Court File No. 34609

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

BETWEEN:

DIANE KNOPF, WARDEN OF MISSION INSTITUTION AND HAROLD MASSEY, WARDEN OF KENT INSTITUTION

APPELLANTS
(Appellants)

– and –

GURKIRPAL SINGH KHELA

RESPONDENT
(Respondent)

– and –

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

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PART I: OVERVIEW

1. The British Columbia Civil Liberties Association (hereafter the "BCCLA") is the oldest and most active civil liberties group in Canada. The mandate of the BCCLA is to preserve, defend, maintain and extend civil liberties and human rights in British Columbia and across Canada, including the civil and human rights of prisoners.

2. The BCCLA adopts the statement of facts set out in the Respondent's factum.

3. The BCCLA's submissions focus on the historical, legal and scholarly context of the role and scope of timely judicial oversight of prison administrators' decisions that infringe *Charter* protected institutional liberty. In particular, the BCCLA will make the following submissions:

a) Timely judicial oversight with a remedial toolbox that includes a robust interpretation of the great writ of *habeas corpus* is essential to maintaining the rule of law in the Canadian penitentiary;

b) Access to justice is a fundamental concern, and supports strengthening the role of provincial superior courts in applications for *habeas corpus*;

c) In assessing the sufficiency of disclosure, the court must give careful consideration to the systemic concerns from the use of prison informers, and the resulting questions of reliability; and

d) If this court accepts that a *habeas corpus* application may include consideration of whether the decision was reasonable, such consideration ought not and cannot result in a return to the "hands-off" doctrine wherein such decisions are effectively unreviewable, or otherwise water down the protection afforded by *habeas corpus*.

PART II: QUESTIONS IN ISSUE

4. This appeal raises two issues, the first pertains to the scope of review on an application for *habeas corpus*, and the second pertains to the scope of disclosure mandated on such applications. The BCCLA's submissions are intended to address both issues.

PART III: ARGUMENT

(a) Timely and Robust Judicial Intervention and the Rule of Law

5. This appeal is an important chapter in the long and continuing struggle to ensure that the rule of law runs inside Canadian prisons.

6. There are unique characteristics of the correctional environment that mark it out for special vigilance that are critical to understanding the rationale for judicial intervention, and conceptualizing the scope of judicial oversight. No other system of government activity entails as much power over individual citizens' freedom. At the federal level the correctional authorities control every element of the lives of those sentenced between 2 years and natural life from the basics of food and shelter, clothing, medical care, access to family and friends, recreation, education, and religious observance. The exercise of this power occurs behind walls that are intended to keep prisoners inside but they also keep the community outside. The physical separation and security focus makes prison management largely invisible to the public – in contrast with other powerful systems like the courts that operate in a publicly accessible forum.

7. The Correctional system then is one of great power operating in a forum that is inaccessible by the public and media. A succession of commissions of inquiry have documented the recurring human rights abuses beginning with the Brown Commission that castigated the cruel administration of Kingston Penitentiary in the 1840s and almost 150 years later the Arbour Commission that condemned the strip searching of women prisoners by male guards at the Prison for Women. The 2008 report of the Correctional Investigator on the death in custody of the teenager Ashley Smith after two years of sequential involuntary transfers and serial segregation is but the latest example of how great the challenge is to ensure that the rule of law and respect for human dignity survives behind prison walls.[1]

8. The necessary counterbalance to guard against these failures and abuses is a complex web of laws, policies and practices underpinned by a culture that at its core is intended to address the fundamental need of us all, both individually and collectively, to have our human dignity respected. Timely judicial oversight with a remedial toolbox that includes a robust interpretation of the great writ of *habeas corpus* is one of the foundations of this counterbalance.

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[1] Michael Jackson, *Justice behind the Walls: Human Rights in Canadian Prisons,* Vancouver: Douglas & McIntyre, 2002, at pp. 15-21; *A Preventable Death*, Report of the Correctional Investigator, June 2008.

9. The leitmotif of the BCCLA's submission in *May v. Ferndale*, and that we re-assert in this appeal, is that the rule of law has struggled for a foothold in the harsh landscape of the Canadian penitentiary. Now is not the time to undermine a vital and complementary part of judicial intervention. The work of the great writ has hardly begun in our prisons. This Court got it right in *May* and the years have not dulled its important message.

