

Part IV

Prisons and Punishment

Easy Prisoner Cases

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Straightforward legal victories are rare for the prisoner litigant. First, court orders can be difficult to enforce in the prison context, such that the formal legal outcome of prisoner litigation is often less important to effective reform than other factors.¹ Second, courts are often deferential to prison officials in light of the pressures that appear to bear upon the prison context. Even in cases where the individual prisoner officially succeeds, courts may announce legal tests designed to accommodate the preferences of government and prison officials.

Prisoners prevailed in two recent Supreme Court of Canada cases. In *Canada (Attorney General) v. Whaling*, a case about legislative changes to parole entitlements, the Court protects prisoner expectations by holding that post-sentencing legislative changes that automatically extend time in prison are constitutionally invalid.² In *Mission Institution v. Khela*, a case in which a prisoner challenged his involuntary transfer to a higher-security prison, the Court rejects the government's persistent attempts to narrow prisoner access to *habeas corpus*, thereby preserving the ability of prisoners to challenge the liberty-depriving decisions of prison officials.³ Both cases entailed the largely straightforward application of clear constitutional principles and settled law, and in both cases all courts below agreed on the outcome as did a unanimous Supreme Court. These were, in several respects, easy cases and clear victories.

The first point to complicate this portrait is to note that these holdings had limited practical effect. A larger scheme designed to reduce access to parole in the background of *Whaling* was not at stake. The Court held only that the scheme must apply prospectively, and the

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¹ See generally, Jules Lobel, *Success without Victory: Lost Legal Battles and the Long Road to Justice in America* (New York: New York University Press, 2003).

² [2014] S.C.J. No. 20, 2014 SCC 20 (S.C.C.) [hereinafter "*Whaling*"].

³ [2014] S.C.J. No. 24, 2014 SCC 24 (S.C.C.) [hereinafter "*Khela*"].

retroactive cases were a relatively small and shrinking group. The three litigants at bar, for example, had already been released by other means when final judgment was rendered. The prisoner in *Khela* was almost immediately transferred again, for the exact same reason, but this time through a decision that the prison took better care to justify and insulate from review.⁴

Apart from their limited practical effects, each decision contains worrying lines of thought. At the core of each is a view that the power to determine significant aspects of the qualitative terms of imprisonment are largely assigned or delegated to the administrative penal realm. Relatedly, the vision of judicial review and constitutional rights contained in these decisions is that of partial and deferential constraints on the otherwise expansive powers of prison officials to determine the meaning of state punishment. This may be business as usual in the law that governs prisons, but we should at least be precise about the limits and potential consequences of these putative victories.

In the course of the *Whaling* analysis, the Court confirms a doctrinal and conceptual divide between the terms of imprisonment that courts consider to be an official part of the sentence and those that amount to mere modes of sentence administration. This reasoning reflects the way that the legal system is currently organized and conceptualized with respect to imprisonment. In this conventional understanding, the central term of the sentence — the formal duration or quantity of custodial time — is announced by the sentencing judge and receives robust legal review and protection. The conditions of confinement and other concrete features and experiences of imprisonment are delegated to prison officials and, while governed by a legislative and policy framework, attract minimal constitutional coverage and largely deferential modes of judicial review. In reality, however, as I argue in this article, the duration and conditions of custody are not so neatly separated, but rather interact with and bear upon one another throughout the administration of a custodial term imposed by a court.

Turning to *Khela*, this is a decision that protects central developments of modern prison law in two key respects: the Court holds the prison system to now settled arrangements regarding, first, prisoner access to courts and, second, the rule of law in prison administration. On the first point, the bulk of the *Khela* decision is concerned with resisting the most recent attempt by government lawyers to narrowly confine the scope of

⁴ *Khela v. Mission Institution (Warden)*, [2011] B.C.J. No. 836, 2011 BCSC 577 (B.C.S.C.).

habeas corpus review. *Khela* confirms that the 1985 *Miller* trilogy,⁵ unambiguously affirmed in 2005 in *May v. Ferndale*, remains good law.⁵ As *Khela* repeats: the provincial superior courts and the statutory Federal Court have concurrent jurisdiction to review deprivations of prisoner liberty, through *habeas corpus* or judicial review, respectively. Second, *Khela* insists that prison officials abide by the plain language of their governing legislation. Under that heading, the Court found that the prison failed to disclose information to *Khela* in accordance with legislative rules and thereby breached procedural fairness.

A third aspect of the *Khela* decision raises more difficulty. While not strictly necessary to dispose of the appeal, the Supreme Court holds, for the first time, that the standard of review for the substance of official decisions in *habeas corpus* is reasonableness. And yet, the fundamental character of *habeas corpus* is constitutional: that is the very reason why provincial superior courts retain concurrent jurisdiction with the Federal Court, which otherwise has exclusive jurisdiction over administrative decisions of the Correctional Service of Canada as a federal entity. In this article I argue that the *Khela* decision appears as yet another instance of administrative standards eclipsing constitutional law.⁶ The implications of importing an essentially deferential reasonableness standard into *habeas corpus* remain unclear at this stage. As Audrey Macklin has noted more generally, it is difficult to predict the consequences of such a “jurisprudential mashup”.⁷ What does seem clear is that the Court has shifted away from the historical distinctiveness of the writ of *habeas corpus*, endorsing a view that the decisions of prison employees should attract deference even in cases in which constitutional rights are engaged.

⁵ *May v. Ferndale Institution*, [2005] S.C.J. No. 84, 2005 SCC 82 (S.C.C.) [hereinafter “*May*”], affirming: *Cardinal v. Director of Kent Institution*, [1985] S.C.J. No. 78, [1985] 2 S.C.R. 643 (S.C.C.); *R. v. Miller*, [1985] S.C.J. No. 79, [1985] 2 S.C.R. 613 (S.C.C.) [hereinafter “*Miller*”]; *Morin v. Canada (National Special Handling Unit Review Committee)*, [1985] S.C.J. No. 80, [1985] 2 S.C.R. 662 (S.C.C.) [three cases hereinafter “*Miller* trilogy”].

⁶ See generally, Evan Fox-Decent and Alexander Pless, “The Charter and Administrative Law: Cross-Fertilization or Inconstancy?” in Colleen Flood & Lorne Sossin, eds., *Administrative Law in Context* (Toronto: Emond Montgomery, 2013), at 407; Mark D. Walters, “Respecting Deference as Respect: Rights, Reasonableness and Proportionality in Canadian Administrative Law” in Mark Elliott and Hanna Wilberg, eds., *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (Oxford: Hart Publishing, 2015), at 395-422 [hereinafter “Walters, ‘Respecting Deference as Respect’”]; Lorne Sossin and Mark Friedman, “Charter Values and Administrative Justice”, Osgoode Legal Studies Research Paper No. 13/2014; Audrey Macklin, “Charter Right or Charter-Lite? Administrative Discretion and the Charter” in J. Cameron, B.L. Berger & S. Lawrence, eds. (2014) 67 S.C.L.R. (2d) 563 [hereinafter “Macklin ‘Charter Right’”].

⁷ Macklin, “Charter Right”, *id.*, at 563.

I. THE *WHALING* “VICTORY”: NO NEW PUNISHMENT AFTER THE FACT

The story of *Canada (Attorney General) v. Whaling* begins over 20 years before the case was decided. In 1992, Parliament brought in a policy called accelerated parole review (“APR”) that would allow non-violent first-time offenders in the federal prison system to access early release through a simplified procedure, provided they met basic criteria. The process was automatic: eligible offenders were referred to the National Parole Board without having to apply.⁸ Decisions were made by paper review, and with no hearing.⁹ The test for release was based on a presumptive standard, lower than the one applicable to normal parole. The Board had no discretion to decide against release so long as there were no reasonable grounds to believe that the offender was likely to commit an offence involving violence.¹⁰ In 1997, the process was expanded to include early eligibility for day parole as well as full parole: eligible offenders would now be considered for day parole after serving the later of one-sixth of the sentence imposed or six months.¹¹ The idea behind these policies is clear: remove relatively non-criminalized, often young individuals from a destructive environment, and begin the process of supervised reintegration into the community as early as possible.

