The Crime of Punishment

1. Acknowledge traditional custodians of the land
2. Thank Deb, Anne and SI for bringing me here

3. ***Question Posed:*** *The Queensland Government has tabled the Corrective Services Bill. The Bill provides for the removal of all Judicial Review for classification and transfers between prisons. This is an attack on the fundamental rights of people in prison and is an erosion of the natural justice we are all afforded - where will it end?*

4. Before the SCC decision in *May*, judicial review of correctional decisions by/in the Federal court were seen as requisite in Canada which consequently made *habeas corpus* virtually in accessible.

CAEFS/JHS Intervention in *May v. Ferndale*

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PART I - STATEMENT OF FACT

1. The Interveners accept the facts as stated by the Appellants.

PART II - ISSUES

2. With respect to Question A of the Appellants' Questions in Issue, the Interveners submit that the Court of Appeal erred in deciding that habeas corpus jurisdiction should be declined where the Appellants, federal penitentiary prisoners, could have sought judicial review in the Federal Court.

PART III - ARGUMENT

A. Summary of the Intervener's Submissions

1. In *May v. Ferndale*, the Appellants filed applications for writs of habeas corpus in the superior court of the province to contest the legality of their transfers to higher security prisons.

2. The Court of Appeal agreed that the superior court had jurisdiction to hear the habeas corpus applications, but held that prisoners in federal penitentiaries may not exercise their right to apply for habeas corpus if they offer no reasonable explanation for failing to pursue judicial review in the Federal Court. The Court of Appeal erred in holding that the legality of their detention must be determined in the Federal Court pursuant to its general judicial review power over decisions made by federal tribunals.

3. This very issue, whether federal penitentiary prisoners may apply for habeas corpus to contest the legality of their detentions, has been squarely before this Court on several occasions. In *Miller, Dumas* and *Gamble*, this Court affirmed the right of federal penitentiary prisoners to chose

habeas corpus even though judicial review was also available in the Federal Court. It is submitted that the Court of Appeal's error results from a misreading of a decision of this Court in *Steele*, a case which was subsequently clarified in *Idziak,* which confirmed the right of federal penitentiary prisoners to chose habeas corpus.

4. In barring federal prisoners from access to habeas corpus, the Court of Appeal refused to follow the decisions of this Court in *Miller, Dumas, Gamble* and *Idziak*, and has in effect, removed federal prisoners from the protection of section 10(c) of the *Charter*.

B. Everyone is entitled to apply for habeas corpus on arrest or detention

(i) Constitutional Importance of Habeas Corpus

5. In Canada, the constitutional importance of the jurisdiction of the provincial superior court to grant *habeas corpus* has been entrenched in s. 10(c) of the *Canadian Charter of Rights and Freedoms*.

> 10. Everyone has the right on arrest or detention
> ...
> (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

(ii) The nature of the writ

1. The writ of *habeas corpus* has long been considered the judicial safeguard of the liberty interest of the individual and the principal protection against arbitrary and illegal imprisonment. Blackstone described the remedy of *habeas corpus* as "the great and efficacious writ in all manner of illegal confinement." Dicey said:

> ...the right to issue a writ of habeas corpus, strengthened as that right is by statute, determines the whole relation of the judicial body towards the executive. The authority to enforce obedience to the writ is nothing less than the power to release from imprisonment any person who in the opinion of the court is unlawfully deprived of his liberty, and hence in effect to put an end to or to prevent any punishment which the Crown or its servants may attempt to inflict in opposition to the rules of law as interpreted by the judges.
>
> Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed.) 1961 at p. 222
> 3 *Blackstone's Commentaries* 131

2. At its heart, the constitutional and historical role of habeas corpus is to entrench the right to have the legality of state imposed detention determined by a court.

(*iii) The writ of habeas corpus issues as of right*

3. A writ of *habeas corpus* is not a discretionary remedy. That is, it issues as of right, where the applicant shows that there is cause to doubt the legality of his detention.

