NOVA SCOTIA COURT OF APPEAL

Citation: *Gogan v. Canada (Attorney General)*, 2017 NSCA 4

Date: 20170124
Docket: CA 439891
Registry: Halifax

Between:

Dylan Robert Douglas Gogan

Appellant

v.

Attorney General of Canada and Warden (Springhill Institution)

Respondent

Judges:	The Honourable Justice Van den Eynden The Honourable Justice J.E. (Ted) Scanlan (dissenting)
Appeal Heard:	June 1, 2016, in Halifax, Nova Scotia
Subject:	*Habeas corpus*/Deprivation of residual liberty/Initial security classification
Summary:	The appellant, Mr. Gogan, filed a *habeas corpus* application. The hearing was bifurcated. The focus of the hearing was on Mr. Gogan's obligation to establish a deprivation of his liberty. The application judge found that in these circumstances, where Mr. Gogan underwent an initial security classification assessment, there was no deprivation of residual liberty. He found that only the Federal Court had the power to quash decisions of this nature and craft a remedy. The application judge dismissed the application without assessing the merits of Mr. Gogan's case.

Issues:

(1) Was the application judge correct in finding that in the context of an initial security classification it was not open to the appellant to argue there was a deprivation of his residual liberty?

(2) Was the application judge correct in concluding that only the Federal Court had the authority to quash an initial security classification and grant a remedy?

Result:

The majority concluded the appellant satisfied his burden to establish a deprivation of liberty and allowed the appeal. There was a substantial change in the appellant's confinement conditions which resulted in a further deprivation of his residual liberty. Further, the appellant raised a legitimate concern upon which to challenge his security classification. As the hearing was bifurcated, the merits of whether the classification was lawful was not adjudicated by the application judge; nor was the record complete. Accordingly, the matter is remitted back to application judge for determination on the merits.

Scanlan J.A. (dissenting) would have dismissed this appeal because *habeas corpus* is not a remedy available to inmates at the classification stage as no residual liberties are affected. In the context of this case, Mr. Gogan is attempting to use *habeas corpus* to do what is more properly the subject of a judicial review in the Federal Court.

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Respondent

Judges:	Beveridge, Scanlan and Van den Eynden, JJ.A.
Appeal Heard:	June 1, 2016, in Halifax, Nova Scotia
Held:	Appeal allowed without costs, per reasons for judgment of Van den Eynden, J.A.; Beveridge, J.A. concurring; Scanlan, J.A. dissenting
Counsel:	Claire McNeil, for the appellant Sarah Drodge, for the respondent

Reasons for judgment:

Introduction

[1] In the court below, Mr. Gogan filed a *habeas corpus* application. The Honourable Justice Jeffrey Hunt heard the application and rendered an oral decision (unreported) on May 11, 2015. The hearing was bifurcated, meaning the focus of the hearing was on Mr. Gogan's obligation to establish the prerequisite deprivation of his liberty. Had he been successful, the determination of whether the impugned decision which deprived him of his liberty was reasonable or tainted by procedural unfairness would be determined on a subsequent hearing date.

[2] The application judge found that in these circumstances, where Mr. Gogan underwent an *initial* security classification assessment, there was no deprivation of his residual liberty. He further found that only the Federal Court had the power to quash decisions of this nature and craft a remedy. As a result, Justice Hunt dismissed the application without assessing the full merits of Mr. Gogan's case.

[3] Can a federal inmate challenge their initial security classification (as opposed to an increase in their existing security classification) by way of a *habeas corpus* application before a provincial superior court? Or, because of it being an initial classification, must an inmate pursue an internal grievance and/or bring his challenge of this administrative decision before the Federal Court by way of judicial review? These are the critical questions raised by Mr. Gogan on appeal. The Supreme Court of Canada has not yet dealt with *habeas corpus* in the specific context of an inmate's challenge to their initial classification.

Background

[4] Mr. Gogan was convicted and sentenced to two years and six months for break and enter with intent to commit an indictable offence. His federal sentence commenced on October 24, 2014. However, he did not enter the federal prison system until March 13, 2015. In the interim, he remained on remand in a provincial correctional institute (Central Nova Scotia Correctional Facility in Burnside) because he was facing additional outstanding charges. Although Mr. Gogan's physical presence in the federal prison system was delayed, his offender intake assessment process got under way while he was under provincial remand.

[5] This was not Mr. Gogan's first federal prison term. He had served his prior time and was re-entering. Although his institutional history is a consideration, he goes through the intake and classification process afresh, so to speak.

[6] When an inmate from Atlantic Canada first enters the federal system, they are initially housed in the Regional Reception Centre (RRC) which is a separate detention unit contained within the Springhill Institution. The Springhill Institution is a medium security institution. In Mr. Gogan's case, he arrived at the RRC on March 13, 2015. Inmates housed in the RRC enjoy considerably less freedom than the general medium security inmate population at Springhill.

[7] Inmates remain in the RRC unit until they are assigned a security classification. If assigned a minimum security classification the inmate is then transferred to a minimum security institution. If assigned a medium security classification the inmate (assuming the inmate remains at Springhill) is released into the general population. If the inmate is assigned a maximum security classification, as was the case with Mr. Gogan, the inmate is removed from the RRC and held in administrative segregation (solitary confinement) pending transfer to a maximum security institution. In Atlantic Canada, the only maximum security institution is Atlantic Institute, located in Renous, New Brunswick.

[8] Mr. Gogan was placed in solitary confinement on March 31, 2015 and remained there until his involuntary transfer to Atlantic Institute. There was considerable lag time in Correctional Service of Canada (CSC) effecting his transfer. His transfer date is not in the record; however, as at the hearing date on May 11, 2015, CSC continued to hold Mr. Gogan in solitary confinement. He was obviously transferred sometime after May 11, 2015, and he was housed at Atlantic Institute at the time of his appeal hearing.

[9] In the Springhill Institution, an inmate's placement in solitary confinement (following a maximum security classification) happens as a matter of course. CSC maintains that once an inmate is classified as "maximum security" they are no longer suitable even to remain at the RRC pending transfer to another institution; hence their immediate placement in solitary confinement. CSC's position is that the Springhill Institution does not have the infrastructure in place to manage the risks posed by maximum security offenders. Other than the above blanket statement, no reasons were given as to why Mr. Gogan could not have remained at the RRC pending transfer.

[10] Mr. Gogan asserted his classification decision was unlawful and caused a deprivation of his liberty. He claimed CSC relied on inaccurate information, and he was denied procedural fairness. He explained that during his offender assessment process, he was initially identified as being a medium security risk. That aligned with his first custody rating scale (CRS). The CRS is a standard computerized security classification tool used in assessing an inmate's appropriate level of security and penitentiary placement recommendations. Although an important tool, it is not determinative. The judgment of corrections staff is also an important component in the process.

[11] Daniel Harroun was Mr. Gogan's parole officer and the prison official responsible for completing his offender intake assessment, which included completion of Mr. Gogan's CRS. After the first CRS was completed, Mr. Harroun received information about a shoving incident Mr. Gogan had with a corrections officer while being held in the provincial institution (Burnside). This information was cryptic. Based on this limited information, he categorized the occurrence as Mr. Gogan having committed a "serious assault" against a corrections officer. He did so without confirming with firsthand sources that his characterization appropriately matched what actually occurred.

[12] Mr. Harroun reran the CRS after inputting his own interpretation of this new information. The resulting score led to the appellant's maximum security classification. The information about the Burnside incident was the tipping point. In his decision, the application judge appropriately pointed out that it was open to CSC to consider new evidence respecting Mr. Gogan's conduct during the classification process and rerun a second CRS based on new information. Mr. Gogan's complaint was not with CSC's right to consider new information. Rather, he argues the information itself was not correct and CSC failed to take appropriate steps to confirm its accuracy.

[13] During his classification process, Mr. Gogan vehemently denied assaulting a corrections officer and repeatedly pressed his probation officer and the warden to follow up with the provincial institute (Burnside) and obtain the correct details. From the record, it appears little effort was made by CSC to get the details of this critical information. Mr. Gogan says CSC failed in its obligation to ensure that this critical information, which CSC relied upon, was as accurate, up to date and complete as possible. (See s. 24(1) *Corrections and Conditional Release Act,* S.C. 1992, c. 20 (*CCRA*).) Further, Mr. Gogan complains that CSC's failure to get this information and disclose it to him, rendered him unable to properly respond.

[14] The RRC restrictions are relevant to the determination of whether Mr. Gogan experienced a deprivation in liberty as a result of his initial classification and resulting placement in segregation/solitary confinement. During the hearing Daniel Harroun gave evidence respecting the confinement terms in the RRC unit. He explained that the RRC unit is a separate unit, and even within the unit, there are three separate ranges where inmates are housed. These separate ranges are important if there are incompatibility issues among the inmates in the RRC. It is not a classified unit (in the sense of minimum, medium or maximum); however, confinement conditions in the RRC are more restrictive than those found in the general medium security inmate population. Mr. Harroun explained that RRC inmates have less freedom to move and associate. For example: RRC inmates are not permitted to socialize or mix with the general inmate population; they have less access to programs or work opportunities within the prison because their movement is restricted; they are subject to a higher level of supervision than the general inmate population; and they are permitted less time outside of their cells.

[15] Mr. Gogan filed his *habeas corpus* application on April 8, 2015. He was self-represented in the court below. The judge conducted a timely pre-hearing conference on April 15, 2015 to set hearing dates and address procedural matters. During this conference, counsel for the Crown informed the judge it would not concede a deprivation of liberty resulted from Mr. Gogan's classification as a maximum security offender. The Crown contended that Mr. Gogan could not challenge his initial classification in a provincial superior court. The Crown said an initial classification did not equate to a deprivation of liberty, and further, there was no remedy available, as technically, there was no prior and lower security classification to which the court could return Mr. Gogan. Crown counsel labelled its position as a preliminary jurisdictional issue and advised the judge of the Crown's intention to argue that Mr. Gogan's complaint fell within the exclusive jurisdiction of the Federal Court. Absent the Crown's concession on deprivation arising from the classification decision, it was up to Mr. Gogan to prove (on a balance of probability) a deprivation of his residual liberty.

[16] During the pre-hearing conference, the Crown requested and got a bifurcated proceeding wherein the application judge restricted the issues to be determined. The focus of the hearing was on whether Mr. Gogan could meet his burden of establishing a deprivation of liberty resulted from his initial security classification. The Crown further indicated that should the application judge find a deprivation of liberty, the assessment of whether the classification decision was lawful would be

for another day, and the Crown intended to adduce supplemental evidence at the next hearing.

