HABEAS CORPUS AFTER *KHELA*: DYNAMICS ATTENUATING PRISONERS' RIGHTS

by

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A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF

THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS

in

THE FACULTY OF GRADUATE AND POSTDOCTORAL STUDIES

THE UNIVERSITY OF BRITISH COLUMBIA

(Vancouver)

April 2021

The following individuals certify that they have read, and recommend to the Faculty of Graduate and Postdoctoral Studies for acceptance, the thesis entitled:

Habeas Corpus after *Khela*: Dynamics Attenuating Prisoners' Rights

submitted by Ellen Bolger in partial fulfillment of the requirements for

the degree of Master of Laws

in Law

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Abstract

This study examines *habeas corpus* prison decisions from *Khela* (March 27, 2014) to August 4, 2020. The types of administrative decisions reviewed were security reclassification and transfer and solitary confinement. *Habeas corpus* review of decision-making in the prison context should be more robust because of the special vulnerability of the affected individuals and the deeply problematic discretionary nature of these decisions and procedures. There are new possibilities set out in *Vavilov* to have robust reasonableness review and the accompanying culture of justification inform and reshape this area of administrative decision-making so that it better accords with the demands of the rule of law, protects and vindicates prisoners' rights, and redresses wrongs.

The same behaviour by prisoners can lead to either a formal disciplinary charge or security reclassification and transfer. The formal disciplinary system is advantageous to prisoners as it has more procedural safeguards and limited negative consequences. The reclassification and transfer process allows for problematic exercises of discretion by decision makers. Security reclassification and transfer and the former administration segregation regime complemented and propped each other up in creating a parallel system of punishment to the formal system. At an institutional level, prison administrators and decision makers did not demonstrate legal expertise during the cases examined in my study.

Many judges on *habeas corpus* review misinterpreted the text of *Khela* to stand for the principle that wardens should be granted "significant" deference. Some reviewing judges would say they did not want to "micromanage" the prison because they appeared to be uncomfortable exercising their jurisdiction. A careful analysis of language used by government lawyers, prison administrators, and judges was conducted. The question was also raised as to whether statutory procedural rights should be considered a ceiling or a floor, and the impact of either option. Reviewing judges have attenuated prisoners' rights by using qualifying language. There are also recent doctrinal developments where respondents are trying to introduce a test where a prisoner

has to show how they were prejudiced by the breach. The general body of case law in this area shows an underenforcement of prisoners' rights.

Lay Summary

Prisoners have the right to challenge their detention through the writ of *habeas corpus*. In 2014, the Supreme Court of Canada confirmed that prisoners can apply for a substantive review of the decision to lose their residual liberty - the "reasonableness" of the decision, in superior provincial courts. This study examines *habeas corpus* prison decisions from *Khela* (March 27, 2014) to August 4, 2020. The types of administrative decisions reviewed were security reclassification and transfer and solitary confinement. The study found that prisoners' rights are generally underenforced. Wardens are not accountable for many of the discretionary decisions they make. The same behaviour by prisoners can lead to either a formal disciplinary charge or security reclassification and transfer, creating parallel systems. Reviewing judges have deferred to wardens to an excessive degree. A 2019 decision, *Vavilov*, has the potential to provide a foothold for prisoner advocates to improve the state of the law.

Preface

This thesis is the original, unpublished, independent work of Ellen Bolger.

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List of Abbreviations

CSC	Correctional Service of Canada
ESP	Enhanced Supervision Placement
OCI	Office of the Correctional Investigator
OPCAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
SCC	Supreme Court of Canada
SIO	Security Intelligence Officer
SIU	Structured Intervention Unit
SRS	Security Reclassification Scale
UN	United Nations

Acknowledgements

I would like to thank the Law Foundation of B.C. Graduate Fellowship, the E.M. Culliton Scholarship and the Peter A. Allard School of Law Graduate Scholarship for providing financial support for this project. I am also very thankful for my supervisory committee, Debra Parkes and Mary Liston, who helped me to structure my project and provided invaluable feedback.

I was very fortunate to have the LL.M. cohort that I did. Thank you to Kemi, Max, Seun, Tom, Jennie, and especially Sofia. I would also like to thank Professors LeBaron, Sarfaty, and Lin.

I owe a huge debt of gratitude to my partner, Riley Hill, for his endless encouragement. A special mention is required for him reading cases out loud to me and taking dictation for my notes while I recovered from eye surgery. I would also like to thank my parents, Maggie and Steve Bolger, for their assistance throughout my years in post-secondary.

My interest in prison law was sparked by the work done through the Systemic Initiatives Project at CLASSIC Law, headed by Amanda Dodge. That interest was further strengthened when taking the Prison Law and Human Rights seminar at the University of Saskatchewan, which was taught by Gillian Gough and Nicholas Blenkinsop.

I would also like to thank my articling Principal, Jennie Cunningham, for her example as an extraordinary advocate. Thanks also to my former colleagues Colleen Harrington and Emmanuel Owusu and current colleague Dale Melville for their support.

Chapter 1: Introduction

1.1 Background

1.1.1 Legal framework for *habeas corpus* review

Habeas corpus, Latin for "produce the body," is a common law writ from England which originated in the 13th century.[1] Originating as far back as 1215, the "*Magna Carta* entrenched the principle that '[n]o free man shall be seized or imprisoned . . . except by the lawful judgement of his equals or by the law of the land.'"[2] The term came to be part of the British conception of the rule of law.[3] It has been described by the Supreme Court of Canada ("SCC") as "the strongest tool a prisoner has to ensure that the deprivation of his or her liberty is not unlawful."[4]

In *habeas corpus* applications in Canada, the applicant must apply to a superior provincial or territorial court and show that they have experienced a deprivation of liberty and raise a legitimate ground to challenge the lawfulness of that deprivation.[5] Once the applicant has done so, the burden shifts to the government to justify the legality of the detention.[6] *Habeas corpus* is often conducted "with *certiorari* in aid,"[7] which means the reviewing court can view the record the decision-maker used. *Habeas corpus* applications can challenge the jurisdiction of the decision-maker, the procedure used to make the decision, or the reasonableness of the decision.

Historically, administrative decisions made in Canadian prisons were shielded from the influence of judges. Once a "series of riots and other violent incidents broke out in penitentiaries across Canada in the 1970s," the courts began to depart from their "hands off" approach, with the shift

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[1] Judith Farbey, Robert J. Sharpe & Simon Atrill, *The Law of Habeas Corpus*, 3rd ed (New York: Oxford University Press, 2011) at 2.
[2] *May v Ferndale Institution*, 2005 SCC 82 at para 19 [*May*].
[3] Mary Liston, "Administering the Canadian Rule of Law," in Colleen Flood and Lorne Sossin (eds), *Administrative Law in Context*, 3rd (Toronto: Emond Montgomery, 2018) 139-182 at 163 [Administering the Rule of Law].
[4] *Mission Institution v Khela*, 2014 SCC 24 at para 29 [*Khela*].
[5] *Khela*, *ibid*, at para 40, citing *May*, *supra* note 2 at para 71.
[6] *Khela*, *ibid*.
[7] *Ibid*, at para 35.

being made clear in the *Miller* trilogy.[8] The *May* and *Khela* decisions of the SCC in 2005 and 2014 respectively marked another milestone for standard of review in prison law.[9] In the *Khela* decision, Justice LeBel reaffirmed that prisoners can seek *habeas corpus* through provincial superior courts and provided guidance on how reasonableness and procedural fairness review were to be conducted.[10]

At the time *Khela* became law, reasonableness review was conducted under the structure set out in *Dunsmuir v New Brunswick*.[11] The case law laid out in my thesis will show that reviewing judges were overly deferential to prison administrators under *Dunsmuir* reasonableness review. In late 2019, the SCC released the *Vavilov* decision, which provided a revised framework for judicial review.[12] In the *Vavilov* decision, the SCC agreed that judicial review had become too deferential to government parties and, responding to concerns and criticisms, improved reasonableness review by mandating a more robust form of review that is firmly attached to a "culture of justification."[13] This shift is of great importance for the decision making in prisons that my thesis examines.

1.1.2 Research question

My research question is: how have reviewing courts interpreted prisoners' *habeas corpus* rights claims after the *Khela* decision?[14] My ultimate argument is that *habeas corpus* review of decision-making in the prison context should be more robust because of the special vulnerability of the affected individuals and the discretionary nature of these decisions and procedures. Prisoners are vulnerable to arbitrary uses of power by prison administrators and decision

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[8] Debra Parkes, "The 'Great Writ' Reinvigorated? *Habeas Corpus* in Contemporary Canada" (2012) 36:1 Manitoba LJ 351, citing Michael Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Vancouver: Douglas & McIntyre 2002) [*Justice Behind the Walls*]; The "Miller Trilogy" refers to: *R v Miller*, [1985] 2 SCR 613, 52 OR (2d) 585 [*Miller*]; *Cardinal v Kent Institution*, [1985] 2 SCR 643, 24 DLR (4th) 44 [*Cardinal*]; *Morin v Canada (National Special Handling Unit Review Committee)*, [1985] 2 SCR 662, 24 DLR (4th) 71.
[9] *May*, *supra* note 2; *Khela*, *supra* note 4.
[10] However, the SCC did not conduct a reasonableness review of the decision.
[11] *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*].
[12] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].
[13] *Ibid*, at para 2.
[14] *Khela*, *supra* note 4.

makers.[15] This is due in part to their physical and social exclusion from society. I investigate the new possibilities set out in *Vavilov* to have robust reasonableness review and the accompanying culture of justification inform and reshape this area of administrative decision-making so that it better accords with the demands of the rule of law, protects and vindicates prisoners' rights, and redresses wrongs. I also note the potential impact of two decisions of appellate courts in British Columbia and Ontario, which found that the legal regime authorizing solitary confinement in federal prisons violated the *Charter*.[16] These decisions also mark a pivotal change in prisoners' rights, being called a "sea change" by some.[17]

1.2 Theoretical framework

The main starting point for this thesis is the proposition that prisoners' rights (under the *Charter*, statute or common law) should not be attenuated due to the fact that the rights-holders are imprisoned. Efrat Arbel has identified the *Sauvé* case as a "statement of constitutional and carceral theory."[18] Arbel pointed out how the SCC held that "subjecting inmates to such 'unmodulated deprivation' would be 'tantamount to saying that the affected class is outside the full protection of the *Charter*.'"[19] However, Lisa Kerr rightly pointed out that *Sauvé* was a voting rights case where prisoners' rights were not coming in conflict with security/prison administration dynamics.[20] When security concerns and prisoners' rights appear to be in conflict, the appeal to deference may be stronger.[21]

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[15] According to Debra Parkes, "It is difficult to imagine a class of people more vulnerable to majoritarian indifference and excesses of state power than prisoners." Debra Parkes, "A Prisoners' Charter? Reflections on Prisoner Litigation Under the Canadian Charter of Rights and Freedoms" (2007) 40:2 UBC L Rev 629 at 632 [A Prisoners' Charter].
[16] *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62 [*BCCLA*], affirmed in part: 2019 BCCA 177 [*BCCLA* BCCA]; *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen*, 2017 ONSC 749 [*CCLA*], affirmed in part: 2019 ONCA 243 [*CCLA* ONCA].
[17] Efrat Arbel, "Devalued Liberty and Undue Deference: The Tort of False Imprisonment and the Law of Solitary Confinement" (2018) 84:2 SCLR 43 at 44.
[18] Efrat Arbel, "Contesting Unmodulated Deprivation: Sauvé v Canada and the Normative Limits of Punishment" (2015) 4:1 Can J of Hum Rights 121, at 140 [Contesting Unmodulated Deprivation].
[19] *Ibid*, at 135, citing *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 69 at para 46.
[20] Lisa Kerr, "Contesting Expertise in Prison Law" (2014) 60:1 McGill LJ 43, at 47-48 [Contesting Expertise].
[21] *Ibid*, at 48.

There is a long record of Canadian prison culture failing to follow the rule of law.[22] While one might assume that failure to do so would be most noticeable at the lowest level, such as Correctional Officers, Justice Louise Arbour said in her groundbreaking *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* [the "Arbour Report"] that this failure went through all levels.[23] According to Justice Arbour, "the absence of the rule of law is most noticeable at the management level, both within the prison and at the Regional and National levels."[24] She further stated, "the rule of law has to be imported and integrated, at those levels, from the other partners in the criminal justice enterprise, as there is no evidence that it will emerge spontaneously."[25] Mary Liston has set out how the rule of law principle has "four essential guarantees to legal subjects: "(1) that all persons will be considered formally equal under the rule of law, including those holding public power; (2) that public standards will guide the creation, enactment, revision, and enforcement of all laws; (3) that the government and the legal system will treat individuals fairly; and (4) that an existing legal system enables access to legal processes for all persons in order to resolve complaints."[26] These guarantees help to form the normative frame for this thesis. I investigate judicial consideration of prisoner *habeas corpus* claims in relation to these rule of law standards.