> In principle, habeas corpus is not a discretionary remedy; it issues ex debito justitiae on proper grounds being shown. It is however, a writ of right rather than a writ of course,
> ...
> This means simply that it is not a writ which can be had for the asking upon payment of a court fee, but one which will only be issued where it is made to appear that there are proper grounds. While the court has no discretion to refuse relief, it is still for the court to decide whether proper grounds have been made out to support the application. The rule that the writ issues ex debito justitiae means simply that the court may only properly refuse relief on the grounds that there is no legal basis for the application and that habeas corpus should never be refused on discretionary grounds such as inconvenience.
>
> R. Sharpe, *The Law of Habeas Corpus* (2nd) 1989, at p. 58. (emphasis added)
> See also *Philip v. D.P.P.* [1992]1 A.C. 545 (P.C. at p. 552-53); and Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed.) 1961 at p. 215

4. The Supreme Court of Canada has recognized that *habeas corpus* is a writ which issues as of right, which distinguishes it from other prerogative writs, such as *certiorari*, which are discretionary. In *Re Harelkin and University of Regina*, the Court quoted with approval de Smith

in *Judicial Review of Administrative Action* as follows:

> ...but although none of the prerogative writs is a writ of course, not all are discretionary. Prohibition, for example, issues as of right in certain cases and habeas corpus ad subjiciendum, the most famous of them all is a writ of right which issues ex debito justitiae when the applicant has satisfied the court that his detention was unlawful. These two writs are not in the fullest sense writs of grace.
>
> *Re Harelkin and University of Regina,* [1979] 2 S.C.R. 561 at p. 575
> See also *Goldhar v. The Queen* [1960] S.C.R.431 at p. 440-1; and *R. v. Governor of Pentonville Prison, Ex Parte Azam*, [1974] A.C. 18, at 32.

5. Habeas Corpus jurisdiction should never be declined for mere inconvenience or unless the court is satisfied that there is an equally advantageous statutory route to a court.

> *Gamble v. R.*, [1988] 2 S.C.R. 595 at p. 635,642

C. A transfer to a higher security prison is a detention

13. The *Corrections and Conditional Release Act* ["*CCRA*"] and the *Corrections and Conditional Release Regulations* [*Regulations*] require that all prisoners be assigned a security classification of maximum, medium or minimum. Prisoners are confined in a prison with a security level which corresponds to their classification. The residual liberty of prisoners is significantly affected, depending on the security level of the prison in which they are confined.

> Sections 28 and 30 *Corrections and Conditional Release Act,* S.C. 1992, c.20
> Sections 17 and 18 *Corrections and Conditional Release Regulations*, SOR/92-620

14. In *Miller*, this Court held that the confinement of prisoners at a higher security level than could be legally justified is a form of detention which triggers the entitlement to apply for habeas corpus.

> In effect, a prisoner has the right not to be deprived unlawfully of the relative or residual liberty permitted to the general inmate population of an institution. Any significant deprivation of that liberty, such as that effected by confinement in a special handling unit,

> meets the first of the traditional requirements for habeas corpus, that it must be directed against a deprivation of liberty.
>
> *R. v. Miller*, [1985] 2 S.C.R. 613 at p. 637

15. In *May v. Ferndale*, the Court of Appeal did not dispute that the Appellants' transfer to higher security prisons is a distinct form of detention, the legality of which may be contested by habeas corpus.

D. The Court of Appeal erred in barring federal prisoners from access to habeas corpus

(i.) This Court has expressly affirmed the right of prisoners to apply for habeas corpus (Miller)

16. In *R. v. Miller* and two companion cases, prisoners used habeas corpus to challenge the legality of their transfers to higher security prisons. In *Miller*, this Court emphasized the "importance" of habeas corpus as "the safeguard of the liberty of the subject" and concluded that access to it can be restricted or curtailed only by express statutory language. According to *Miller*, the jurisdiction of the superior court to grant *habeas corpus* is not affected where the unlawful detention is caused by a federal authority, purporting to act pursuant to federal legislation.

> ...the provisions of the Federal Court Act indicate a clear intention on the part of Parliament to leave the jurisdiction by way of habeas corpus to review the validity of a detention imposed by federal authority with the provincial superior courts. *While s. 18 of the Federal Court Act confers an exclusive and very general review jurisdiction over federal authorities by the prerogative and extraordinary remedies to which specific reference is made, it deliberately omits reference to habeas corpus...I agree with Laskin*
>
> *C.J.C. that because of its importance as a safeguard of the liberty of the subject habeas corpus jurisdiction can only be affected by express words.* One may think of reasons why it was thought advisable to leave the habeas corpus jurisdiction with respect to federal authorities with the provincial superior courts, including the importance of the local accessibility of this remedy. (emphasis added)
>
> *R. v. Miller,* [1985] 2 S.C.R. 613 at p. 624
> Also *Cardinal and Oswald v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662

(ii.) This Court has held that access to habeas corpus is not defeated by Federal Court jurisdiction on judicial review (Miller, Dumas, Gamble)

17. One of the issues squarely before the Court in *Miller* was whether habeas corpus should be declined on the basis that there is jurisdiction in the Federal Court to judicially review decisions of federal prison authorities. This Court held that the applicant was entitled to choose the forum in which to challenge unlawful restrictions of liberty in the prison context. Where the applicant chooses habeas corpus, that claim should be dealt with on its merits, without regard to other potential remedies in the Federal Court.

