableness and found the adjudicator's decision reasonable.<sup>130</sup>

These examples show that the argument made by CAEFS/JHSC in *Khela* is overstated. That argument underappreciates the important distinction between outcomes and the factors that determine those outcomes or the "qualities that make a decision reasonable".<sup>131</sup> There are a number of factors that bear on the legality of a given decision. Some decisions are unlawful because they are procedurally unfair. Others are unlawful because they are unsupported by evidence. A lawful decision, in contrast, is procedurally fair, supported by evidence, compliant with statutory requirements and otherwise well-reasoned. There is no single, correct way to support a decision with evidence, justify a decision with reasons or interpret a statutory provision. Thus, when it comes to achieving the qualities that make decisions lawful or unlawful, a "range of possible, acceptable outcomes" seems unavoidable, including on an application for *habeas corpus*.<sup>132</sup>

<sup>125</sup> *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29 [Wilson].

<sup>126</sup> *Canada Labour Code*, RSC, 1985, c L-2. Section 240(1) provides: "Subject to subsections (2) and 242(3.1), any person (a) who has completed twelve consecutive months of continuous employment by an employer, and (b) who is not a member of a group of employees subject to a collective agreement, may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust." Mr. Wilson made such a complaint.

<sup>127</sup> See *Wilson*, *supra* note 125 at paras 15, 40, 70–71. But see the dissenting opinion.

<sup>128</sup> *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 [Alberta Teachers].

<sup>129</sup> See *Personal Information Protection Act*, SA 2003, c P-6.5, s 50(5).

<sup>130</sup> *Alberta Teachers*, *supra* note 128 at para 72. See also *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 [CHRC 2011]; *HBC Imports (Zellers Inc.) v Canada (Border Services Agency)*, 2013 FCA 167 at paras 9–11.

<sup>131</sup> *Dunsmuir*, *supra* note 18 at para 47.

<sup>132</sup> *Ibid.*

Furhter, in my view, the concerns raised by CAEFS/JHSC and Kerr about undue deference are mistaken, at least in principle. There was no pure lawfulness standard of substantive *habeas corpus* review prior to *Khela*. As Justice Chiasson noted in *Khela*, the patent unreasonableness standard of review was explicitly applied to substantive *habeas corpus* review prior to *Dunsmuir* and *Khela* or, at least, implicitly informed *habeas corpus* review.<sup>133</sup> The argument about undue deference fails to appreciate this reality. The patent unreasonableness standard was the most deferential standard of review. A decision was said to be patently unreasonable only if it was “clearly irrational” or “so flawed that no amount of curial deference can justify letting it stand.”<sup>134</sup> In contrast, *Khela* confirmed that the standard of substantive *habeas corpus* review post-*Dunsmuir* is reasonableness, a less deferential standard of review than patent unreasonableness. Reasonableness review requires courts on *habeas corpus* review to grant less deference to correctional decision-makers than they were required to do before *Khela* (and before *Dunsmuir*). So, *Dunsmuir* and *Khela* are, in principle, favourable to prisoners.

This is not to say that undue deference to correctional decision-makers is not a valid concern in applying the reasonableness standard. In *Canada v Khosa*, the Supreme Court stated that “[r]easonableness is a single standard that takes its colour from the context.”<sup>135</sup> The correctional context is one that has historically attracted considerable, and at times unwarranted, deference. The reasonableness standard of review hardly changes this tendency to defer. As Justice Chiasson suggested in *Khela*, all that has changed since *Dunsmuir* “is the terminology that did away with patent unreasonableness” and that “considerable deference” is still required by the correctional context.<sup>136</sup> In other words, the reduced level of deference required in principle by the shift from patent unreasonableness to reasonableness may not materialize in practice. This is supported by Kerr’s analysis of *White*. The reasonableness standard of review was applied with such deference that Mr. White’s *habeas corpus* application hardly amounted to a review at all. The warden’s reasoning

<sup>133</sup> See *Khela* BCCA, *supra* note 90 at para 32 (“*habeas corpus* was issued [prior to *Dunsmuir*] on the basis that a decision to deprive a person of liberty was patently unreasonable”), citing *Lord*, *supra* note 89; *Mapara*, *supra* note 89; *Fitzgerald*, *supra* note 91. See also *Khela* BCCA, *supra* note 90 at para 68 (“[p]re-*Dunsmuir*, the court looked at the decisions of prison administrators through the lens of patent unreasonableness, or stated that this was the standard of review for the inquiry”). For other cases, see e.g. *Chityal c Canada (Justice)*, 2006 QCCA 20 at para 50; *Bachynski v Gallagher (Warden of William Head Institution)*, [1995] BCJ No 1715 at para 22, 1995 CanLII 958 (BC SC); *Mowers v Canada (Attorney General)*, 2009 BCSC 1566 at para 10; *Tschritter*, *supra* note 89 at para 25; *Hoang v Warden of Kent Institution et al*, 2002 BCSC 197 at para 8. There are many other cases that do not explicitly use the terms “patent unreasonableness” but do use the language of jurisdictional review, which is connected to the “patent unreasonableness” standard.

<sup>134</sup> *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at paras 52–53 as cited in *Dunsmuir*, *supra* note 18 at para 40.

<sup>135</sup> *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. See also *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 18.

<sup>136</sup> *Khela* BCCA, *supra* note 90 at para 68.

was arguably flawed and the court simply accepted it.