Section 24 of the *CCRA* imposes obligations on the Correctional Service of Canada to keep up-to-date information on prisoners.[27] In *Ewert*, the SCC used section 4(g) of the *CCRA* to interpret

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[22] Canada, *Report of the Royal Commission to Investigate the Penal System of Canada* (Ottawa: King's Printer, 1938) (Chair: Archambault).; Canada, *Report of the House of Commons Justice Committee's Sub-Committee on the Penitentiary System in Canada* (Ottawa: Minister of Supply and Services, 1977) (Chair: MacGuigan); Canada, *Report of the Study Group on Dissociation* (Ottawa: Solicitor General of Canada, 1975) (Chair: Vantour); Canada, *Correctional Law Review: Influences on Canadian Correctional Reform* (Ottawa: Department of the Solicitor General, 1986-1988); Canada, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) (Chair: Arbour) [Arbour Report]; Canada, Coroner's Inquest Touching the Death of Ashley Smith, (Ottawa: Correctional Service of Canada, 2014), online: Government of Canada <https://www.csc-scc.gc.ca/publications/005007-9009-eng.shtml>; Debra Parkes & Kim Pate, "Time for Accountability: Effective Oversight of Women's Prisons," (2006) 48 Can J Criminol Crim Justice 251; Lisa Kerr, "The Chronic Failure to Control Prisoner Isolation in US and Canadian Law" (2015) 40:2 Queen's LJ 483.
[23] Arbour Report, *ibid.*
[24] *Ibid*.
[25] *Ibid*.
[26] Administering the Rule of Law, *supra* note 3, at 141.
[27] *Corrections and Conditional Release Act*, SC 1992, c 20 at section 24 [*CCRA*].

the Correctional Service of Canada's obligations under s. 24.[28] Section 4(g) of the *CCRA* holds "correctional policies, programs and practices respect gender, ethnic, cultural, religious and linguistic differences, sexual orientation and gender identity and expression, and are responsive to the special needs of women, Indigenous persons, visible minorities, persons requiring mental health care and other groups."[29] Similarly, section 4(d) of the *CCRA*, which states that prisoners "retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted" should be taken seriously and used to interpret other sections of the *CCRA*, *CCRR*, and Commissioner's Directives.[30]

This thesis is rooted in a critique of prisons as institutions and concerns about the limits of prison reform to achieve justice.[31] This is because prisons tend to reproduce inequalities and exacerbate existing problems, such as mental illness. Scholars with abolitionist aims "argue that prison researchers have an obligation to 'bear witness to what happens behind the doors of closed institutions.'"[32] The research in this thesis does not simply call for fairer or better prisons, but instead hopes to call into question the practice of using a deprivation of someone's liberty as a solution to a problem. According to scholar Debra Parkes:

> A crucial point that is often not part of prisoner litigation or other prison reform efforts is an understanding that the persistence of solitary confinement (or other forms of isolation and inhumane treatment) is rooted in carceral logics. Imprisonment itself creates its own logic and imperative for the use of solitary. When people are put in cages, many of them will not respond well to that environment. They will act out. They will harm themselves or others. Consequently, they are put in smaller cages (segregation cells) and they do

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[28] *Ewert v Canada (Attorney General)*, 2018 SCC 30 at paras 6, 39, and 51-66 [*Ewert*]; *CCRA*, *ibid*.
[29] *CCRA*, *ibid*.
[30] *CCRA*, *ibid*; Corrections and Conditional Release Regulations, SOR/92-620 [*CCRR*]; Correctional Service of Canada, "Commissioner's Directives", online: <https://www.csc-scc.gc.ca/politiques-et-lois/005006-0001-en.shtml> [Commissioner's Directives].
[31] The phenomenon of retrenching problematic correctional practices is discussed in Debra Parkes' article: "Solitary Confinement, Prisoner Litigation, and the Possibilities of a Prison Abolitionist Lawyering Ethic" (2017) 32:3 CJLS 165. [Prison Abolitionist Lawyering Ethic].
[32] Sarah Turnbull, Joane Martel, Debra Parkes & Dawn Moore, "Introduction: Critical Prison Studies, Carceral Ethnography, and Human Rights: From Lived Experience to Global Action" (2018) 8:2 Oñati Socio-legal Series 174, online: <https://doi.org/10.35295/osls.iisl/0000-0000-0000-0934> at 177, citing P. Scraton & J. McCulloch, eds, *The Violence of Incarceration* (New York: Routledge, 2009).

> even less well, but they are contained. The fundamental carceral logic of punishing and caging goes unchallenged.[33]

Parkes noted how a "reformist" approach "can contribute to the expansion and proliferation of carceral sites."[34] She listed the example of how Howard Sapers, the former Correctional Investigator, conducted a review of solitary confinement in Ontario. According to Parkes, "the decision to build two new and improved prisons, with expanded capacity, has been the primary response of the Ontario government to the report which also called for hard time limits on the use of segregation and independent oversight of the practice."[35] No part of this thesis should be read to suggest that the carceral state should be expanded or entrenched.

1.3 Methodology

Out of interest for how *Khela* has been interpreted by lower courts, I conducted a search in WestLaw, LexisNexis, and CanLII for all reported cases since the decision (March 27, 2014). I searched for English-language *habeas corpus* cases involving adults detained in prison, excluding immigration detention, mental health detention, dangerous offender proceedings, bail, hearings involving the Parole Board of Canada, and extradition. There were several cases solely centred around whether the detention could be considered a deprivation of the applicant's residual liberty, which I excluded, as I only wanted to look at cases where the judge ruled on the lawfulness of that detention for either procedural fairness or reasonableness review. For example, the courts in some provinces do not consider a prisoner's initial security classification in the federal system to be a deprivation of liberty. So, in those jurisdictions, reviewing judges will not rule on the merits of the prisoner's procedural fairness argument or determine whether the decision was reasonable, because the prisoner has not met the first stage of *habeas corpus*.[36]

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[33] Prison Abolitionist Lawyering Ethic, *supra* note 31 at 179.
[34] *Ibid*, at page 183.
[35] *Ibid*, at page 184.
[36] This is the law in British Columbia. See: *L.V.R. v Mountain Institution (Warden)*, 2016 BCCA 467, [*L.V.R.*].

Specifically, I searched all reported *habeas corpus* decisions citing *Khela* on Westlaw, CanLII and LexisNexis up until August 4, 2020. Those searches yielded 839, 885, and 911 cases, respectively. I also searched phrases on all three databases to capture cases not citing *Khela*: "'procedural fairness' & prison & '*habeas corpus*'", "'procedural fairness' & inmate & '*habeas corpus*'", "'procedural fairness' & penitentiary & '*habeas corpus*'", and "reasonab! & '*habeas corpus*'". Once I filtered through the cases, I found a total of 90 which met my criteria. These 90 cases form the basis of my study.[37] I only included cases where prisoners' procedural fairness or reasonableness review decisions were considered by the judge. I used my own judgment to determine whether a case met this criteria, reading every case which appeared on the databases through my searches. Some cases were easy to exclude, such as when they were obviously in a different context, like parole.

Most of the cases included in my study were about federal prisoners who had their security classification reclassified and had been transferred to a higher security facility.[38] Sixty-three of the cases were about security reclassification and transfer, or 70%. Twenty-eight (31%) of the cases involved prisoners challenging some form of segregation. Only one case in the study dealt with the new legislation replacing administrative segregation with Structured Intervention Units.[39] There was some overlap in the categories of cases, as prisoner applicants might be challenging both segregation and reclassification/transfer. Many of the reclassification/transfer cases mentioned that prisoners were confined in administrative segregation, but most prisoners did not challenge such placement using *habeas corpus*. All cases involving provincial prisons were about solitary confinement, except one, which was about transfer to a different unit.[40] Only one prisoner applicant appeared to be female identified, based on the pronouns used by judges.[41] I did not analyze whether each case could be considered a win or loss by the applicant. However,

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[37] See Appendix A for a table of cases.
[38] *Ibid*.
[39] *Raju v Warden of Kent Institution*, 2020 BCSC 894, [*Raju*] citing *An Act to amend the Corrections and Conditional Release Act and another Act*, SC 2019, c 27.
[40] In *Mercredi v Saskatoon Provincial Correctional Centre*, 2019 SKCA 86 [*Mercredi*], Mr. Mercredi was challenging his unit placement in a provincial prison, which employed some of the same legal principles.
[41] *Charlie v British Columbia (Attorney General)*, 2016 BCSC 2292 [*Charlie*].

there were cases where prisoners were granted the *habeas corpus* and cases where judges denied the remedy. This study examines cases with both these outcomes.

Three cases from Alberta and Saskatchewan, two regarding disciplinary hearings and one regarding solitary confinement in provincial prisons were not included in the study because the judges referred to their analyses as "judicial review" and not *habeas corpus*.[42] This distinction is not very meaningful as periods of segregation can be ordered during disciplinary hearings. However, these judicial review decisions were not included because they were not strictly *habeas corpus* proceedings, as the burden was on the applicant instead of the detaining authority. Most cases were from the federal prison system, but I have also included provincial prison cases. In this thesis, both federal and provincial/territorial facilities will be called prisons: cases can be assumed to involve federal penitentiaries unless marked as being a provincial prison.

Part of my methodology is critical discourse analysis, which is "a type of discourse analytical research that primarily studies the way social power abuse, dominance and inequality are enacted, reproduced and resisted by talk and text."[43] Critical discourse analysis does not have a unitary theoretical framework.[44] Scholar Norman Fairclough mentioned one of the goals of this type of analysis: "to help increase consciousness of language and power, and particularly, how language contributes to the domination of some people by others."[45] According to Teun van Dijk, "argumentation may be persuasive because of the social opinions that are 'hidden' in its implicit premises and thus taken for granted by the recipients."[46] I primarily use critical discourse analysis in chapter 4, where I examine how prisoners' rights are attenuated through the use of language. By examining this language critically, I hope to expose some of the underlying social opinions hidden within judicial decisions. Fairclough also sought to help people "see the extent to which

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[42] *Paxton v Alberta (Director of the Calgary Remand Centre)*, 2014 ABQB 438; *Prystay v Alberta*, 2018 ABQB 197; *Forest v Saskatoon Correctional Centre*, 2018 SKQB 49.
[43] Teun A. van Dijk, *Discourse and Power* (New York: Palgrave Macmillan, 2008) at 85 [*Discourse and Power*].
[44] *Ibid*, at 87.
[45] Norman Fairclough, *Language and Power* (London: Longman, 1989) at 4 [*Language and Power*].
[46] *Ibid*, at 93.

their language does rest upon common-sense assumptions, and the ways in which these common-sense assumptions can be ideologically shaped by relations of power."[47]

In addition to my chapter on language, critical discourse analysis is also useful when thinking about inherent power imbalances between self-represented prisoners on the one hand, and government lawyers, prison administrators, and reviewing judges on the other. According to van Dijk, in an area such as a courtroom, lawyers have more "exclusive access to, and control over" legal discourse. Since lawyers have control over more discourse than self-represented prisoners, and that discourse is more influential, they enjoy more power.[48] In my study, 45 of the cases had prisoner applicants representing themselves.

The analysis undertaken in this thesis seeks to take prisoners' arguments seriously, even though they often do not conform with the language regularly used in legal discourse. For instance, chapter 2 will explore the concept of punishment being enacted through the security reclassification and transfer system will be explored. The decisions reveal that many prisoners raised this problem in their submissions, but it was never taken seriously by government lawyers or reviewing judges, partly because it did not fit the dominant legal discourse. Similarly, self-represented prisoners also brought up problems with the administration of the test used for re-classifying a prisoner's security level, which I discuss in chapter 3. These complaints often did not conform with the conventions of "legalese" used by legal professionals. According to van Dijk, "this archaic lexical, syntactic and rhetorical style not only symbolizes and reproduces a legal tradition, thus facilitating communication among legal professionals, but obviously excludes lay persons from effective understanding, communication, and, hence, resistance."[49]

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[47] *Ibid*, at 4.
[48] *Discourse and Power*, *supra* note 43 at 90.
[49] *Ibid*, at 90.

1.3.1 Limitations of research

A major limitation of my research is that I only used reported cases. Many cases are not reported. Also, many prisoners do not apply for *habeas corpus* but may have cause to. This is due to barriers such as access to legal representation, fear of retaliation, and constraints inherent to being in forms of detention like solitary confinement.

I was also limited by only reading English-language decisions, therefore eliminating most decisions out of Quebec. Evaluating French-language decisions could be a possible avenue for future scholarship. Evaluating prison decision making through an explicit racial and gender-based lens is also critical work to be done.