> Timely judicial oversight, in which provincial superior courts must play a concurrent if not predominant role, is still necessary to safeguard the human rights and civil liberties of prisoners, and to ensure that the rule of law applies within penitentiary walls.[2]

10. This Court in *May* chronicled the history of judicial intervention in Canada and how prior to the 1970s the prevailing "hands-off" doctrine, "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".[3]

11. Beginning with this Court's decision in *Martineau* and subsequently the judgments in the 1985 trilogy of *Miller, Cardinal* and *Morin* (the "Trilogy"), the conceptual and procedural foundations for concurrent federal and provincial superior court oversight were laid, with the latter lying within a generous and flexible development of *habeas corpus*.[4]

12. The Appellants urge this Court to arrest the evolution of *habeas corpus* by advancing a restrictive interpretation of both the scope of disclosure and the grounds on which the lawfulness of a decision may be challenged, arguing that it involves a change in the common law that is better left to Parliament. The BCCLA submits that not only is this proposed approach at odds with this Court's jurisprudence as set out in *May* and the Trilogy, it is at odds with the practical realities faced by prisoners. Far from supporting this revised version of "hands-off", the history of federal correctional policy and practice present powerful arguments in favour of strengthening not attenuating the role of provincial superior courts.

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[2] *May v. Ferndale Institution,* [2005] 3 S.C.R. 809, 2005 SCC 82, at para. 72 ("*May*").

[3] *May*, at para. 24 (citing Michael Jackson, *Prisoners of Isolation: Solitary Confinement in Canada.* Toronto: University of Toronto Press, 1983, at p. 82).

[4] *May,* at paras. 26-28; *Idziac v Canada (Minister of Justice),* [1992] 3 S.C.R. 631, at pp. 646-647; *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662; *R. v. Miller*, [1985] 2 S.C.R. 613; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; Court of Appeal Reasons, at paras. 57-61.

13. Despite pronouncements of this Court and the enactment of the *Charter* there remains a great distance between the rhetoric of a *Charter* culture of rights inside the walls and the reality of prisoners' lives. The most authoritative example of this distance is found in the 1996 Arbour *Commission of Inquiry Report into Certain Events at the Prison for Women in Kingston* (The "Arbour Report"). The Arbour Report is a critical document in the history of Canadian corrections, opening a window into correctional practices and attitudes beyond the narrow view provided by individual judicial challenges by prisoners. Based on her broad examination of the Correctional Service of Canada's (the "CSC") application of federal correctional powers, Justice Arbour found that the evidence at the inquiry demonstrated that "The Rule of Law is absent, although rules are everywhere" (emphasis added).[5]

14. In finding "little evidence of the will to yield pragmatic concerns to the dictates of the legal order", Justice Arbour concluded that the enactment of new legislation, the existence of internal grievance mechanisms, and the existing forms of judicial review had not been successful in developing a culture of rights within the Correctional Service of Canada. She also expressed deep skepticism that the Service was able to put its own house in order and made specific recommendations to bring the federal correctional authorities into the orbit of the rule of law. Most significantly for the purposes of this case, Justice Arbour addressed the need for greater judicial supervision by those members of the judiciary involved in the criminal justice process:

> In terms of general correctional issues, the facts of this inquiry have revealed a disturbing lack of commitment to the ideals of justice on the part of the Correctional Service. I firmly believe that increased judicial supervision is required.[...]There is nothing to suggest that the Service is either willing or able to reform without judicial guidance and control.[6]

15. Notably, in *May*, this Court recognized that provincial superior courts have a critical role to play in the administration of criminal justice, which is closely connected with the oversight of prison law and life in the penal institution.[7] Since this Court's decision in *May*, the need for judicial oversight of prison law and life has not waned; instead, the BCCLA submits, such oversight is more important than ever.

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[5] *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) [Commissioner: Louise Arbour], at pp. 180-181.
[6] Arbour Report, at p. 198; *Justice Behind the Walls*, at pp. 372-374.
[7] *May*, at para. 68.