[17] In his oral decision, delivered on May 11, 2015, the application judge found no deprivation of liberty could be established in the context of an initial security classification, as there was no available remedy. Mr. Gogan's application was dismissed.

Issues

[18] The parties disagreed on the scope of issues that should be before this Court. Mr. Gogan requested that this Court conduct the merit assessment respecting the reasonableness/lawfulness of the initial classification decision and declare his maximum security classification null and void. The Crown strenuously argued this merit assessment should not be determined by this Court. The Crown says that to do so in these circumstances (absence of a complete record due to the bifurcated nature of the proceedings and no adjudication in the court below) would be highly prejudicial to the respondent. Although the evidence presented by both the Crown and Mr. Gogan before Justice Hunt strayed into the decision-making process and the concerns raised respecting procedural fairness, it is clear that the application judge never adjudicated whether Mr. Gogan had raised a legitimate issue upon which to challenge the classification decision or whether the decision itself was reasonable/lawful. I agree with the Crown. I decline to consider the merits.

[19] I frame the issues before this Court as follows:

1. Was the application judge correct in finding that in the context of an initial security classification it was not open to the appellant to argue there was a deprivation of his residual liberty?

2. Was the application judge correct in concluding that only the Federal Court had the authority to quash an initial security classification and grant a remedy?

Standard of Review

[20] If a provincial superior court improperly exercises or declines to exercise *habeas corpus* jurisdiction, this constitutes an error of law and the applicable standard of review is correctness. (See *May v. Ferndale Institution*, 2005 SCC 82.)

Analysis

[21] Essentially, the issues to be determined raise two questions. First, can a deprivation of residual liberty be established in the context of an initial classification context? Second, is there concurrent jurisdiction? I will address both issues together because it is evident that these issues are inextricably interrelated in the judge's reasons. The application judge's decision is brief (18 paragraphs). He sets out his reasons for not entertaining Mr. Gogan's *habeas corpus* application on its merits in these three paragraphs:

> [14] After having reviewed all the case law and material cited by both sides, and I have looked at the cases referenced by both sides and certainly by Mr. Gogan, I am persuaded by the rationale in the ***Wood v. Atlantic Institution***, 2014 NBQB 135 decision of Justice Walsh**.** I find that in this instance Mr. Gogan cannot satisfy his burden under the two part *habeas corpus* test as no deprivation of residual liberty has occurred as a result of his classification. The Crown today, verbally and in writing, have said they think the only avenue – they are not inviting Mr. Gogan to do it – but they are saying "if" there is a remedy, it would be within the Federal Court jurisdiction. It is not through *habeas corpus.*
>
> [15] On a *habeas corpus* application a provincial superior court cannot get involved in crafting a resolution**.** *Habeas corpus* is a powerful tool and one which the case law clearly directs that I must exercise my discretion when called upon in appropriate circumstances. In this case, however, there is a jurisdictional issue. The Federal Court has power over quashing decisions of this nature and crafting remedies**.** They have the power even to order the manner in which a security classification or reconsideration could take place. That is simply not the scope of a *habeas corpus* application in this context.
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> [16] I state, again, that I am persuaded by Justice Walsh's reasoning which asked "What remedy could there be?" Under a classic *habeas corpus* analysis I am to release someone to their "previous level of liberty". Well this previous level of liberty does not exist here. We cannot have a situation where Mr. Gogan exists in some sort of intake limbo**.** The very fact that we know that is impossible, reveals the correctness of Justice Walsh's analysis. There may be a remedy that can be sought but I am persuaded it is not in this forum.
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> [Emphasis added]

[22] The application judge saw the lack of a *previous* security classification as a roadblock to entertaining Mr. Gogan's *habeas corpus* application. He reasoned that there was no "previous level of liberty" to which he could return Mr. Gogan. This perceived lack of remedy lead the application judge to conclude that this was

not a situation where a provincial superior court had jurisdiction. Rather, the decision Mr. Gogan wanted to attack and the remedy he sought, fell within the jurisdiction of the Federal Court.

[23] In my view, the application judge made two material errors. He was wrong in concluding there was no remedy available within the jurisdiction of a provincial superior court. This error is entangled with his conclusion that there was no deprivation of liberty. The application judge simply relied on his perceived lack of remedy to conclude there could be no deprivation of liberty. He bypassed any assessment, based on the evidence before him, of whether Mr. Gogan's residual liberty was impacted by the initial security classification. His failure to conduct a proper deprivation analysis was also an error of law.

[24] The application judge's reliance on *Wood v. Canada (Atlantic Institution),* 2014 NBQB 135 is misplaced. *Wood* involved an inmate's challenge to a security classification review decision which maintained the inmate's same security classification. In *Wood*, Walsh J. identified difficulties with any potential remedy, as the previous level of security for which he could return the inmate was the same as that which he challenged. Walsh J. found that a continuation of an existing classification did not amount to a deprivation of liberty, and, thus, the court had no jurisdiction to proceed further, as the inmate did not get over the first step in advancing his *habeas corpus* application. (In case he was wrong on this determination, the judge went on to decide the application on its merits and found the decision to be reasonable.) *Wood* is not authority for a finding that there was no deprivation of liberty or available remedy in Mr. Gogan's circumstances. The two cases present entirely different circumstances.

[25] On appeal, the Crown also relied on *Thompson v. Atlantic Institution (Warden),* 2015 NBQB 216, which involved an inmate's challenge to his initial classification. In *Thompson*, Ferguson J. relied on Justice Hunt's reasoning and reached a similar conclusion respecting jurisdiction. With respect, in *Thompson,* Justice Ferguson followed the same narrow reasoning path as the application judge did in this case.

[26] I will expand upon the errors made by the application judge, explain how Mr. Gogan's liberty was deprived and set out the available remedy. However, before doing so, I will summarize the key overarching legal principles respecting *habeas corpus.*

Legal Principles

[27] The importance of *habeas corpus* and an inmate's choice of forum, when a deprivation of liberty is experienced, is well-settled in law. However, the circumstances of what constitutes a "deprivation of liberty" has not been exhaustively set out in the jurisprudence. Nor, in my view, can it be. It is clear the Supreme Court of Canada has directed that provincial superior courts should guard against unduly narrowing the scope of *habeas corpus*—which is a constitutionally protected right.

[28] As LeBel and Fish JJ., writing for the majority in *May* stated:

> [22] *Habeas corpus* is a crucial remedy in the pursuit of two fundamental rights protected by the *Canadian Charter of Rights and Freedoms* : (1) the right to liberty of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (s. 7 of the *Charter*); and (2) the right not to be arbitrarily detained or imprisoned (s. 9 of the *Charter*). Accordingly, the *Charter* guarantees the right to *habeas corpus:* ….
> …
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> [44] To sum up therefore, the jurisprudence of this Court establishes that prisoners may choose to challenge the legality of a decision affecting their residual liberty either in a provincial superior court by way of *habeas corpus* or in the Federal Court by way of judicial review. As a matter of principle, a provincial superior court should exercise its jurisdiction when it is requested to do so. *Habeas corpus* jurisdiction should not be declined merely because another alternative remedy exists and would appear as or more convenient in the eyes of the court. The option belongs to the applicant. Only in limited circumstances will it be appropriate for a provincial superior court to decline to exercise its *habeas corpus* jurisdiction. For instance, in criminal law, where a statute confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be, *habeas corpus* will not be available (i.e. *Gamble*). Jurisdiction should also be declined where there is in place a complete, comprehensive and expert procedure for review of an administrative decision (i.e. *Pringle* and *Peiroo).*
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> ….
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> [50] Given the historical importance of *habeas corpus* in the protection of various liberty interests, jurisprudential developments limiting *habeas corpus* jurisdiction should be carefully evaluated and should not be allowed to expand unchecked. The exceptions to *habeas corpus* jurisdiction and the circumstances under which a superior court may decline jurisdiction should be well defined and limited. …

[29] In *Mission Institution v. Khela*, 2014 SCC 24, LeBel J. referred to *R v. Miller*, [1985] 2 S.C.R. 613 and said:

> [34] Le Dain J. also held in *Miller* that relief in the form of *habeas corpus* is available in a provincial superior court to an inmate whose "residual liberty" has been reduced by a decision of the prison authorities, and that this relief is distinct from a possible decision to release the inmate entirely from the correctional system (*Miller*, at p. 641). Decisions which might affect an offender's residual liberty include, but are not limited to, administrative segregation, confinement in a special handling unit and, as in the case at bar, a transfer to a higher security institution.

[30] In *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459, the Supreme Court of Canada succinctly identified three categories of cases in the correctional law realm, where an inmate's liberty may be compromised. Lamer J. writing for the court said:

> [11] Thus, with respect, the lower courts erred in holding that *habeas corpus* was available to attack only the initial warrant of committal. *Habeas corpus* is available to challenge an unlawful deprivation of liberty. In the context of correctional law, there are three different deprivations of liberty: the initial deprivation of liberty, a substantial change in conditions amounting to a further deprivation of liberty, and a continuation of the deprivation of liberty. …

Mr. Gogan did not challenge his incarceration/placement in the RRC, which was his initial deprivation of liberty. The circumstances he challenges fall within the second category, this being "a substantial change in conditions amounting to a further deprivation of liberty."

[31] In *Khela*, the Supreme Court of Canada reiterated the required elements to advance a successful *habeas corpus* application. It is a stepped analysis with a shifting burden. Writing for the Court, LeBel J. said:

> [30] To be successful, an application for *habeas corpus* must satisfy the following criteria. First, the applicant must establish that he or she has been deprived of liberty. Once a deprivation of liberty is proven, the applicant must raise a legitimate ground upon which to question its legality. If the applicant has raised such a ground, the onus shifts to the respondent authorities to show that the deprivation of liberty was lawful (*citations omitted*.)

[32] In *Khela*, the Supreme Court of Canada confirmed that an inmate may challenge the reasonableness of their deprivation of liberty which resulted from a federal administrative decision. The Court said:

> [72] … "Reasonableness" is therefore a "legitimate ground" upon which to question the legality of a deprivation of liberty in an application for *habeas corpus***.**
>
> **[. . .]**
>
> [74] As things stand, a decision will be unreasonable, and therefore unlawful, if an inmate's liberty interests are sacrificed absent any evidence or on the basis of unreliable or irrelevant evidence, or evidence that cannot support the conclusion, although I do not foreclose the possibility that it may also be unreasonable on other grounds. Deference will be shown to a determination that evidence is reliable, but the authorities will nonetheless have to explain that determination.