However, the reasonableness standard is not bound to be applied with undue deference, as it was in *White*. There are cases in which the reasonableness standard was applied with much less deference. These cases show that the danger in undue deference is more a function of how reasonableness review is applied than reasonableness as the standard of review. *Anderson v Pacific Institute* is such a counter-example. Mr. Anderson was transferred from medium security Pacific Institution to a maximum-security institution in Quebec. Although Mr. Anderson was not opposed to the transfer itself, he was opposed to the increase in security classification, which was the basis for the transfer decision. Mr. Anderson applied for *habeas corpus*.<sup>137</sup>

The correctional authorities sought to rely on section 18(a)(ii) of the *CCRR*, which provides that an inmate is to be classified as maximum security where the inmate is assessed by the CSC as requiring “a high degree of supervision and control within the penitentiary”.<sup>138</sup> The justification for the increase in Mr. Anderson’s security classification under section 18(a)(ii) of the *CCRA* was a long list of Mr. Anderson’s alleged misbehaviours within Pacific Institution.<sup>139</sup> The essence of the evidence against Mr. Anderson included that:

1. Mr. Anderson had been serving a life sentence for a gang-related killing and had previously ran afoul of gang-related inmates while incarcerated;
2. Mr. Anderson was seen speaking with rival gang members “who were understood to be the incumbent ruling group of his particular unit”;
3. Mr. Anderson was seen running the card table (a place of business between inmates) which had previously been run by a rival gang;
4. correctional officers “suspected or theorized” that Mr. Anderson was engaged in a power struggle with a rival gang;
5. prisoner informants informed correctional authorities of “a looming war between the gangs on the unit”;
6. Mr. Anderson twice acted belligerently or uncooperatively toward correctional officers without his shirt on, thereby displaying his gang tattoo;

<sup>137</sup> *Anderson v Pacific Institute*, 2015 BCSC 1789 at paras 1–2 [*Anderson*].

<sup>138</sup> *CCRR*, *supra* note 50, s 18.

<sup>139</sup> *Anderson*, *supra* note 137 at para 40.

7. Mr. Anderson “appeared to be seeking out information about other inmates” and was overheard on the phone speaking angrily about a domestic matter; and
8. some contraband items were found in Mr. Anderson’s cell.<sup>140</sup>

Justice Schultes granted *habeas corpus*. He held that the evidence was insufficient to establish that Mr. Anderson required a high degree of supervision and control within the penitentiary. Justice Schultes found that the case against Mr. Anderson came “across as more of a working theory than as a series of reliable inferences drawn from evidence.”<sup>141</sup> In support of this conclusion, Justice Schultes reasoned as follows:

[42] Put simply, the gang connection appears tenuous here and the intelligence about a conflict between rivals is not attributable to Mr. Anderson, even inferentially. It seems unlikely that two incidents of yelling, swearing, and defying officers, which were resolved by verbal approaches by the officers, could support an increase in security level in themselves, and Mr. Anderson’s track record of institutional conflict with other gang members is as consistent in its history with having been targeted by them as with targeting them himself, particularly given his own past requests for protection and segregation.

[43] I conclude that, even extending the greatest permissible level of deference to the officials here, the actual evidence considered in support of the transfer, taken at its highest, could not on any reasonable interpretation justify a conclusion that in light of the factors in s. 28 of the Act or s. 17 of the Regulations “a high degree of supervision and control within the penitentiary” was needed for Mr. Anderson, thus requiring a maximum security classification. Put in the language of *Dunsmuir v. New Brunswick*, 2008 SCC 9, the reasons for this decision are not reasonably capable of supporting the decision that was reached.

[44] What seems to have occurred here is that the legitimate need of institutional officials to defuse a violent conflict that source information suggested was in the offing was also enlisted to support a decision to move out and reclassify an offender whose behaviour, while certainly far less than praiseworthy, could not yet be proven to justify those actions.<sup>142</sup>

This passage displays remarkably little deference to the CSC’s view of the evidence, which is in stark contrast to *White*. In *White*, the court accepted the decision of the warden despite it being based on a dubious psychological claim that had no foundation in the relevant law. The CSC provided no cogent evidence to establish that Mr. White maintaining his innocence made him more dangerous. The court did not scrutinize the evidence. In *Anderson*, however, the court held the CSC to a much more demanding evidentiary

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<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid* at para 41.

<sup>142</sup> *Ibid* at paras 42–44.



standard. According to the CSC, all of the incidents involving Mr. Anderson showed that he was sufficiently troublesome to justify reclassifying him as a maximum-security inmate. Justice Schultes rejected the CSC's view that the evidentiary threshold to establish that Mr. Anderson required a high degree of supervision and control within the penitentiary was met. The evidence merely established, according to Justice Schultes, a "working theory" about Mr. Anderson, not a case that could support reclassification.<sup>143</sup> In the end, *White* and *Anderson* provide two strikingly different illustrations of the application of *habeas corpus* reasonableness review. *Anderson* is only one case, but it suggests that the reasonableness standard does not necessarily prevent judges from protecting prisoners' rights.<sup>144</sup>

Indeed, *White* and *Anderson* are indicative of a more general feature of substantive judicial review: the reasonableness standard of review is not always applied according to the level of deference that, in principle, the standard seems to require.<sup>145</sup> This incongruence is clear from *White* and *Anderson*, and surely there are other examples. But this incongruence is no reason to reject reasonableness as a standard of *habeas corpus* review. Ultimately, the intensity of reasonableness review (or degree of deference) varies according to the reviewing court's assessment of the interplay between two foundational constitutional principles of judicial review: legislative supremacy and the rule of law.<sup>146</sup> On the one hand, the principle of legislative supremacy requires that

<sup>143</sup> *Ibid* at para 41.