16. Of particular significance in 2008 the Correctional Service adopted as the basis for its "Transformation Agenda", the recommendations of a 2007 a policy paper entitled *A Roadmap to Strengthening Public Safety.* In its almost 200 pages, the *Roadmap*, in charting the direction for Corrections in the 21st century, makes no mention of the importance of human rights, the *Charter* or to this Court's judgments dealing with prisoners' rights. Nowhere in the *Roadmap* can be found any reference to the well-documented record of how difficult it has been to entrench a culture of respect for rights within CSC. Far from a clarion call to reinvigorate the application of the rule of law, a call that this Court has consistently echoed, the *Roadmap* and the Transformation Agenda signaled a retreat from the task of entrenching a culture of rights within the correctional system.[8]

17. It is in such a climate that this Court's imprimatur on judicial vigilance, utilizing the most timely and efficacious judicial remedies for the vindication of human rights in Canadian prisons, is needed.

(b) Timely Access to Justice and the Role of Superior Courts

18. The BCCLA submits that the need for a robust interpretation of the scope of *habeas corpus* review is reinforced when we consider concerns about *timely* access to justice. These concerns were recognized by this Court in *May*[9], and there is no evidence in this appeal that the problems regarding the lack of accessibility to a timely and effective remedy in federal court in cases involving segregation and transfer have been ameliorated. Rather, as referenced in the Respondent's factum, such problems have persisted.

19. Yet the Appellants suggest, strangely, that strengthening the role of provincial superior courts hinders rather than helps concerns about timely access to justice. They say it will unduly lengthen the affidavit material and court time required for a *habeas corpus* application. The Appellants suggest that there has been a veritable avalanche of cases that has driven up hours worked and that threatens to overwhelm the Department of Justice's resources.

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[8] Michael Jackson and Graham Stewart, *A Flawed Compass*: *A Human Rights Analysis of the Roadmap to Strengthening Public Safety* (2009) at pp. 1-6 and 12-18 (referring to the *Report of the Correctional Service of Canada Review Panel: A Roadmap to Strengthening Public Safety* (Minister of Public Works and Government Services Canada, 2007)).

[9] *May*, at paras. 69-70.

20. Justice Wilson's statement in *Gamble*, that "relief in the form of *habeas corpus* should not be withheld for reasons of mere convenience" is particularly apt in response to the Appellants arguments in this regard, as is Lord Atkin's acute observation: "Convenience and justice are often not on speaking terms".[10]

21. In any event, the Appellants' fears of an onslaught of litigation are unfounded. Given the number of prisoners in federal custody and the number of yearly segregation placements and involuntary transfers, judicial review, in any forum, of prison administrators' decisions that affect institutional liberty is a relatively rare event. According to the Annual Report of the Correctional Investigator, in 2010-11, out of an average federal inmate count of 14,200, there were 6677 involuntary segregation placements. For the same year there were 1358 involuntary transfers. Yet, according to the Appellants' affidavit in that year there were only 55 actively managed *habeas corpus* files. The BCCLA submits that securing the foundations for timely access to justice for prisoners through *habeas corpus* will not cause the sky to fall at the Department of Justice.[11]

(c) Habeas Corpus Review: Disclosure and informer information

22. The Appellants' efforts to bifurcate the disclosure obligations of s. 27 and dissociate their obligations from the exception to preserve the confidentiality of information to protect safety and security concerns, reflect an impoverished view of *habeas corpus,* one that would immunize the Appellants from any legal obligation to demonstrate to a court, through confidential affidavits or otherwise, that it had the necessary reasonable grounds to withhold information.

23. The issue of disclosure of information and the related issue of a process to independently evaluate the reliability of confidential information, particularly prisoner informer's information, used by correctional authorities to justify the deprivation of institutional liberty, are systemic issues that are implicated in this appeal.[12] The BCCLA agrees with the submissions of the Intervener, the John Howard and Elizabeth Fry Societies, which call for a probing inquiry to

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[10] *R. v. Gamble*, [1988] 2 S.C.R. 595, at 635; *General Medical Consulate Council* v. *Spackman*, [1943] A.C. 627 (H.L.) at p. 638.