In March 2011, the *Abolition of Early Parole Act* (“AEPA”)¹² came into effect, seemingly fuelled by a sense that fraud and white-collar crime should not be punished differently than crimes of violence.¹³ In the *Whaling* decision, the Court acknowledges the fact of criticism of the APR scheme, but does not engage in a thorough review of the evidence.¹⁴ The

⁸ *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 126(4), repealed [hereinafter “CCRA”].

⁹ CCRA, *id.*, at s. 126(1), repealed.

¹⁰ *Id.*, s. 126(2), repealed.

¹¹ *Id.*, s. 119.1, repealed.

¹² S.C. 2011, c. 11.

¹³ Remarks from Mr. Paul Calandra (Oak Ridges – Markham, CPC), *House of Commons Debates*, Vol. 145, No. 131, 3rd Sess., 40th Parl., February 15, 2011, at 8159: promising that the bill will “ensure that all offenders will be treated equally, regardless of the nature of the crime they commit, when it comes to eligibility for parole”.

¹⁴ While the Court did not engage closely with this evidence, some background helps to assess both the optics of this legislation and the arguments advanced by the Crown in *Whaling*. The Crown relied on a report issued by the Correctional Service of Canada Review Panel (Review Panel), which criticized APR and asserted that individuals released under APR have “not proved as effective as discretionary release in mitigating violent reoffending” (*Whaling*, *supra*, note 2, para. 6, citing *Report of the Correctional Service of Canada Review Panel: A Roadmap to Strengthening Public Safety* (2007) at 110). Government of Canada data does not, however, support that

case concerned only section 10(1), which applied abolition retroactively to any offenders currently serving sentences.¹⁵ The new law changed both the timing and the process for early day parole and imposed a higher standard to qualify. Day parole eligibility would now come only six months before the full parole eligibility date — which is at one-third of the sentence. Automatic referral to the Board was eliminated, and the paper review was replaced by a hearing. The test for granting parole was now a more onerous one of “undue risk to society” and discretion to deny was assigned to the Board.¹⁶ Instead of APR, the normal parole provisions of the CCRA would now apply.

The effect of the law was immediately to delay day parole eligibility dates in the case of three prisoners who came forward with a legal challenge: the delay was three months for Christopher Whaling, nine months for Judith Slobbe, and 21 months for Cesar Maidana. They were successful at each level of court. The trial judge and the British Columbia Court of Appeal declared section 10(1) to be invalid to the extent it made AEPA apply retroactively, on the basis of the right under section 11(h) of the *Canadian Charter of Rights and Freedoms* “... if finally found guilty and punished for the offence, not to be tried or punished for it again”.¹⁷

The only live legal issue at the Supreme Court was the retroactivity provision. Parliament’s intention for the provision appeared to be driven by a single individual, thus raising the spectre of an unconstitutional purpose. Earl Jones was a former Montreal investment advisor who received a sentence of 11 years for fraud in February 2010. A government research paper on AEPA stated explicitly that retroactivity

conclusion. Corrections and Conditional Release Statistical Reports (released by Public Safety Canada) in the years 2009, 2010 and 2011 indicate that the vast majority of prisoners released under APR successfully completed parole with no new offences of any kind. The rate of violent offending while released on this form of parole ranged recently from zero per cent to 0.8 per cent out of hundreds of people each year — a lower rate than ordinary parole (recently between 0.4 per cent to 1.8 per cent). For critical discussion of the work conducted by the Review Panel, see Michael Jackson and Graham Stewart, “A Flawed Compass: A Commentary on Bill C-43, An Act to amend the Corrections and Conditional Release Act and the Criminal Code” (September, 2009).

¹⁵ The text of s. 10(1), AEPA reads: “Subject to subsection (2), the accelerated parole review process set out in sections 125 to 126.1 of the *Corrections and Conditional Release Act*, as those sections read on the day before the day on which section 5 comes into force, does not apply, as of that day, to offenders who were sentenced, committed or transferred to penitentiary, whether the sentencing, committal or transfer occurs before, on or after the day of that coming into force.”

¹⁶ CCRA, *supra*, note 8, s. 102.

¹⁷ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

would enable a *post facto* increase in the severity of punishment for Jones.¹⁸ That sentiment was repeated in legislative debates by a Member of Parliament who stated: “Unfortunately for the victims of Earl Jones, if this bill is not retroactive, these victims will never have any kind of justice served.”¹⁹ Justice Wagner, in his opinion for the Court, mentioned these “troubling passages” from Hansard that were “suggestive of an unconstitutional purpose”, but he proceeded to dispose of the appeal on different grounds.²⁰

The legal issue was framed as whether retroactive changes to parole eligibility, which changed the length of time that the prisoners would be held in custody rather than supervised in the community, amounted to new punishment. The Court noted how this particular issue had not been addressed in the few section (11)(h) decisions handed down to date. *R. v. Wigglesworth* holds that protection against double jeopardy could be triggered by additional proceedings that are criminal in nature and that entail “true penal consequences”.²¹ *R. v. Rodgers* deals with whether imposing an additional consequence, namely a DNA sample order, constitutes a new punishment.²² The issue in *Whaling* was different: there was no new proceeding and no additional consequence added to the punishment. Rather, legislation appeared to change the punishment itself. The retroactive changes to parole eligibility modify the manner in which an existing sanction is carried out.

Justice Wagner wrote that the change to parole eligibility is not a *second procedure* as in *Wigglesworth*, and nor is it a *discrete addition* to

¹⁸ The reason for retroactivity is described as follows: “Bill C-59 provides for the elimination of accelerated parole review for all those who *had not received that review upon the coming into force of the bill*. This means that offenders sentenced before the coming into force of Bill C-59 (such as Earl Jones) who have not served one sixth of their sentence upon its coming into force will not be entitled to accelerated parole review.” *Bill C-59: An Act to amend the Corrections and Conditional Release Act (accelerated parole review) and to make consequential amendments to other Acts*, Publication No. 40-3-C59-E 11, February 2011, Lyne Casavant Dominique Valiquet (Legal and Legislative Affairs Division Parliamentary Information and Research Service).

¹⁹ Remarks from Ms. Candice Hoepfner (Portage – Lisgar, CPC) *House of Commons Debates*, Vol. 145, No. 131, 3rd Sess., 40th Parl., February 15, 2011, at 8205.

²⁰ *Whaling*, *supra*, note 2, at para. 68.

²¹ [1987] S.C.J. No. 71, [1987] 2 S.C.R. 541, at para. 24 (S.C.C.) [hereinafter “*Wigglesworth*”].

²² [2006] S.C.J. No. 15, 2006 SCC 15 (S.C.C.) [hereinafter “*Rodgers*”]. Holding that the imposition of a DNA sample was *not* a new punishment. Justice Charron in *Rodgers* articulated a two-part test for determining whether a consequence amounts to punishment for Charter purposes (at para. 63): “when it forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence and the sanction is one imposed in furtherance of the purpose and principles of sentencing.” DNA samples are not part of the “arsenal of sanctions”. In *Whaling*, Wagner J. said that changes to parole are similarly not part of the “arsenal of sanctions” (at para. 50).

a sanction like the DNA order at issue in *Rodgers*. Rather, the issue here is about the offender's *expectation* about the original punishment or sanction, and whether such expectations have been frustrated and whether this constitutes new punishment. Accordingly, Wagner J. held that the case introduces a new, third situation where the rule against double jeopardy set out in section 11(h) may be violated. Where an offender has been finally acquitted of, or finally found guilty and punished for, an offence, section 11(h) now precludes the following further state actions in relation to the same offence:

- (a) from *Wigglesworth*: a proceeding that is criminal or quasi-criminal in nature (being "tried ... again");
- (b) from *Rodgers*: an additional sanction or consequence that meets the two-part *Rodgers* test for punishment (being "punished ... again") in that it is similar in nature to the types of sanctions available under the *Criminal Code* and is imposed in furtherance of the purpose and principles of sentencing; and
- (c) from *Whaling*: retroactive changes to the conditions of the original sanction which have the effect of adding to the offender's punishment (being "punished ... again").