[33] As noted, the issue before the application judge was whether Mr. Gogan could get over the hurdle of establishing a deprivation of his liberty resulted from his initial classification decision (Step 1 in a *habeas* application). Whether Mr. Gogan raised a legitimate basis upon which to challenge the decision and the reasonableness/lawfulness of the classification decision itself (Step 2) was not decided during the May 11, 2015 hearing.

[34] I have had the benefit of reviewing my colleague's reasons. A significant portion of Justice Scanlan's dissenting reasons are devoted to analyzing whether the classification decision was reasonable/lawful. He concludes, or at least strongly suggests, it was (¶¶ 102, 105, 106). For the reasons set out at ¶ 18, I hold the view that any Step 2 analysis is not properly before this Court. It is for the application judge to determine whether there is merit to Mr. Gogan's complaints of procedural fairness and whether the classification decision is unreasonable, and to do so once the record has been supplemented, as was the intent should Mr. Gogan's application move on to the Step 2 analysis. Although the Crown has been vocal about the need to supplement the record, this may also be a concern to Mr. Gogan given the restricted nature of the hearing in the court below. Mr. Gogan must also be given a full and fair opportunity to put his best foot forward during the Step 2 analysis.

Deprivation of Liberty Error

[35] I return to how the application judge erred in finding there could be no deprivation of liberty in the context of an initial security classification. Whether his initial classification resulted in a deprivation of residual liberty was the central issue before the judge. Although he concluded that Mr. Gogan did not satisfy his burden, this conclusion was based on his finding there was no available remedy that a provincial superior court could grant if the decision was found to be

unlawful. His error on remedy led to his error on jurisdiction. The judge failed to conduct the required analysis of the change in confinement terms and whether, on the evidence before him, Mr. Gogan suffered a deprivation of liberty.

[36] Whether the initial classification decision resulted in a deprivation of Mr. Gogan's residual liberty is the issue the parties have brought to this Court for determination. This point was fully argued by both sides in the court below and unlike the sufficiency of the record respecting the Step 2 analysis, neither party raised any concern with the sufficiency of the record such that this Court could not make this determination. Unlike my colleague, I am satisfied the record is sufficient to permit this Court to conduct a proper Step 1 analysis.

[37] I see the deprivation analysis as a question of mixed law and fact. In order to understand the error made by the application judge, a review of Mr. Gogan's confinement terms and the changes he experienced as a result of the impugned classification decision is required. I will review the evidence contained in the record and apply the noted legal principles set out in *Miller*, *Dumas*, *May* and *Khela*.

[38] In the court below, although it had every opportunity to do so, the Crown did not lead evidence or argue that the terms of confinement in the RRC were equivalent to or greater than a maximum security penitentiary or that Mr. Gogan would experience an increase in his liberty upon leaving the RRC and going to Atlantic Institute. Other than a hint during oral submissions before this Court, the Crown did not argue that the terms of confinement at the RRC at the Springhill Institute were equal to or greater than those found in a maximum security facility. (Such as the case in *L.V.R. v. Mountain Institution (Warden)*, 2014 BCSC 1998, aff'd 2016 BCCA 467 where the confinement terms at the specific reception centre in the British Columbia federal penitentiary were found to be akin to those found in a maximum security penitentiary.) Notwithstanding this, my colleague suggests that perhaps the confinement terms at the RRC are more restrictive than those Mr. Gogan might experience in a maximum security institution. With respect, the record does not support this contention and is contrary to the evidence put forward by both the Crown and Mr. Gogan. In fact, based on the Crown's evidence in the court below, the RRC fit into the hierarchy of deprivation—going from least restraint to greatest as follows: minimum security institute; medium security institute; RRC detention unit; maximum security institute; solitary confinement/administrative segregation.

[39] There was uncontroverted evidence before the application judge respecting the abrupt curtailment of Mr. Gogan's liberty upon receiving his initial classification. Had the judge conducted the required analysis, there was only one conclusion open to him on the evidence, that being, Mr. Gogan's liberty interests were substantially curtailed as a result of the decision to classify him as a maximum security offender. After being notified of his classification, Mr. Gogan was immediately moved to solitary confinement. Although the RRC had more restrictions than the general medium security inmate population at Springhill (see ¶ 14), the deprivation paled in comparison to solitary confinement. Mr. Gogan's resulting involuntary transfer and placement in segregation/solitary confinement cannot be untied from his classification decision. The latter led to the former.

[40] Mr. Gogan gave evidence respecting the impact the classification decision had on his liberty. He testified:

> **MR. GOGAN**: All right. First off I'd like to establish the deprivation of liberty by the fact that I was unlawfully rated as a maximum security offender when I was—when I should be entitled to a medium security in the institution, and I can establish deprivation of liberty and—by the fact that being housed in the regional reception centre is a less restrictive environment than administrative segregation and a maximum security institution by the fact that—the reason why I'm in segregation, because the regional reception centre doesn't have a structured environment to hold a person that was rated as a maximum security offender. That's why ultimately I was removed from the regional reception centre and put into the administrative segregation, because that's the only viable alternative at the moment, pending a transfer to a maximum security institution, where maximum security has the certain requirements and structure to manage a maximum security case and, therefore, if it was—if—a more structured environment would be more of a deprivation of someone's liberty on them grounds.

[41] Mr. Gogan was not cross-examined on his evidence respecting the more restrictive environment of a maximum security institute. In his oral submissions he articulated his position as follows:

> As well, it's just kind of right there that we describe that I couldn't be in a—housed in the reception centre because I was being processed for a maximum security now, that I'm already processed to be in maximum security, I'm to be maintained in segregation because the regional reception centre doesn't have the structed environment to hold a maximum security inmate. Therefore, I'd remain in segregation till I'd be transferred to a maximum security institution which has the environment to—and the structure.

> And I would argue that having a more structured and—type environment is more restrictive and ultimately deprivation of liberty as I can't be housed in a place where—a regional reception centre because of the—it didn't have the restrictions and environment necessary as you have for—like, more—well, that's why ultimately I'm put in segregation.
>
> If I was to be—if the reception centre was equivalent to hold a person as a maximum security inmate, then I would have been maintained there until a transfer could have been processed. So, therefore, that—since now I'm in segregation, because the reception centre can't hold me, then they wouldn't be able to hold a maximum security inmate neither, and that restrictive environment constitutes, I would say, a deprivation of liberty. Unless the court has other opinions, then I could probably go on and show some more case law and stuff. Is there anything, Your Honour?
>
> [. . .]
>
> But with the onus on me for the deprivation of liberty, I can say it's pretty clear that there's deprivation of liberty where I'm being confined in segregation where—23 hour lockdown, and I'm already approved to be a maximum security inmate, so, therefore, I'm already a maximum security inmate locked in by the warden and officially—as far as it goes, there's nothing holding it back except for maybe this *habeas corpus* or bed space there, so—and that's a more structured environment, because I can ultimately be released into a—out of segregation to their—to be housed there. And if I was a maximum security offender and it was in a more structured environment, the regional assessment centre would be able to hold inmates as—I guess their policy that any inmate to be transferred to Atlantic is to go to segregation once it's recommended, Your Honour.

[42] I do not accept that perhaps the RRC detention unit is comparable to Atlantic Institution (maximum security) in the scale of deprivation experienced by Mr. Gogan. If that were the case, then why would Mr. Gogan have been placed and held in solitary confinement as a matter of course while awaiting involuntary transfer? If the level of restrictions were comparable, then presumably Mr. Gogan could continue to have been maintained at the RRC, pending transfer. Maximum security offenders are subject to a higher level of supervision and more confinement restrictions than inmates with a lower classification. Although the RRC is an unclassified unit, there is nothing in the record to support any contention that the RRC and Atlantic Institution are so comparable such that Mr. Gogan going from the RRC unit to a maximum security institution did not result in a deprivation of his residual liberty interests. To suggest so defies common sense.

[43] The Crown argues on appeal, as it did in the court below, that because this is Mr. Gogan's initial classification this somehow changed the landscape such that it

falls within the exclusive jurisdiction of the Federal Court. The Crown's theory is that Mr. Gogan did not experience a distinct form of detention from the form imposed on all general inmates; he was treated no different than any other inmate. Specifically, upon his entry into the federal prison system he went to a reception centre unit. CSC then conducted his offender risk assessment and security classification. This is the same process for each inmate. With respect, this position completely ignores the substantial changes in confinement terms inmates like Mr. Gogan can experience if they receive a maximum security classification.

[44] The Crown's position is untenable. For illustration, assume that Mr. Gogan is correct in asserting his classification process was fatally flawed. If CSC has its way, this type of decision making would be immune from review by a provincial superior court. An inmate would have to trudge through an internal grievance procedure and ultimately seek judicial review before the Federal Court. Neither option will afford timely access to justice (available by right to an inmate's constitutionally guaranteed access to *habeas corpus*) to have the validity of their detention determined.

[45] As the Supreme Court of Canada has confirmed in *May* and *Khela*, the statutory grievance process is not a complete, comprehensive and expert process. The Federal Court enjoys no greater expertise than a provincial superior court in these matters. Unlike the judicial review process in the Federal Court, *habeas corpus* is not a discretionary remedy. As the Supreme Court of Canada said in *Khela*:

> [41] Finally, judicial review is an inherently discretionary remedy (C. Ford, "Dogs and Tails: Remedies in Administrative Law", in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (2nd ed. 2013), 85, at pp. 107-9). On an application for judicial review, the court has the authority to determine at the beginning of the hearing whether the case should proceed (D. J. Mullan, *Administrative Law* (2001), at p. 481). In contrast, a writ of *habeas corpus* issues as of right if the applicant proves a deprivation of liberty and raises a legitimate ground upon which to question the legality of the deprivation. In other words, the matter *must* proceed to a hearing if the inmate shows some basis for concluding that the detention is unlawful (*May*, at paras. 33 and 71; Farbey, Sharpe and Atrill, at pp. 52-54).

Furthermore, in Nova Scotia, *Civil Procedure Rule* 7.13(1) expressly provides that "*Habeas corpus* takes priority over all other business of the court."

[46] I am not persuaded by the Crown's argument that the circumstances Mr. Gogan complains of fall outside the scope of a *habeas corpus* application. That view is too narrow and not in keeping with the clear principles enunciated in several Supreme Court of Canada cases respecting the scope of a *habeas corpus* writ. (See *Miller*, *May*, and *Khela*.) As a result of his classification, Mr. Gogan experienced a new and distinct change in his form of detention. It matters not that the change arose from an initial security classification or a reclassification as in *May*. In both cases, the inmate suffered a deprivation of his residual liberty. I see no principled reason to deny Mr. Gogan access to relief by way of *habeas corpus* in these circumstances.