<sup>144</sup> See also e.g. *Antinello v Warden of Dorchester Institution*, 2018 NBQB 9. In *Antinello*, the court protected a prisoner from transfer and reclassification on the basis of, as the court put it, "probably one of the most inoffensive breach[es] of any detention institution rule, we can think of" (para 48) and "an insignificant and banal misunderstanding" (para 45). The applicant was given a gospel music device by the institutional chaplain. As the court noted at para 47, the applicant's "sin" was "failing to return that device at the proper time, a mistake that the Applicant [had] anyway admitted." The CSC then suspended Mr. Antinello's work privileges. Mr. Antinello reacted with frustration and, apparently, used threatening words. The court noted that there was no evidence of violence (para 51). The CSC proceeded to review Mr. Antinello's security classification. They concluded that Mr. Antinello's behaviour warranted an increase in security classification resulting in a transfer. Mr. Antinello became increasingly frustrated with the CSC's response. In granting *habeas corpus*, the court ultimately concluded that the CSC had unjustifiably overreacted to Mr. Antinello's failure to return the music device on time and that the CSC had used this incident to have Mr. Antinello removed from the institution (para 43-50, 55).

<sup>145</sup> See e.g. Stratas, "A Plea", *supra* note 114 at 35-36. Justice Stratas writes at page 35 that "[o]ften the Supreme Court of Canada purports to engage in reasonableness review—a "deferential standard"—but acts non-deferentially, imposing its own view of the facts or the law or both over the view of the administrative decision maker, without explanation": citing e.g. *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52; *CHRC* 2011, *supra* note 130; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37; *Quebec (Commission des normes du travail) v Ashpalte Desjardins Inc*, 2014 SCC 51; *United Food and Commercial Workers, Local 503 v Wal-Mart Canada Corp*, 2014 SCC 45; *Canadian Artist's Representation v National Gallery of Canada*, 2014 SCC 42; *John Doe v Ontario (Finance)*, 2014 SCC 36; *Dionne v Commission scolaire des Patriotes*, 2014 SCC 33; *Martin v Alberta (Workers' Compensation Board)*, 2014 SCC 25; *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61. Justice Stratas then notes at page 36 that sometimes the Supreme Court does appear to accord the deference required by *Dunsmuir*, but it has "never been explained" why in only some cases "deference prevails".

<sup>146</sup> See *Dunsmuir*, *supra* note 18 at paras 27-31; Stratas, "A Plea", *supra* note 114 at 43-45; Paul Daly,



courts respect legislative decisions to vest “jurisdiction over a subject matter to an administrative decision maker, not the courts.”<sup>147</sup> On the other hand, the principle of the rule of law requires “that the judiciary must sometimes enforce minimum rule of law standards – things such as rational fact-finding, procedural fairness and (at least) acceptable and defensible interpretations and applications of law.”<sup>148</sup> The deference required by reasonableness does not necessarily dictate which of these two principles trumps the other on any given *habeas corpus* application. What matters is how reviewing judges assess the tension between the CSC’s jurisdiction over the subject matter of corrections and the principle that the “rule of law must run within penitentiary walls.”<sup>149</sup> A similar tension arises every time a judge reviews an administrative decision in another context, whether or not reasonableness is the standard. So the reasonableness standard is not inherently damaging to *habeas corpus* and prisoners’ rights. It depends on how the standard is applied.

To summarize, I have argued that the objections to *habeas corpus* reasonableness review are not particularly compelling: *habeas corpus* reasonableness review does not erase the distinctions between *habeas corpus* and judicial review; is compatible with the binary nature of the outcomes on an application for *habeas corpus*; requires, in principle, less deference than the standard of substantive *habeas corpus* review prior to *Dunsmuir* and *Khela*; and does not preclude sufficient scrutiny of correctional decisions to protect prisoners’ rights.

## B. Reasonableness and the Right to Rebuttal

I now aim to show that *habeas corpus* reasonableness review can be, and has been, applied to protect prisoner’s rights. This aspect of *Khela*’s promise relates to prisoners’ statutory right to make representations in response to transfer decisions and placements in solitary confinement.<sup>150</sup> Part of *Khela*’s promise, and the potential for *habeas corpus* reasonableness review to promote prisoners’ rights, arises from cases where prisoners challenge the CSC’s responses to inmate representations. The relevant CDs require that inmate representations

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“Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness” (2016) 62:2 McGill LJ 527.

<sup>147</sup> Stratas, “A Plea”, *supra* note 114 at 43.

<sup>148</sup> *Ibid* at 44.

<sup>149</sup> Martineau, *supra* note 8 at 622.

<sup>150</sup> The prisoner’s right to make representations with respect to a placement in solitary confinement is set out in CCR, *supra* note 50, s 21(3)(b), which provides that: “The institutional head shall ensure that an inmate who is the subject of a Segregation Review Board hearing pursuant to subsection (2)... (b) is given an opportunity to be present and to make representations at the hearing”. The Segregation Review Board reviews the justification for solitary confinement on a periodic basis: see CCR, *supra* note 50, s 21(1)-(2). On solitary confinement generally, see e.g. *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62.

be considered and addressed.<sup>151</sup> However, as the cases reviewed in this section demonstrate, the CSC's "consideration" of prisoner rebuttals tends to amount to mere lip service in some cases. One of the key advantages of *habeas corpus* reasonableness review is that it provides a basis for why such disregard is unlawful. Ignoring prisoner representations is unreasonable because it fails to justify to the person affected by the decision why the decision was made. What follows are some examples.

In *Tschritter v Canada (Attorney General)*,<sup>152</sup> a transfer decision was found to be unreasonable because it failed to address the prisoner's exculpatory explanation for the incident that precipitated the transfer. Two inmates were killed and another suffered brain damage. Initially, Mr. Tschritter was accused of being one of the attackers but later was accused of actively participating in a riot and transferred on that basis. After further investigation, most of the inculpatory evidence supporting the theory that Mr. Tschritter participated in the riot was discredited and excised from the correctional reports.<sup>153</sup> What remained was Mr. Tschritter's rebuttal, including his admission that he left his cell when the rioters broke it open.<sup>154</sup> On the basis of this evidence, Mr. Tschritter was transferred for having "actively participated" in the riot.<sup>155</sup> The transfer was challenged by way of *habeas corpus* and the writ was granted.