To repeat: the constitutionality of the repeal of the APR provisions was not at issue in *Whaling*, but the Court held that the retroactive application of that repeal, which altered the parole expectations of offenders who had already been sentenced, violated section 11(h). Since section 10(1) of the AEPA had the effect of automatically lengthening the offender's period of incarceration, as I discuss in more detail below, this represented to Wagner J. one of the "clearest cases" of retroactive double punishment for purposes of constitutional analysis. Finally, the infringement could not be justified under section 1 of the Charter. The Court accepted, though with a whisper of doubt,²³ the Crown's argument that the law had a legitimate purpose. But the Crown failed to show that there was no less intrusive alternative. One obvious option would have been to pass the law with only prospective application.

The question that remains, and that I will now address, concerns what other changes to a sanction could violate the rule announced in

²³ As I note above, there was a hint in the judgment that the state purpose was unconstitutional, at least in terms of the retroactivity provision, because it appeared driven by a desire to enhance the punishment of a single individual and thus resembled a *bill of attainder*. *Whaling, supra*, note 2, at para. 68.

Whaling. What changes to a sanction will “have the effect of adding to the offender’s punishment” and thus violate section 11(h)? The *Whaling* Court attempts to announce a bright line rule: changes that automatically increase the time spent physically inside prison will violate section 11(h) if passed retroactively. I explain that reasoning in the following section. I then critique the premise upon which that rule is built, showing that the line it draws is far from bright.

1. Automatically Longer In-Prison Time

One issue at the heart of the *Whaling* litigation, which cut in favour of the Crown’s position that this was not a change that constituted “punishment”, was the fact that changes are regularly made to prison rules and prison conditions after sentenced prisoners arrive without raising constitutional concerns of the *ex post facto* or double jeopardy variety. Specifically, the *Whaling* Court had to address the 1993 precedent of *Cunningham v. Canada*,²⁴ which seemed to hold that even significant post-sentencing changes to parole do not run afoul of the Charter.

In *Cunningham*, as in *Whaling*, the prisoner complained about a legislative change to parole that was created after he was sentenced. At the time he was sentenced in 1981, Cunningham was presumptively entitled to release after serving two-thirds of his sentence. A change in 1986 allowed the Commissioner of Corrections, in certain circumstances, to refer the issue of his release to the National Parole Board. After a hearing, Cunningham was ordered detained until his full sentence expired. Justice McLachlin (as she then was), on behalf of a unanimous Court, held that the change did not violate section 7 of the Charter. Cunningham did experience a deprivation of liberty, but he had the opportunity to satisfy the Parole Board as to his eligibility for release, by way of a hearing and with access to counsel. The deprivation accorded with the principles of fundamental justice.

The prospect of individualized treatment and procedural rights is how *Whaling* distinguished *Cunningham* (along with the fact that the earlier case was decided under section 7). Justice Wagner held that the *Whaling* facts were at the extreme end of the continuum, inasmuch as it involved a retroactive change to the rules governing parole eligibility that had the effect of automatically lengthening the offender’s period of incarceration. “A change that so categorically thwarts the expectation of

²⁴ [1993] S.C.J. No. 47, [1993] 2 S.C.R. 143 (S.C.C.) [hereinafter “*Cunningham*”].

liberty of an offender who has already been sentenced qualifies as one of the clearest of cases of a retroactive change that constitutes double punishment in the context of s. 11(h).²⁵ Justice Wagner bolstered his reasoning by pointing to specific places where the *Criminal Code* authorizes judges to consider the punitive effect of delayed parole eligibility as a formal part of the sentence, suggesting that parole is often a topic that falls within judicial rather than administrative authority.²⁶

As I have noted, Whaling and his co-plaintiffs had already become eligible for other release possibilities by the time judgment was handed down, and APR remains abolished for all offenders sentenced after the legislation came into force. The significance of the *Whaling* holding is thus limited. More significant, as I discuss in the following section, is the Court's commitment to a doctrinal and conceptual divide between the terms of imprisonment that courts consider an official part of the sentence and those that amount to mere modes of sentence administration. After *Whaling*, legislators and prison officials remain free to alter significant features of the prison system, and criminal defendants have few enforceable expectations as to what state punishment will constitute.

Practically speaking, the legal boundary between punishment and its administration is an illusion. It is an illusion developed and deployed so as to avoid the rule of law problem that emerged in the age of the penitentiary: where state punishment entails the consignment of individuals to closed institutions that are administered according to their own logic and preferences.

2. The Punishment and its Administration: An Unstable Boundary

While not strictly necessary to dispose of the appeal, Wagner J. briefly considers the general question as to what types of retroactive changes to the conditions of a sentence will constitute double punishment. The case at

²⁵ *Whaling*, *supra*, note 2, at para. 60.

²⁶ See, for example, *R. v. Wust*, [2000] S.C.J. No. 19, 2000 SCC 18, [2000] 1 S.C.R. 455, at para. 24 (S.C.C.): "Rarely is the sentencing court concerned with what happens after the sentence is imposed, that is, in the administration of the sentence. Sometimes it is required to do so by addressing, by way of recommendation, or in mandatory terms, a particular form of treatment for the offender. For instance in murder cases, the sentencing court will determine a fixed term of parole ineligibility: s. 745.4 of the Code." Also, in *R. v. Shropshire*, [1995] S.C.J. No. 52, [1995] 4 S.C.R. 227 (S.C.C.), Iacobucci J. noted that the duration of parole ineligibility is the only difference in terms of punishment between first and second degree murder, which "clearly indicates that parole ineligibility is part of the 'punishment' and thereby forms an important element of sentencing policy" (at para. 23).

bar created the “clearest of cases”, but he also contemplates what other sorts of changes would qualify. Here, Wagner J. confirms the central principle that divides the criminal and administrative dimensions of punishment: that offenders have “constitutionally protected expectations as to the duration, but not the conditions, of their sentences”.²⁷

Justice McLachlin (as she then was) made a similar distinction in *Cunningham*, in the context of section 7, regarding the qualitative aspects or *form* of a sentence. The correctional authority will typically be free to control and adjust these dimensions:

... A change in the form in which a sentence is served, whether it be favourable or unfavourable to the prisoner, is not, in itself, contrary to any principle of fundamental justice. Indeed, our system of justice has always permitted correctional authorities to make appropriate changes in how a sentence is served, whether the changes relate to place, conditions, training facilities, or treatment. Many changes in the conditions under which sentences are served occur on an administrative basis in response to the prisoner’s immediate needs or behaviour. Other changes are more general. From time to time, for example, new approaches in correctional law are introduced by legislation or regulation. These initiatives change the manner in which some of the prisoners in the system serve their sentences.²⁸

The key judicial move reflected in this passage from *Cunningham* — which *Whaling* and a great many other prison law cases endorse — confirms the central fact of the penitentiary itself: that the correctional authority has a great deal of freedom to adjust the conditions of prison sentences. Both *Cunningham* and *Whaling* share a commitment to the idea that internal aspects of prison regimes matter less than the all-important question of whether an individual remains in physical custody.

As McLachlin J. (as she then was) put it in *Cunningham*: “...One has ‘more’ liberty, or a better quality of liberty, when one is serving time on mandatory supervision than when one is serving time in prison”.²⁹ *Whaling* confirms: “...Generally speaking, a retroactive change to the conditions of a sentence will not be considered punitive if it does not substantially increase the risk of additional incarceration”.³⁰ In sum, both cases agree that changes can be made to the conditions of a sentence, but

²⁷ *Whaling, supra*, note 2, at para. 57.

²⁸ *Cunningham, supra*, note 24, at 152-53.

²⁹ *Id.*, at 150.