1.4 Structure of thesis

In chapter 2, the thesis will explore the idea of a parallel or shadow punishment system which exists in federal prisons. Specifically, the security reclassification and transfer system is an unofficial form of punishment, operating in a parallel manner to the more formal disciplinary system. I will then discuss and critique the level of deference generally granted by reviewing judges to correctional administrators in chapter 3. *Vavilov* has the potential to ensure stronger judicial review of the substantive reasonableness of a decision to harm a prisoner's liberty interests without proper justification. A careful analysis of language used by government lawyers, prison administrators, and judges will then be conducted in chapter 4. That chapter will also look at whether statutory procedural rights should be considered a ceiling or a floor, and the impact that has for attenuating language and nascent doctrinal developments. The image which might best describe the findings of the study would be a diminishing of prisoners' rights by a thousand paper cuts. While none of the identified problems are decisive on their own, together they create an unfavourable body of case law for prisoners and their advocates. In my fifth and final chapter, I will identify areas of potential reform and suggestions for further research.

Chapter 2: Framing and Recognizing a Parallel System of Punishment

2.1 The legal framework around prisons: judicial review and *habeas corpus*

Generally, sentences of imprisonment which are longer than two years fall under the jurisdiction of the federal government and are legally considered "penitentiaries" though they are often called institutions. These sentences are governed by the *Corrections and Conditional Release Act* and regulations.[50] Sentences of imprisonment under two years fall under provincial or territorial jurisdiction and are ruled by the legislation of the respective province or territory. Provincial and territorial sentences are served in institutions usually called correctional centres.

The *CCRA* sets out a number of purposes and principles in sections 3-4.[51] The "paramount consideration" set out in the *Act* is the "protection of society."[52] What serves the protection of society is open to interpretation. Under one reading, it can be used to justify punitive measures against prisoners. However, in *Ewert v Canada*, the SCC used this paramount consideration, together with a principle about attending to the circumstances of Indigenous offenders, to interpret the CSC's obligations under another section of the *Act* in a manner more favourable to prisoners.[53] It interpreted this "paramount consideration" as being served by rehabilitation and reintegration into the community.[54]

When prisoners experience conditions of confinement or treatment that they believe is unlawful, they have the choice of pursuing public law remedies in either provincial/territorial superior courts, where they can access judicial review and *habeas corpus*, or the Federal Court, where they can only access judicial review.[55] The remedy of *habeas corpus* was deliberately excluded from the jurisdiction of the Federal Courts in their enabling statute.[56] In *Khela*, the SCC

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[50] *CCRA*, *supra* note 27.
[51] *Ibid*.
[52] *Ibid*, at section 3.1.
[53] *Ewert*, *supra* note 28 at para 59.
[54] *Ibid*.
[55] *May*, *supra* note 2, at paras 27-75.
[56] *Federal Courts Act*, RSC 1985, c F-7, at section 18.

confirmed that, in addition to review on jurisdiction and procedural fairness, superior provincial/territorial courts on *habeas corpus* can also review the substance of the decision. To access judicial review through the Federal Court, a prisoner must first exhaust the official grievance procedure.[57] The federal grievance procedure has more than one level and can take a long time to complete.[58] Therefore, the SCC found that *habeas corpus* through the superior provincial/territorial courts was generally a more timely remedy.[59] In their factum and oral submissions in *Khela*, CSC posited that substantive review (reasonableness review) should only be available in Federal Courts. They claimed that reasonableness review would take too long in provincial court.[60] This appears to have been a disingenuous "access to justice" argument.[61]

In addition, judicial review through the Federal Court is an "inherently discretionary remedy."[62] *Habeas corpus* is non-discretionary.[63] As well, the burden of proof in *habeas corpus* is on the detaining authority (once the claimant proves a deprivation of liberty), whereas for judicial review in the Federal Court, the burden is on the applicant.[64] Judicial review through the Federal Court often results in a decision remitting back to the original decision maker. However, in rare cases, *mandamus* will be available as a remedy, which could order a prisoner to their former level of liberty.[65]

When courts determine whether an administrative decision was within the bounds of the law, they categorize their review as being about (1) whether the decision-maker had jurisdiction, (2) the procedure which took place, or (3) the substance of the decision. This process/substance

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[57] *Khela*, *supra* note 4, at para 61.
[58] *Ibid*.
[59] *Ibid*.
[60] Diane Knopf, Warden of Mission Institution & Harold Massey, Warden of Kent Institution, "Factum of the Appellants" for Mission Institution v Khela, 2014 SCC 24, online: <https://www.scc-csc.ca/WebDocuments-DocumentsWeb/34609/FM010_Appellants_Diane-Knopf-et-al.pdf> [CSC Factum]; Supreme Court of Canada, "Webcast of Proceedings" for Mission Institution v Khela, 2014 SCC 24, online: <https://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=34609&id=2013/2013-10-16--34609&date=2013-10-16&fp=n&audio=n> [*Khela* Webcast].
[61] CSC Factum, *ibid*, at page 1.
[62] *Khela*, *supra* note 4, at para 41.
[63] *Ibid*, at para 38.
[64] *Ibid*.
[65] *Canada (Public Safety and Emergency Preparedness) v LeBon*, 2013 FCA 55.

distinction is a permeable one, as the two areas are prone to overlap. David Dyzenhaus and Evan Fox-Decent discussed this complex distinction, saying "it does at least have the function of demarcating the domains of legislation and its implementation, on the one hand, and adjudication, on the other."[66] According to Dyzenhaus and Fox-Decent "courts regard procedure as their domain, while substance is left to the legislature and its delegates."[67]

When a court is reviewing the process followed, they are assessing "procedural fairness," and the standard of review is "correctness."[68] The process required to comply with the duty of procedural fairness is a contextual one. In *Baker*, L'Hereux-Dube listed several factors to be taken into account when determining the level of fairness necessary in the circumstances. These non-exhaustive factors include: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself.[69] When reviewing prison decisions, procedural fairness issues can include: insufficient disclosure, lack of reasons for the decision, no meaningful opportunity to respond, and lack of notice that a hearing is taking place. Correctness requires the reviewing court to substitute their own interpretation of the law for the administrative decision maker's. If the reviewing judge has a different interpretation of the law, that interpretation replaces the original one.

When a court is reviewing the substance of a decision, they are looking at whether the outcome was "reasonable." Prior to 2019, the question was whether it fell within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."[70] In December 2019, the Supreme Court of Canada revised their framework for reasonableness review in *Vavilov*.[71]

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[66] David Dyzenhaus & Evan Fox-Decent, "Rethinking the Process/Substance Distinction: Baker v. Canada" (2001) 51:3 U of TLJ 193 [Process/Substance Distinction].
[67] *Ibid*, at 195.
[68] *Khela*, *supra* note 4, at para 79.
[69] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*].
[70] *Khela*, *supra* note 4, at para 73, citing *Dunsmuir*, *supra* note 11 at para 47.
[71] *Vavilov*, *supra* note 12.

Vavilov called for "responsive justification"[72] of governmental decisions, and required that reasons be "based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker."[73] When reviewing prison decisions, the type of issues which come up around substantive review is fundamentally about whether the decision-maker's conclusion was open to them, given the record.

Lawyers for the CSC in *Khela* tried to limit *habeas corpus* to whether the decision-maker had jurisdiction to make the decision, as opposed to reviewing the reasonableness of the decision itself.[74] This proposition was rejected by the Court. Advocates for the Canadian Association of Elizabeth Fry Societies (CAEFS) and the John Howard Society (JHS) also argued against importing reasonableness review into *habeas corpus*, but for different reasons. Lawyer and scholar Allan Manson argued on behalf of CAEFS and the JHS to the SCC that *habeas corpus* would be lessened by incorporating a reasonableness standard:

> *Dunsmuir* reasonableness will bring deference to the warden. The warden is not a decision-maker who warrants deference in that sense. It's not adjudicative, not tasked with questions of law, in *Charter* issues it's not someone we expect to give sufficient attention to *Charter* values.[75]

Another prison law scholar and lawyer, Michael Jackson, appeared for the British Columbia Civil Liberties Association ("BCCLA") in *Khela*. Jackson argued that provincial/territorial superior courts must be able to "conduct a robust review."[76] This approach was adopted by the Court: "[T]he intervener the BCCLA argues that the application of a standard of review of reasonableness should not change the basic structure or benefits of the writ. I agree."[77]

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[72] *Ibid*, at para 133.
[73] *Ibid*, at para 85.
[74] CSC Factum, *supra* note 60.
[75] *Khela* Webcast, *supra* note 60.
[76] *Khela*, *supra* note 4, at para 24.
[77] *Ibid*, at para 77.

Manson described importing reasonableness into *habeas corpus* review as a "bad marriage."[78] This "marriage" has been criticized by others as well.[79] Lisa Kerr rightly pointed out that since the SCC did not conduct a reasonableness review in *Khela*, there is little guidance on how it should be done.[80]

For discretionary administrative decisions involving *Charter* rights, the *Doré v Barreau du Québec* [*Doré*] framework applies.[81] According to the authors of *Administrative Law: Cases, Text, and Materials*, to identify whether a question is discretionary, "the key is to look to the relevant statute in order to determine whether the statute frames the decision-maker's authority in very general terms, such that it requires choices to be made from a wide range of options, usually involving broadly framed policy considerations."[82] In *Doré*, the SCC described a reasonableness analysis that "centres on proportionality."[83] This means that the analysis by the reviewing judge should ensure "that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives."[84] In other words:

> If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one.[85]

In 2015, Lisa Kerr wrote "*Doré* has yet to officially arrive to the prison law context, but the *Khela* decision imports part of the *Doré* rationale when it imports reasonableness to *habeas*

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[78] *Ibid*.
[79] See, for example, Lisa Kerr, "Easy Prisoner Cases" (2015) 71 The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference, Article 9, online: <https://digitalcommons.osgoode.yorku.ca/sclr/vol71/iss1/9> [Easy Prisoner Cases]. The marriage between administrative law and the *Charter* in *Doré* was well set out in Audrey Macklin, "Charter Right or Charter-Lite?: Administrative Discretion and the Charter." (2014) 67 The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference, Article 18, online: <https://digitalcommons.osgoode.yorku.ca/sclr/vol67/iss1/18>.
[80] *Ibid*, at pages 255-256,
[81] *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*].
[82] Gus Van Harten, et al., *Administrative Law: Cases, Text, and Materials*, 7th ed (Toronto: Emond Montgomery Publications Limited, 2015) at 730.
[83] *Doré*, *supra* note 81 at para 7.
[84] *Ibid*.
[85] *Ibid*.

corpus, and raises the prospect that reasonableness could be extended to other *Charter* complaints arising from the prison context." *Doré* was not cited in any of the cases in my study. It is unclear why this analysis has not been introduced into the *habeas corpus* context. Most cases in the study seemed to be operating from a pure administrative law framework, even though *habeas corpus* is itself guaranteed in the *Charter* and necessarily involves *Charter* interests.[86] While *Doré* is likely less favourable to prisoner applicants than a traditional *Charter* analysis, it may be preferable to the pure administrative law review currently adopted.