Justice Grist found the transfer decision unreasonable for three reasons. First, because it relied on discredited evidence. Second, because the credible evidence failed to support the conclusion that Mr. Tschritter actively participated in the riot.<sup>156</sup> Third, the decision failed to address Mr. Tschritter's explanation for the events. In his rebuttal, Mr. Tschritter explained that his cell mate was a sex offender (a "skinner") and that, when he heard the rioters "cheering and yelling 'Kill the Skinner' [i.e., the sex offender]",<sup>157</sup> he feared for his and his cellmate's lives.<sup>158</sup> This is why Mr. Tschritter evacuated his cell and fled to another part of the prison to seek protection. Despite providing this representation to the CSC, Justice Grist found that the CSC gave "no consideration to the exculpatory explanation offered by Mr. Tschritter."<sup>159</sup> The failure to address Mr. Tschritter's explanation rendered the transfer decision unreasonable because the warden failed to explain why the CSC's interpretation of events was preferred over Mr. Tschritter's. Justice Grist concluded that "[t]o

<sup>151</sup> See CD 710-2, *supra* note 63, ss 9(e), 19; Canada, "Administrative Segregation" (24 September 2015), s 35(b), online: *Correctional Service Canada* <[www.csc-scc.gc.ca/politiques-et-lois/709-cd-eng.shtml](http://www.csc-scc.gc.ca/politiques-et-lois/709-cd-eng.shtml)> [perma.cc/A6YY-7554].

<sup>152</sup> *Tschritter*, *supra* note 89.

<sup>153</sup> See *ibid* at paras 8-15.

<sup>154</sup> See *ibid* at para 14.

<sup>155</sup> *Ibid* at para 16.

<sup>156</sup> See *ibid* at paras 27-31.

<sup>157</sup> *Ibid* at paras 3, 6.

<sup>158</sup> *Ibid* at para 7.

<sup>159</sup> *Ibid* at para 30.

avoid the criticism of having rendered an arbitrary decision, both sides of an account need to be considered.”<sup>160</sup>

The principle set out by Justice Grist in *Tschritter* was affirmed in *R v Elliott*.<sup>161</sup> Mr. Elliott’s transfer was based on many factors,<sup>162</sup> but one incident seems to have been the catalyst.<sup>163</sup> Mr. Elliott was dissatisfied with his treatment at Mission Institution<sup>164</sup> and during an argument with the CSC about his complaints, Mr. Elliott allegedly threatened correctional officers and called one guard a “fucking moron”.<sup>165</sup> In protest, and with the aim of pressuring the warden into meeting with him, Mr. Elliott covered his cell window and refused to remove the covering until an hour of negotiations had occurred. On the basis of this and other incidents, the warden approved Mr. Elliott’s transfer to higher security. In a 16-page handwritten rebuttal, Mr. Elliott offered his version of the window-covering incident. He outright denied some of the allegations made against him, admitted but offered justifications for others and characterized other allegations as misinterpretations of the facts.<sup>166</sup>

As in *Tschritter*, Mr. Elliott’s application for *habeas corpus* was granted. Justice Graesser found the transfer decision unlawful on several grounds, one of which was the warden’s failure to engage with Mr. Elliott’s rebuttal. Justice Graesser found there was “no discussion in the Final Decision relating to why Mr. Elliott’s explanations and Rebuttal were given no weight and why the information from the guards was accepted over Mr. Elliott’s.”<sup>167</sup> The warden acknowledged that Mr. Elliott’s rebuttal “explain[ed] some of the circumstances.”<sup>168</sup> However, the Warden quickly dismissed the rebuttal because it did “not indicate that Mr. Elliott [took] full responsibility ... [for the incident, presumably].”<sup>169</sup> Not surprisingly, Justice Graesser found this response inadequate. Not only did it assume that Mr. Elliott ought to take responsibility for an incident he considered justified, it did so without first grappling with Mr. Elliott’s position. Thus, Justice Graesser held that there should have been “some assessment of Mr. Elliott’s credibility or the credibility of the guards who provided the contrary information on which the warden obviously relied.”<sup>170</sup> In other words, for the transfer decision to be reasonable, the warden did not have to agree with Mr. Elliott’s rebuttal but she did, at least, have to engage with it.

<sup>160</sup> *Ibid.*

<sup>161</sup> *R v Elliott*, 2014 ABQB 429 [*Elliott*].

<sup>162</sup> See *ibid* at paras 8–9, 21, 38.

<sup>163</sup> See *ibid* at paras 8, 34.

<sup>164</sup> See *ibid* at para 6.

<sup>165</sup> See *ibid* at para 8.

<sup>166</sup> See *ibid* at paras 18, 22–36.

<sup>167</sup> *Ibid* at para 95.

<sup>168</sup> *Ibid* at para 121

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid* at para 122.