³⁰ *Whaling, supra*, note 2, at para. 63.

where the result is a substantial increase in the risk of “additional incarceration”, constitutional interests such as those in section 7 and section 11(h) will be engaged. The Court confirms a boundary between the conditions and the duration of punishment. Most “conditions” issues will be left to the correctional authority; only “conditions” decisions that affect the amount of “in-prison” time will engage constitutional interests.³¹

The point here is that while *Cunningham* and *Whaling* make clear that “in-prison” time is a constitutionally-significant form of punishment, we might also consider how “in-prison” time itself can be so differently delivered and experienced. The deprivation of liberty is more or less deeply felt in different prisons and according to the individual backgrounds and characteristics of prisoners and correctional officers. The effects of imprisonment are determined by material conditions such as the size and age of the institution and the levels of staffing and crowding. All imprisonment is not created equal. And the central features of imprisonment change over time according to the government in power, the culture among correctional employees, state economies, legislative and policy shifts, rates of criminal offending and prosecution, and myriad other factors. Prisoners adapt differently to prison life and to the institutional changes that occur over time. Many of the qualitative terms of imprisonment will be as or more important than the length of “in-prison” time itself. Levels of reliance on prisoner segregation, as just one example, change according to correctional mood and prisoner demographics.³²

As Michel Foucault described so well, the rise of the penitentiary in the late 18th century marked a shift away from more specific and concrete sanctions like banishment or physical punishments. When

³¹ This might be a good place to mention that *R. v. Shubley*, [1990] S.C.J. No. 1, [1990] 1 S.C.R. 3, 74 C.R. (3d) 1 (S.C.C.), is in direct conflict with both *Cunningham* and *Whaling*. In the provincial jail system considered in *Shubley*, the prison disciplinary board had the power, among other things, to cancel 15 days of remission entitlement earned by the prisoner. (The remission penalty could be longer with the permission of the Minister: *Ministry of Correctional Services Act*, R.S.O. 1980, c. 275, s. 31(1).) The case concerned the alteration of “in-prison” time: it should have attracted Charter protection rather than being characterized as a benign administrative measure by the majority.

³² Indeed, the use of administrative segregation is increasing. In 2012-2013, there were 8,221 admissions into segregation, up from 7,137 in 2003-2004. (Statistics provided by the CSC and obtained through Access to Information.) See Kathleen Harris, “Isolation of Inmates Rising in Crowded Prisons”, CBC News (August 6 2013), online: <www.cbc.ca>. In his Annual Report from 2013-2014, the Correctional Investigator reported a 6.4 per cent increase in administrative segregation over the preceding five years. In that year, there were 8,328 administrative segregation placements, with an average count of 850 segregated offenders per day. See Canada, Office of the Correctional Investigator, *Annual Report 2013-2014*, by Howard Sapers, Catalogue No. PS100-2014E-PDF (Ottawa: OCI, 2014), at 32.

punishment for serious offences means time spent in the physical custody of the state, officials are free to “modulate” the severity of a judicially imposed sanction. It is prison officials — not courts — that control the administration, quality and rigours of punishment.³³ Canadian sentencing law, however, is premised on the assumption that sentencing courts must impose a “fit sentence” which is proportionate to the seriousness of the offence.³⁴ It is difficult to square the concern with fitness and desert in the judicially imposed sanction with the power of prison officials (and legislators) to modulate the severity of punishment in the course of its administration.

Perhaps most significantly, the conditions of imprisonment directly impact both “in-prison” time and the duration of the sentence itself.³⁵ These facts become visible if we travel just one or two links down the “conditions” causal chain. The accrual of prison disciplinary convictions, for example, is a proper factor for penal authorities to consider in exercising discretion on early release applications. In addition, prison staff make recommendations as to release, based on their personal experience with the prisoner, that are heavily relied upon by parole authorities. And the behaviour of prisoners can be linked to factors like crowding and access to meaningful activities. The effects of time in segregation and other prison experiences can bear upon the future prospects of prisoners, in terms of their mental health, their relations with correctional officers, and their reputation in the prisoner society. In other words, the prisoner’s ability to access treatment and perform well in the prison environment is actually what comes to determine his chance of early release to the community and, potentially, his prospects of returning to prison under new convictions. In this way, the quality of punishment can be constitutive not only of the severity of punishment but the prison population itself.³⁶

³³ See Michel Foucault, *Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan (New York: Pantheon Books, 1977), at 244-47.

³⁴ See, for example, Wilson J. in her concurring judgment in *Reference re Motor Vehicle Act (British Columbia) s. 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 at 533 (S.C.C.): “It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a ‘fit’ sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender ‘deserved’ the punishment he received and feel a confidence in the fairness and rationality of the system.”

³⁵ Remember that neither *Whaling* nor *Cunningham* were about duration. Changes to parole do not change the length of a sentence — parole is about the place that the sentence is served. For discussion see *Cunningham*, *supra*, note 24, at 150.

³⁶ This reasoning appears in a recent decision upheld by the United States Supreme Court. A California federal court held that prison overcrowding in that state was perpetuating a “criminogenic prison system that itself threatens public safety.” Levels of crowding and staffing,

Judges are politically responsible for imposing a fit sanction, so the legal system clings to the story that the power to stipulate punishment belongs with the judicial authority. The only way to normatively sustain the system is to characterize the powers exercised by prison officials as administrative — as not the real sanction. In direct and indirect ways, however, the prison regime influences both the severity and length of confinement. Judges do not run prisons and for that reason they must delegate the delivery of the punishment. The exercise of delegated power comes to shape the actual punishment on significant quantitative and qualitative dimensions. The idea of a boundary between judicial and administrative powers is central to the legal story told about prisons, but it does not reflect how punishment unfolds on the ground.³⁷

II. THE *KHELA* “VICTORY”: PRISONER TRANSFERS ACCORDING TO LAW

For many of the everyday aspects of prison administration in Canada, legislation governs how authority is to be exercised, and prisoners can bring administrative law challenges in Federal Court to insist upon adherence to the legislative scheme. When constitutional issues are engaged, provincial superior courts also have jurisdiction to hear claims. And when decisions implicate the residual liberty that prisoners retain under section 7 of the Charter, prisoners can seek either a judicial review in Federal Court or a writ of *habeas corpus* in superior provincial court.³⁸ Litigation on this topic has centred on maintaining access to the writ and, recently, on the standard of judicial review that applies under it.

along with denials of mental and physical health care, meant that the prison system was itself a cause of criminal offending. Juris. Statement App., O. T. 2009, No. 09-416 at 186a, upheld in *Brown v. Plata*, 131 S. Ct. 1910 (2011).

³⁷ For a thoughtful treatment of exceptions to the general claim I am making here, see Benjamin L. Berger, “Sentencing and the Salience of Pain and Hope” in Dwight Newman & Malcolm Thorburn, eds., *The Dignity of Law: The Legacy of Justice Louis LeBel* (Toronto, ON: LexisNexis Canada Inc., 2015). Berger points to places where the Supreme Court of Canada has called on judges to think about sentencing in ways “better attuned to the lived experience of punishment”, including in cases concerning police misconduct, collateral consequences and delayed parole.

³⁸ Since 1985, *habeas corpus* has been available to free inmates from restrictive forms of custody within an institution: *Miller* trilogy, *supra*, note 5.

Before I turn to the *Khela* case, which considers the current scope of *habeas corpus* protection, I will provide the basic legal background to the standard *habeas corpus* proceeding. Legislative provisions in the CCRA govern the assignment and transfer of inmates within the federal prison system. When an inmate is first assigned to a penitentiary, section 28 of the CCRA requires that his or her assignment be to “an environment that contains only the necessary restrictions” taking into account the safety and security of the public, the inmate, and other persons in the facility. Before placement of the inmate, the prison service is directed to consider issues like accessibility to the inmate’s community and the availability of programs. As part of the assignment process, the inmate is given one of three security-classifications: maximum, medium or minimum. Each security level correlates with three factors: the probability of escape; the risk to public safety in the event of escape; and the degree of supervision and control required within the penitentiary.³⁹

The prison is empowered to transfer inmates between institutions in the course of sentence administration. Inmates are entitled to notice before transfer, including the reasons for it.⁴⁰ This provision is waived where an immediate transfer is necessary to “preserve the security of the facility or the safety of the inmate or of any other person”. In an emergency transfer, the institutional head or staff members must meet with the inmate within two days, and “explain the reasons for the transfer and give him an opportunity to make representations regarding the transfer in person or in writing”. If the inmate so chooses, the inmate’s representations are sent to the decision-maker. The decision-maker must provide a final decision in writing within five working days after the final decision is made.