[11] *Annual Report of the Office of the Correctional Investigator (*2011-2012); Exhibit "A" to Affidavit of Chelsea Clogg (Motion to Adduce Further Evidence by the Appellants).

[12] *Justice behind the Walls*, at pp. 435-482.

ensure that the evidence, including confidential information, supports any findings necessary to the legality of the detention.

24. The case for a probing inquiry into the reliability of information and the extent to which it must be disclosed becomes compelling in the case of prisoner informers. In Canada, commissions of inquiry have identified the inherent unreliability of prisoner informer's testimony, its contribution to miscarriages of justice, including wrongful convictions, and the substantial risks that the dangers may not be fully appreciated by the jury.[13] These have recommended a long list of factors to be considered in assessing an informer's reliability statement. In implementing those recommendations several provinces have now established In-Custody Informer Committees.

25. The inherent and significant danger in relying on prisoner informers is even greater in the correctional context. In a criminal trial, the informer must take the witness stand and is subject to vigorous cross-examination by defence counsel. Even this protection may not be enough to challenge the credibility of a well-tutored and experienced informer; hence there is a need for special procedures to review the use of an informer and special instructions to the jury in considering the evidence. In stark contrast, a prisoner such as Mr. Khela, facing segregation or involuntary transfer based on information from an informer(s), is not given an opportunity to cross-examine his accuser; indeed, in most cases the informer's identity understandably remains concealed from the prisoner. Yet within CSC there are no independent committees evaluating the use of the informer's information to assess its reliability.

26. While it is the high-profile wrongful conviction cases that have become the lightning rod for critical concern, the use of jailhouse informers in criminal proceedings is an exceptional event. However, the use of such informers in correctional decision-making is commonplace, and the occasions for possible miscarriage of justice are multiplied. The present procedures surrounding both segregation and involuntary transfer involve no legally anchored, independent determination of whether information is sufficiently reliable to justify interference with a prisoner's liberty. For this and other reasons, there have been repeated calls by a succession of

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[13] *Justice Behind the Walls*, at pp. 473-475 (referring to the *Report of the Commission on Proceedings involving Guy Paul Morin* (Toronto: Ontario Ministry of the Attorney General, 1998) [Chairman Fred Kaufman], and the *Report of the Inquiry Regarding Thomas Sophonow* (2001) [Chairman: Peter Cory]).

Parliamentary sub-committees, commissions of inquiry, human rights committees, task forces and academic experts, for the introduction of independent adjudication into correctional decision-making that have the greatest impact on institutional liberty. Only within such a framework can the scrutiny and caution which accompanies the use of jailhouse informers in a criminal context be given meaning behind the walls.[14]

27. It is the absence of independent adjudication within the walls that makes the timely availability of judicial oversight through a robust application of *habeas corpus* all the more important. Provincial superior court judges are well-placed to assess, as has become the practice in many *habeas corpus* cases, confidential information in sealed affidavits. Given the judicial experience in related areas of authorization for warrants and wiretaps, judicial assessment of the reliability of the information in such affidavits and the sufficiency of disclosure, is a manageable and appropriate development of *habeas corpus.*

(d) Reasonableness and deference in the correctional context

28. This appeal concerns the scope of review by a provincial superior court on an application for *habeas corpus*. The parties agree that the scope of review permits an assessment of whether the decision was lawful, but disagree whether this includes review of the overall "reasonableness" of the decision. While the BCCLA agrees with the Court of Appeal's succinct conclusion that, "The question is whether the deprivation of liberty was lawful. I do not think an unreasonable decision is lawful"[15], the BCCLA cautions this Court against endorsing a wholesale review for "reasonableness", divorced from particular grounds for review or particular defects in the decision. Rather, the BCCLA submits, the court's analysis on a *habeas corpus* application should be on whether the decision was lawful and whether there is a particular basis on which the decision was rendered unlawful. In this regard, that there is no reason in law or policy to narrow the scope of the grounds for challenging the lawfulness of a deprivation of residual liberty on an application for *habeas corpus*.