> ...I am of the opinion that the better view is that habeas corpus should lie to determine the validity of a particular form of confinement in a penitentiary notwithstanding that the same issue may be determined upon certiorari in the Federal Court. The proper scope of the availability must be considered first on its own merits, apart from possible problems arising from concurrent or overlapping jurisdiction. The general importance of this remedy as the traditional means of challenging deprivations of liberty is such that its proper development and adaptation to the modern realities of confinement in a prison should not be concerned about conflicting jurisdiction. As I have said in connection with the question of jurisdiction to issue certiorari in aid of habeas corpus, these concerns have their origin in the legislative judgement to leave the habeas corpus jurisdiction against federal authorities with the provincial superior courts. (emphasis added)
>
> *R. v. Miller,* [1985] 2 S.C.R. 613 at p. 640-641; affd. *Gamble v. R.* ,[1988] 2 S.C.R. 595; *Dumas v. Lelerc Institute of Laval*, [1986] 2 S.C.R. 459; *Idziak v. Canada*, [1992] 3 S.C.R. 631

18. In *Miller*, this Court recognized that declining habeas corpus jurisdiction in favour of the general judicial review power of the Federal Court would improperly restrict access of federal penitentiary prisoners to habeas corpus based on the identity of the detaining authority. This Court held that there "cannot be one definition of the reach of habeas corpus in relation to federal authorities and a different one for other authorities."

> *R. v. Miller,* [1985] 2 S.C.R. 613 at p. 641

19. Repeatedly, in unanimous decisions in *Gamble*, *Dumas* and *Idziak*, this Court has held that where an applicant is entitled to apply for habeas corpus to contest the legality of a detention imposed by a federal authority, the superior court should not decline jurisdiction in favour of the general judicial review power in section 18 of the *Federal Court Act*.

20. In *Gamble*, the applicant sought habeas corpus on the grounds that her continued parole ineligibility had become unconstitutional because she had been sentenced under the wrong law. The Crown argued that even if habeas corpus jurisdiction existed, it should be declined in favour of judicial review in the Federal Court. This Court followed *Miller* and held that the prisoner was entitled to chose habeas corpus, notwithstanding any considerations of concurrent jurisdiction.

> The respondent in his written submissions asserts not only that the courts of Ontario do not have jurisdiction to entertain the appellant's application but, in the alternative, that the applicant must seek relief in the Federal Court. This alternative claim is without merit, in light of this court's recent decision affirming and upholding the traditional jurisdiction of provincial superior courts in *habeas corpus* matters.
>
> *Gamble v. R.*, [1988] 2 S.C.R. 595 at p. 635

21. In *Dumas*, this Court rejected the federal government's argument that habeas corpus to contest a parole decision should be declined in favour of judicial review pursuant to section 18 of the of the *Federal Court Act,* and again, relied on *Miller*.

> The jurisdictional issue was settled by this Court in *Miller*, supra, when LeDain, J. concluded at p. 626:
> ...a provincial superior court has jurisdiction to issue certiorari in aid of habeas corpus to review the validity of a detention authorized or imposed by a federal board commission or other tribunal as defined by s. 2 of the Federal Court Act...
>
> *Dumas v. Leclerc Institute of Laval*, [1986] 2 S.C.R. 459 at p. 462

17. In *Idziak*, this Court held that habeas corpus to contest the legality of an imminent detention under a warrant of surrender issued by the federal Minister of Justice in extradition proceedings should not be declined where the alternative was judicial review of the Minister's decision pursuant to section 18 of the *Federal Court Act*. Following *Miller*, this Court held that the identity of the Minister as a federal authority did not make the Federal Court a more appropriate forum

Idziak v. Canada, [1992] 3 S.C.R. 631

(iii.) This Court has never resiled from its position in Miller (Steele)

23. In the case at bar, the Court of Appeal relied on the reasons of Doherty, JA in *Spindler*, which interpreted the decision of this Court in *Steele* as having reversed *Miller*. In *Spindler*, Doherty held that habeas corpus jurisdiction should be declined based on the identity of the jailor as a federal authority:

> As I read *Steele*, *supra*, except in exceptional circumstances, a provincial superior court should decline to exercise its habeas corpus jurisdiction where the application is in essence, a challenge to the exercise of a statutory power granted under a federal statute to a federally appointed individual or tribunal. Those challenges are specifically assigned to the Federal Court under the Federal Court Act R.S.C.. 1985 c. F-7 s. 18, s. 28.
>
> Reasons for Judgement in *May v. Ferndale*, Appellants' Record at p. 77

24. It is submitted that the Court of Appeal erred in following *Spindler*, which flies in the face of *Miller* and is based on a misreading of *Steele*, which does not take into account the factual context of *Steele*, nor the subsequent clarification by this Court of *Steele* in *Idziak*.