[47] Counsel for the respondent Crown and the appellant referred to numerous decisions in which provincial superior courts have either found or not found a deprivation of liberty.[1] These cases do not parallel Mr. Gogan's circumstances. The cases cited by the Crown and appellant address challenges to the third *Dumas* category, being a continuation of the deprivation of liberty. They all involve situations where the inmate has requested an increase in liberty. For example, *Moulton*, *Scarcella*, *Hollinger*, *Bonamy*, *Musitano*, *Palfrey*, *White*, *Ahmad*, *Moldovan*, *L.V.R.*, and *Robinson* challenged a refusal to decrease security classification; *Mapara* challenged a refusal to grant the inmate escorted temporary absences; and, in *Holland*, the inmate was eligible for transfer from a maximum to a medium security institution. However, the inmate wanted to be transferred to the institution of his choice, which was refused due to the presence of an incompatible inmate at his chosen institution. His refusal to transfer to an alternative medium security institution affected his security rating, maintaining it at maximum.

[48] There appears to be a divide developing in *habeas corpus* jurisprudence across Canada respecting the third category of deprivation noted in *Dumas*. (To restate, this category is a continuation of the deprivation of liberty.) Some cases align more with a flexible view on *habeas corpus*; others, a more rigid, traditional view. Because Mr. Gogan's circumstances establish a deprivation in liberty due to

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[1] The appellant referred to *R. v. Moulton*, 2010 ONSC 2448; *R. v. Scarcella*, [2009] O.J. No. 2667 (O.N.S.C.); *Canada (Attorney General) v. Hollinger*, [2007] O.J. No. 3326 (O.N.S.C.)) The Crown provided additional cases, stating they fell into the same philosophical camp as those cited by the appellant: *Bonamy v. Canada (Commissioner of Corrections)*, 2000 SKQB 385; *Musitano v. Canada (Attorney General)*, [2006] O.J. No. 1152, 2006 CarswellOnt 1750; *Hutchison v. Canada (Attorney General)*, 2010 ONSC 535. The Crown then referred to several cases which they argue reject this approach: *Palfrey v. Mission Institution*, 2015 BCSC 1777; *Canada (Attorney General) v. White*, 2015 ONSC 6994; *Ahmad v. Canada (Attorney General)*, 2015 ONSC 7010; *Moldovan v. Canada (Attorney General)*, 2012 ONSC 2682; *Holland v. Canada (Attorney General)*, 2013 QCCS 5317; *Mapara v. Ferndale Institution*, 2012 BCCA 127; *L.V.R. v. Mountain Institution (Warden)*, 2014 BCSC 1998, aff'd 2016 BCCA 467; *Robinson v. Canada (Attorney General)*, 2013 ONSC 7992.

"a substantial change in conditions amounting to a further deprivation of liberty" (*Dumas*, category 2), I need not settle which philosophical camp I see as correct. To reiterate, the case at bar is similar to *May* and *Khela*, as it involves a change in circumstances that deprives the inmate of liberty. Mr. Gogan was moved from a situation (RRC) that is higher than medium security, yet lower than maximum security, to a maximum security institution. Further, the impugned classification decision caused him to be placed in solitary confinement pending transfer.

[49] I referenced the *L.V.R.* (trial court) decision in the footnote of ¶¶ 47 and 63 and ¶ 38. This decision was under appeal at the time of Mr. Gogan's hearing before this Court. The British Columbia Court of Appeal recently released its decision in *L.V.R.* Because *L.V.R.* involved, in part, a challenge to an initial security classification, I will set out the context of the alleged deprivation of liberty and explain how it differs from Mr. Gogan's circumstances.

[50] Upon his entry into the federal prison system, the appellant inmate in *L.V.R.* was housed in the Regional Reception Assessment Centre (RRAC) in Matsqui Institution, British Columbia. He underwent his offender assessment and received an initial medium security classification. As a result, he was transferred to Mountain Institution, which is a medium security institution. The trial judge found that the specific terms of confinement at the RRAC were considered to be akin to those found in a maximum security institution (¶ 38). Hence, the appellant inmate experienced an increase in his liberty upon being classified as a medium security offender and transferred out of the RRAC. The inmate subsequently applied to be reclassified as minimum security. His reclassification application was denied and he remained at Mountain Institution. The trial judge found that since his classification remained static as medium security, he did not suffer a deprivation of liberty as a result of his unsuccessful reclassification. Having found neither decision (initial classification or denial of reclassification) involved any adverse effect on L.V.R.'s residual liberty, the trial judge did not go on to consider the reasonableness of CSC's classification decisions. Justice Stromberg-Stein, writing for the Court of Appeal, upheld the findings of the trial judge and dismissed the appeal. Justice Stromberg-Stein said this at ¶¶ 36, 37 and 42:

> [36] **Similarly, an initial security classification, where the initial committal is not challenged, does not attract relief by means of *habeas corpus***. In *Fisk v. Canada (Pacific Region Correctional Service)*, [1986] B.C.J. No. 179 (S.C.), Mr. Justice Drost dismissed a petition for habeas corpus where the inmate objected to his initial maximum security classification and sought an order to transfer him to a medium security penitentiary. He stated:

> [37] The petitioner does not challenge the validity of the initial deprivation of his liberty, nor does he suggest that there has been any substantial change in conditions amounting to a further deprivation of liberty. Since his committal he has never had any greater degree of liberty than he currently enjoys. That being the case, this Court does not have jurisdiction to grant relief in the nature of *habeas corpus*.
>
> [38] What the petitioner is saying is that the decision to rate him as a maximum security offender was made in an unfair manner because he was not given the full particulars and a reasonable opportunity to respond. In other words, he maintains that there was a lack of procedural fairness. If so, his proper course is to challenge the decision by way of certiorari proceedings in the Federal Court Trial Division which has been given statutory jurisdiction to review decisions made under the *Federal Corrections Act*.

[37] I agree with and adopt these comments of Mr. Justice Drost.

[. . .]

[42] The availability of the writ of *habeas corpus* is of importance to an inmate. As discussed in *Khela*, provincial superior courts should not decline jurisdiction just because of available recourse by judicial review in the federal courts. *Khela* does not seek to exhaustively list the type of decisions that could constitute a deprivation of residual liberty, but the examples listed in *Khela* at para. 34 all reflect decisions that would increase the restriction of an inmate's residual liberty. **Thus, an initial classification decision following a valid committal or a decision denying a transfer to a lower security facility would not be decisions that constitute a deprivation of residual liberty for the purposes of *habeas corpus*.**

[Emphasis added]

[51] Although the above statements by the BCCA respecting the limits of *habeas corpus* in the initial classification context are unqualified, with respect, they should be restricted to the context of *L.V.R.* The circumstances in *L.V.R.* and *Fisk* ([1996] B.C.J. No. 179, 1996 CarswellBC 19 (S.C.)) which the Court of Appeal relied upon, do not mirror Mr. Gogan's. In fact, they are fundamentally different. To repeat, in *L.V.R.*, the inmate's liberty increased as a result of his initial security classification and transfer out of the RRAC. In *Fisk*, the inmate was also held at the same RRAC and initially classified as a maximum security offender. The terms of confinement were considered to be lateral (maximum to maximum) so no further deprivation arose from the initial classification. Put another way, neither *L.V.R.* or *Fisk* suffered a "substantial change of circumstances resulting in a further deprivation of liberty" (*Dumas*, category 2).

[52] In contrast, Mr. Gogan was held in the RRC at Springhill, which, again, is higher than medium security and lower than maximum. Mr. Gogan was then classified as a maximum security inmate, moved to solitary confinement, and then transferred to a maximum security institution. His liberty decreased. This was a substantial change of circumstances. Mr. Gogan's situation engages the second category of *Dumas*.

[53] Before addressing what remedies were available to the application judge, my colleague makes several statements that warrant comment and reference to further legal principles. Justice Scanlan states that inmates in the RRC, being unclassified, have no residual liberties to protect (¶ 75). A strong statement to make, which, from my perspective, is not supported in the jurisprudence. Further, that statement is puzzling in light of Mr. Gogan's placement in solitary confinement and given that Justice Scanlan says he is unable to assess the degree of the change in confinement terms between the RRC and Atlantic Institution. Justice Scanlan concludes that Mr. Gogan should be directed to seek an appropriate remedy through the judicial review process in the Federal Court (¶ 74).

[54] In my review of the leading Supreme Court of Canada cases referenced herein, denying Mr. Gogan the right to have a provincial superior court conduct the reasonableness/lawfulness review, which as recognized by the Court in *Khela* is in essence a judicial review, is contrary to the clear direction and principles established by the Supreme Court of Canada. With great respect to Justice Scanlan, his position that initial security classification decisions are hands-off as far as a provincial superior court is concerned appears to be anchored more in policy preferences than legal principles. He states at ¶ 80 that courts are ill-equipped to run prisons. I agree. But what courts are well-equipped to do is conduct the reasonableness/lawfulness (judicial) review of the administrative decision. In *Khela*, the Supreme Court of Canada said this:

> [37] This being said, there are, from a functional standpoint, many similarities between a proceeding for *habeas corpus* with *certiorari* in aid and a judicial review proceeding in the Federal Court. After all, "judicial review", "[i]n its broadest sense", simply refers to the supervisory role played by the courts to ensure that executive power is exercised in a manner consistent with the rule of law (Farbey, Sharpe and Atrill, at pp. 18 and 56). This is also the purpose of *habeas corpus*, if distilled to its essence (see generally, Farbey, Sharpe and Atrill, at pp. 18 and 52-56).
>
> [. . .]