In terms of which *Charter* sections apply to *habeas corpus* decisions, the SCC held in *May* that the writ is "crucial" for sections 7 and 9.[87] The right to access *habeas corpus* is protected under section 10(c) of the *Charter*. During submissions for Mr. Khela before the SCC, lawyer Bibhas Vaze said that it is his practice during *habeas corpus* applications to plead under *Charter* grounds (in addition to the administrative law arguments).[88] In my review of post-*Khela* cases, the reviewing judges generally did not apply the *Charter* and instead used administrative law analyses. Non-*habeas corpus Charter* challenges have been made. The most notable in recent memory are the *BCCLA* and *CCLA* decisions which struck down the administrative segregation regime as contrary to the Charter.[89]

2.2 The institutional framework of prisons and prison decision making

2.2.1 Administrative segregation/solitary confinement decisions

Solitary confinement is defined in international law, specifically the Standard Minimum Rules on Treatment of Prisoners ("Mandela Rules") as confinement of 22 hours or more per day with

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[86] See, for example, the approach taken by some Alberta judges as outlined in *Shoemaker v Canada (Drumheller Institution)*, 2018 ABQB 851 at para 37 [*Shoemaker*], "The procedure and onus of proof involved in the *habeas corpus* procedure means *habeas corpus* is incompatible with other forms of *Charter* relief." Overturned on appeal on other grounds: 2019 ABCA 266 [*Shoemaker* ABCA]
[87] *May*, *supra* note 2, at para 22.
[88] *Khela* Webcast, *supra* note 60.
[89] *BCCLA*, *supra* note 16; *CCLA*, *supra* note 16.

no meaningful human contact.[90] Solitary confinement constitutes a deprivation of residual liberty and is therefore reviewable under *habeas corpus*.[91] The federal prison system formerly allowed for solitary confinement using the terms "administrative segregation" and "disciplinary segregation." The federal administrative segregation regime was held to be unconstitutional in two cases decided by the courts in British Columbia and Ontario in recent years, *BCCLA* and *CCLA*, with the Supreme Court of Canada granting leave to appeal in February 2020 and the Attorney General of Canada discontinuing the appeal in April 2020.[92]

The relevant legislation of the former regime is outlined in the following chart:

Table 1: The Former Legislative Framework for Administrative Segregation[93]

Source	Description
• Sections 31 to 37 of the CCRA • Sections 19 to 23 of the CCRR	• Provided the basic framework for administrative segregation
• Section 31 of the CCRA	• Sets out the purpose and grounds for ordering administrative segregation: o 31. (1) The purpose of administrative segregation is to maintain the security of the penitentiary or the safety of any person by not allowing an inmate to associate with other inmates. o (2) The inmate is to be released from administrative segregation at the earliest appropriate time. o (3) The institutional head may order that an inmate be confined in administrative segregation if the institutional head is satisfied that there is no reasonable alternative to administrative segregation and he or she believes on reasonable grounds that ▪ (a) the inmate has acted, has attempted to act or intends to act in a manner that jeopardizes the security of the penitentiary or the safety of any person and allowing the inmate to associate with other inmates

[90] UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules): resolution / adopted by the General Assembly, 8 January 2016, A/RES/70/175, online: <https://www.refworld.org/docid/5698a3a44.html> [Mandela Rules].
[91] *Miller*, *supra* note 8, at 641; *May*, *supra* note 2, at para 32.
[92] *Attorney General of Canada v Corporation of the Canadian Civil Liberties Association*, 2020 CanLII 10506 (SCC); *Attorney General of Canada v British Columbia Civil Liberties Association, et al*., 2020 CanLII 10501 (SCC).
[93] *BCCLA*, *supra* note 16 at paras 77-82.

	would jeopardize the security of the penitentiary or the safety of any person; ▪ (b) allowing the inmate to associate with other inmates would interfere with an investigation that could lead to a criminal charge or a charge under subsection 41(2) of a serious disciplinary offence; or ▪ (c) allowing the inmate to associate with other inmates would jeopardize the inmate's safety.
• Section 32 of the CCRA	• Provides that all decisions by the institutional head (warden) to "release or not to release an inmate from administrative segregation shall be based on the considerations set out in section 31".
• CCRA • CCRR	• Provide for a periodic review of an inmate's placement in administrative segregation after five days, 30 days and every 30 days thereafter by an institutional segregation review board ("ISRB"). • The ISRB is chaired by the deputy warden at the five-day review, and by the warden at the 30-day and all subsequent reviews.
• CCRR • Commissioner's Directive 709	• The Regulations direct regional reviews of segregation placements by the Regional Segregation Review Board ("RSRB") that continue past 60 days, though CD 709 has shortened that period to 38 days, and every 30 days thereafter. o The CD also requires a national review of cases in which the inmate reaches 60 days in segregation or has had four segregation placements or spent 90 cumulative days in segregation in a calendar year.

Different names for solitary confinement have been used by correctional authorities throughout Canada.[94] However, solitary confinement under the Mandela Rules is not limited by name. It occurs when a prisoner has been confined for "22 hours or more a day without meaningful human contact."[95] In the words of the Canadian Association of Elizabeth Fry Societies, "segregation is actually a status and not merely a place."[96]

[94] For example, within the Yukon alone, Secure Living Unit, Segregation, Voluntary Separate Confinement, and Separate Confinement were all used to describe various types of solitary confinement: Yukon, Whitehorse Correctional Centre Inspection Report (Whitehorse, Department of Justice 2018) (Loukidelis); *Sheepway v Hendriks*, 2019 YKSC 50 [*Sheepway*].
[95] Mandela Rules, *supra* note 90, at Rule 44.
[96] Canadian Association of Elizabeth Fry Societies, "Human Rights in Action: Handbook for Women Serving Federal Sentences" (2014), online: <https://www.publicsafety.gc.ca/lbrr/archives/cn36884-eng.pdf>.at page 55.

Justice Leask found in *BCCLA* that the practice "places inmates at significant risk of serious harm" and "many inmates suffer permanent harm as a result."[97] One example of such harm is the tragic case of Ashley Smith, a prisoner who died in administrative segregation after having spent more than a year in continuous segregation.[98] Lisa Kerr has noted, "solitary has generated stays of proceedings in criminal cases, justified large grants of credit for time spent in pretrial custody, and led to a $20 million *Charter* damages award against the federal government."[99]

The federal government claimed to have ended solitary confinement in 2019 but appear to have instituted a new version of it in the form of "Structured Intervention Units."[100] While the new legislation purports to get rid of solitary confinement, "critics have lamented the absence of three features: time limits, judicial oversight, and categorical restrictions for vulnerable inmates, like the mentally ill."[101] Under Canada's former administrative segregation rules, prisoners could be placed in solitary confinement for a potentially unlimited amount of time, with no external oversight under the "administrative segregation" regime.[102] The criteria for placing someone in administrative segregation and keeping them there was worded in such a way where alleged security interests could almost always justify the placement. Justice Leask in *BCCLA* accepted scholar Michael Jackson's evidence about the "broad correctional discretion that can lead to extended placements in segregation."[103] Since the *BCCLA* and *CCLA* decisions, solitary confinement is now considered very harmful (and unconstitutional) whereas before it was commonplace.

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[97] *BCCLA*, *supra* note 16 at para 276.
[98] *Ibid*, at para 41.
[99] Lisa Kerr, "The End Stage of Solitary Confinement" (2019) 55:7 C.R. 382 [End Stage], citing *Brazeau v Attorney General (Canada)*, 2019 ONSC 1888, overturned on appeal: 2020 ONCA 184.
[100] *CCRA*, *supra* note 27 at sections 31-37.91; *CCRR*, *supra* note 30 at sections 19-23.
[101] End Stage, *supra* note 99, at 3.
[102] *CCRA*, *supra* note 27 at sections 31-37; *CCRR*, *supra* note 30 at sections 19-23.
[103] *BCCLA*, *supra* note 16 at para 328.

2.2.2 Disciplinary decisions

Formerly, in the federal prison system, there was a codified set of disciplinary charges that could result in a sentence of time spent in solitary confinement, called "disciplinary segregation."[104] This was part of the overall formal disciplinary system in federal prisons. In 2019, the option for prisoners to be punished with solitary confinement for a disciplinary offence was removed.[105] According to the *CCRA*, the purpose of this formal disciplinary system is "to encourage inmates to conduct themselves in a manner that promotes the good order of the penitentiary, through a process that contributes to the inmates' rehabilitation and successful reintegration into the community."[106] There are both minor and "serious" types of infractions under this system. Disciplinary segregation was only available for serious offences.[107] Other types of punishments for disciplinary offences include a warning or reprimand,[108] a loss of privileges,[109] a restitution order,[110] a fine,[111] or "performance of extra duties."[112]

None of the cases in my study were *habeas corpus* reviews of disciplinary decisions. That is likely due to the statutory cap on the amount of time a person could be sentenced to disciplinary segregation: 30 days for a single offence and 45 days total if serving two "sentences" consecutively.[113] If a prisoner were to apply for *habeas corpus* due to a decision to place them in disciplinary segregation, it likely would have been moot by the time the court had the record placed in front of it because their "sentence" would have been served. As well, a prisoner may have been less likely to bother applying for *habeas corpus* for disciplinary segregation compared

[104] *CCRA*, *supra* note 27 at section 44(1)(f) [repealed, 2019].
[105] *An Act to amend the Corrections and Conditional Release Act and another Act*, SC 2019, c 27.
[106] *CCRA*, *supra* note 27 at section 38.
[107] *Ibid*, at section 44(1)(f) [repealed, 2019].
[108] *Ibid*, at section 44(1)(a).
[109] *Ibid*, at section 44(1)(b).
[110] *Ibid*, at section 44(1)(c).
[111] *Ibid*, at section 44(1)(d).
[112] *Ibid*, at section 44(1)(e).
[113] *Ibid*, at section 44(2) [repealed, 2019].

to administrative segregation because many prisoners reported the worst part of administrative segregation was its indefinite nature.[114]

The behaviour that is the subject matter of disciplinary offences is set out in Commissioner's Directive 580.[115] This includes activities such as disobeying an order, damaging property, theft, fighting, possessing or dealing in contraband, taking an intoxicant, participating in a disturbance, gambling, taking steps to escape, and bribing.[116] Prisoners can also be punished for attempting to do these things or assisting another person in doing them.[117] Section (f) is potentially troubling due to its subjective nature: being "disrespectful toward a person in a manner that is likely to provoke them to be violent or toward a staff member in a manner that could undermine their authority or the authority of staff members in general."[118] However, most of the other offences have corresponding counterparts in the *Criminal Code*.[119]

During disciplinary hearings in federal penitentiaries, the "rules of evidence in criminal matters do not apply."[120] An Independent Chairperson presides over the hearing.[121] The Chairperson can admit any evidence they consider "reasonable or trustworthy."[122] During a disciplinary hearing, incriminating evidence from a separate disciplinary hearing may not be used as evidence.[123] The standard of proof during a disciplinary hearing is "beyond a reasonable doubt, based on the evidence presented at the hearing."[124] The prisoner in a disciplinary hearing only has to face the charges they were formally charged with.[125]

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[114] See, for example, Efrat Arbel & Ian Davis, "Immigration Detention and the Problem of Time: Lessons from Solitary Confinement" (2018) 4:4 IJMBS 326.
[115] Commissioner's Directives, *supra* note 30 at CD 580, at Annex B.
[116] *Ibid.*
[117] *Ibid.*
[118] *Ibid.*
[119] *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].
[120] Commissioner's Directives, *supra* note 30 at CD 580, at section 37.
[121] *Ibid.* As well, in Alberta provincial prisons, adjudicators must be independent: *Currie v Alberta (Edmonton Remand Centre)*, 2006 ABQB 858.
[122] *Ibid.*
[123] *Ibid*, at section 39.
[124] *Ibid*, at section 41.
[125] *Ibid.*

During a disciplinary hearing, prisoners may question witnesses, introduce evidence, call their own witnesses, examine exhibits, and make submissions.[126] Also, prisoners cannot be charged more than once for the same "action, simultaneous actions or a chain of uninterrupted actions."[127] Disciplinary hearings must take place "as soon as practicable" but not more than three working days after the prisoner receives notice.[128]

In disciplinary hearings, it does not appear that prison administrators can lawfully withhold information from the prisoner. In *Hamm*, the judge stated that section 27(3) of the *CCRA* "may not allow the institution to withhold information from an inmate during a discipline hearing."[129] The Commissioner's Directive on Discipline of Inmates does not mention withholding information under section 27(3) of the *CCRA*.[130] No cases in the study mentioned withholding this type of information within the context of a disciplinary hearing. While no disciplinary hearings were the type of administrative decision reviewed under *habeas corpus* in my study, the disciplinary and security reclassification processes were compared to each other in more than one case. If withholding information was possible in the disciplinary process, it likely would have been mentioned at least once.

The legislation surrounding the disciplinary process can always be altered through Parliament. Process or substance could always be improved. This can be contrasted to security reclassification and transfer decisions, which do not have the same statutory constraints. The model for disciplinary decisions is preferable to the model for security reclassification and transfer.

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[126] Commissioner's Directives, *supra* note 30 at CD 580, at section 34.
[127] *CCRR*, *supra* note 30 at section 26. Unless the "offences that are the subject of the charges are substantially different" (*ibid*).
[128] *CCRA*, *supra* note 27 at para 28.
[129] *R v Hamm*, 2016 ABQB 440, at para 9 [*Hamm*]
[130] Commissioner's Directives, *supra* note 30 at CD 580.