25. The issue in *Steele* was not the proper forum in which to challenge the legality of detentions in federal penitentiaries. It was not a *Miller*-type case. The issue in *Steele* was whether a validly imposed indeterminate sentence had become unconstitutional by reason of the

applicant's continued incarceration notwithstanding that he posed no risk.

26. In *Steele*, the applicant had served 37 years of an indeterminate sentence commencing in 1953. He pleaded guilty to attempted rape and was declared a "criminal sexual psychopath". He was sentenced to five years for attempted rape to be followed by an indeterminate sentence of preventive detention. From 1953 he was incarcerated in penitentiaries, with brief periods on parole which were followed by suspension of parole and re-incarceration. Commencing in 1988, Steele stopped attending his annual parole reviews. Instead, he brought a habeas corpus application arguing that his continued detention violated s.12 of the Charter. Expert evidence was adduced before Paris,J. who found that Steele was no longer dangerous. He concluded that the length of confinement was "grossly disproportionate" in violation of s.12 and ordered Steele's unconditional release. The Court of Appeal agreed that the continued detention violated s.12 but expressed concern about Steele's unconditional release. It dismissed the appeal but varied the order " by declaring that the sentence of indeterminate imprisonment remains in effect and that the Crown is entitled to apply to the trial court at any time...for an order that the respondent be returned to custody ...." if he appears to represent a danger.

Steele v. Mountain Institution, [1990] 2 S.C.R. 1385

27. Steele's application was directed toward the termination of his indeterminate sentence, on the ground that it violated s. 12 of the *Charter* by reason of its duration. But the grounds of Steele's application were inconsistent with the decision of this Court in *Lyons. Lyons* held that the constitutionality of the indeterminate sentence, which might otherwise offend s. 12 by its duration, would be saved by the parole process, which must tailor the sentence to the prisoner's circumstances. Cory,J. expressly adverted to this problem and commenced his analysis in *Steele* by reference to *Lyons*:

> The analysis must begin with a reference to *Lyons*, supra. In that case the provisions of the Criminal Code pertaining to the sentencing and continued detention of dangerous offenders were challenged on the grounds that they contravened s. 12 of the Charter. La Forest, J. writing for the full court on this point, held that the imposition of an indeterminate sentence, without other safeguards, would be certain, at least occasionally, to violate s. 12 of the Charter. However, he found that the requirements of regular parole review of an offender's continuing detention ensured that the sentence would be tailored to fit the circumstances of the individual and the offence. As a result he found that these

sentencing provisions do not infringe s. 12 of the Charter.

Steele v. Mountain Institution, [1990] 2 S.C.R. 1385 at p. 1408
R. v. Lyons, [1987] 2 S.C.R. 309

28. Cory, J. disagreed with the approach taken by the judge of first instance and the British Columbia Court of Appeal because it undermined *Lyons*. Cory, J. held that the Steele's sentence itself was not unconstitutional, but that his continued incarceration pursuant to the sentence was cruel and unusual because of the failure of the Parole Board to properly tailor the sentence to his circumstances.

> ...If this position is correct it would mean that while the parole review process would work effectively in the vast majority of cases, there would be the occasional case in which even the most responsible and careful application of the parole review process could not prevent a continuing detention from becoming cruel and unusual punishment.
>
> I must with respect, differ from that conclusion. It seems to me to fly in the face of the decision of this court in *Lyons*, where this court observed at p. 363 that "the fairness of certain procedural aspects of a parole hearing may well be the subject of constitutional challenge, at least when the review is of the continued incarceration of a dangerous offender." *In my view the unlawful incarceration of Steele was caused, not by any structural flaw in the dangerous offender provisions, but rather by errors committed by the National Parole Board*. These errors are apparent upon a review of the record of Steele's treatment by the board over the long years of his detention. (emphasis added)

Steele v. Mountain Institution, [1990] 2 S.C.R. 1385 at p. 1410

29. The reluctance of Cory J in *Steele* to grant relief by habeas corpus was clearly to avoid a conflict with the decision in *Lyons*. Furthermore, although not articulated in the judgement, the termination of an indeterminate sentence should be avoided because it can be characterized as a collateral attack on the integrity of the sentence and as "circumven[ting] the ordinary appeal procedures established in the Criminal Code."