> [54] This Court has recognized in its decisions that *habeas corpus* should develop over time to ensure that the law remains consistent with the remedy's underlying goals: no one should be deprived of their liberty without lawful authority. The significance of *habeas corpus* to those who have been deprived of their liberty means that it must be developed in a meaningful way (*Miller*, at pp. 640-41). In *May*, the Court quoted with approval the statement by Black J. of the United States Supreme Court that *habeas corpus* is "not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose — the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty" (*May*, at para. 21; *Jones v. Cunningham*, 371 U.S. 236 (1962), at p. 243; see also the preface to R. J. Sharpe's *The Law of Habeas Corpus* (2nd ed. 1989)). This remedy is crucial to those whose residual liberty has been taken from them by the state, and this alone suffices to ensure that it is rarely subject to restrictions.
>
> [55] This Court has been reluctant to place limits on the avenues through which an individual may apply for the remedy. As I mentioned above, the Court confirmed in *Miller* that *habeas corpus* will remain available to federal inmates in the superior courts regardless of the existence of other avenues for redress (pp. 640-41). Similarly, Wilson J. stated in *Gamble* that courts have not bound themselves, nor should they do so, to limited categories or definitions of review where the review concerns the subject's liberty (pp. 639-40). In *May*, the Court confirmed that there are in fact only two instances in which a provincial superior court should decline to hear a *habeas corpus* application: (1) where the *Peiroo* exception applies (that is, where the legislature has put in place a complete, comprehensive and expert procedure) (*Peiroo v. Canada (Minister of Employment and Immigration*) (1989), 69 O.R. (2d) 253 (C.A.)), and (2) where a statute such as the *Criminal Code*, R.S.C. 1985, c. C-46, confers jurisdiction on a court of appeal to correct errors of a lower court and release the applicant if need be (*May*, at paras. 44 and 50). Reviews of decisions of correctional authorities for reasonableness do not fall into either of these exceptions, and in accordance with *May*, they therefore can and should be considered by a provincial superior court.

[55] In *Khela*, the Supreme Court of Canada extensively articulates the importance of an inmate's choice of reviewing forum and the many reasons why a provincial superior court is likely to be the preferred forum. (See *Khela*, ¶¶ 3, 4, 31, 33, 40-49, 54-59.) Further, in *May*, LeBel and Fish JJ., writing for the majority, stated:

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

> security classification or for changing that classification". Of course, correctional decisions, including security classifications, must "be made in a forthright and fair manner [. . .]

[56] I reference Justice Scanlan's statement in ¶ 81 that if Mr. Gogan were to remain in administrative segregation for an unreasonable amount of time, then he could challenge the transfer process, not the classification process. As noted earlier, CSC's decision to place Mr. Gogan in segregation and his involuntary transfer is inextricably linked to the classification decision. In the process outlined by my colleague, Mr. Gogan could challenge one decision before a provincial superior court but not the alleged unlawful decision that lead to his placement. Rather, he would have to fight that battle in a separate forum although both legal disputes arise from the same circumstances. How is this an appropriate use of judicial resources or fair to an inmate?

[57] Earlier, I said the Supreme Court of Canada has not specifically ruled on an inmate's right to challenge an initial security classification by way of *habeas corpus*. That said, in my view, there is nothing that the Supreme Court of Canada said in *May*, *Khela* or *Miller* that would expressly or implicitly support the restrictive approach advanced by my colleague in Mr. Gogan's circumstances. In fact, as noted in ¶ 55, the Supreme Court of Canada referenced the duties of CSC in all cases where a security classification is being assigned.

[58] Mr. Gogan's case is not complex. If he can establish the requisite level of deprivation and raise a legitimate concern (which I am satisfied he has), then, as of right, he gets to choose his forum. I now turn to address available remedies.

Available Remedy

[59] As stated, the pivotal reason why the judge dismissed Mr. Gogan's application was because he concluded there was no remedy available which he could order. The application judge expressed a concern with "intake limbo". He said, "We cannot have a situation where Mr. Gogan exists in some sort of intake limbo." He does not analyse or explain how this might result. On appeal, Mr. Gogan's counsel argued that returning Mr. Gogan to the RRC does not result in "intake limbo" nor create some sort of conceptual vacuum. I agree. I reject the Crown's submission that returning an inmate to a reception centre creates an absurd situation.

[60] In Mr. Gogan's case, the available remedy (had the judge conducted a merit assessment and found the classification decision to be unlawful) was to return (or, to use the traditional term, "release") Mr. Gogan to his previous terms of confinement at the RRC. As discussed earlier, the RRC, although a temporary inmate housing arrangement, is a stand-alone unit with established confinement terms. The unit itself has no classification *per se* and inmates residing there are all awaiting their security classification. The lack of "classification" is not a barrier; the Crown's argument is form over substance. At least this temporary and unclassified status precluded Mr. Gogan from being placed in solitary confinement and transferred to a maximum security institution.

[61] This remedy does not release Mr. Gogan from prison. He would still remain in the lawful custody and control of CSC. Furthermore, Mr. Gogan would not remain in the RRC indefinitely—only until CSC completed a new initial classification. One would expect this would happen as a matter of course, regardless of the absence of a specific order directing CSC to do so. Presumably the process would be properly completed the second time around. No limbo.

[62] This remedy is comparable to that found in a reclassification case, where the security classification reverts to the previous lower classification (if the increased reclassification is found to be unlawful) and CSC returns the inmate to an institution with the lower (previous) classification. (See *May; Khela*; and *Springhill Institution v. Richards*, 2015 NSCA 40.) In Mr. Gogan's case, the equivalent lower security detention level is found in the RRC; or "*a*" reception centre; as conceivably, for valid reasons, CSC might not wish to return an inmate to the former reception centre. In such a case, as long as the inmate is returned/released to a reception centre with comparable terms of confinement, the objective of a *habeas corpus* remedy is achieved.

[63] When questioned by the appeal panel, Crown counsel very reluctantly acknowledged, at least in theory, that a return/release to the RRC was a possible remedy available to the application judge. The Crown expressed concern with a floodgate opening up. Specifically, if inmates can challenge an initial security classification the courts would be inundated with *habeas corpus* applications. A challenge to an initial classification in which a provincial superior court entertained

the assessment of deprivation is not a novel situation[2], and, it does not appear as if an avalanche of challenges to initial classifications has resulted.

[64] To ease the Crown's floodgate concern, I note that an inmate must be able to demonstrate a legitimate basis upon which to challenge the administrative decision (*Khela*). Further, this decision is specific to an initial maximum security classification. Inmates who are classified as either medium or minimum experience an increase in liberty upon release from the RRC. Conceivably, an inmate may attempt to challenge an initial medium classification (asserting it should be minimum), or argue that the initial terms of RRC confinement (*Dumas*, category 1) are too restrictive. These issues are not before this Court. Even if there might be an increase in the number of challenges to initial maximum security classifications that is no justification to deny an inmate their choice of forum and remedy. *Habeas corpus* is an important and constitutionally protected remedy.

[65] Not every administrative decision made by prison authorities will attract a *habeas corpus* remedy. It will depend on the circumstances of the alleged deprivation and the applicable legal principles. A provincial superior court cannot improperly encroach upon the Federal Court's jurisdiction. Equally important, a provincial superior court must not shy away from its important supervisory function. Classification decisions impact liberty interests. If the decision-making process is procedurally unfair and/or unreasonable, then effective judicial oversight is a necessary check. This principle was also captured well by this Court in *Richards* when Justice Beveridge stated:

> [228] Timely access to the courts to determine if detention was unlawful was a concern voiced hundreds of years ago. It is no less relevant today, particularly when the actions by state officials that deprive individuals housed in institutions may be short lived.
>
> [229] Without timely access, detentions which may otherwise be found to be unlawful may never be subject to judicial scrutiny, leading to a failure of the rule of law in institutions, and a frustration of the enshrined right in the *Charter* to have the validity of a detention determined by way of *habeas corpus*.

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[2] See for example: *Moulton*, ¶ 78 and 85; *L.V.R.* where Joyce J. entertained a habeas corpus application involving a challenge to an initial classification, but determined the inmate's liberty increased after classification and removal from the reception centre. Joyce J. looked at the terms of confinement at the Reception Centre and compared them to the institution where L.V.R. had been placed. In looking at whether a deprivation of liberty occurred, he did not find his hands were tied by lack of remedy or jurisdiction (decision upheld on appeal); *Cain v. Canada (Correctional Services)*, 2013 NSSC 367, wherein an inmate challenged his initial security classification and the Crown did not appear to raise any preliminary issues as it did in Mr. Gogan's case.

[66] My colleague seems to suggest there is no time advantage over the Federal Court process. I do not share that view. Provincial superior courts have been recognized time and time again across Canada for their ability to ensure *habeas corpus* applications are heard in a timely manner. In fact, Mr. Gogan's case is yet another example of just how timely access to justice can be before a provincial superior court. Mr. Gogan filed his *habeas corpus* application on April 8th, 2015. Justice Hunt held a prompt organizational prehearing conference on April 15th, 2015. A hearing was held on May 11, 2015, and an oral decision rendered on the same day. Had the proceeding not been bifurcated at the Crown's request, conceivably the full hearing on the merits could have been completed that day and a decision rendered.

[67] Finally, I will briefly address the use of ancillary remedies in *habeas corpus*. The Crown adopted a narrow view of the scope of relief available in a *habeas corpus* application. The appellant, on the other hand, argued that a provincial superior court has the power to order a variety of ancillary remedies and referenced *Constitutional Remedies in Canada*.[3] Because the remedy identified herein falls within the more traditional authority of a provincial superior court (releasing Mr. Gogan, albeit temporarily, to his previous and less restrictive confinement terms at the RRC), I need not delve into a review of the law respecting the scope of ancillary remedies available to a provincial superior court in the *habeas corpus* context. That said, it is worth noting the following additional comments of Justice Beveridge in *Richards*, respecting the importance of a provincial superior court granting declaratory relief in the *habeas corpus* context. Justice Beveridge said:

> [120] . . . The availability, and utility of such relief in the context of an application for *habeas corpus* was made clear by Wilson J. in *R. v. Gamble*:
>
> > 81 One issue remains, namely the jurisdiction of the court to issue a declaration of parole eligibility in aid of its *habeas corpus* jurisdiction. Declaratory relief has been recognized by this Court as an effective and flexible remedy for the settlement of real disputes: see *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at pp. 830-33. Moreover, this Court, having assumed jurisdiction over the subject matter and the person on this appeal from a denial of *habeas corpus*, can exercise its broad discretion under s. 24(1) of the *Charter* to order any remedy within its jurisdiction which it considers appropriate and just in the circumstances. Given the prejudice already suffered by the appellant it seems appropriate and just that she be declared eligible for parole forthwith. The Parole Board is, however, the

[3] Kent Roach, *Constitutional Remedies in Canada*, 2d ed, loose-leaf (Release 26, December 2015), (Toronto: Canada Law Book, 2013), pp. 9-90, 9-91.

> final arbiter of whether and when she should be released on parole and this Court has nothing to say on that subject.

Conclusion

[68] The application judge did not apply, as he was required to do, the well-established legal principles respecting the nature and availability of *habeas corpus* to the circumstances before him. This was an error in law. His decision unduly constrains the scope of *habeas corpus* relief. Contrary to the application judge's finding, there is concurrent jurisdiction with the Federal Court in these circumstances. Mr. Gogan is entitled to his choice of forum.