2.2.3 Security reclassification and transfer decisions

Decisions involving security reclassifications and transfer of incarcerated people from one prison to another are of interest. The level of security a person is assigned has a big impact on their day-to-day lives, such as their ability to access programming, the level of freedom they are afforded, and the likelihood of experiencing violence. Additionally, a federal prisoner's security classification impacts their likelihood of being granted forms of early release, such as temporary absences and parole. All people incarcerated in federal prisons receive a security classification when they initially enter the system, of either minimum, medium, or maximum. Most institutions have only one level of security, but there are also "clustered" institutions.[131] For example, Mission Institution is a medium security prison located next to Mission Minimum Institution (which used to be called Ferndale Institution). All federal women's prisons are multi-level. While security reclassification and transfer to a different institution are technically two different decisions, courts have recognized that they functionally should be reviewed at the same time, as they typically are based on the same information. The security reclassification is primarily governed by section 28 of the *CCRA*, sections 17 and 18 of the *CCRR* and a tool called the Security Reclassification Scale ("SRS").[132] Throughout the case law, it was clear that the SRS plays an important role in prisoner security reclassification and transfer. It was succinctly described by Justices LeBel and Fish in *May*:

> The Security Reclassification Scale ("SRS") is a computer application that provides a security rating based on data entered with respect to various factors related to the assessment of risk: (1) the seriousness of the offence committed by the offender; (2) the existence of outstanding charges against the offender; (3) the offender's performance and behaviour while under sentence; (4) the offender's social, criminal and, if applicable, young-offender history; (5) any physical or mental illness or disorder suffered; (6) the offender's potential for violent behaviour; and (7) the offender's continued involvement in criminal activities. The SRS scale has been developed to assist caseworkers to determine the most appropriate level of security at key points throughout the offender's sentence: SOP 700-14, at paras. 18-19.
>
> The SRS is completed by assigning scores to several factors assessing the offender's security risk and custody performance. The SRS provides numerical "cut-off levels"

[131] See Commissioner's Directives, *supra* note 30 at CD 706: Classification of Institutions.
[132] *CCRA*, *supra* note 27 at sections 17 and 18.

> which determine a security rating. If the officer completing the review does not agree with the results provided by the SRS, he or she may override the results and give a different security classification. The override provisions are incorporated in the SRS as a means to address factors that may compel the transfer of an offender to a security level that is different from the one obtained through the computer application: SOP 700-14, at para. 20.[133]

The decision to reclassify is based on a document called an "Assessment for Decision."[134] For security reclassification and transfer, there are notice and disclosure requirements set out in section 27(1) of the *CCRA*.[135] Transfer decisions are made pursuant to section 29 of the *CCRA*, and prisoners receive a notice of the Warden's decision to move them.[136] Once they receive the notice of this decision, they can make submissions to the Warden, either in person or in writing.[137] Section 17 of the *CCRR* legislates factors to be considered when classifying prisoners. However, this section was very rarely cited in the cases in the study.[138] In *Khela*, the SCC held that for a "strictly technical breach" of section 27(3), the "reviewing judge must determine whether that error or that technicality rendered the decision procedurally unfair."[139]

While disciplinary hearings must take place "as soon as practicable," there is no similar requirement for the impugned behaviour to be addressed within a certain time frame for security reclassification. The standard of proof for the reclassification process is unclear. It is clearly somewhere below proof beyond a reasonable doubt, which is required for disciplinary decisions. For disciplinary hearings, the Independent Chairperson can only admit evidence they consider reasonable or trustworthy, but for security reclassification decisions, the warden can seemingly admit any evidence, using it to paint a picture of how dangerous the prisoner is.[140] In *MacNeil*, a case from my study, the judge stated, "it was open to the Warden to consider the relevant evidence in its totality and to draw reasonable inferences from it, although obviously she was

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[133] *May*, *supra* note 2, at paras 102-103.
[134] *May*, *ibid*, at para 99; Commissioner's Directives, *supra* note 30 at CD 710-6, Annex B: Assessment for Decision for a Security Reclassification – Report Outline.
[135] *CCRA*, *supra* note 27; see also *Khela*, *supra* note 4, at paras 81-83.
[136] *CCRA*, *ibid* at section 29.
[137] *CCRR*, *supra* note 30 at section 13.
[138] This section was mentioned in *Clark v Canada (Attorney General)*, 2018 ABQB 116 at para 63 [*Clark*].
[139] *Khela*, *supra* note 4, at para 90.
[140] Commissioner's Directives, *supra* note 30 at CD 580, at section 37.

obliged to take into account any weaknesses or other reasons to be concerned with it reliability."[141] In *MacNeil*, the judge described it as, "not a situation where she could only consider evidence if she was satisfied that it met a standard of likelihood or more."[142] This might suggest a standard *lower* than even the civil standard of proof on a balance of probabilities, if there are no real standards for the individual pieces of evidence being used. However, the judge in *Gogan* (2018) provided a differing standard: "in making classification decisions, CSC ought only to act on relevant, accurate and up to date information which is reasonably capable of being relied upon."[143]

For the Security Reclassification Scale, there are three broad categories of inquiry: institutional adjustment, escape risk, and public safety risk. In relation to each category the individual is rated as high, moderate, or low risk and then an overall assessment is made. The SRS is reproduced at Appendix B of this thesis.

Prison administrators can withhold information received from confidential sources from the person being reclassified and decision-makers can consider such information when making a decision. Under section 27(3) of the *CCRA*, only "as much information as strictly necessary" should be withheld from the prisoner.[144] An "adequate summary" of the withheld information must be provided to the prisoner.[145] CSC created categories of reliability for confidential informants under a Commissioner's Directive.[146] The categories are set out as follows:

> **Unknown reliability**: The Security Intelligence Officer, at the time of recording the information, is unable to assess the reliability of the information received.
>
> **Doubtful reliability**: Refers to information which is believed unlikely at the time, although the element of possibility is not excluded.

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[141] *MacNeil v Kent Institution*, 2017 BCSC 30 at para 72 [*MacNeil*].
[142] *Ibid*.
[143] *Gogan v Canada (Attorney General)*, 2018 NSSC 18 at para 71 [*Gogan* 2018].
[144] *CCRA*, *supra* note 27 at section 27(3).
[145] *Khela*, *supra* note 4, at para 92
[146] Commissioner's Directives, *supra* note 30 at CD 568-2, Annex B.

> **Believed reliable**: Refers to information that gives every indication that it is accurate, but has not been confirmed. The information somewhat agrees with the general body of intelligence, is reasonable and consistent with other information on the same subject.
>
> **Completely reliable**: Refers to information that is substantiated or confirmed by one or more independent sources. The information is logical and consistent with other corroborated information on the same subject.[147]

This system for assessing the reliability of confidential informants in penitentiaries has parallels to the *Garofoli* process for determining the validity of judicial authorizations in criminal law.[148] However, whereas in *Garofoli*, the sources are evaluated according to the three *Debot* criteria: compellability, credibility, and corroboration,[149] the credibility of informants in the prison informant process does not seem to be part of the evaluation metric.

The decision to initiate the security reclassification process is a discretionary one. It can and has been used to punish prisoners for their alleged wrongdoing. During the security reclassification process, the decision maker can override the SRS score if it falls within a certain margin.[150] This too is discretionary. What is included in the SRS inputs is also discretionary, to some degree.

2.3 Decision-making factors that create a parallel world for disciplinary offences and security reclassification/transfer decisions

An unofficial or shadow disciplinary system exists within federal prisons parallel to the official disciplinary offence system. This shadow system offends the purposes of the *CCRA*, the rule of law, and the constitution. Double jeopardy is at play. In the cases in my study, when alleged wrongdoing took place, CSC would often immediately place the prisoner in administrative segregation "pending investigation," and would use these allegations to increase their security

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[147] *Ibid.*
[148] *R v Garofoli*, [1990] 2 SCR 1421.
[149] *R v Crevier*, 2015 ONCA 619, at para 70, citing *R v Debot*, [1989] 2 S.C.R. 1140.
[150] *Khela*, *supra* note 4, at para 97

classification, often with the use of vague information from confidential sources. Based on the cases in the study, when the shadow disciplinary system was used, it was rare for the prisoner to face disciplinary of *Criminal Code* ("street") charges. This was true even for prisoners accused of serious harm such as stabbing or assault.[151] Administrative segregation was mentioned in 30 of the cases in the study where prisoners were challenging their security reclassification and transfer.[152] The prisoner's placement in administrative segregation was a background fact to the rest of the case. Since administrative segregation was a background fact in so many cases, it seems reasonable to conclude that it was a measure used routinely.[153]

There were a number of cases where prisoners were placed in administrative segregation and/or faced reclassification who did not appear to be charged with disciplinary charges or *Criminal Code* charges despite how the alleged activity would be eligible for such charges.[154] For example,

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[151] See, for example, *Danvers v Attorney General of Canada*, 2016 ONSC 4121 at paras 4-5 [*Danvers*].
[152] *R v Elliott*, 2014 ABQB 429 at para 7 [*Elliott* 2014]; *Maestrello v Mission Institution*, 2014 BCSC 1116 at para 1 [*Maestrello*]; *Maillet v Springhill Institution*, 2014 NSSC 240 at para 24 [*Maillet*]; *Yang v Millhaven Institution*, 2014 ONSC 7067 at para 5 [*Yang*]; *Tuckanow v Institutional Head of Bowden Penitentiary*, 2014 ABQB 563 at para 8 [*Tuckanow*]; *Richards v Springhill Institution*, 2014 NSSC 121 at para 35 [*Richards*]; *Surujpal v Millhaven Institution*, 2015 ONSC 473 at para 3 [*Surujpal*]; *Samaniego v Canada (Attorney General)*, 2015 ONSC 6790 at para 5 [*Samaniego*]; *Emonts v Canada (Attorney General)*, 2015 ONSC 852 at para 5 [*Emonts*]; *Janjanin v Canada (Attorney General)*, 2015 ONSC 964 at para 12 [*Janjanin*]; *Anderson v Pacific Institute*, 2015 BCSC 1789 at para 10 [*Anderson*]; *Tyler v Canada (Attorney General)*, 2015 ONSC 1283 at para 48 [*Tyler*]; *Earhart v Canada (Attorney General)*, 2015 ONSC 5218 at para 6 [*Earhart* 2015]; *Wynter v Millhaven (Warden)*, 2015 ONSC 6495 at para 28 [*Wynter*]; *Omoghan v Canada (Attorney General)*, 2015 ONSC 7046 at para 3 [*Omoghan*]; *Muir* v Canada (Attorney General), 2015 ONSC 3593 at para 4 [*Muir*]; *Wiebe v Stony Mountain Institution*, 2015 MBQB 118 at para 116 [*Wiebe*]; *Illes v Canada (Attorney General)*, 2016 ABQB 426 [*Illes*], at para 14; *Sedore v Canada (Attorney General)*, 2016 ONSC 4668 [*Sedore*], at para 9; *Danvers*, *ibid* at para 4; *Horton v Attorney General of Canada*, 2018 NBQB 5 [*Horton*], at para 7; *Clark*, *supra* note 138 at para 8; *Shoemaker*, supra note 86; *Jackson v Warden of Dorchester Institution*, 2018 NBQB 192 at para 8 [*Jackson*]; *Brown v Dorchester Institution*, 2018 NBQB 179 at para 6 [*Brown*]; *Vandette v Farmer*, 2018 ABQB 153 at para 4 [*Vandette*]; *Blackmer v Drumheller Institution*, 2019 ABQB 771 at para 4 [*Blackmer*]; *Germa c Tremblay*, 2019 QCCS 1764 at para 58 [*Germa* 2019]; *Wu v Canada (Attorney General)*, 2019 ABQB 902 [*Wu*] – however, this case might not technically fit, as Mr. Wu sought damages for his time spent in administrative segregation; *Rivest v Gardien du Penitencier de Dorchester*, 2020 NBQB 12 at paras 27, 30, and 53 [*Rivest*].
[153] On April 1, 2014, there were reported to be 749 prisoners in administrative segregation (out of a population of 14,500) with 8,300 placements in administrative segregation in 2014-2015: Office of the Correctional Investigator, "Annual Report 2014-2015" (2015), online: <https://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20142015-eng.pdf>.
[154] For example, *Surujpal*, *supra* note 152 at para 8 (he was alleged to be involved in an attack where another prisoner was stabbed); *MacKinnon v Bowden Institution*, 2017 ABQB 654 at para 7 [*MacKinnon*] (he was placed in administrative segregation, then reclassified and transferred for allegedly manufacturing "brew"); *Horton*, *supra* note 152 at para 11 (he was alleged to have spit in an officer's face); *Rivest*, *supra* note 152 at paras 57-58 (accused of trafficking drugs).

in *Hamm*, none of the four applicants who spent time in administrative segregation had any charges laid against them, though "the conduct alleged would provide the basis for criminal charges or institutional charges."[155] The judge in *Hamm* noted the applicants were not afforded the same protections as they would have had if they had been so charged.[156] In *Danvers*, no criminal or disciplinary charges were laid, despite the fact that Mr. Danvers was alleged to have stabbed someone.[157] He was instead placed in administrative segregation, reclassified, and then transferred.[158]