The parameters of the right to receive information and make representations with regard to a transfer decision — central to the outcome in *Khela* — are governed by section 27 of the CCRA. The provision makes clear that the inmate is to receive “all the information to be considered in the taking of the decision or a summary of that information”. The only exception is where there are “reasonable grounds” to believe that the disclosure of information would jeopardize

³⁹ Section 18 of SOR/92-620 [hereinafter “Regulations”]. See also s. 30 of the CCRA and s. 17 of the Regulations, which directs security classification to consider particular factors. The federal prison service also makes use of a Security Reclassification Scale (SRS), the use of which is governed by Commissioner’s Directive 710-6. The SRS is a research-based actuarial tool developed to determine the appropriate level of security at key points during an offender’s sentence.

⁴⁰ CCRA, *supra*, note 8, s. 29; s. 12, Regulations.

the safety of any person, the security of a penitentiary, or the conduct of any lawful investigation.⁴¹ Where those exceptions are invoked, as much information may be withheld as is “strictly necessary” in order to protect those three specified instances.

1. The *Khela* Facts

In *Mission Institution v. Khela*, a federal prisoner was the subject of an emergency involuntary transfer from a medium to a maximum-security prison. The Court described the events surrounding the transfer as follows:⁴² On September 23, 2009, an inmate was stabbed after arriving to Mission Institution, the medium-security facility where Khela had resided for three years. One week after the stabbing, the Security Intelligence Office at Mission received information implicating Khela in the incident. On February 2, 2010, that office completed a Security Intelligence Report (“Security Report”) that contained information that Khela had hired two other inmates to carry out the stabbing in exchange for heroin. As a result of the Security Report, Khela was transferred to the maximum-security prison.

On February 4, 2010, Khela received an “Assessment for Decision” (“Assessment”) and a “Notice of Emergency Involuntary Transfer Recommendation” (“Notice”). The Assessment indicated that the primary reason for the transfer was the Security Report. The Assessment stated that the Warden came to this conclusion on the basis of anonymous information received from “three separate and distinct sources”. It was clear that these sources were Khela’s fellow inmates. The Assessment did not contain information with respect to the sources’ names, what they said or why they might be considered reliable. The Notice confirmed that Khela’s medium-security classification was overridden so as to transfer him. On February 26, 2010, Khela submitted a written rebuttal, which asked that the scoring matrix used to determine his ranking be disclosed to him together with the Security Report, in addition to information on why the “sources” should be considered reliable and how the Warden had determined that they were reliable.

On March 15, 2010, Khela received a response indicating that the Warden’s final decision was to transfer him to the maximum-security facility. The Warden responded to the inquiry about the credibility of the

⁴¹ *Id.*, s. 27.

⁴² I am drawing here from *Khela*, *supra*, note 3, at paras. 7-12.

sources by stating that the information received was believed reliable because of the expertise and policies of the security intelligence officers. On April 27, 2010, Khela filed a notice that he would be making a *habeas corpus* application in the British Columbia Supreme Court. The application was heard by Bruce J. on May 11, 2010. Ten days later, Bruce J. granted the writ and ordered that Khela be returned to the general population of Mission Institution, the medium-security facility, though he was subsequently returned to maximum-security in a further decision that was upheld. The first transfer was thus factually moot when it came before the Supreme Court of Canada. The Court nevertheless heard the appeal on the basis that the factual circumstances of transfer decisions change quickly and are therefore elusive of review.⁴³

Three issues addressed in the *Khela* decision merit attention: (1) the concurrent jurisdiction of provincial superior courts and the Federal Court; (2) the procedural unfairness of the transfer decision; (3) the standard of review that applies regarding the substance of a transfer decision in *habeas corpus* proceedings. The first two issues are as straightforward and easy as the third is complex.

(a) *Concurrent Jurisdiction*

The topic of concurrent jurisdiction was dealt with in the 1985 *Miller* trilogy and repeated in *May v. Ferndale*, where the Court took pains to distinguish between *habeas corpus* in provincial superior courts and judicial review in the Federal Court and to reiterate that the prisoner is free to choose between them. Subsequent to *May*, government lawyers continued to resist the rule on concurrent jurisdiction in various ways.⁴⁴ The *Khela* Court repeated the key holding in *May*: that provincial superior courts retain jurisdiction to review prison transfers,

⁴³ *Id.*, at para. 14. The Court's decision on mootness, though covered in a single paragraph, is a significant aspect of the judgment. The Court displayed real appreciation of prison realities — namely that decisions involving the transfer and segregation of inmates can change quickly and thereby evade appellate review — along with a commitment to developing the law that applies to prisoners.

⁴⁴ At times, such arguments are based on s. 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which confers exclusive jurisdiction on the Federal Court to issue specified relief against any federal board, commission or other tribunal. As *Khela* confirms, however: *habeas corpus* was “deliberately omitted” from the list of writs set out in s. 18. (Also, see *Miller*, *supra*, note 5, at 624-26.) Jurisdiction to grant *habeas corpus* with regard to inmates clearly remains with provincial superior courts.

and federal prisoners should not be forced to go through the judicial review process in Federal Court.⁴⁵ While *May* affirmed two possible instances in which a provincial superior court could refuse *habeas corpus* applications, those two possibilities were still absent and the prison in *Khela* did not argue otherwise.⁴⁶

The *Khela* decision reiterates the major remedial and procedural differences between judicial review in Federal Court and *habeas corpus*, which justify preserving prisoner access to the latter. A *habeas corpus* application in the provincial court system requires only six days' notice, versus the 160 days that could be required under the judicial review process to proceed to hearing.⁴⁷ The *habeas corpus* application triggers a non-discretionary hearing, and the burden of proof falls on the warden once a legitimate issue about a deprivation of liberty has been raised.⁴⁸ In contrast, judicial review through a federal court is a discretionary remedy, and the onus is on the prisoner to show that a transfer has been unreasonable. In addition, provincial courts can provide local access and are expert in the constitutional rights at stake for prisoners who are transferred to higher security facilities.⁴⁹ Finally, the Court held that the vulnerability of prisoners and the realities of confinement mean that inmates should have the ability to choose between the forums and remedies available to them.⁵⁰

⁴⁵ *Khela*, *supra*, note 3, at para. 49: "The history and nature of the remedy, combined with what this Court has said on this issue in the past, unequivocally support a finding that favours access to justice for prisoners, namely that of concurrent jurisdiction. As the majority stated in *May* at para. 72: '[t]imely judicial oversight, in which provincial superior courts must play a concurrent if not predominant role, is still necessary to safeguard the human rights and civil liberties of prisoners....'"

⁴⁶ *May*, *supra*, note 5, at paras. 44-50: Provincial superior courts should decline *habeas corpus* jurisdiction only where (1) a statute, such as the *Criminal Code*, confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be; or (2) the legislator has put in place complete, comprehensive and expert procedure for review of an administrative decision, such as the scheme created by Parliament for immigration matters. The *Khela* Court observes, at para. 42, that the first exception clearly does not apply, and "the appellants have offered no argument to suggest that the transfer and review process of CSC has, since *May*, become a 'complete, comprehensive and expert procedure'".

⁴⁷ *Khela*, *supra*, note 3, at para. 46. See also para. 61 for discussion of the requirement that prisoners exhaust the internal grievance system before challenging a decision in Federal Court for want of procedural fairness and for unreasonableness. Even if an inmate's complaint is designated as a high priority, it can take 90 days to reach final decision. *May* also enumerates the inadequacies of the internal grievance system.

⁴⁸ *Id.*, at paras. 40-41 and 48.

⁴⁹ *Id.*, at paras. 45 and 47.

⁵⁰ *Id.*, at para. 44.