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[14] *Justice behind the Walls*, at pp. 594-595 (referring to the Report of the Sub-Committee on Corrections and Conditional Release Act, *A Work in Progress: The Corrections and Conditional Release Act*, May 2000, at pp. 48-9).

[15] Court of Appeal Reasons, at para. 66.

29. If this Court affirms that *habeas corpus* lies to review correctional decisions under the rubric of reasonableness, in order to ensure that the writ *meaningfully* protects the liberty interests of prisoners, the BCCLA invites the Court to make three important observations.

30. First, a challenge to the reasonableness of a decision in no way changes the basic structure of an application for *habeas corpus*. The applicant need only show a deprivation of liberty, and then the burden shifts to the detaining authority to satisfy the court that the detention is lawful.[16] If the detention is unlawful, the remedy is as of right. This is in contrast to an application for judicial review where the burden is on the applicant to show that the decision is unreasonable, and where the granting of remedial relief is discretionary.

31. Second, the ability to challenge a decision on the basis that it is unreasonable does not change the traditional analysis courts have applied to other grounds that may be advanced on a *habeas corpus* application, and the standard on which they are reviewed. The BCCLA submits that it is appropriate that where the lawfulness of a decision is challenged on the grounds that it breaches the *Charter*, the common law duty of procedural fairness, or a statutory duty, the Court ought to review such decisions with the same level of scrutiny it always has, on a correctness standard. [17]

32. Third and finally, with respect to challenges to the reasonableness of a decision, the BCCLA would invite this Court to confirm that the level of deference afforded to correctional authorities must take account of the documented realities of correctional administration, particularly the history of abuse of correctional authority and the continuing struggle to ensure compliance with the rule of law.

33. The BCCLA submits that this approach to deference is supported by this Court's administrative law jurisprudence, in which this court has sought to devise an approach to judicial review that ensures the preservation of the rule of law, in a manner that is both theoretically sound and effective in practice.[18] As this Court has recognized, different levels of respect, or deference, may be required in different situations, and that even the standard of reasonableness

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[16] *May,* at p. 845.
[17] *May*, at p. 846.
[18] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, at paras. 1 and 32 (per Bastarache J.); *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, 2009 SCC 12, at para. 59 (per Binnie J.); *Penner v Niagara (Police Services Board)*, 2013 SCC 19, at paras. 30-31.

"takes its colour from the context".[19] The factors that should be considered in "contextualizing reasonableness", including the precise nature and function of the decision maker including its expertise, and the nature of the issue being decided.

34. Some courts, and indeed the Court of Appeal in this case, have read this Court's statements in *Dunsmuir* that "Reasonableness is a deferential standard" as justifying the greatest deference in the correctional context (see Court of Appeal Reasons, at paras 68 and 84). While the interests identified by the Court of Appeal are important, they give no consideration to the weight of the documented history of correctional administration and its resistance to the importation of the rule of law. Locating decisions that deprive prisoners of their *Charter* protected institutional liberty at the most deferential point of judicial review would risk returning to the "hands-off" doctrine that this Court clearly rejected in *May*. For the BCCLA there is a real concern that expanding the degree of judicial deference given to prison wardens would undermine the public interest in protecting human rights at those points where they become most vulnerable. Within Canada, that vulnerability is nowhere more evident than inside penitentiaries.

35. The BCCLA submits that in order to preserve the rule of law in the corrections context, the level of deference afforded on a *habeas corpus* application must be commensurate with both the importance of the liberty interests at stake and the unique challenges faced in maintaining the rule of law behind the walls.

PART IV: SUBMISSION ON COSTS

36. The BCCLA does not seek costs, and requests that no costs be awarded against it.

PART V: ORAL SUBMISSION

37. The BCCLA seeks leave to make oral submissions not exceeding 10 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated this 16th day of July, 2013

for MICHAEL JACKSON, Q.C.
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[19] *Dunsmuir*, at para. 139 (per Binnie J.).

PART VI – TABLE OF AUTHORITIES

6.	Annual Report of the Office of the Correctional Investigator (2011-2012) online at http://www.ocibec.gc.ca/cnt/rpt/annrpt/annrpt20112012-eng.aspx	21
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