In *Richer*, the applicant was placed in administrative segregation and was later reclassified and transferred for alleged conduct that would clearly fall within the purview of disciplinary charges.[159] Had there been any disciplinary charges, they very likely would have been mentioned in the judge's analysis of the reclassification decision, but there appears to have been none. The lack of institutional charges was brought up by the applicant in *Illes*.[160] Instead of disciplinary charges and potential disciplinary segregation, Mr. Illes was placed in administrative segregation and later reclassified and transferred.[161] In *Shoemaker*, Mr. Shoemaker was accused of smuggling fentanyl into the prison, which resulted in two other prisoners dying by overdose.[162] He did not face any charges and was reclassified and transferred.[163]

Michael Jackson noted how in one case he observed in 1994, the same evidence resulted in only a warning under the disciplinary system, but through security reclassification, the same prisoner was elevated to maximum security, lost his job in the prison with a relatively high pay level, and spent 21 days in a segregation cell.[164] The dynamic of a shadow system of punishment was identified in *Justice Behind the Walls* as "Greyhound therapy," referring to the Greyhound bus

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[155] *Hamm*, *supra* note 129 at para 9.
[156] *Ibid*, at para 70.
[157] *Danvers*, *supra* note 151 at para 5.
[158] *Ibid*, at paras
[159] *Richer v Canada (Attorney General)*, 2016 SKQB 179 at paras 8, 14 and 15 [*Richer*].
[160] *Illes*, *supra* note 152 at para 21.
[161] *Ibid*, at paras 14, 15 and 18.
[162] *Shoemaker* ABCA, *supra* note 86 at para 2.
[163] *Ibid*, at para 4.
[164] *Justice Behind the Walls*, *supra* note 8 at 453.

system that likely transported prisoners during transfers. According to Jackson, "what wardens refer to as "Greyhound therapy" is often used as an administrative alternative in cases where the evidence against a prisoner is insufficient to secure a disciplinary conviction."[165] Jackson stated, "In a significant number of cases, prisoners are transferred from medium to maximum security in the absence of formal disciplinary charges on the basis of allegations and the suspicion of misconduct."[166] According to a Warden in 1981: "It is better to move five or six people, four of whom you are certain are doing nasty things in your institution, and a couple of whom you suspect might be, to another institution, than to gamble and leave a couple inmates behind."[167]

The dynamic identified by Jackson in 1981 was apparent in the 2018 decision, *Antinello*.[168] In that case, it seemed apparent that the prison administrators were trying to remove him from their institution with the least amount of effort:

> This Court is instead left to understand and to conclude, from the whole of the evidence (Affidavits, oral testimonies and piles of documents) that the reality is simply of a certain or some Dorchester staff forming the opinion that Mr. Antinello had better be removed from Dorchester and that opinion has launched, within the Institution, a certain non-official and probably unconscious common movement and process (including that "Review of Offender Security Classification") that ultimately produced the very results that would have essentially been identified or sought from the outset.
>
> Not that this Court has found any good reasons to make that removal a necessity or a justified option, but this Court remains in wonders about why, once some people at the Dorchester institution, had decided that the Applicant's removal was necessary, did they not simply consider moving him to another "minimum security Institution" and let him continue benefiting from that hard earned classification as a "Minimum Risk Inmate", instead of launching that very complicated and ultimately severely impacting process for the Applicant, namely that: "Review of Offender Security Classification"?[169]

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[165] *Ibid* at page 11.
[166] *Ibid* at page 436.
[167] *Ibid* at page 437.
[168] *Antinello v Dorchester Institution (Warden)*, 2018 NBQB 9 [*Antinello*].
[169] *Ibid* at paras 43-44.

There were many examples where prisoners complained about the prison's use of the shadow punishment system instead of the formal disciplinary system.[170] For instance, in *Wynter v Millhaven (Warden)*, the disciplinary charges relating to his alleged behaviour had been dismissed.[171] However, that fact was determined by the judge not to be relevant to the their analysis.[172] In *Karafa v The Attorney General for Canada*, the conduct which resulted in Mr. Karafa having their security classification increased very likely could not result in disciplinary charges because he was only *trying* to convince someone from the outside to bring in contraband.[173] He had not taken any steps towards the goal of bringing it in other than speaking with a disinterested person on the outside.[174]

In *Keiros-Meyer v Canada (Attorney General)*, the applicant's argument was largely centred around the complaint that "his reclassification process amounted to a disciplinary hearing about his conduct."[175] This characterization of the process was rejected by the judge.[176] Similarly, in *Surujpal*, the judge cited an earlier case in the study, *Maillet*,[177] and held that "the Warden may consider information that did not result in charges against the inmate."[178] In *Gogan* (2018), a parole officer noted that there was no requirement to use the disciplinary system when wrongdoing is alleged.[179]

It was common in security reclassification and transfer cases for prisoners to be kept in administrative segregation "pending investigation" or because of their alleged misconduct. It seems clear that there was a direct connection between the perceived wrongdoing and placement in solitary confinement. Solitary confinement, or "administrative segregation," was a vital part of the parallel punishment system. It remains to be seen whether the new legislation around

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[170] See *Horton*, *supra* note 152 at para 15; *Rivest*, *supra* note 152 at paras 57-58.
[171] *Wynter*, *supra* note 152 at para 13.
[172] *Ibid*, at para 31.
[173] *Karafa v Canada (Attorney General)*, 2016 ONSC 380 at para 36 [*Karafa*].
[174] *Ibid*.
[175] *Keiros-Meyer v Canada (Attorney General)*, 2018 BCSC 1104 at para 60 [*Keiros-Meyer*].
[176] *Ibid*.
[177] *Maillet*, *supra* note 152.
[178] *Surujpal*, *supra* note 152 at para 15.
[179] *Gogan* 2018, *supra* note 143 at para 37.

"Structured Intervention Units" will curtail this dynamic. While solitary confinement was itself a form of punishment, it seems to have been used as a means for isolating the prisoner as a means to gather information to use for the second part of the parallel punishment system: security reclassification and transfer.

There were several examples of cases where prisoners were placed in segregation pending investigation and were later reclassified and transferred.[180] There were also many examples of cases where administrative segregation appeared to be more of a punishment or simply someplace to wait before being reclassified and transferred.[181] For example, in *MacNeil*, part of Mr. MacNeil's recommendation for transfer said,

> On 2016-02-28, information was received which indicated you or another identified inmate were in possession of a cell phone. A search of your person and your cell was conducted with nil results. A search of the other identified inmate produced a watch phone. Information received by the Security Intelligence Office indicates the cell phone was yours and the other inmate was holding it on your behalf. As a result, you were involuntarily placed in segregation.[182]

The existence of a parallel system was partially acknowledged as existing in Alberta provincial prisons in *Chung*.[183] In that case, the judge said, "Counsel for the Attorney General cautions that Mr. Chung's commentary concerning the disciplinary review and appeal that followed from the May 14, 2017 incident is in many ways irrelevant, since that proceeding is separate and in a

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[180] *Telfer v Canada*, 2014 ONSC 6799 at para 16 [*Telfer*]; *Germa v Canada (Correctional Service)*, 2014 NSSC 273 at para 25 [*Germa* 2014 NS]; *Richards*, *supra* note 152 at para 36; *Blackmer*, *supra* note 152 at para 4; *Tuckanow*, *supra* note 152 at para 8; *Emonts*, *supra* note 152 at para 5; *Clark*, *supra* note 138 at para 4; *Yang*, *supra* note 152 at para 5; *Tyler*, *supra* note 152 at para 42; *Brown*, *supra* note 152 at paras 6, 7 and 26; *Rivest*, *supra* note 152 at para 53.
[181] *Simms v Canada (Attorney General)*, 2019 NBQB 261 at para 9 [*Simms*]; *Brauss v Canada (Attorney General)*, 2016 NSSC 269 at para 11 [*Brauss*]; *MacNeil*, *supra* note 141 at para 5; *Wiszniowski v Dorchester Institution*, 2016 NBQB 146 at para 3 [*Wiszniowski*]; *Wynter*, *supra* note 152 at para 9; *Samaniego*, *supra* note 152 at para 5; *Maestrello*, *supra* note 152 at para 11; *Omoghan*, *supra* note 152 at para 3; *Wu*, *supra* note 152 at para 20; *Antinello*, *supra* note 168 at para 40; *Germa* 2019, *supra* note 152 at para 12.
[182] *MacNeil*, *ibid*.
[183] *Chung v Alberta*, 2017 ABQB 456 at para 30 [*Chung*].

sense parallel to the safety-related decision to place Mr. Chung in Administrative Segregation" [*emphasis added*].[184] However, the Attorney General for Alberta in *Chung* submitted that "safety-related and disciplinary processes at the Edmonton Remand Centre are two separate and distinct apparatuses."[185] The interconnected nature between different systems of punishment was brought up in *Horton*, where Mr. Horton said his response was written "to address his segregation review, not the re-classification decision and that he did not give permission for it to be used for that additional purpose."[186]

Under the security reclassification and transfer process, basic details about what is alleged to have happened are sometimes withheld from the prisoner. In some cases, this was taken to a near-comical extreme, such as where a prisoner applicant was not provided the name of the prisoner whom he was alleged to have assaulted.[187] With fewer procedural protections, prisoners have a more difficult time rebutting the alleged wrongdoing. For instance, under the former federal administrative segregation statutory scheme, a prisoner could be placed in prison due to their *intention* to "jeopardize the security of the penitentiary."[188] Under the former legislation, there did not seem to be any requirement to show that the prisoner had taken any steps to prepare or plan for this intended wrongdoing. It is, of course, difficult to prove that one *did not* have the intention to do something.

2.3.1 Judges unwilling to characterize security reclassification and transfer as punishment

Within the study, in several cases prisoners described security reclassification and transfer as punishment. According to Michael Jackson, "These are labelled "involuntary administrative transfers," but they are seen by everyone as being an additional disciplinary measure."[189] Prison administrators and government lawyers universally denied this characterization. Lisa Kerr has pointed to "the power of prison officials (and legislators) to modulate the severity of punishment

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[184] *Ibid*.
[185] *Ibid*, at para 59.
[186] *Horton*, *supra* note 152 at para 9.
[187] See page 89.
[188] *CCRA*, *supra* note 27 at section 31(3)(a) [repealed].
[189] *Justice Behind the Walls*, *supra* note 8, at 436.

in the course of its administration."[190] While she was not specifically talking about security reclassifications and transfers, that process is also part of the prison's system of modulating punishment.

The applicant in *Brown* described the reclassification and transfer process as punishment.[191] The judge in *Nagle-Cummings* resisted Mr. Nagle-Cumming's description of being placed in lockdown as being a punishment.[192] According to the judge, "This decision was not made to punish Mr. Nagle-Cummings. The decision was made to reduce the likelihood of further assaults taking place on the unit, to maintain better control over the unit, to more easily examine the dynamics within the unit, and to ultimately ensure the safety and security of the inmates, staff and the correctional facility."[193] In *Howdle*, Mr. Howdle asserted that he was reclassified and transferred as punishment and the outcome of the decision was "fixed and framed."[194] However, the judge found that Mr. Howdle had not pointed to any evidence to support his assertion.[195]

In *Haug*, a 1987 Federal Court case is cited where the prisoner applicant referred to their transfer as "punishment."[196] The judge in the 1987 case also resisted characterizing a transfer as punishment, saying, "Such a decision to transfer an inmate is, as mentioned earlier, of an administrative nature."[197] In *Wiszniowski*, Mr. Wiszniowski argued he was being punished twice for the same thing.[198] In *Maillet*, the judge cited an earlier case which says that reclassification and transfer are not punishment.[199]

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[190] Easy Prisoner Cases, *supra* note 79 at 246.
[191] *Brown*, *supra* note 152, at para 59.
[192] *Nagle-Cummings v Nova Scotia (Attorney General)*, 2020 NSSC 188 at paras 29 and 69 [*Nagle-Cummings*]. This case was about being placed in lockdown in a Nova Scotia provincial prison. Mr. Nagle-Cummings, at the most restrictive point during the rotational lockdowns, was kept in his cell for 22 hours per day (*ibid*, at para 38).
[193] *Ibid*, at para 69.
[194] *Howdle v Canada (Attorney General)*, 2018 BCSC 1775 at para 84 [*Howdle*].
[195] *Ibid*, at para 94.
[196] *Haug v Warden Dorchester Institution*, 2018 NBQB 126 at para 32 [*Haug*], citing *Kelly v Canada (A.G.)*, [1987] FCJ No 642, 12 FTR 296 [Fed Ct Trial Div] [*Kelly*].
[197] *Kelly, ibid*.
[198] *Wiszniowski*, *supra* note 181 at para 17.
[199] *Maillet*, *supra* note 152 at para 36, citing *Caouette v Mission Institution*, 2010 BCSC 769 at para 86 [*Caouette*].