(b) *Disclosure/Procedural Fairness*

The prison in *Khela* lost on procedural fairness, where the Court held that the standard of judicial review “will continue to be ‘correctness’”.⁵¹ The problem was a lack of compliance with the legislative transfer rules, outlined above. Recall that an inmate is entitled to make representations about the transfer decision, and section 27(1) of the CCRA provides that the decision-maker must give him “all the information” to be considered in taking a final decision regarding the transfer. Even inmates transferred on an emergency and involuntary basis, as *Khela* was, are entitled to “all the information” considered in the Warden’s decision-making process, or a summary thereof. Prison officials are only required to disclose the evidence that was *considered* in the decision; the standard is less onerous than the criminal law disclosure standard where innocence is at stake.⁵² The only exception is when the security concerns set out in section 27(3) are specifically invoked:

... where the Commissioner has *reasonable grounds* to believe that disclosure ... would jeopardize (a) the *safety of any person*, (b) the *security of a penitentiary*, or (c) the *conduct of a lawful investigation*, he or she may authorize the withholding from the inmate of as much information as is *strictly necessary* in order to protect the interest that would be jeopardized.⁵³

The prison failed to invoke section 27(3) in the *Khela* proceedings, such that the exception was not applicable. The Warden failed to disclose information about the reliability of the sources, the specific statements made by the sources, and the scoring matrix that informed *Khela*’s security classification.⁵⁴ The prison failed to lead any evidence (including the possibility of a sealed affidavit) to suggest that their withholding of information related to the permitted statutory concerns. *Khela* was not provided with sufficient information to “know the case to be met”.⁵⁵ The decision was procedurally unfair and therefore unlawful.⁵⁶

⁵¹ *Id.*, at para. 79.

⁵² For the more onerous criminal law standard, see *R. v. Stinchcombe*, [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326, at 343 (S.C.C.).

⁵³ *Khela*, *supra*, note 3, at para. 84 (emphasis added).

⁵⁴ *Id.*, at para. 93. The fact that the Warden overrode the SRS does not matter. The important thing is that it was *considered* prior to being overridden: paras. 96-97.

⁵⁵ *Id.*, at para. 94.

⁵⁶ Though the Court made clear, at para. 90, that not all breaches of the CCRA or the Regulations will be unfair. It will be up to the reviewing judge to determine whether a given breach resulted in procedural unfairness.

(c) *Standard of Review of the Transfer Decision*

In a more complex part of the *Khela* decision, the Court went on to determine the standard of review for transfer decisions. In the past, the question on *habeas corpus* had always been articulated as whether the confinement was “lawful”.⁵⁷ But here the prison takes another crack at limiting provincial superior court jurisdiction by suggesting that the reviewing court could not assess the merits of a transfer decision.⁵⁸ The Court rejects that position, largely by repeating its reasoning about the importance of the *habeas corpus* remedy and the need to avoid placing burdens on prisoners and requiring duplicative procedures in Federal Court.⁵⁹

While *Khela* rejects an extremely narrow conception of *habeas* review, the decision imports, for the first time, the administrative law standard of “reasonableness”.⁶⁰ This was a hotly debated issue at oral

⁵⁷ For example, the language of the *Magna Carta*, cited in *May*, *supra*, note 5, at para. 19, was that “no free man shall be seized or imprisoned except by the lawful judgment of his equals or by the law of the land.” Section 10 of the Charter states, that “[e]veryone has the right on arrest or detention ... (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.” The 1985 *Miller* trilogy and *May* both refer to the need for *habeas corpus* to be available to prisoners to challenge “unlawful” deprivations of liberty from within the prison context. (*May*, *supra*, note 5, at para. 32)

⁵⁸ The Crown cited trial decisions that seemed to support this position, such as in *Williams v. Smith-Black*, [2008] B.C.J. No. 1757, 2008 BCSC 1250, at para. 29 (B.C.S.C.): “...*Habeas corpus* does not open the door to a whole scale review of the merits of the administrative decision. *Habeas corpus* will only issue where the decision-maker has acted without jurisdiction. A disagreement as to the facts... does not amount to a jurisdictional error...” The Crown admitted, however, that there were conflicting trial decisions on this issue, including, for example, *Caouette v. Mission Institution*, [2010] B.C.J. No. 1039, 2010 BCSC 769 at para. 62 (B.C.S.C.): “...a writ [of *habeas corpus*] may issue if the transfer decision was not reasonably open to the Warden on the evidence. I am of the view that while this court must treat the decisions of statutory decision-makers with appropriate deference, an inmate may seek a review of the merits of a warden’s decision that curtails his liberty by way of an application to a provincial superior court for relief in the nature of *habeas corpus*.”

⁵⁹ *Khela*, *supra*, note 3, at paras. 51-74. See especially para. 69 where the Court rejects the Crown submission that jurisdictional error alone determines “lawfulness”. Also, at para. 66, the Court responds to the fact that the Crown had partially relied on “Dain J.’s conclusions in *Miller* ... that *certiorari in aid* cannot be employed to convert an application for *habeas corpus* into an appeal on the merits (p. 632)”. The *Khela* Court points out that Le Dain J. was simply echoing earlier decisions specifying that *habeas corpus* cannot be used to appeal a conviction, given that the *Criminal Code* confers jurisdiction on courts of appeal to review convictions. This obviously could not be interpreted as a rule that provincial superior courts may not rule on the substance of an administrative decision. *Khela*, *supra*, note 3, at para. 66.

⁶⁰ Now referred to as “Dunsmuir” reasonableness, after the case that abolished “patent unreasonableness” and settled on the two standards of “reasonableness” and “correctness” for judicial review of administrative decisions: *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 (S.C.C.) [hereinafter “Dunsmuir”].

argument, and it provoked disagreement even within the plaintiff-side members of the prison law bar, including between Allan Manson on behalf of the interveners The John Howard Society of Canada and the Canadian Association of Elizabeth Fry Society, and Michael Jackson on behalf of the intervener the British Columbia Civil Liberties Association. Jackson accepted that reasonableness could be an appropriate standard for a limited number of issues on *habeas* review. Manson objected on the grounds that reasonableness entails deference, which is a standard that is “inconsistent with the strict onus of proof borne by the detaining authority” on *habeas corpus*.⁶¹ The *Dunsmuir* standard contemplates a range of reasonable alternatives.⁶² The question on *habeas corpus*, however, is different. As Manson put it: “Either the detaining authority proves the legality of the deprivation of liberty, or the applicant must be released. There is no ‘range of possible acceptable outcomes’ which is the principle underlying reasonableness. It is either or.”⁶³

Perhaps Manson’s most compelling point involved his call for the Court to develop the law of *habeas corpus* in its own context, without importing administrative law principles developed in a different setting. Manson’s position seems particularly apt in light of the multiple paragraphs in *Khela* dedicated to emphasizing the unique history of the “great writ”; with the Court expounding on its status as “an essential remedy” to protect two fundamental Charter rights and the need for it to be interpreted purposively and expansively.⁶⁴ And yet, after all that, the *Khela* judgment arrives at the conclusion that the judicial powers of review under the “great writ” are at least partly akin to those exercised in contemporary administrative law.

The issue of what legality or lawfulness means in this context did require some clarification in the years leading up to *Khela*. But the best

⁶¹ Factum of the interveners The John Howard Society of Canada and the Canadian Association of Elizabeth Fry Society in *Khela*, *supra*, note 3, at para. 9.

⁶² See *Dunsmuir*, *supra*, note 60, at para. 47: “Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions.” Also *Canada (Citizenship and Immigration) v. Khosa*, [2009] S.C.J. No. 12, [2009] 1 S.C.R. 339, at para. 59 (S.C.C.): “Where the reasonableness standard applies, it requires deference. ... There might be more than one reasonable outcome.”

⁶³ Factum of the interveners The John Howard Society of Canada and the Canadian Association of Elizabeth Fry Society in *Khela*, *supra*, note 3, at para. 9.