[69] I would allow the appeal and make a finding that Mr. Gogan has satisfied his burden to establish a deprivation of liberty. Accordingly, he is entitled to have the lawfulness of the classification decision determined on its merits. As the record is incomplete, I would remit that issue back to the application judge for determination. Should the application judge conclude the decision was unlawful, I have identified an available remedy. Mr. Gogan could be returned to the RRC so the classification process can be redone. However, declaratory relief alone (decision unlawful) is itself a powerful remedy.

[70] I note that in ¶ 93 of my colleague's dissenting reasons he writes, "I understand the majority to be saying that it was improper for the RRC Corrections Officer to rely only on the "cryptic" information they had about the incident in view of Mr. Gogan's challenge to the characterization of the evidence." With respect, I did not suggest it was improper for CSC to rely on this information. Mr. Gogan has raised what appears to be legitimate concerns as to whether CSC ensured that this critical information upon which it relied was as accurate, up to date and complete as possible—which is the duty placed upon CSC pursuant to s. 24(1) of the *CCRA*. It is for the trial judge to determine whether CSC met its obligation.

[71] The Crown conceded Mr. Gogan's placement in segregation/solitary confinement deprived him of his residual liberty. The Crown argued and the application judge accepted that this deprivation was lawful. The judge drew this conclusion in complete isolation as to whether the classification decision itself was reasonable/lawful. As noted, the deprivation of liberty that arose from being removed from the RRC to solitary confinement cannot be detached from the classification decision. Therefore, it follows logically, that in assessing Mr. Gogan's application on its merits, should a judge find the classification

decision was unreasonable/unlawful, then Mr. Gogan's placement in solitary confinement cannot be said to be lawful and, that conclusion could not stand.

[72] The appellant did not seek costs. None are awarded.

Van den Eynden, J.A.

Concurred in:

Beveridge, J.A.

Dissenting Reasons for judgment:

[73] There are a number of reasons that I suggest would justify the dismissal of this appeal. Although I discuss them in greater detail below, it may help the reader for me to summarize at the beginning.

[74] What Mr. Gogan is attempting to do is use *habeas corpus* to deal with what should in reality be a judicial review. Mr. Gogan should be directed to seek an appropriate remedy through the judicial review process in the Federal Courts.

[75] I am not convinced that *habeas corpus* has any place in the classification process. If it does, it is not in the context of this case. While *habeas corpus* is available to protect the residual liberties of inmates, inmates in the RRC, being unclassified, have no residual liberties to protect. If *habeas corpus* ever applied to an inmate in the RRC process, I respectfully suggest it would be a unique set of circumstances indeed. Below, I review the record only in an attempt to determine whether there is something about this case which would justify the use of the extraordinary writ at this stage. With respect, this review simply reinforces my opinion that this is a case for judicial review, not the use of *habeas corpus*.

[76] I do not agree that the evidence supports my colleague's determination that Mr. Gogan's residual liberties will be decreased if he is not returned to the RRC. That is a finding of fact that she says, at ¶ 39, is supported by the fact that he was transferred to administrative segregation, as a matter of course, while awaiting involuntary transfer. That does speak to the transfer process, and it is not a qualitative comparison of residual liberties in the RRC compared to a maximum security facility.

[77] The Supreme Court of Canada in *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, confirmed that courts of appeal have jurisdiction to make a fresh assessment of the evidence on the record where they deem such an assessment to be in the interests of justice and feasible on a practical level. In that case, they determined the record was sufficient, saying:

> [33] . . . While appellate courts are generally, and justifiably, wary of making findings of fact without having the advantage of seeing and hearing testimony first-hand, I do not believe that such concerns arise in this case because the bulk of the critical evidence adduced at trial was documentary, not testimonial. . . .

[78] In this case, I am not convinced the record is sufficient to fill in the gap on the issue of whether Mr. Gogan's residual liberties would be greater in the RRC versus the maximum security facility. There is good reason why appeal courts exercise the power to make findings of fact sparingly. When they do so, it must clearly be supported by the record. My colleague, at ¶ 38, has referred to corrections hierarchy and the fact that placement in administrative segregation (solitary confinement) pending transfer somehow conclusively proves that residual liberties are greater in the RRC than in a maximum security institution. With respect, I do not agree. The record is deficient on the issue of whether any residual liberties are lost as a result of imprisonment at a maximum security prison versus the RRC. Residual liberties are what are at stake in *habeas corpus* applications.

[79] My colleague, at ¶ 38, distinguishes *L.V.R.* on the basis that residual liberties in the classification centre, in that case, were akin to those found in a maximum security penitentiary. The distinction is only valid if there is evidence that the residual liberties are greater in the RRC than in the maximum security facility. For Mr. Gogan, what record there is suggests that programming and treatments, greater freedom of movement, and interaction with other inmates available in the maximum security facility are not available in the RRC. In *Khela*, the court said, at ¶ 30, the first criterion in a *habeas corpus* application is for the **applicant** to establish that he or she has been deprived of liberty. Mr. Gogan would have to provide that evidence. It is not in the record.

[80] To focus on Mr. Gogan's placement in solitary confinement pending transfer to a maximum security facility is a red herring. That is part of the transfer process, not the classification process. It is part of running the prison on a day-to-day basis, which courts are ill-equipped to do.

[81] If Mr. Gogan were to remain in administrative segregation for an unreasonable amount of time, then he could challenge the transfer process, not the classification process.

[82] In the hearing below, the judge allowed the process to be bifurcated. I would discourage that approach in the future as it simply causes delay. All parties would benefit from the early resolution of the matter.

[83] *Habeas corpus* has been a pillar of common law since the signing of the *Magna Carta* in England in 1215. It is referred to as being one of the Great Writs. Initially it was employed as a legal procedure to keep government from holding citizens indefinitely without showing cause. I am concerned that the course my

colleagues have embarked upon will turn the extraordinary writ of *habeas corpus* into an ordinary remedy. The greatest threat to the continued existence of that Great Writ may well be the transformation of it from the extraordinary to the ordinary.

Facts and Background

[84] The majority decision sets out much of the background and facts in the introductory paragraphs. I will avoid repeating where possible and supplement where necessary.

[85] The offence for which the appellant was originally convicted involved a break and enter into a dwelling house that was occupied by a corrections officer at the Springhill Institution. The appellant had been previously incarcerated in the Springhill facility. This appeal relates to the third federal custodial sentence Mr. Gogan is serving in his short adult life. Mr. Gogan's prior corrections experience is relevant to the classification process under review. Mr. Gogan did not challenge the assertion that his prior inmate experience includes the following:

2009/07 -	involvement in inmate fight at Springhill Institution
2009/09 -	non-compliant with staff, physical force applied – Springhill Institution
2009/09 -	inmate fight at Atlantic Institution
2010/02 -	inmate fight at Atlantic Institution
2010/03 -	possession of 8" metal shank and 7" wooden shank – Atlantic Institution
2011/03 -	attempted to breach cell door at Springhill Institution
2011/04 -	inmate assault at Atlantic Institution
2011/05 -	spat towards the gun port at Atlantic Institution
2011/05 -	10.5" metal shank and 7" metal pick found in cell at Atlantic Institution
2011/05 -	refused direction to leave cell, staff placed him in wrist locks – Springhill Institution
2012/05 -	found with a needle attached to a wire which could be used as a stabbing weapon – Springhill Institution
2012/09 -	placed in segregation after information was received alleging Mr. Gogan planned to assault another offender with a weapon

2013/06 - inmate assault at Atlantic Institution

2014/03 - attacked a fellow inmate at CNSCF

[86] I refer to the decision of Nova Scotia Supreme Court Justice Jeffrey Hunt which is now on appeal and note that at ¶11 he indicated:

> [11] As part of the offender intake assessment process, Mr. Harroun completed an initial custody rating scale (or "CRS") on Mr. Gogan. CRS is a computerized security classification tool. We heard much evidence about it. It is only a tool. **It is a step only.** It is not determinative. It is not the final determination. The parole officer will use this tool together with subjective observations and conclusions to formulate a recommendation to the final decision maker. **The decision maker is the warden or designate.** Only when this person makes a decision does it become effective. In this case, the conclusion of the decision maker (based on recommendation of the Parole Officer) was for a maximum classification. The initial CRS did have a score on the institutional adjustment rating of 69 and a security risk rating of 89. Taken on their own they are consistent with a medium security classification. However, as stated above, this is just one step in the process. **As the pre-intake process continued Mr. Harroun became aware of an incident at the Burnside Institution. This incident involved a confrontation in Burnside between Mr. Gogan and a Correctional Officer there. There was physical contact.** It was deemed to be serious by Mr. Harroun. It lead [sic] him to re-run the CRS with this new information included. He was rated by the computerized system as a maximum security offender. This tool was one part only of the decision making process which eventually lead [sic] the decision maker to classify Mr. Gogan as a maximum security offender. **Mr. Gogan was never rated as a medium security offender. His only confirmed and assigned classification was maximum.**
>
> (Emphasis added)

[87] On appeal, the appellant argued that the incident at Burnside was not a serious incident and that Mr. Harroun did not properly investigate that incident. My colleague, in the majority judgment, refers in ¶11 to the information the officer had as being "cryptic", saying he relied upon it "… without confirming with firsthand sources that his characterization appropriately matched what actually occurred." I refer to the affidavit of Mr. Harroun dated May 1, 2015, which was before the hearing judge. It stated in part:

> [32] On February 25, 2015 I received a telephone call from an official at the Burnside jail after having left a message in an effort to arrange to speak with Mr. Gogan. This official from the Burnside jail advised me that Mr. Gogan was currently unavailable to speak as he was in segregation as a result of committing

> an assault on a staff member at the jail. I requested copies of any reports relating to this incident, and subsequently received a Disciplinary Report relating to Mr. Gogan, which is attached to my affidavit as **Exhibit "1 Tab B.** This Disciplinary Report describes and incident on February 3, 2015, during which Mr. Gogan shoved a correctional officer.

I attach a copy of that exhibit as Appendix A.

Standard of Review

[88] The standard of review is as set out in ¶20 of the majority decision.

Analysis

[89] I respectfully suggest that this Court should consider the consequences for Corrections Services and prison operations, including the RRC if *habeas corpus* applications are to be used to cloak what is really a judicial review. Any analysis as to the consequences of that decision must include a discussion of what happens to inmates in the RRC, pending *habeas corpus* hearings and appeals related to those hearings. This issue of conditions in the RRC and maximum security, general population are relevant to that discussion. I am satisfied there is not sufficient materials on the record to understand the limited liberties in the RRC versus general population in maximum security, where there is work, programming and mixing with the general population. All are relevant to the issue of possible remedies for this Court and the issue of whether residual liberties could be affected. As I suggest above, at best it is not clear that an inmate has greater residual liberties in the RRC than in a maximum security facility.