Similarly, administrative segregation appears to have been used for the purposes of punishment. Since the most serious penalty for committing a disciplinary offence is solitary confinement, then how could solitary confinement not be considered a punishment if it is ordered for a different reason? This point was made by the applicants and judge in *Hamm*.[200] One of the applicants in *Hamm* had been in administrative segregation for a total of 822 days while never having been convicted of a disciplinary offence.[201] Meanwhile, the worst punishment the prison could give for a disciplinary offence was 30 days in solitary confinement.[202] The judge in *Hamm* also notes how "the inmates here have suffered punishment beyond that which would have been available to the institution if it had proceeded by way of disciplinary hearings."[203] In *Wu*, Mr. Wu was told he was placed in segregation "due to [his] predatory behaviour."[204] In a couple of cases in the study, the prisoner appeared to be punished for complaining about prison conditions.[205] In addition to using administrative segregation as punishment, it appears to have also been used at times for administrative convenience.[206] In the 2019 *Pratt* decision, Mr. Pratt was kept in the Nova Scotia provincial prison version of administrative segregation known as "administrative close confinement."[207] While he was initially placed in close confinement for disciplinary infractions, prison administrators continued to detain him there, but "not as punishment."[208]

In the *BCCLA* decision, Justice Leask focused on the harms of administrative segregation, instead of relying on CSC's categorization.[209] Justice Leask also made findings which displayed

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[200] *Hamm*, *supra* note 129 as paras 2 and 74.
[201] *Ibid*, at para 2.
[202] *Ibid*, citing section 44(1)(f) of the *CCRA*, *supra* note 27 (now repealed: *An Act to amend the Corrections and Conditional Release Act and another Act*, SC 2019, c 27, s 11).
[203] *Hamm*, *ibid*, at para 74.
[204] *Wu*, *supra* note 152 at para 20.
[205] *Elliott* 2014, *supra* note 152 at paras 6-7; *Muir*, *supra* note 152 at para 6.
[206] See *Gogan* 2018, *supra* note 143 at paras 7 and 87.
[207] *Pratt v Nova Scotia (Attorney General)*, 2019 NSSC 6, at para 26 [*Pratt* 2019], overturned on appeal: 2020 NSCA 39 [*Pratt* NSCA].
[208] *Ibid*, at para 47, *Correctional Services Act*, SNS 2005, c 37; *Correctional Services Regulations*, NS Reg 99/2006.
[209] *BCCLA*, *supra* note 16 at para 95: "The CSC witnesses were adamant that administrative segregation is not punishment, nor is it a tool for dealing with problematic patterns of behaviour, absent a risk to the safety of individuals or the institution."

the differences between laws on the books and how the law operated in practice.[210] CSC was found to be unable to fairly undertake the review of administrative segregation decisions.[211] The harms from administrative segregation were serious and sometimes permanent.[212]

Instead of focusing on whether the more formal hallmarks of punishment are present (such as enumerated offences, charges, a hearing with witnesses, etc.), the *substance* of dealing with an alleged wrong should be focused on and reframed as a mode of punishment; that is, the alleged wrongdoing was dealt with through further restrictions of liberty. It is fundamental to recognize that the security reclassification system and, to an extent, the former administrative segregation regime, modulate punishment on prisoners without the procedural protections found in the formal disciplinary system. Without this recognition, prison administrators will continue to say one thing (reclassification is not punishment) while doing the opposite (punishing prisoners).

2.3.2 Discretionary decisions under the parallel punishment system

Three examples of problematic discretionary decisions under the parallel punishment system include: (1) prisoners placed in solitary confinement during the investigative process in order to gain more probative evidence or using solitary confinement as a reason to transfer them to a different facility; (2) reliance on prior wrongdoing to enhance reclassification decisions, including alleged gang affiliation; and (3) not disclosing vital information to prisoners which includes reliance on information that may be incorrect or biased. The prisoner would not have an opportunity to vet or change this information.

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[210] For example, "while both the *Act* and CSC policy as reflected in CD 709 mandate considerable mental health monitoring, in practice, the mental health care actually provided is not sufficient to address the risk of psychological harm that arises from segregation." *BCCLA* BCCA, *supra* note 16 para 90, citing *BCCLA*, *supra* note 16 at para 303.
[211] *BCCLA*, *ibid* at paras 87–390, 409; *BCCLA* BCCA, *ibid* at para 90.
[212] *BCCLA*, *ibid* at para 249, *BCCLA* BCCA, *ibid* at para 90.

2.3.2.1 Use of solitary confinement in cases involving security reclassification and transfer

It was very common in security reclassification and transfer cases for prisoners to be kept in administrative segregation "pending investigation" or because of their alleged misconduct. It seems clear that there was a direct connection between the perceived wrongdoing and placement in solitary confinement. Solitary confinement, or "administrative segregation," was a vital part of the parallel punishment system. It remains to be seen whether the new legislation around "Structured Intervention Units" will curtail this dynamic. While solitary confinement was itself a form of punishment, it seems to have been used as a means for isolating the prisoner in order to gather information to use for the second part of the parallel punishment system: security reclassification and transfer.

There were several examples of cases where prisoners were placed in segregation pending investigation and were later reclassified and transferred.[213] There were also many examples of cases where administrative segregation appeared to be more of a punishment or simply someplace to wait before being reclassified and transferred.[214]

A tragic example of the harms of administrative segregation was the case of Ashley Smith:

> In the fall of 2007, Ashley Smith died in her segregation cell after spending more than a year of continuous segregation in federal institutions. In June 2008, the OCI documented the abuse of administrative segregation as a factor contributing to Ms. Smith's death in a report entitled A Preventable Death. Despite her documented troubled history in provincial juvenile corrections, Ms. Smith was never provided with a comprehensive mental health assessment or treatment plan. Immediately upon her entry into the federal system, she was placed in administrative segregation and maintained on that status for her entire time under federal jurisdiction.[215]

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[213] *Telfer*, *supra* note 180 at para 16; *Germa* 2014 NS, *supra* note 180 at para 25; *Richards*, *supra* note 152 at para 36; *Blackmer*, *supra* note 152 at para 4; *Tuckanow*, *supra* note 152 at para 8; *Emonts*, *supra* note 152 at para 5; *Clark*, *supra* note 138 at para 4; *Yang*, *supra* note 152 at para 5; *Tyler*, *supra* note 152 at para 42; *Brown*, *supra* note 152 at paras 6, 7 and 26; *Rivest*, *supra* note 152 at para 53.
[214] *Simms*, *supra* note 181 at para 9; *Brauss*, *supra* note 181 at para 11; *MacNeil*, *supra* note 141 at para 5; *Wiszniowski*, *supra* note 181 at para 3; *Wynter*, *supra* note 152 at para 9; *Samaniego*, *supra* note 152 at para 5; *Maestrello*, *supra* note 152 at para 11; *Omoghan*, *supra* note 152 at para 3; *Wu*, *supra* note 152 at para 20; *Antinello*, *supra* note 168 at para 40; *Germa* 2014 NS, *supra* note 213 at para 12.
[215] *BCCLA*, *supra* note 16 at para 41.

Similarly to how administrative segregation was used to support this parallel punishment system, in the case of Ashley Smith, the transfer system was used to prop up her prolonged administrative segregation.[216] In a span less than a year long, Ms. Smith was "moved 17 times between three federal penitentiaries, two treatment facilities, two external hospitals and one provincial correctional facility."[217] Part of why she did not receive timely reviews of her segregation status was because her transfers to different facilities would restart the clock for a statutorily mandated review.[218] According to Howard Sapers, the former Correctional Investigator:

> The required regional reviews were never conducted because each institution erroneously "lifted" Ms. Smith's segregation status whenever she was physically moved out of a CSC facility (e.g., to attend criminal court, to be temporarily admitted to a psychiatric facility, or to transfer to another correctional facility). This occurred even though the Correctional Service had every intention of placing Ms. Smith back on segregation status as soon as she stepped foot back into a federal institution. This totally unreasonable practice had the effect of stopping and starting "the segregation clock", thereby negating any review external to the institution on the continuation of the placement in segregation. This in turn assisted in reinforcing the notion that segregation was an acceptable method of managing Ms. Smith's challenging behaviours.[219]

2.3.2.1.1 "Alleviation" of segregation status through transfer

In at least three cases, prison administrators used the fact that the prisoner was in administrative segregation as a reason to transfer them to a different facility.[220] In *Muir*, the Respondent argued that the transfer from a penitentiary in Ontario to one in BC increased the prisoner's liberty, as he

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[216] Office of the Correctional Investigator, "Backgrounder: A Preventable Death" (2008), online: <https://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20080620info-eng.aspx>.
[217] *Ibid*
[218] Rebecca Bromwich & Jennifer M. Kilty, "Introduction: Law, Vulnerability, and Segregation: What Have We Learned from Ashley Smith's Carceral Death?" (2017) 32:2 CJLS 157.
[219] Canada, Office of the Correctional Investigator, "A Preventable Death" (2008), online: <https://www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20080620-eng.pdf> at page 10, para. 43.
[220] *Brown*, *supra* note 152; *Muir*, *supra* note 152; *Wu*, *supra* note 152.

would be going "from maximum security segregation to maximum security general population."[221] The judge in *Muir* ultimately found that Mr. Muir did not show that he met his onus for a *habeas corpus* application, as he did not show that he suffered a deprivation of liberty.[222] The Respondent in *Muir* seemed to provide the judge with a false choice, with no mention of changing Mr. Muir's placement in segregation at the penitentiary he was currently living in.[223] The 2015 *Earhart* case seemed to follow a similar dynamic – Mr. Earhart had been in administrative segregation for around a year and was said by the Respondent to be transferred across the country for his own benefit.[224] In *Justice Behind the Walls*, Michael Jackson described a similar false set of options used in 1984, where the prisoner was told "they could transfer you to an institution of a higher security level or segregate you. They chose the first alternative, which I believe was in your best interest."[225]

In *Wu* and *Brown*, the prisoner applicants were transferred to different institutions to "alleviate" their "segregation status."[226] In *Wood v Atlantic Institution*, a transfer was considered by prison administrators to do the same.[227] Similarly, in *Hamm*, there was a plan by prison administrators to remove Mr. Hamm from segregation was to transfer him to a different maximum security prison.[228]

In *Campbell*, the applicant applied to be released from segregation.[229] According to prison officials, he could not be released into the general population because of his alleged "involvement in gang activities."[230] He was offered a place in the "Enhanced Supervision Range," also known as "protective custody," which he refused.[231] The judge in that case said he

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[221] *Muir*, *ibid*, at para 17.
[222] *Ibid*, at para 26.
[223] *Ibid*, at para 17.
[224] *Earhart* 2015, *supra* note 152 at paras 6 and 46.
[225] *Justice Behind the Walls*, *supra* note 8, at 440-441.
[226] *Wu*, *supra* note 152 at para 18; *Brown*, *supra* note 152 at para 41.
[227] *Wood v Atlantic Institution*, 2014 NBQB 135 at paras 18 and 50 [*Wood* 2014].
[228] *Hamm*, *supra* note 129.
[229] *Campbell v Canada (Correctional Service)*, 2015 NSSC 371 [*Campbell*].
[230] *Ibid*, at para 4.
[231] *Ibid*, at paras 5 and 6.

was offered "less restrictive deprivations of his liberty," which meant his placement in segregation was lawful.[232] However, it is common knowledge in prison that protective custody is associated (rightly or wrongly) with sex offenders and informants.[233]

Prisoners may not see an offer to move into protective custody as worth the associated stigma and potential violent attacks. For example, in 2018, protected status prisoners at the Edmonton Institution reported to the Office of the Correctional Investigator that prisoners "on other ranges on the main living unit were throwing food items, liquids and other objects at them during movement."[234] A couple months later, the OCI followed up and found that the situation had not improved, as "protective status inmates were still subjected to assaultive and intimidating behaviour and officers were still not providing physical escort, direct observation or intervening to stop the assailants."[235] In fact, staff would have witnessed prisoners preparing for these assaults, as on video the prisoners can be seen "looking for and gathering food and other items, heating up food in the microwave" and then "carefully watching and waiting until staff moved out of the way."[236] The OCI suggested that staff were, to some degree, complicit in these attacks on protective custody prisoners.[237]

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[232] *Ibid*, at para 43.
[233] *Justice Behind the Walls*, *supra* note 8, at 6 and 420.
[234] Office of the Correctional Investigator, "Annual Report 2018-2019" (2019), online: <https://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20182019-eng.aspx?pedisable=true>.
[235] *Ibid*.
[236] *Ibid*.
[237] *Ibid*. According to the OCI: "In context of an incident that appears to have been repeated a number of times, and with knowledge that protected status inmates were about to be moved, officers could not have missed the preparations that were underway in the ranges that housed the assailants. The video recordings also demonstrate Correctional Officers in the Unit's main entrance handling waste while inmates are assaulted, under direct surveillance, as they move towards the main entrance. The video evidence shows Edmonton Institution failed to appropriately monitor and safely control inmate movement, in a facility where all population movements are highly regulated. That these incidents continued to occur even though Senior Management was made aware of them months before is extremely disturbing. The repeated and orchestrated nature of these incidents suggests those committing them did so with relative impunity. Had these assaults been directed at staff, the outcome would surely have been very different."