A similar issue arose in *Illes v Canada (Attorney General)*.<sup>171</sup> The CSC attempted to discharge its duty to consider the prisoner's rebuttal by simply stating that the rebuttal was considered. Mr. Illes was transferred for a number of reasons, including that he was, allegedly, in possession of unauthorized items, involved in the institutional subculture, intimidating other inmates, connected to the Russian mafia and other gangs and had a history of institutional adjustment concerns.<sup>172</sup> Mr. Illes prepared a written rebuttal to these allegations in which he denied his involvement in gangs and contraband, and suggested that the evidence against him was fabricated by other inmates. For example, Mr. Illes said that he was not involved with the Russian mafia because he was Hungarian and the Russian mafia did not accept Hungarians.<sup>173</sup>

Justice Macklin granted *habeas corpus*, again on the basis that the CSC effectively ignored the prisoner's position. The judge found that the warden's reasons for Mr. Illes' transfer were inadequate, and therefore, unreasonable. Firstly, Justice Macklin was concerned by the fact that "no explanation" was provided by the warden as to how "the veracity of the factors he relied on" was determined.<sup>174</sup> Further, the warden did not provide "any basis for preferring the evidence contained in the Assessment to the Applicant's rebuttal evidence."<sup>175</sup> The warden's decision simply stated: "Illes's written rebuttal has been considered in this decision making process."<sup>176</sup> This, according to Justice Macklin, was insufficient. To be reasonable, the warden's decision had to explain to Mr. Illes not just that his rebuttal was considered, but also how it was considered.<sup>177</sup>

The principle that reasonableness requires explanations, rather than mere conclusions, was further applied in *Hamm v Attorney General of Canada (Edmonton Institution)*.<sup>178</sup> Several inmates were placed in solitary confinement. The basis for the placement was that the CSC had received information suggesting that the inmates were planning to seriously harm or assault three specific correctional officers. Apparently, the prisoners wanted to teach the officers a "lesson not to 'fuck' with the inmates."<sup>179</sup> The prisoners challenged their placement in solitary confinement by way of *habeas corpus*. Justice Veit granted the writ partly on the basis that the CSC failed to meaningfully address the prisoners' arguments, which included that another inmate had

<sup>171</sup> *Illes v Canada (Attorney General)*, 2016 ABQB 426 [Illes].

<sup>172</sup> See *ibid* at para 7.

<sup>173</sup> See *ibid* at paras 11–13.

<sup>174</sup> *Ibid* at para 51.

<sup>175</sup> *Ibid*.

<sup>176</sup> *Ibid* at para 17.

<sup>177</sup> *Ibid* at paras 50–55.

<sup>178</sup> *Hamm v Attorney General of Canada (Edmonton Institution)*, 2016 ABQB 440.

<sup>179</sup> *Ibid* at para 7.

fabricated the assault plot to benefit himself. Justice Veit found:

[T]he institution was not willing to explain and justify its decision to maintain the inmates in segregation. It would not deal with the issue raised by both Keepness and Hamm with respect to the recantation of an inmate who had provided information to the institution. It did not respond to Keepness' argument that in his relatively lengthy history as a prisoner, he had never before had a serious problem with a jailer. It did not respond to Hamm's argument that, given the short time he has left in his sentence and the fact that he is serving the last weeks of his sentence in Edmonton where his mother and his daughter reside, it is unreasonable to conclude that he would put his immediate future at risk by participating in such a plan.<sup>180</sup>

Failing to respond to prisoners' arguments, as the CSC did in *Hamm*, was the source of another unreasonable decision in *Hennessey v Warden of Kent Institution*.<sup>181</sup> This time, however, it was not a prisoner's word that was disregarded, but objective exculpatory evidence. Mr. Hennessey was transferred to higher security because he allegedly assaulted another prisoner to enforce a drug debt. The transfer decision was based on two sources of evidence. First, a "Believed Reliable"<sup>182</sup> source identified Mr. Hennessey as the assailant. Second, video evidence showed that Mr. Hennessey entered the victim's cell, stayed for "approximately 12-15 seconds", then exited.<sup>183</sup> In his rebuttal, Mr. Hennessey admitted that he entered the victim's cell, but denied that he was the assailant. More importantly, Mr. Hennessey noted that the video showed him and the victim exiting together "with the victim apparently unharmed."<sup>184</sup> Although the Warden acknowledged Mr. Hennessey's interpretation of the video, she found it "reasonable to conclude" that Mr. Hennessey was the assailant.<sup>185</sup>

Again, *habeas corpus* was granted. Justice N. Smith noted that in relying on the informant's identification evidence and the uncontested fact that Mr. Hennessey was in the victim's cell, the Warden "obviously gave no weight to Mr. Hennessey's denial and preferred the evidence of the source."<sup>186</sup> If that had been all the evidence, Justice Smith suggested that the transfer decision would "probably" have been reasonable.<sup>187</sup> However, there was more evidence: the video footage of Mr. Hennessey and the victim exiting the cell together apparently unharmed. The Court found that this evidence was not addressed in the Warden's decision "in any substantial way."<sup>188</sup> Thus, because the evidence was equally consistent with Mr. Hennessey or someone

<sup>180</sup> *Ibid* at para 73 (emphasis added).

<sup>181</sup> *Hennessey v Warden of Kent Institution*, 2015 BCSC 900 [*Hennessey*].

<sup>182</sup> *Ibid* at para 5. Justice Smith characterized a "believed reliable" source as one who provides "credible but not necessarily conclusive" information (para 5).

<sup>183</sup> *Ibid* at para 6.

<sup>184</sup> *Ibid*.

<sup>185</sup> *Ibid* at para 7.

<sup>186</sup> *Ibid* at para 15.

<sup>187</sup> *Ibid*.