[90] I review the record in an effort to assess whether it could in any way justify treating this case as unique and warrant the use of the extraordinary writ of *habeas corpus*. I do so keeping in mind that the process has been bifurcated. I also remind myself that this Court would not normally paw around in the facts. I consider the facts on the record only so far as to suggest that there is nothing extraordinary about this case to warrant expansion of *habeas corpus* into an area where it has not been previously used.

[91] The appellant suggests that what occurred in Burnside was an incident that did not involve a "serious assault" on the corrections officer, asserting that it was not a "serious incident" as defined in the applicable regulations. Mr. Gogan's evidence was to the effect that the corrections officer in Burnside was attempting to seize an alcoholic brew that was concocted in the provincial corrections facility.

As the corrections officer attempted to seize that noxious libation, Mr. Gogan says he was "resisting" the corrections officer by pushing himself away, not assaulting the officer. I refer to the evidence before the hearing judge:

> "No charge apparently was laid in outside court, so the report was not made available to us."
>
> "My recollection is that Mr. Gogan stated that he had been resistive and that he had shoved himself away from a correctional officer."

[92] In his casework log, Mr. Harroun says he considered Mr. Gogan's rebuttal of the incident at Burnside, and in the official log he wrote:

> The following is an overview of the subject's verbal rebuttal re the OSI and pen placement. Wherever possible the exact words used by Mr. Gogan are provided and in other instances his rebuttal has been paraphrased.

Mr. Gogan speaking says:

> If you want to override me to a max, I appealed the level charge at the Central Nova Scotia Correctional Facility because I was found to be resisting an officer. The officer didn't want to write a charge…
>
> "…(for assault). It didn't say I shoved the officer, I shoved myself away from the officer."

[93] I do not understand the majority to suggest that Mr. Gogan is entitled to have homemade brew (contraband) in a provincial corrections facility, or that Mr. Gogan was entitled to interfere with the officer attempting to seize the contraband. I understand the majority to be saying that it was improper for the RRC corrections officer to rely only on the "cryptic" information they had about the incident in view of Mr. Gogan's challenge to the characterization of the evidence. Clearly, Mr. Gogan takes issue with the quality of the evidence relied upon by the assessor, and his failure to follow up with Burnside officials.

[94] The record shows that Mr. Harroun unsuccessfully attempted to contact the officers from Burnside who were involved in the incident. He did, however, have the handwritten incident report prior to the final pen placement. Mr. Gogan had an opportunity to challenge both assertions in the incident report from Burnside and the characterization of the incidents.

[95] The information was used by Mr. Harroun when he did a second CRS. He treated the information as qualifying as a "serious incident". Mr. Gogan challenged

the categorization of the incident as serious saying, among other things, that there were no criminal nor institutional charges resulting from the incident so they could not be considered as "serious" incidents for the purpose of pen placement. Mr. Harroun noted, at ¶35 of his affidavit, that there is no requirement in the Institutional Adjustment Ratings that "actions or behaviours" in question result in charges: internal or criminal. The record is replete with evidence that the Institutional Adjustment Rating is not determinative of pen placement.

[96] There was evidence before the hearing judge from Mr. Harroun and he testified:

> A. When I read the summation, it says that Mr. Gogan had shoved a correctional officer, which itself would be an assault. As well, the offence, institutional offence list it as assault on staff and possession of contraband.
>
> Q. Are you familiar with the institutional disciplinary process?
>
> A. In Burnside?
>
> Q. No. In the federal penitentiary context is fine.
>
> A. I am, yes.
>
> Q. Pardon me?
>
> A. Yes.
>
> Q. Yes. And have you been involved in disciplinary proceedings in the institutional context?
>
> A. Personally not directly, but it is a big part of what a parole officer does for assessments is reviewing that information.
>
> Q. All right. Trying to figure out the correct phrasing. Can you describe any experience you have for – exposure you've had to – actually, no, I'm going to withdraw that question. Let's go back to talking about the assessment for decision a bit, so we've seen how an incident like the one described in Exhibit 1B would affect the custody rating scale scores. And I know we haven't really gone into that right now in your testimony, but it is in your affidavit and was discussed a bit earlier in some earlier evidence, so I'd like to get a little bit more specific. You've talked sort of generally about how an assessment for decision is completed, so it involves a file review, reviewing all the relevant information, rating an offender under three dimensions of institutional adjustment, escape risk and public safety risk, and that's all evidence you've previously given. I'd like to talk specifically about this notion of institutional adjustment. Can you explain what sort of factors you would take into consideration in assessing an offender's institutional adjustment rating?

A. We would look at, if there's any prior incidents, violent or otherwise, during the current committal or previous terms, and the severity and recency, again, would be factors we'd be considering. Take into consideration other - - whether there were previous segregation placements and why. Look at previous security classifications and how an offender behaved or did their time, whether they were manageable in the lower security environment or not. If they started out in a lower security environment and, due to incidents or negative behaviour, maybe their security classification had to be elevated and transfer to higher security. We look at if there's any mental health needs, how the person's adjusting to being incarcerated, things of that nature.

Q. And when you considered all those facts in relation to Gogan, what rating did you give for his institutional adjustment?

A. High.

Q. And why is that? And feel free to reference your affidavit, if you like. And the AFD, again, is at tab E.

A. As I outlined in the assessment for decision, Mr. Gogan has been involved in prior institutional incidents, some more serious than others, some that had involved violence or weapons and some contraband or negative behaviour. I reviewed his preventive security file and also consulted with the security intelligence office on prior and more recent conduct, and also looked at Mr. Gogan's conduct prior to his arrival to the regional reception centre during the current sentence as well.

We take into consideration many, many factors regarding that, and I've outlined some of the prior institutional incidents that were especially concerning in that section of the assessment for decision, which involved fights with other inmates, possession of weapons, disciplinary issues with staff, some more recent issues from his time at the Burnside jail.

Also, what's taken into account is an inmate's acceptance of responsibility for their offending. And when I interviewed Mr. Gogan for the completion of the criminal profile report, he wasn't taking responsibility for his index offence that he's currently serving a sentence for, so I rated his accountability low based on that.

And when I took everything into consideration, Mr. Gogan's history while incarcerated, which had included prior incidents that had placed him in the maximum security environment and his time at Burnside, while there were some positives that he had done, he had completed creative writing class and participated in I believe it was an African Nova Scotia Heritage event, I also had to consider the incident from February as part of that and compare it to prior to institutional conduct. And when I looked at that and considered the recency of it, I decided that the appropriate rating would be high for institutional adjustment.

> Q. And can an offender whose institutional adjustment is rated as high be classified as a maximum secur - - or, sorry, as a medium security offender?
>
> A. No.
>
> …

[97] As noted by my colleague (¶13), Mr. Gogan vehemently denied assaulting a corrections officer and repeatedly pressed his probation officer and the warden to follow up with the provincial institution to obtain the correct details, citing s. 24(1) of the *Corrections and Conditional Release Act*, S.C.1992, c. 20 (*CCRA*).

[98] Mr. Harroun repeatedly noted that the computerized rating system used at the RRC is nothing more than a tool that is used in the determination of the security classification of inmates. The classification is only complete when the Warden or his designate make the final placement. That final determination takes into account not just the computerized ratings but the corrections history of the offender. As is evidenced above, Mr. Gogan has not been a model prisoner. His prior corrections history suggests that he is a security threat in terms of staff and other prisoners and that he does not shy away from contraband.

[99] Court reports and public reporting commonly refer to incidents of extreme violence within corrections facilities. It is apparent from this case that institutional decision-making and prison operations are complex matters. Pen placement and risk assessment are matters that often rely upon jail house informants or other less than ideal sources. Yet, on a daily basis, corrections staff are required to make determinations as to placement, and security threat assessments, using that type of information.

[100] I compare the jail house informant to the information and process that exists in this case, an incident report, Mr. Gogan having an opportunity to challenge the assertions and his opportunity to present his version/characterization as to what transpired in Burnside.

[101] Section 24(1) of the *CCRA* requires:

> The Service shall take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible.

In this case, attempts were made to verify the information. In addition, Mr. Gogan was informed as to the contents of the material from Burnside and he had an opportunity to present his version and interpretation of the events in Burnside.

Even his version speaks of possession of contraband and, at best, him pushing away from the corrections officer. The attempts to contact the Burnside officials, obtaining the incident report and giving Mr. Gogan a copy and allowing him to provide his version, all speak to the Service taking reasonable steps to ensure the information was as accurate, and complete as possible. Section 24(1) does not impose upon them a standard of perfection that means they must contact the Burnside staff in person before being able to rely upon the information as part of the pen placement.

[102] Mr. Gogan's extensive corrections history, combined with the fact that Mr. Gogan's version of the Burnside events speak to the reasonableness of the process of pen placement. All of this leaves me convinced that Mr. Gogan is using *habeas corpus* to challenge the quality of the evidence as opposed to this truly being a case in which Mr. Gogan was denied fundamental justice. Mr. Gogan is simply using the writ as an opportunity to have a redo of the pen placement process. I echo the words of Addy J. as cited in *Samms v. LeBlanc*, 2004 NBQB 140*:*

> … judges, as a general rule, should avoid the temptation of using their ex officio wisdom in the solemn, dignified and calm atmosphere of the courtroom and substituting their own judgment for that of experienced prison administrators.

[103] I recognize the courts have been reluctant to close the door on an inmate's right to choose the forum in which to challenge decisions made by prison staff. The Supreme Court of Canada has made it clear that when it comes to *habeas corpus*, provincial superior courts have a shared jurisdiction with Federal courts. *Habeas corpus*, however, is not, and should not be, available to challenge every decision made by corrections officials. I also acknowledge the Supreme Court of Canada has adopted a flexible approach in defining the scope of *habeas corpus* saying, in *Mission Institution v. Khela*, 2014 SCC 24, ¶34, that relief in the form of *habeas corpus* is available in a provincial superior court to an inmate whose "residual liberty" has been reduced by the decision of the prison authorities, and that this relief is distinct from a possible decision to release the inmate entirely from the correctional system.