Gamble v. R., [1988] 2 S.C.R. 595 at p. 642

30. Moreover, in practical terms, ordering release on habeas corpus of a prisoner serving an indeterminate sentence, rather than through the parole process by the Parole Board, means that the provisions of the *Parole Act* (since replaced by the *Corrections and Conditional Release Act,*

S.C. 1992, c. 20) do not apply. Therefore, the prisoner would not be subject to conditions, nor to the parole suspension and revocation provisions in that Act.

31. It was in the context of deciding whether the initially valid indeterminate sentence had become unconstitutional that Cory, J. considered the errors committed by the Parole Board. Applying *Lyons,* just as it is the parole process which, in part, consitutionalizes the indeterminate sentence, errors in the parole process can render the manner in which the sentence is served unconstitutional if a low risk offender is not released on parole. To avoid the problem of terminating the sentence itself on habeas corpus, judicial review may be sought of the errors committed by the Parole Board. Cory, J. explained this in the controversial paragraph in *Steele*:

> It is necessary to make a further comment. As I have made clear above, the continuing detention of a dangerous offender sentenced pursuant to the constitutionally valid provisions of the Criminal Code will only violate s. 12 of the Charter when the National Parole Board errs in the execution of its vital duties of tailoring the indeterminate sentence to the circumstances of the offender. This tailoring is performed by applying the criteria set out in s.16(1) of the Parole Act. *Since any error that may be committed occurs in the parole review process itself, an application challenging the decisions should be made by means of judicial review from the National Parole Board decision, not by means of an application for habeas corpus. It would be wrong to sanction the establishment of a costly and unwieldy parallel system for challenging a parole board decision*. As well, it is important that the release of a long-term inmate should be supervised by those who are experts in this field. (emphasis added)
>
> *Steele v. Mountain Institution,* [1990] 2 S.C.R. 1385 at p. 1418

24. It is submitted that the above paragraph has been taken out of context and misread by the Court of Appeal. This paragraph has been interpreted by the Court of Appeal to mean that habeas corpus should not be brought to contest the legality of any form of detention of federal penitentiary prisoners. However, it is submitted that it is clear not only from the *Steele* factual context, but also from the context of the paragraph itself that Cory, J. is referring only to parole decisions made with respect to indeterminate sentences. The two sentences on which the Court

of Appeal relies in restricting habeas corpus jurisdiction are bracketed by sentences which specifically refer to the indeterminate sentence.

25. Although habeas corpus was available to Steele in the "highly unusual circumstances of his case" (length of time served, his age, risk posed), Cory, J. held it is preferable to review whether the parole board has erred in the execution of its "vital duties of tailoring the indeterminate sentence" on judicial review. Judicial review avoids the concern about whether habeas corpus is a collateral attack on the sentence, because, on judicial review the sentence will not be terminated and the prisoner will continue to be subject to the on-going supervision of the Parole Board for life.

26. Unfortunately, in the case at bar, and in *Spindler*, on which it relies, the "highly unusual circumstance" in which Steele was granted relief has become a condition precedent for all applications for habeas corpus by federal penitentiary prisoners. Ironically, although *Steele* in fact extended the scope of habeas corpus beyond *Miller*, it has been read by the Court of Appeal to exclude them from the traditional safeguard of their residual liberty guaranteed by *Miller*, *Gamble*, and *Dumas* and section 10(c) of the *Charter*.

(iv.) This Court has expressly confirmed its position in Miller post- Steele (Idziak)

27. In *Idziak*, an extradition case, decided two years after *Steele*, this Court was faced again with an argument that habeas corpus jurisdiction should be declined in favour of the general judicial review power in section 18 of the *Federal Court Act*.

36. Although the warrant of surrender issued by the Federal Minster of Justice could have been reviewed in the Federal Court, the applicant chose to apply for habeas corpus in the superior court of the province. Cory, J. upheld the applicant's right to chose the forum, and clarified that *Steele* did not reverse *Miller*. He observed that there were two lines of authority dealing with the proper forum where habeas corpus was sought in respect of a detention imposed by a federal authority. One was *Miller*, where the Court properly deferred to the applicant's

choice of habeas corpus to contest the legality of his confinement in a federal penitentiary, notwithstanding judicial review jurisdiction in the Federal Court:

> There seem to be two lines of authority dealing with his issue, which at first glance, appear divergent. The first line of authority includes the trilogy of *Miller*, *Cardinal* and *Morin*. Each of these cases dealt with an application for habeas corpus who had available as an alternative to the superior court, a review procedure in the Federal Court. *In those cases, this court accepted the decision of the applicant to seek the remedy in the provincial superior courts although it acknowledged that the relief could, as an alternative, be sought in the Federal Court.* (emphasis added)
>
> *Idziak v. Canada,* [1992] 3 S.C.R. 631 at p. 651-52

37. Cory,J. went on to explain the other line of authority, consisting of two kinds of cases in which the choice of forum should not be left to the applicant, because an alternative forum was more appropriate. Firstly, in immigration cases, jurisdiction may be declined because of a comprehensive scheme of review in the *Immigration Act* itself:

> In *Pringle* and *Pieroo*, the applicable statue (the *Immigration Act*, R.S.C. 1952, c. 325, and later R.S.C. 1970, c. I-2) set out a procedure for review. In both cases, it was held that habeas corpus should be denied since the statute provided a complete, comprehensive and expert review.
>
> *Idziak v. Canada*, [1992] 3 S.C.R. 631 at p. 652

37. The other kind of case described by Cory,J was *Steele*, where a successful habeas corpus application, unlike judicial review, would affect the "ultimate disposition of the case." [i.e. the termination of the sentence] Explaining *Steele*, he said:

> If the applicant had sought judicial review of the National Parole Board's decision and succeeded, the Board could still have maintained, through the parole system, supervision over the inmate. In contrast, if he was successful in obtaining a writ of habeas corpus, the inmate would have to be released without any supervision. It was only in light of the very lengthy period of Steele's incarceration that the court agreed to grant a writ of habeas corpus. However, the order fixed special conditions to his release.
>
> *Idziak v. Canada*, [1992] 3 S.C.R. 631 at p. 652

38. The appellants in this case have a *Miller*-type claim and neither the particular features of

the immigration cases nor *Steele* are present. Firstly, there is no comprehensive statutory route of appeal to a court in the *Corrections and Conditional Release Act* as there is in the immigration cases. Secondly, the Appellants are not seeking to terminate or alter their sentences as was the case in *Steele*. Cory,J.'s analysis in *Idziak* is equally applicable to this appeal:

> The factors cited in favour of refusal to hear an application for habeas corpus which appeared in the *Pringle, Peiroo* and *Steele* cases are not present here. Parliament has not provided a comprehensive statutory scheme of review, tailored to the extradition process, comparable to the immigration scheme referred to in *Pringle* and *Peiroo*. Unlike the *Steele* case, proceedings by way of habeas corpus will not affect the ultimate disposition of the case.
>
> *Idziak v. Canada*, [1992] 3 S.C.R. 631 at p. 653

39. It is submitted that *Idziak* makes it abundantly clear that this Court has continued to apply *Miller,* and does not recognize *Steele* as a reversal of that decision*,* nor that the practice of declining habeas corpus jurisdiction in immigration cases has any impact on *Miller.*

E. There is no comprehensive statutory scheme of appeal to a court as in immigration cases

37. The thrust of the Respondents' argument is that *Steele* has severely curtailed *Miller*, and that habeas corpus jurisdiction should be declined except in highly unusual circumstances. In addition the Respondents argue that *Pieroo* and *Reza* apply because the comprehensive statutory scheme of review to a court of record in the *Immigration Act* can be analogized to the internal prison grievance process. This argument is tantamount to placing habeas corpus beyond the reach of federal penitentiary prisoners.

(i.) The internal grievance process is an internal process only

38. The internal grievance process set out in the *Corrections and Conditional Release Act* consists in the review of decisions made by prison authorities by other prison authorities.

39. Section 90 of the *Corrections and Conditional Release Act* provides that prisoners may grieve decisions of the Correctional Service of Canada on any matter within the jurisdiction of the Commissioner. Sections 74-82 of the *Corrections and Conditional Release Regulations* provides that a prisoner "who is dissatisfied with an action or decision by a staff member" may

submit a complaint to the staff member's supervisor. If the complaint is not resolved to the satisfaction of the complainant, he may submit a grievance to the warden of the institution, or if the warden's action is the subject of the grievance, to the head of the region. That decision may be appealed to the Commissioner.

40. By policy, the Commissioner of Corrections has delegated her authority as the final decision-maker with respect to grievances under section 74 of the *Corrections and Conditional Release Regulations* to her subordinate, the Assistant Commissioner, Policy, Planning and Coordination.