<sup>188</sup> *Ibid* at para 16.

else being the assailant, Justice Smith found it “impossible for the court to understand” why Mr. Hennessey was found to be the assailant.<sup>189</sup> If the crucial rebuttal evidence relied on by Mr. Hennessey was rejected by the Warden, “some explanation [was] required” in support of that conclusion.<sup>190</sup>

In another case, *Nguyen v Mission Institution*,<sup>191</sup> exculpatory evidence gathered and presented by the prisoner was ignored. The conduct that triggered Mr. Nguyen’s transfer included his alleged involvement in the institutional drug and gang subcultures. However, the primary basis for the transfer was Mr. Nguyen’s alleged ownership of a cell phone found within the institution<sup>192</sup> (cell phones are contraband).<sup>193</sup> The cell phone was linked to Mr. Nguyen because there were numbers programmed on the phone that were allegedly associated only with him.<sup>194</sup> Confidential sources provided information to the CSC which alleged Mr. Ly possessed the cell phone for Mr. Nguyen. Apparently, Mr. Ly owed a drug debt to Mr. Nguyen. However, in Mr. Nguyen’s rebuttal he explained that he and Mr. Ly were related, sharing common friends and relatives, and as such, the numbers in the phone were not attributable only to Mr. Nguyen. Mr. Nguyen secured a statement from Mr. Ly in which he confirmed his relation to Mr. Nguyen and stated that Mr. Nguyen neither owned nor used the cell phone.<sup>195</sup> Mr. Ly also stated that he was not in debt to Mr. Nguyen’s and would not “take the fall for something” Mr. Nguyen might have done.<sup>196</sup>

On Mr. Nguyen’s application for *habeas corpus*, Justice McEwan found the transfer decision unreasonable, in part, because it failed to address the prisoner’s evidence. Justice McEwan criticized the warden for dismissing Mr. Nguyen’s rebuttal by simply stating, “I am satisfied this has been addressed”.<sup>197</sup> Justice McEwan found that the exculpatory evidence provided by Mr. Nguyen would have been “a complete defence to the question of ownership or linkage to the applicant if it turned out to be true.”<sup>198</sup> Yet, the warden made “no attempt to reconcile” Mr. Nguyen’s evidence with the confidential source

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<sup>189</sup> *Ibid* at para 19.

<sup>190</sup> *Ibid* at para 18.

<sup>191</sup> *Nguyen v Mission Institution (Warden)*, 2012 BCSC 103 [Nguyen].

<sup>192</sup> *Ibid* at para 12.

<sup>193</sup> See *ibid* at paras 12, 40. For a the statutory definition of “contraband”, see *CCRA*, *supra* note 49, s 2: “contraband means (a) an intoxicant, (b) a weapon or a component thereof, ammunition for a weapon, and anything that is designed to kill, injure or disable a person or that is altered so as to be capable of killing, injuring or disabling a person, when possessed without prior authorization, (c) an explosive or a bomb or a component thereof, (d) currency over any applicable prescribed limit, when possessed without prior authorization, and (e) any item not described in paragraphs (a) to (d) that could jeopardize the security of a penitentiary or the safety of persons, when that item is possessed without prior authorization”.

<sup>194</sup> *Nguyen*, *supra* note 191 at para 25.

<sup>195</sup> *Ibid* at para 26.

<sup>196</sup> *Ibid*.

<sup>197</sup> *Ibid* at para 45.

<sup>198</sup> *Ibid* at para 52.



information.<sup>199</sup> Justice McEwan accepted that it would have been insufficient for Mr. Nguyen “merely to deny the allegations and give an alternate version of events and expect the institution to conduct an investigation.”<sup>200</sup> However, Mr. Nguyen did much more than that; he “produced evidence it was the responsibility of the institution to weigh and consider fairly.”<sup>201</sup>

What these cases show is that a decision which disregards prisoner representations is unlawful. The reasonableness standard best explains why this is the case. A decision that disregards the representations of a person affected by a decision lacks the justification required by *Dunsmuir*.<sup>202</sup> In a society like Canada, “marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of *rationality and fairness*.”<sup>203</sup> A culture of justification is one in which “every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command.”<sup>204</sup> Thus, judicial review on substantive grounds requires “rational justification” in order to be reasonable.<sup>205</sup> Accordingly, the CSC may only exercise its public power to restrict a prisoner’s liberty if the decision to do so can be reasonably justified to the prisoner.<sup>206</sup>

A decision that completely disregards credible defences disclosed in the prisoner’s representations cannot be reasonable because it lacks rational justification. Mr. Tschritter had a believable explanation for why he left his cell during the riot, but no one cared about it. Mr. Elliott took the time to write a 16-page handwritten rebuttal only to have it considered by a closed mind. Mr. Illes submitted a rebuttal that was considered, but we do not know how. The CSC’s failure to address Mr. Hamm’s rebuttal implied, implausibly,

<sup>199</sup> *Ibid.*

<sup>200</sup> *Ibid* at para 63.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Dunsmuir*, *supra* note 18 at para 47.

<sup>203</sup> *Toronto (City) v CUPE*, [2003] 3 SCR 77 at para 130, 232 DLR (4th) 385 [*CUPE*], citing the Honourable Madam Justice B. McLachlin, “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law” (1998-1999) 12 Can J Admin L & Prac 171 at 174 (emphasis in original).

<sup>204</sup> Etienne Mureinik, “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 SAJHR 31 at 32. See also David Dyzenhaus, “Law as Justification: Etienne Mureinik’s Conception of Legal Culture” (1998) 14 SAJHR 11.

<sup>205</sup> *CUPE*, *supra* note 203 at para 130 (“[j]udicial review on substantive grounds ensures that the decisions of administrative adjudicators are capable of rational justification; review on procedural grounds (i.e., does the decision meet the requirements of procedural fairness?) ensures that they are fair”).