⁶⁴ See, for example, *Khela*, *id.*, at paras. 27-30.

guidance could be found in the following paragraph from *May v. Ferndale*, which does not mention administrative standards of review:

A deprivation of liberty will only be lawful where it is within the jurisdiction of the decision-maker. Absent express provision to the contrary, administrative decisions must be made in accordance with the *Charter*. Administrative decisions that violate the *Charter* are null and void for lack of jurisdiction: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078. Section 7 of the *Charter* provides that an individual's liberty cannot be impinged upon except in accordance with the principles of fundamental justice. Administrative decisions must also be made in accordance with the common law duty of procedural fairness and requisite statutory duties. Transfer decisions engaging inmates' liberty interest must therefore respect those requirements.⁶⁵

May did not frame the issue as whether courts can review the "reasonableness" of an impugned decision. Rather, the language from *May* suggests that there are two central issues on *habeas corpus*. After the inmate proves that liberty has been deprived and the onus shifts to the detaining authority, the questions that section 7 demands are: (1) Did the decision-maker comply with requisite statutory duties? (2) Did the decision-maker follow procedural fairness? The onus is on the prison to prove both. Rather than import an ambiguous concept of reasonableness, it seems that courts could just continue to ask those questions.

2. The Uncertain Meaning of Reasonableness

There are at least three reasons why it is not clear what reasonableness review in the *habeas corpus* context means after *Khela*. First, the Court emphasizes that reasonableness review should not change "the basic structure or benefits of the writ".⁶⁶ One wonders, then, what if any change is being effected, and why. Second, the Court makes clear that reasonableness does not necessarily apply to *all* of the flaws in the decision or the decision-making process, but the judgment does not specify what the list includes.⁶⁷ Finally, the transfer decision in *Khela* itself is not reviewed for reasonableness, because the Court finds that the

⁶⁵ *May*, *supra*, note 5, at para. 77.

⁶⁶ *Khela*, *supra*, note 3, at para. 77.

⁶⁷ *Id.*, at para. 79.

process was procedurally unfair.⁶⁸ So there was no concrete application of the standard in the case itself.

What the Court seems to envision is that reasonableness could apply to certain aspects of decisions that wardens make pursuant to the statutory criteria, but the Court does not specify which decisions or which statutory criteria. Consider one possibility: section 27(3) of the CCRA, discussed above, which allows wardens to refrain from disclosing information to inmates in the face of specific security concerns. In future cases, when wardens invoke this provision, *Khela* suggests that courts should review that decision on a deferential reasonableness standard, though the authorities will have to explain their determination.⁶⁹ The warden's 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".⁷⁰

But consider the actual language of section 27(3), which already allows the withholding of information from inmates on "reasonable grounds". The statute permits the warden to make a decision on reasonable grounds regarding this specific topic. The provision was undoubtedly written that way because wardens need some space to operate on this issue. It follows that reviewing statutory compliance on *habeas corpus* already entailed an element of deference on that issue. From this angle, the *Khela* holding might just echo how *habeas corpus* already worked. But a second possibility also arises. Future courts might find that the question of whether the warden found objectively "reasonable grounds" should itself be reviewed on a deferential reasonableness standard. In this second scenario, the level of constitutional protection for prisoners stands to be lower than the conception of "lawfulness" in *May* that required adherence to statutory criteria.

At the very least, and perhaps most problematic for the field of prison law, importing a reasonableness standard is bound to generate further litigation. For that reason, the *Khela* decision threatens to generate a new barrier for prisoners to access justice, in a way that runs contrary to the central principles of *habeas corpus*. Any satisfaction derived from creating conceptual harmony between administrative law and *habeas corpus* does not seem worth the cost.

⁶⁸ *Id.*, at para. 80.

⁶⁹ *Id.*, at para. 74.

⁷⁰ *Id.*, at para. 74: specifying that the possibility of a decision being unreasonable on other grounds is not foreclosed.

3. Warden as Decision-maker

The Court's motivation for importing the standard of reasonableness to *habeas corpus* seems to have been tied to a set of assumptions about the prison context, where several of the Court's remarks stand out. The Court characterizes an involuntary transfer decision as an "administrative decision made by a decision maker with expertise in the environment of a particular penitentiary".⁷¹ The Court says further that to apply any standard other than reasonableness in reviewing such a decision could well lead to the "micromanagement of prisons by the courts".⁷²

These kinds of statements appear often in prison decisions,⁷³ but one wonders what they mean, especially here. After all, the question is not whether the Court has jurisdiction over the proceedings; the question is not whether this is an issue that engages Charter rights or administrative law or the "great writ" of *habeas*. The subject matter is squarely and properly before the Court, because it involves the deprivation of residual liberty and the right against arbitrary detention that inmates retain. In this sense a prisoner transfer is more than an "administrative decision" and the question is not about "micromanagement" but about checking for compliance with a legal regime that implicates the Charter.

It goes without saying that a reviewing court on *habeas corpus* will examine the warden's account of whether and how she complied with her governing legislation. Equally obvious: the warden is located in a unique penitentiary context, and the security concerns that she faces may be part of how her decisions are made. (In the example of section 27(3), as I have noted, she is already entitled to make a decision based on "reasonable grounds" related to prison security.) And, surely there *will* be cases in which the warden's expertise in the particular security matrix

⁷¹ *Id.*, at para. 75.

⁷² *Id.*

⁷³ *Re Cline* (1981), Court No. T-894-81 (F.C.T.D.) ("judges, as a general rule, should avoid the temptation of using their *ex officio* wisdom in the solemn, dignified and calm atmosphere of the court-room and substituting their own judgment for that of experienced prison administrators. The latter are truly in the firing-line and are charged by society with the extraordinarily difficult and unenviable task of maintaining order and discipline among hundreds of convicted criminals, who, as a class, are not generally reputed to be the most disciplined or emotionally stable members of society and who, by the mere fact of incarceration, are being forcibly deprived of many of their most fundamental freedoms.") Similar statements appear in *Hnatiuk v. Canada (Solicitor General)*, [1987] F.C.J. No. 624, 12 F.T.R. 44, at 49 (F.C.T.D.); *Evans v. Lusk*, [1993] B.C.J. No. 2802 (B.C.S.C.), and others. While there is little doubt that prisons present a unique context within which to analyze constitutional compliance, there is no principled reason why a special doctrine of enhanced deference need apply. For discussion and argument see Lisa Kerr, "Contesting Expertise in Prison Law" (2014) 60:1 McGill L.J. 43-94.

of her penitentiary will inform her actions, and this will be revealed to the reviewing court. The warden may explain, for example, that disclosure of particular information to an inmate in a particular prison would be tantamount to adding a match to a tinderbox. Reviewing courts could, in many cases, find that evidence to be convincing.

There could be other cases, however, in which the facts will suggest that a warden's decision is more connected to neglect or *animus* than to expertise or legitimate concerns. In other words, the time for respecting her analysis may come, and it might be encouraged in the legislation itself as with section 27(3). But it need not be built into the jurisprudential standard. As Professor Jackson stated in his oral submissions at the *Khela* hearing: "there are situations where you cut the Warden some slack. But deference as a broad-based approach to correctional decision-making runs the risk of returning prisons to the pre-*Martineau* [*Martineau v. Matsqui Institution*, [1979] S.C.J. No. 121, [1980] 1 S.C.R. 602 (S.C.C.)] context, where wardens were virtually invulnerable to review by the courts."⁷⁴

Central to this argument is the issue of what we should expect from particular kinds of decision-makers, and how that expectation should inform the level of judicial scrutiny on Charter-based review. Audrey Macklin makes this point in her critique of recent changes to the law that governs administrative discretion and the Charter emerging from *Doré v. Barreau du Québec*.⁷⁵ The *Doré* case involved the decision of a provincial law society to discipline a lawyer for writing an intemperate letter to a judge. The lawyer complained that the decision violated his Charter-protected right of free expression. In the course of upholding the decision of the law society, the Court appears to shrink the ambit of correctness review by preferring a deferential reasonableness standard for questions of constitutionality that arise in the individual exercise of discretion.⁷⁶

⁷⁴ While Professor Jackson did not entirely resist the idea of reasonableness review in oral argument at the *Khela* hearing, he was emphatic that the issues of lack of procedural fairness, unreliable evidence, and breach of statutory duty should all be a matter of *correctness*. He said there should be "no wholesale review for reasonableness" even if reasonableness applies to some aspect of the warden's decision. If Professor Jackson's conception of reasonableness governs future cases, the concerns expressed in this article will be alleviated. The worry is that importing reasonableness creates uncertainty (requiring litigation that prisoners cannot easily bring) and that the Court expresses and condones a general tone of judicial deference to prison administrators.