Commissioner's Directive 081 "Grievance Procedure," paras.18-19

(ii.) The internal prison grievance process cannot be equated with the comprehensives statutory route of appeal to a court of record in the Immigration Act

41. The pivotal point in the immigration cases is the statutory creation of a court of record to which decisions of immigration authorities may be appealed. The existence of that specialized court of record is the reason why the *Immigration Act* offers an adequate substitute for the habeas corpus jurisdiction of a superior court. Nothing of the kind has been established by the *Corrections and Conditional Release Act* where reviews of decisions are conducted by other staff members:

(a) the prison authorities identified in section 74 of the *Corrections and Conditional Release Regulations* do not exercise the jurisdiction of a superior court judge.

(b) there are no remedies set out in the *Corrections and Conditional Release Act* or *Regulations* and there are no articulated grounds upon which grievances may be reviewed;

(c) the decisions with respect to grievances are not legally enforceable;

(d) in cases like the case at bar and *Spindler*, where the legality of a Commissioner's policy is contested, it cannot reasonably be expected that the final decision-maker, the Assistant

Commissioner, Policy Planning and Coordination, who is subordinate to the Commissioner, could fairly and impartially decide the issue;

(e) the Assistant Commissioner, Policy Planning and Coordination is not a court of competent jurisdiction for the purpose of making an order pursuant to section 24(1) of the *Charter*.

42. The *Immigration Act* in force at the time of *Pieroo* provided for an appeal from decisions of immigration authorities to the Appeal Division, a court of record (s. 71.4(1)).The Appeal Division was invested with all the powers of a superior court of record, including the jurisdiction to issue summons, administer oaths and enforce its orders:

> The Appeal Division has, as regards the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record ...
>
> *Immigration Act*, *1976,* S.C.1988, c. 35, s. 71.4
> *Pieroo v. Canada (Min. of Employment and Immigration)* (1989), 69 O.R.(2d) 253 (C.A.)

37. The *Immigration Act, 1976* also provided for a detailed procedure for the manner in which applications and appeals may be brought to the Federal Court Trial Division and the Federal Court of Appeal.

> *Immigration Act, 1976*, S.C. 1988, c. 35, ss. 83.1-85.1

38. Unlike in immigration matters, and contrary to the Respondent's argument, Parliament has not expressed its intention in the *Corrections and Conditional Release Act* to have decisions made by federal prison authorities subject to a comprehensive statutory route of appeal. Aside from the internal grievance process, the *Corrections and Conditional Release Act* is completely silent on routes of review or appeal from decisions made by prison authorities.

39. Contrary to the Respondents' submissions, *Reza* has no application to this appeal. *Reza* was a classic case of forum shopping in which the applicant had exhausted his statutory remedies and routes of appeal pursuant to the *Immigration Act*. Only then did he apply to the Ontario

Court (General Division) for declaratory relief. This Court held that the Ontario Court (General Division) had properly declined jurisdiction. In *Reza*, this Court confirmed its ruling in *Idziak*, that jurisdiction in immigration matters should be declined in favour of the comprehensive statutory scheme of appeal and review in the *Immigration Act*.

> Ferrier J. properly exercised his discretion on the basis that Parliament had created a comprehensive scheme of review of immigration matters and the Federal Court was an effective and appropriate forum.
>
> *Reza v. Canada (Min. of Employment and Immigration)*, [1994] 2 S.C.R. 394 at p. 405

F. Judicial Review in the Federal Court is not a substitute for Habeas Corpus

(i). It is time-consuming and unwieldy

50. The remedial process suggested by Doherty,J.A in Spindler, followed by the Court of Appeal in this appeal, places an undue burden on federal penitentiary prisoners. The process is time-consuming and cumbersome, and ultimately defeats the right of penitentiary prisoners to have the legality of forms of detention adjudicated in a timely manner.

> *Spindler v. Warden of Millhaven Institution* (2003), 15 C.R.(6th) 183 at p. 190-91

51. According to the process suggested by Doherty, JA, a federal penitentiary prisoner will have to leap the following hurdles *before* applying for habeas corpus:

- he must first apply for judicial review in the Federal Court, where Doherty, JA found there was "some evidence of considerable delay" (*Spindler*, supra, at p. 190)

- he must apply for and have been unsuccessful on an application for an expedited hearing
- Federal Court jurisprudence requires that prisoners exhaust the internal grievance process before applying for judicial review *(Condo v. Canada(A.G.)* (F.C.A.) [2003] FCJ No. 310

- in many cases, as where the challenge is to the legality of a decision or policy made by the Commissioner, the internal grievance process will be *pro forma* only

-the grievance process has been severely criticized for failure to provide responses which comply with the law and is replete with delay.