<sup>206</sup> Of course, this does not mean that the prisoner must *in fact* accept the decision. I suspect that prisoners will only rarely accept correctional decisions that negatively affect their rights. They are skeptical of correctional authority, given that “the relationship between the inmate and the institution is one of fundamental imbalance, both with respect to power and information”: *MacNeil v Kent Institution (Warden)*, 2017 BCSC 30 at para 46 [*MacNeil*]. As the court noted in *MacNeil* at para 46, “the inmate will be, not surprisingly, inclined to have a sense of wariness or outright distrust as to the fairness of the process.” But this distrust does not affect whether the CSC’s exercise of its authority is legitimate. There need only be an objectively reasonable basis for a liberty-depriving correctional decision.

that Mr. Hamm was so irrationally intent on teaching correctional officers a lesson that he would jeopardize his upcoming early release date to do so. Mr. Hennessey pointed to exculpatory video evidence which the CSC appears to have deliberately ignored. Finally, it was left a mystery to Mr. Nguyen why the statement absolving him of responsibility for the unauthorized phone was given no weight. Decisions where only conclusions, not explanations, are offered cannot be reasonable because they cannot be understood and accepted by the prisoners affected by them. In short, they lack the justification required by *Dunsmuir*.<sup>207</sup>

As the cases reviewed show, the statutory right to make representations is rendered hollow without the justificatory standards that reasonableness review imposes. The persistent problem throughout the cases reviewed is that prisoners are treated as persons not deserving of justifications for decisions made which affect their rights. Bald statements such as, “I am satisfied this has been addressed” (*Nguyen*)<sup>208</sup> or the rebuttal “has been considered in this decision-making process” (*Illes*),<sup>209</sup> require the prisoner to accept, on faith, that their representations have been reasonably considered and rejected. But, there is no basis for such faith. The CSC has shown itself prepared, not only to reject prisoners’ representations out of hand, but also to disregard exculpatory evidence when a prisoner points to (*Hennessey*),<sup>210</sup> or provides it (*Nguyen*).<sup>211</sup> In one case, the CSC actively suppressed exculpatory evidence by threatening witnesses.<sup>212</sup> This kind of conduct is particularly repugnant to the reasonableness standard. It is the exercise of public power without a cogent case to support such power.

The onerous *Dunsmuir* standard of justification was not a part of the scope of *habeas corpus* review prior to *Khela*. In *May*, the Supreme Court of Canada conceived substantive *habeas corpus* review as relating mainly to compliance

<sup>207</sup> *Dunsmuir*, *supra* note 18 at para 47.

<sup>208</sup> *Nguyen*, *supra* note 191 at para 45.

<sup>209</sup> *Illes*, *supra* note 171 at para 17.

<sup>210</sup> *Hennessey*, *supra* note 181 at para 16–17.

<sup>211</sup> *Nguyen*, *supra* note 191 at para 26.

<sup>212</sup> In *Bradley v Correctional Service Canada*, 2012 NSSC 173, Mr. Bradley was transferred to higher security for having allegedly uttered a single threat toward a correctional officer. The officer identified Mr. Bradley by the sound of his voice, but Mr. Bradley denied that he uttered the threat. On an application for *habeas corpus*, Mr. Bradley was successful. The court found the transfer decision unreasonable. Mr. Bradley argued that the correctional officer was likely mistaken about who uttered the threat. Moreover, at least one inmate attempted to convey to the CSC that Mr. Bradley was not the one who uttered the threat. However, the court found that the CSC “actively suppressed” the testimony of Mr. Bradley’s fellow inmates by threatening them with “negative repercussions” if they continued to support Mr. Bradley (paras 73, 74). For other attempts to undermine prisoners’ cases, see *Butler v Matsqui Institution (Warden)*, 2012 BCSC 672 (where the CSC purposely did not consider potentially exculpatory video evidence so that it did not have to disclose that evidence); *Elliott*, *supra* note 161. (where the prisoner requested that potentially exculpatory video evidence be preserved, but then when the prisoner asked to see the video, he was advised that it went missing); and *MacNeil*, *supra* note 206. (where the prisoner was alleged to have owned or use a contraband phone, but then the CSC failed to disclose that another prisoner had taken responsibility for the phone).

with statutory requirements and procedural fairness.<sup>213</sup> Yet, challenges based on procedural unfairness or statutory non-compliance do not fully capture the unlawfulness of disregarding prisoner representations. In terms of procedure, the common law and relevant legislation grants prisoners the right to make representations; the problem is how the CSC's responses fail to support the substantive outcomes reached.<sup>214</sup> There is no explicit duty to consider prisoner rebuttals in the *CCRA* or *CCRR*. The duty is in CD 710-2; however, CDs are not law. The duty may be implied given the inmate's statutory right to make representations, but the substance of the duty would remain unclear.

One pre-*Khela* case, *Bachynski v Gallagher (Warden of William Head Institution)*,<sup>215</sup> further demonstrates how *habeas corpus* review has been strengthened by the reasonableness standard. Mr. Bachynski was transferred based on his alleged involvement in the murder of an inmate. He was not charged with the murder, but was a suspect due to circumstantial evidence suggesting he was involved. Mr. Bachynski challenged the transfer by way of *habeas corpus* but the application was dismissed. One of Mr. Bachynski's arguments was that the transfer decision lacked justification; the CSC "did not say why they rejected his submissions."<sup>216</sup> The court rejected this proposition on the basis that "as a general principle" it "imposes too onerous a standard".<sup>217</sup> This approach is inconsistent with the *habeas corpus* reasonableness review cases discussed above. That is likely because *Bachynski* was decided prior to *Dunsmuir* and *Khela*. In *Bachynski*, the court explicitly applied the "patent unreasonableness" standard of review, not the reasonableness standard with

<sup>213</sup> *May*, *supra* note 1.