⁷⁵ [2012] S.C.J. No. 12, [2012] 1 S.C.R. 395 (S.C.C.).

⁷⁶ Macklin, "Charter Right", *supra*, note 6, at 569-70. There are, however, already signs that the *Doré* approach, which includes additional elements not discussed in this article, may be short-lived. Most recently, in *Loyola High School v. Quebec (Attorney General)*, [2015] S.C.J. No. 12,

As Macklin puts it, *Doré* presumes that the administrative decision-maker will generally be in the best position to consider the impact of the relevant Charter values on the specific facts of the case.⁷⁷ But of course, the decision-maker in *Doré* was a body of lawyers performing oversight for their own profession. One question is whether the same expectations and presumptions should extend to decision-makers who are non-lawyers. In some cases, Macklin argues, decisions assigned to elected officials might deserve deference on the basis that they will be exposed to political rather than legal accountability. In other cases, proximity to the political branch could pull in the opposite direction, given the incentives that might call for minimizing individual rights in the name of political gain. The point is that justifications for deference will not be identical across administrative settings.

Macklin's concerns apply with force here, and should be analyzed in light of the purpose of *habeas corpus* and the realities of the penal context. *Doré* has yet to officially arrive to the prison law context, but the *Khela* decision imports part of the *Doré* rationale when it imports reasonableness to *habeas corpus*, and raises the prospect that reasonableness could be extended to other Charter complaints arising from the prison context. The worry is that prison officials, like certain other administrative actors, often have a narrow focus that is "coloured by the concerns and possibly the biases of their own professional culture".⁷⁸ They operate in a closed, largely inscrutable environment with unique pressures and concerns and little political or legal accountability. As Macklin notes more generally, there is simply no basis for a presumption that certain officials should receive deference when they exercise their Charter-impacting discretion.⁷⁹ The arguments about why courts should defer to the exercise of non-Charter matters (or non-*habeas* matters) do not automatically extend to those aspects of discretion that implicate *habeas corpus* and the Charter.

2015 SCC 12 (S.C.C.), three judges (McLachlin C.J.C. and Moldaver J., joined by Rothstein J.) decided the case without using or referring to *Doré*. For discussion, see Walters, "Respecting Deference as Respect", *supra*, note 6, at 422.

⁷⁷ Macklin, "Charter Right", *supra*, note 6, at 575.

⁷⁸ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, ON: LexisNexis Canada, 2008), at 625.

⁷⁹ If the official does a good job, as some will, then that can simply be explained to the Court and the Court will be persuaded. As Macklin puts it: "sometimes the reasons may be persuasive, and a judge should be as open to benefiting from a rigorous and compelling set of reasons in the same way he or she is open to persuasion from high-quality submissions by counsel, analyses by law clerks or opinions of fellow judges." (Macklin, "Charter Right", *supra*, note 6, at 576)

Prison officials are not likely to impress when they make decisions that implicate Charter rights. To the limited extent that staff training involves the law, the focus is on prison law and policy rather than the Constitution. Prison staff focus on the task of “processing inmates efficiently and avoiding visible disruption” rather than pursuing a larger normative agenda.⁸⁰ The organizational dynamics of prisons tend to resist constitutional constraints, due to the political powerlessness of inmates and the structural isolation of corrections from the community.⁸¹ The status of the inmate is defined in relation to managerial goals, rather than in relation to an externally defined moral norm, and prison managers tend to focus on their vision of scientific management rather than the larger legal order.⁸² Amid these institutional tendencies, only the judiciary has the inclination and ability to impose a regular and comprehensive legal framework. The judiciary is a necessary player in prison legality, rather than a necessarily amateur outsider at risk of “micromanagement”. The spirit of *habeas corpus*, with its strict emphasis on legality and access to justice so as to challenge deprivations imposed on the physical body, has always had this in mind. If the Court imported reasonableness because of a fantasy of prisons as *legally* expert institutions that would be weakened by judicial scrutiny, the judgment seems deeply misguided.

III. CONCLUSION

In two significant respects, *Khela* held the ground of modern prison law. When prisoners are deprived of the residual liberty that they retain while incarcerated, the Court protects a tradition of capacious access to the courts and insists that officials abide by the details of their governing legislation. But the marriage of *habeas corpus* with administrative law standards is a potentially troubling shift — one that seems to minimize the distinct status of *habeas corpus* as a strict check on the legality of deprivations imposed on the physical body. At the very least, the topic will invite more litigation, as government lawyers may finally relinquish their wish to abolish provincial superior court jurisdiction and transfer energy to defending a wide range of “reasonable” penal powers in *habeas corpus* review.

⁸⁰ Susan Sturm, “Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons” (1990) 138 U. Pa. L. Rev. 805, at 810-20.

⁸¹ *Id.*, at 816.

⁸² *Id.*, at 818.

Several of the Court's remarks in *Khela*, particularly about the need not to second-guess the determinations of prison officials, seem to endorse a view that David Dyzenhaus has called "submissive deference".⁸³ Under this approach, the central question on judicial review is whether a government official is qualified to exercise authority, but the law has little preference as to which decision is selected from within a range of possibilities. The alternative is where judicial deference is something to be earned. As Dyzenhaus puts it, "deference as respect" is granted only when officials engage in reasoned justification of governmental decisions.⁸⁴ In my discussion of section 27(3) of the CCRA, I described how the provision contemplates that wardens may earn judicial deference in specific circumstances, such as where legitimate security concerns prevent the disclosure of information to inmates being involuntarily transferred. Rather than emphasizing that the statute already allows wardens space to operate, the *Khela* decision suggests a space that law does not cover.

My central argument about the *Whaling* decision is that it relies on an unstable boundary between the quantitative and qualitative aspects of imprisonment, between the formal sentence imposed by sentencing courts and the features of punishment that follow from sentence administration. The boundary between *duration* and *conditions* is integral to the *idea* of the penitentiary as a place for the administration of state punishment. But it is only an idea — a comforting one perhaps for those concerned with the rule of law in punitive state institutions — but not reflected in the daily exercise of power inside prisons. Perhaps most importantly, the conditions of punishment can determine in concrete ways the length of time that liberty will be, in the end, deprived.

While the *Whaling* case counts as a prisoner victory, it affirms that most post-sentencing changes to parole will not raise *ex post facto* or double jeopardy concerns, so long as some individualized administrative process is in place to prevent the *automatic* addition of "in-prison" time. The government will have little difficulty enacting retroactive laws that pass muster for the small slice of prison conditions deemed Charter-relevant in this way.

⁸³ David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279, at 286 [hereinafter "Dyzenhaus, 'Politics of Deference'"]. For the larger theory of law and democracy that underpins the Dyzenhausian view, see Walters, "Respecting Deference as Respect", *supra*, note 6, at 417-22.

⁸⁴ Dyzenhaus, "Politics of Deference", *id.*, at 307.

What ties these two cases together is how they both allow the prison context, rather than legislative or judicial action, to determine central features of state punishment. *Whaling* holds that for penal measures to count as “punishment” and attract constitutional protection like non-retroactivity, they must concern nothing other than the time spent in physical custody. This explains part of *Khela* too, in terms of the reasons that the Court sustains access to *habeas corpus* review in provincial superior courts. Just as an automatic extension of “in-prison” time is regarded as punishment attracting constitutional scrutiny, other deprivations of residual liberty attract writs intended to protect section 7 interests. But here we arrive at the potential mischief caused by this pair of cases. Reasonableness review under *Khela* opens the door to submissive judicial deference when prisoner interests are dealt with administratively. And, as I said about *Whaling*, Parliament will have no trouble crafting laws that make a wide range of deprivations happen through administrative discretion.

In these two easy prisoner victories, the Court has set rules of the game that allow significant features of imprisonment to be shaped by the workings of our institutions of punishment, rather than set out in advance and controlled by law. Even where Charter rights are clearly engaged, the Court invites prison officials to make decisions according to their own priorities and preferences, ensuring that the meaning of state punishment will be determined by many factors beyond the law.