[104] As noted by my colleague, in *Khela, supra* the Supreme Court of Canada identified when *habeas corpus* is available. LeBel J. said:

> [30] To be successful, an application for *habeas corpus* must satisfy the following criteria. First, the applicant must establish that he or she has been

> deprived of liberty. Once the deprivation of liberty is proven, the applicant must raise a legitimate ground upon which to question its legality. If the applicant has raised such a ground, the onus shifts to the respondent authorities to show that deprivation of liberty was lawful.

In this case there was but a single pen placement. That was maximum security. This is not a case where the initial warrant of committal was challenged. It is that warrant that put Mr. Gogan in the federal corrections system. This case does not involve residual liberties being eroded after an initial placement. His liberty was curtailed by the warrant of committal.

[105] Even if this case made it past the initial threshold that I refer to above, the record does not suggest it should have made it past the second threshold dealing with the issue of reasonableness. I again refer to *Khela*:

> [74] …a decision will be unreasonable, and therefore unlawful, if an inmate's liberty interests are sacrificed absent **any** evidence **or on the basis of unreliable or irrelevant evidence, or evidence that cannot support the conclusion**, although I do not foreclose the possibility that it may also be unreasonable on other grounds. Deference will be shown to a determination that evidence is reliable, but the authorities will nonetheless have to explain that determination.

(Emphasis added)

[106] As I review the record as referenced above, there was ample evidence to suggest that Mr. Gogan presented a security risk to staff and other inmates, reasonably justifying his pen placement as max. The record does not cry out for the use of a *habeas corpus* remedy in a way that it has not been previously used.

[107] There are additional problems with this case that suggest *habeas corpus* is not appropriate. First, the writ is traditionally seen as a way for the courts to order release. In the prison context it has been used to protect residual liberties, allowing a return to the lesser level of confinement (See *Khela)*. The process of pen placement in this case has, flawed or not, determined that the proper pen placement for Mr. Gogan is in a maximum security facility. There is a complete, comprehensive and expert procedure for review of the administrative decision. Pursuant to section 18.1 of the *Federal Courts Act,* R.C.S. 1985, c. F-7 the Federal Court has broad supervisory and remedial jurisdiction over federal bodies, including exclusive jurisdiction to issue writs of *certiorari, mandamus and prohibition.* These remedies are only available on application for judicial review in the Federal Court. In this case, it is fair to characterize Mr. Gogan as

challenging the reasonableness of the decision in terms of pen placement. This is distinct from a breach of fundamental justice which is the preservation of *habeas corpus*, which protects the liberty of the subject (residual liberties of inmates). If Mr. Gogan was denied access to the Burnside incident report, or prevented from giving his rebuttal of that information then the door to *habeas corpus* would open. That is not what occurred here. His complaint is with the result in terms of pen placement after the information was considered. That is properly the subject of an administrative review as to the reasonableness of the result.

[108] A second problem relates to possible remedies. The record shows the RRC is an unclassified facility; it is not rated for maximum security inmates. That rating takes into account the interests of the inmate, staff and other inmates. Security considerations alone suggest Mr. Gogan should not be returned to the unclassified RRC. A return to the RRC will see the return of Mr. Gogan to an unclassified facility. This means if Mr. Gogan has shown himself, through subsequent actions to be even at the extreme high end of the risk spectrum, this Court would be returning him to the RRC without any information as to his current risk status. This is perhaps even more troubling given the courts' lack of expertise in conducting risk assessment, even if we had all the evidence as to what has transpired since the initial pen placement.

[109] Also, there is a question whether placement in the RRC will have a negative impact on Mr. Gogan's residual liberties when compared to confinement in a maximum security facility. The liberties of inmates in the RRC are extremely limited. Even though the RRC is attached to a medium security institution, it is not classified and the liberties are in no way comparable to the medium security facility when it comes to movement, work, and programming. In the RRC, inmates are housed in such a way that it limits their interaction with other inmates. There is very little programming available to inmates. While housed in the RRC inmates, in fact, are potentially in a more restricted environment than they may find themselves in while serving time in a maximum security institution. It was noted in Exhibit E, page 3 of 7 of Mr. Harroun's affidavit, that the appellant "… would likely be a general population offender in Atlantic". In a maximum security facility inmates may be able to mingle with other prisoners, have access to exercise and library facilities as well as work and programming. All of this suggests there is a possibility of Mr. Gogan increasing his residual liberties by going to a maximum security facility instead of the RRC.

[110] The fact that Mr. Gogan was held in administrative segregation pending transfer should not negate the pen placement. Once Mr. Gogan was pen placed as a maximum security offender, neither the RRC, nor the medium security Springhill Institution are rated as facilities capable of housing maximum security offenders. At paragraph 13 of the majority decision my colleague touches upon this issue noting:

> [13] … the RRC unit is a separate unit, and even within the unit, there are three separate ranges where inmates are housed. These separate ranges are important if there are incompatibility issues among the inmates in the RRC. It is not a classified unit (in the sense of minimum, medium or maximum); however, confinement conditions in the RRC are more restrictive than those found in the general medium security inmate population. …

[111] All inmates, whether it is at the pen placement stage or as a result of reclassification, once classified as maximum security, are placed in administrative segregation pending transfer to a maximum security facility. Administrative segregation is the highest level of incarceration. There are virtually no liberties afforded to the inmate. The risk assessment, flawed or not, now suggests Mr. Gogan should not be in anything other that a maximum security environment. He should not be returned to the RRC.

[112] It is not the job of superior courts using *habeas corpus* to tinker with administrative decisions made by Corrections Services in operating prison facilities. Prison operations are too complex and time sensitive to be managed through a series of *habeas corpus* applications. The court system is not nimble enough to deal with the daily administration challenges faced by institution staff. They are tasked with maintaining both order and security in corrections facilities. They do so, often having to rely upon prison informants as the source of their information, or less than ideal information when doing risk assessments.

[113] I respectfully suggest the approach my colleagues take has the potential to lead to the inevitable result that anytime an inmate is pen placed to maximum he/she would be able to challenge the quality of the evidence or reasonableness of the placement through *habeas corpus*. To suggest they are to be returned to the RRC until that evidence, or the result, is tested potentially leads to an absurdity. In the context of this case the entire sentence may well have ended up being served in the RRC as the *habeas corpus* applications wind through the courts. That would be one consequence of changing the extraordinary writ to the ordinary. Surely that cannot be what the Supreme Court of Canada intended.

[114] Some may suggest that *habeas corpus* provides timely access to justice. Implicit in this is that the Federal court review system is not timely when compared to provincial superior courts. That myth is dispelled simply looking at the timing in this case. The original *habeas corpus* application filed by Mr. Gogan was April 8, 2015. The Notice of Appeal was filed with this Court on May 29, 2015.

[115] The decision to place Mr. Gogan in administrative segregation pending transportation to the maximum security institute is not before this Court. What we have before the Court is a challenge of the pen placement itself. I would, therefore, not interfere with that decision in terms of interim placement.

[116] What has occurred here is more properly the subject of an application to the Federal Court pursuant to s. 18.1 of the *Federal Courts Act.*

[117] I accept that the application judge had no ability to release Mr. Gogan back to the RRC. Once classified as a maximum security classification Mr. Gogan was no longer eligible to remain in the unclassified reception centre. I refer to and adopt the comments of Justice Ferguson in *Thompson*. I am not convinced that Justice Ferguson followed any "narrow reasoning" as suggested by my colleague. In this case, as in *Thompson*, there is no available remedy, and *habeas corpus* is not therefore available. Ferguson J. says:

> [27] The impossibility of granting a remedy for a legally unreasonable and thus unlawful decision on initial assessment at the time of an inmate's admission into the federal corrections system becomes immediately apparent and adds force to the idea that initial classifications cannot be the subject of *habeas corpus* applications.

[118] I am not suggesting that there could never be an appropriate situation where *habeas corpus* could be used in the pen placement process. I am saying such a case would be rare indeed, and this is not one such case. I would have dismissed the appeal.

Scanlan, J.A.

Appendix "A"

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DISCIPLINARY REPORT-LEVEL 2 nnd 3

Pursuant to Section 85 of the Correctional Services Regulatlons dl1clplln1ry rules and procedures are to be established for the following porposes: (a) maintaining the law; (b) protectin g individual rights ond personal safety and the ucurfty of offenders, the public employees :and persons providing a correctional service; (c) maintaining the security or the f:lclUty; (d) promoting the orderly operation and efTectlve delivery of programs and services; (e) protecting personal property and correctional facility property.

OFFENDER'S FULL NAME (PR!NI)	DATE OF BIRTH	DAY Roar/CELL	FACILITY
Ot./IAAJ 6)oG;A-i	23-Sep-89	ws;11	cus·ur

LEVEL	SECTION(S)	OFFENCE(S)	OFFENCE(S) CODE(S)	'PERsoN#	OFmIDER CASE MANAGEMENT#	CuSTODY TEltM #
III	(D)(A)	CONTRABAND ASSAULT STAFF	(Joo l/t55	548527		123187

☐ INFORMATION PUT ON JEIN | DATE ENTERED | INITIALS OF STAFF PLACING INFORMATION ON JEIN:

PART 1: DESCRIPTION OF OFFENDER'S/YOUNG f ols.lifuA VIOR AND CRRECTIONAL STAFF INTERVENTION

Dat.c: / dJ / uwi / cv:"v	Time:	Location:
3/:z//6'	2049	WEST 5

Punoant ta section BB{l}{b}(U) or the Correctlan:al Services Regulations please provide a detailed description of the offence and methods of Intervention.

Details: C≥U H?ls THE ABOVE DATE AND TIME OFFICER AND C/O'S PATTERSON AND MCKENZIE WENT TO ASSIST C/O D. Brooks WHO WAS IN AN VERBAL ALTERCATION WITH Y/M GOGAN. AT THE TIME GOGAN WAS IN POSSESSION OF A "BREW" which C/O Brooks WAS trying TO TAKE FROM THE OFFENDER GOGAN WAS RESISTING C/O Brooks UPON OUR ARRIVAL IN THE DAYROOM AND HE DID SHOVE C/O Brooks AWAY FROM HIMSELF. AT THIS TIME STAFF PRESENCE WAS REQUIRED to CONTAIN Y/M GOGAN, AND MOVE HIM TO HIS CELL.

Name and Signature of Reporting Correctional Staff: C/O T. WILLIAMS	Date: / dd /mm / yyyy 2/25/15
Name and Signature of Staff Witness:	Date: / dd/ mm / YY.V
Name and Signature of Sllff Witncss:	Date: /,h::/ mm /i-J"/)'

lnforrmtlon Must Be Completed In Full.

Form 42.01.00 C vised 06/07