> Appellants' Factum, paras. 57-59

(ii.) The Federal Court has no special expertise in adjudicating liberty issues

52. The superior courts of the province exercise criminal law jurisdiction which requires that they adjudicate matters affecting the legality of detention in matters such as bail, culpability, sentencing and extradition. They also have jurisdiction over restrictions on liberty in provincial jails and psychiatric hospitals. The Federal Court does not exercise a similar jurisdiction and there is no reason to believe that it has acquired any special expertise over matters affecting the legality of detentions and restrictions on liberty.

(iii.) On habeas corpus, the burden is on the jailor to justify the detention.

53. Once an applicant has satisfied the Court that there is reason to doubt the legality of his detention, Professor Sharpe (as he then was) notes that the "legal burden rests with the respondent." He cites *Ex Parte Ashan*, an immigration detention case, as the "leading case on the burden of proof in habeas corpus cases". In *Ex Parte Ashan*, Chief Justice Parker stated:

> We are here inquiring into a claim by the executive to detain in custody a British subject, and apart from authority I should myself have thought that in the end the burden in such a case must be on the executive to justify that detention. I say "at the end" because, of course, nothing need be done in the first instance other than to make a good return valid on its face. But if the applicant for the writ challenges that return, as for example claiming that there was no jurisdiction in the executive officer to make the order which resulted in the detention, it would, I think, be for the executive to negative that challenge by proving that jurisdiction in fact existed.
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> *R. v. Governor of Brixton Prison, Ex parte Ashan*, [1969] 2 Q.B. 222 (Div.Ct.) at p. 231
> Sharpe, *The Law of Habeas Corpus*, 2nd Ed., supra, at p. 86-88

54. *Ex Parte Ashan* was subsequently accepted as a rule of general application in habeas corpus cases by Lord Scarman in *Ex Parte Khawaja*, which Professor Sharpe described as a decision which "fully and properly restores the remedy as an important guarantee of personal liberty."

> *Reg. v. Home Secretary, Ex parte Khawaja et al.*, [1984] 1 A.C. 74, at p. 112
> Sharpe, *The Law of Habeas Corpus*, 2nd Ed., supra, Preface, and at p. 88.

55. In *Ex parte Khawaja*, Lord Scarman, noting that the issue of liberty is a "grave matter" held that the respondent must meet the "preponderance of probabilities" standard of proof and that "the court will require the high degree of probability which is appropriate to what is at stake."

> *Reg. v. Home Secretary, Ex parte Khawaja et al.,* [1984] 1 A.C. 74, at p. 112-114
> See also *Tan Te Lam. v. Tai A Chau Detention Centre*, [1996] 2 W.L.R. 863 (PC) at p. 874-876; *Reg. v. Governor of Pentonville Prison, ex p. Azam* , [1974] A.C. 18 at p. 32; Wade and Forsyth, *Administrative Law*, 7th Ed., 1994 at p. 335-6

56. Accordingly, so long as a prisoner has raised a legitimate ground upon which to question the legality of the deprivation of liberty, the onus is on the respondent to justify legality, and any factual issues must be proven to a "high degree of probability."

(iv.) Habeas corpus in the superior court is locally accessible

57. The importance of access by federal penitentiary prisoners to the superior court of the province, the traditional safeguard of liberty, as asserted by *Miller,* was again emphasized by Wilson, J. for the majority of this Court in *Gamble.* She dismissed as without merit the argument by the Attorney General of Canada that the prisoner should seek relief in the Federal Court.

> This court has previously recognized 'the importance of the local accessibility of this remedy' of *habeas corpus* because of the traditional role of the court as 'a safeguard of the liberty of the subject': *R. v. Miller* [1985] 2 S.C.R. 613 at 524-5, 49 C.R.(3d) 1, 16 Admin. L.R. 184, 23 C.C.C.(3d) 97, 24 D.L.R. (4th) 9, 14 O.A.C. 33, 63 N.R. 321 [Ont.]. Relief in the form of habeas corpus should not be withheld for reasons of mere convenience.
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> *Gamble v. R.* [1988] 2 SCR 595 at p. 635
> *R. v. Miller,* [1985] 2 S.C.R. 613 at p. 624

(v) the judicial review remedies provided for in s. 18 of the Federal Court Act are discretionary and do not issue as of right

58. Even after a litigant establishes a violation of law, jurisdiction or fairness, on judicial review, the Federal Court can deny relief on discretionary grounds.

D. Mullan. *Administrative Law* (Irwin, Toronto:2001) at p. 481