<sup>214</sup> I acknowledge that if the common law requirements of procedural fairness were developed and applied robustly enough, *habeas corpus* may have been sufficient to find unlawfulness in the cases discussed above. That would undermine my argument that reasonableness review adds something to *habeas corpus* that was not there to benefit prisoners prior to *Khela* and *Dunsmuir*. It seems to me, however, that the requirements of procedural fairness do not require the level of justification that *Dunsmuir* imposes. Procedural fairness requires adequate reasons, but not reasonable reasons. Yet I accept that both descriptions may apply to the CSC's reasons in the cases reviewed in this paper: perhaps they are both inadequate and unreasonable, or unreasonable because inadequate. But this overlap only strengthens *habeas corpus*, in my view. On the relation between the requirements of procedural fairness and substantive reasonableness review, see Paul A Warchuk, "The Role of Administrative Reasons in Judicial Review: Adequacy & Reasonableness" (2016) 29:1 Can J Admin L & Prac 87; Mary Liston, "'Alert, Alive and Sensitive': *Baker*, the Duty to Give Reasons, and the Ethos of Justification in Canadian Law" in David Dyzenhaus, ed, *The Unity of Public Law* (Portland: Hart Publishing, 2004) 113; David Dyzenhaus & Evan Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker v. Canada*" (2001) 51:3 UTLJ 193; Larry Alexander, "Are Procedural Rights Derivative Substantive Rights?" (1998) 17:1 L & Philosophy 19; Edward Clark, "Reasonably Unified: The Hidden Convergence of Standards of Review in the Wake of *Baker*", (2018) 31:1 Can J Admin L & Prac 1.

<sup>215</sup> *Bachynski v Gallagher*, [1995] BCJ No 1715, 1995 CarswellBC 2338 [*Bachynski*].

<sup>216</sup> *Ibid* at para 32. According to Mr. Bachynski, the CSC was "required to give an explanation" for rejecting his submissions: para 32, citing *Lee*, *supra* note 53 at 10–11 ("[i]t is insufficient to simply say that responses have been considered. If statements of the applicants in their submissions are not believed, then some explanation as to why they are not believed must be given. The obligation to consider submissions is not satisfied by a mere assertion to that effect").

<sup>217</sup> *Ibid* at para 33.

its focus on justification.<sup>218</sup> Thus, *Bachynski* suggests that *Dunsmuir* and the reasonableness standard imported into *habeas corpus* is a much more onerous justificatory standard.

The result is that reasonableness review strengthens *habeas corpus*. It injects substance into the otherwise hollow statutory right to make representations by imposing a justificatory standard on the CSC that was not obviously captured by the scope of *habeas corpus* review prior to *Khela* (and *Dunsmuir*). Fundamentally, *habeas corpus* reasonableness review requires the CSC to justify their decisions to prisoners, rather than exercise absolute power over them. By doing so, *habeas corpus* reasonableness review requires the CSC to take prisoners' rights seriously.<sup>219</sup>

## VI. Conclusion

In response to *Khela*, some scholars suggest that courts should simply continue to ask whether correctional decisions are procedurally fair and compliant with statutory duties, rather than importing an ambiguous concept of reasonableness into *habeas corpus*.<sup>220</sup> However, as I have argued, more is required of *habeas corpus* if it is to fulfill its potential in the pursuit of prison justice. Correctional statutes require too little of correctional authorities and the principles of procedural fairness only protect certain rights. In respect of inmate representations, the CSC has shown itself prepared to do the bare minimum required to meet statutory requirements and the duty of procedural fairness. Although the right to make representations is routinely respected, and those representations are formally "considered", the substance of prisoners' rights are still vulnerable to abuse.

Such abuse, as evidenced by the cases discussed above, is hardly surprising. As one judge stated in a recent *habeas corpus* case, "the relationship between the inmate and the institution is one of fundamental imbalance, both with respect to power and information."<sup>221</sup> That imbalance is fundamental to the correctional system. Based on this, it is no wonder that the CSC is reluctant to justify its decisions to prisoners. Justification requires transparency and transparency creates vulnerability. To justify oneself to another is to relinquish power and information over them and expose oneself to challenge. This undercuts the very foundation of the correctional system. It upsets the

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<sup>218</sup> *Ibid* at para 22 (describing the issue as "Was the conduct of the Respondents patently unreasonable in the circumstances?").

<sup>219</sup> I do not claim, however, that *habeas corpus* reasonableness review actually has the effect of changing the attitudes of correctional decision-makers. I merely claim that *habeas corpus* reasonableness review imposes a legal standard that requires the CSC to take prisoners' rights seriously, whether they actually do so or not.

<sup>220</sup> Kerr, "Easy Prisoner Cases", *supra* note 17 at 256.

<sup>221</sup> *MacNeil*, *supra* note 206 at para 46.

“fundamental imbalance” between the keeper and the kept.<sup>222</sup>

*Khela* offers a different approach. The incorporation of the reasonableness standard into *habeas corpus* review suggests that effective corrections need not be based on a fundamental imbalance of power. Rather, the key to acquiring legitimate correctional authority may be “respect, fairness, courtesy, empathy, and a willingness to listen.”<sup>223</sup> Reasonableness review encourages these virtues. It does so by requiring justified, transparent and intelligible decisions that respect the rationality, and thus, the humanity of the persons affected by them.<sup>224</sup> Such decisions are achieved by recognizing prisoners’ rebuttals as worthy of being considered and addressed, rather than disregarded or ignored. *Khela* imported these justificatory standards into the law of *habeas corpus*. That is why, in my view, *Khela* has been a welcome development for prisoners.

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<sup>222</sup> *Ibid.*

<sup>223</sup> Michael Weinrath, *Behind the Walls: Inmates and Correctional Officers on the State of Canadian Prisons* (Vancouver: UBC Press, 2016) at 157. See also Robert Clark, *Down Inside: Thirty Years in Canada’s Prison Service* (Fredericton: Goose Lane, 2017) at 24 who argues that: “In my experience, if the staff in humane and reasonable, prisoners are better behaved, and the prisons are generally orderly and stable.”

<sup>224</sup> See e.g. Rainer Forst, “The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach” (2010) 120:4 *Ethics* 711.