2.3.2.2 Reliance on prior wrongdoing

2.3.2.2.1 Phantom allegations

Wrongdoing alleged during the security reclassification/transfer process can follow the prisoner around to the next institution(s) they are in, with little opportunity to correct the record. This dynamic was acknowledged in *Maloney*: "an inmate's carceral history follows them from one institution to the next."[238] In *Earhart v The Attorney General of Canada*, the decision to increase Mr. Earhart's security classification took into account his "history at various institutions including his interaction with staff and other inmates."[239] Much of that information would be collected without the input of the prisoner and could be vulnerable to bias and error. According to section 24(1) of the *CCRA*, CSC must "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."[240] It is possible for a prisoner in a federal penitentiary to apply to have their information changed.[241] However, CSC will only correct information "that is in a document or missing from a document by CSC; and that is factual information proven to be untrue."[242] Once the record has been "locked," it is impossible for CSC to correct the information.[243] According to CSC in *Brown*, for prisoners serving a life sentence, "the protocol was to consider incidents going back two years."[244] However, in *Wood v Atlantic Institution*, evidence of an assault on another prisoner in 1998 was used in a 2014 decision for Mr. Wood, who was serving a life sentence.[245]

In *R v Elliot*, Mr. Elliott said he had been "falsely accused of being the instigator of an assault at his former institution and that he was falsely accused of having been on a "behaviour contract" at

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[238] *Maloney v Fortin*, 2016 QCCS 1864 at para 8 [*Maloney*].
[239] *Earhart v The Attorney General of Canada*, 2018 ONSC 7160 at para 15 [*Earhart* 2018], upheld on appeal: 2019 ONCA 980 [*Earhart* ONCA].
[240] *CCRA*, *supra* note 27 at section 24(1).
[241] *Ibid*, at section 24(2).
[242] Prisoners' Legal Services, "Correcting Your CSC File" (2018), online: <https://prisonjustice.org/wp-content/uploads/2019/01/Federal-File-Correction-2018.pdf>.
[243] *Jenkins v Canada (Correctional Service)*, 2014 ONSC 6922 at paras 6, 8, 20, and 24 [*Jenkins*].
[244] *Brown*, *supra* note 152 at para 60.
[245] *Wood* 2014, *supra* note 227 at para 56.

the former institution."[246] These alleged facts from his past institution were not disclosed to him before the decision was made.[247] Further, the Warden mentioned in their decision that Mr. Elliott instigated an assault without mentioning that this alleged assault occurred in his former institution.[248] The judge determined this, along with another error, amounted to a breach of procedural fairness.[249] That case can be contrasted with *Surujpal*, where the Warden partly based his decision on an attack Mr. Surujpal allegedly committed years ago where "another inmate was beaten and stabbed."[250] Surujpal said he had no knowledge of this attack and had never received a disciplinary or *Criminal Code* charge or conviction.[251] The judge in that case did not see any problem with the use of the information relating to the alleged attack in the past.[252] The judge stated that since the applicant was sentenced to incarceration for similar behaviour, it was reasonable to conclude that the historical attack did happen (for the purposes of security reclassification).[253]

In *Newman*, an extra incident was included in calculating his security reclassification score.[254] In *Hennessy*, the acting warden referred to a previous assault Mr. Hennessy was said to be involved in while at a different institution.[255] It is not clear from the text of the decision whether Mr. Hennessy contested the alleged historical assault, but it is noteworthy that it was used as proof of him having committed the current assault. In a trial for a *Criminal Code* offence, an accused person's criminal record can be excluded or limited through a *Corbett* application.[256] This is due to the highly prejudicial nature of such information.[257]

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[246] *Elliott* 2014, *supra* note 152 at para 38.
[247] *Ibid*, at paras 107 and 109.
[248] *Ibid*, at para 107.
[249] *Ibid*, at para 112.
[250] *Surujpal*, *supra* note 152 at para 8.
[251] *Ibid*.
[252] *Ibid*, at para 15.
[253] *Ibid*, at para 16.
[254] *Newman v Bath Institution*, 2016 ONSC 3815 at paras 10-13 [*Newman*].
[255] *Hennessy v Kent Institution*, 2015 BCSC 900 at para 7 [*Hennessy*].
[256] *Corbett v R*, [1988] 1 SCR 670, 64 CR (3d).
[257] *Ibid*.

Untested allegations from before the prisoner was incarcerated can also follow them around during decision-making. For example, in *Mapara*, charges stayed prior to his penitentiary sentence were considered in revoking his Escorted Temporary Absences.[258] In *Wiebe*, a charge Mr. Wiebe was found not criminally responsible for was mentioned during decision-making.[259] In *Jordan*, prison administrators used information regarding decade-old "serious charges against Mr. Jordan that were not proceeded with" to make their security reclassification decision.[260]

In *Brown*, Mr. Brown summed up this phenomenon well in his submissions: "that events that occurred in the past and for which he had been "punished" were once again being used against him. He took particular exception to the fact that a number of incidents referenced by the SIO occurred 2 years ago and had been considered during the process that resulted in his involuntary transfer from the minimum to the medium security sector at Dorchester."[261] Prisoners intuitively know that the reclassification and transfer system is a form of punishment. Alleged wrongdoing from the past can accumulate and be used to further punish prisoners under this system.

2.3.2.2.2 Alleged gang affiliations

Based on the cases included in the study, alleged gang membership was a factor that would increase a federal prisoner's security classification (SRS score).[262] According to an OCI case study, "as of April 14, 2013, Black inmates were nearly two times more likely than the general population to have a gang affiliation (21.3% vs 12.3%)."[263] In the OCI study, Black male prisoners reported being viewed through a "gang lens," where they were stereotyped as being gang members.[264] While criteria for gang membership appears to be objective, "these criteria can

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[258] *Mapara v Ferndale Institution*, 2014 BCSC 748 at para 5.
[259] *Wiebe*, *supra* note 152 at para 10.
[260] *Jordan v Canada (Attorney General)*, 2014 ONSC 2898 at para 21 [*Jordan*].
[261] *Brown*, *supra* note 152 at para 59.
[262] *Maloney*, *supra* note 238 at para 11; *Loughlin v Her Majesty the Queen*, 2017 ABQB 677 at para 31 [*Loughlin*]; *Jordan*, supra note 260.
[263] Office of the Correctional Investigator, "A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries, Final Report" (2013), online: <https://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20131126-eng.aspx>.
[264] *Ibid*, at para 41.

be discretionary and prone to confirmation bias."[265] Further, "once applied, the validity and reliability of the gang label appear to be rarely questioned, particularly among those in operational positions working with Black inmates."[266] The study points out how information identifying prisoners as being gang members is internal to the institution, and therefore "not always corroborated by external law enforcement, court, or judicial authorities."[267] For the cases read for the study in this thesis, gang membership was a contested area.

In *Raju*, Mr. Raju's former involvement with a gang was part of why he was placed in a Structured Intervention Unit.[268] Similarly, alleged gang membership seemed to be a factor in placing two of the applicants in solitary confinement in *Hamm*.[269] Gang membership was alleged in *Mercredi* and formed part of the basis for placing Mr. Mercredi in a less desirable unit (in a Saskatchewan provincial prison).[270] In *Loughlin*, Mr. Loughlin's security classification was increased mainly because of his alleged gang activity while inside the penitentiary.[271] While *Doan* was decided primarily on the perceived escape risk of Mr. Doan due to changes in his immigration status, this risk was seen to be greater due to his alleged gang membership.[272]

If prison staff ever saw a prisoner to be a member of a gang, that alleged affiliation would be very difficult for the prisoner to disprove. In *Campbell*, the prisoner applicant said he "felt he was being blamed for gang activity which has not been proven against him."[273] In *Maloney*, the actuarial test determining his security classification had a number of points added because he was said to be a member of the Hell's Angels, a criminal organization.[274] The prison administrators who testified in that case admitted that they knew Mr. Maloney was not actually in that organization. According to the judge, "While recognizing that this error was never

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[265] *Ibid*, at para 43.
[266] *Ibid*.
[267] *Ibid*.
[268] *Raju*, *supra* note 39 at para 7.
[269] *Hamm*, *supra* note 129 at para 36 and Appendix A.
[270] *Mercredi*, *supra* note 40 at para 10.
[271] *Loughlin*, *supra* note 262 at para 11.
[272] *Doan v Canada (Attorney General)*, 2014 BCSC 2388 at para 24 [*Doan*].
[273] *Campbell*, *supra* note 229 at para 26.
[274] *Maloney*, *supra* note 238 at paras 10-11.

corrected, there was an attempt to justify the classification by vague, unsupported references to the petitioner's membership in another criminal organisation."[275] This shows that even where the prison does not have solid proof of membership in a gang, the impression of the alleged affiliation can have a lasting impact with serious consequences for the prisoner.

A somewhat extreme example of a prisoner's alleged gang affiliation being used against them can be found in *Jordan*.[276] In that case, prison administrators sought out information from the police that they had known about for over a decade.[277] This information included alleged gang affiliation and unproven allegations.[278] The parole officer in that case specifically sought out any details the police had relating to "any gang affiliation" to "solidify" her recommendation as to his security classification.[279] In the *Illes* decision, the prison claimed to have "information indicating that Mr. Illes is a member of the Rebels Security Threat Group and is associated with the Russian Mafia and Eastern European organized crime."[280] Mr. Illes denied being part of the Russian Mafia and that they do not accept Hungarian people such as himself.[281] The judge in that case ultimately decided that the decision was unreasonable.[282] This was partly because the reasons given did not explain why the Acting Warden accepted the allegations in the Assessment for Decision over Mr. Illes' rebuttal evidence.[283]

Actual gang affiliation can give investigators tunnel vision that leads to leaps in logic not supported by the record.[284] For example, in the *Anderson* case, prison authorities were convinced that Mr. Anderson was involved in an escalating gang conflict.[285] His security classification was

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[275] *Ibid*, at para 11.
[276] *Jordan*, *supra* note 260.
[277] *Ibid*, at para 24.
[278] *Ibid*, at para 43.
[279] *Ibid*, at paras 21 and 22.
[280] *Illes*, *supra* note 152 at para 7.
[281] *Ibid*, at para 13.
[282] *Ibid*, at para 55.
[283] *Ibid*, at para 51.
[284] Tunnel vision has been described as, "the single minded and overly narrow focus on an investigation or prosecutorial theory so as to reasonably colour the evaluation of information received and one's conduct in response to the information": Ontario, *The Commission on Proceedings Involving Guy Paul Morin* (Toronto: Ministry of the Attorney General, 1998) (Chair: Kaufman), at Recommendation 74 [Morin Inquiry].
[285] *Anderson*, *supra* note 152 at para 5.

increased to maximum security.[286] While Mr. Anderson was imprisoned for a gang-related crime, he said he was not involved with any gangs and wished to avoid any violent incidents.[287] The prison had information that there was a "looming war between the gangs."[288] However, the judge pointed out that none of the information implicated Mr. Anderson, "even inferentially."[289] According to the judge, "What seems to have occurred here is that the legitimate need of institutional officials to defuse a violent conflict that source information suggested was in the offing was also enlisted to support a decision to move out and reclassify an offender whose behaviour, while certainly far less than praiseworthy, could not yet be proven to justify those actions."[290] This dynamic brings to mind Michael Jackson's account of "Greyhound Therapy," discussed above, where a warden would rather be over-inclusive in removing everyone allegedly involved in wrongdoing than risk letting someone who was involved remain.[291]

In New Brunswick, Alberta, and in one instance, Ontario, CSC would, at times, present evidence about prisoners being part of a non-descript "subculture." Being a member of the subculture was the basis (or partial basis) for increasing security classification in more than one case, as it increased the "Institutional Adjustment" score.[292] "The subculture" appears to involve lending items to other prisoners and betting on games.[293] Being identified as part of this "subculture" might be harder to disprove than gang membership, as there are few, if any, hallmarks of membership. In *Simms*, the judge said there was "completely no reliable evidence or

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[286] *Ibid*, at para 1.
[287] *Ibid*, at paras 40 and 13.
[288] *Ibid*, at para 40.
[289] *Ibid*, at para 42.
[290] *Ibid*, at para 44.
[291] *Justice Behind the Walls*, *supra* note 8, at 437.
[292] *Brown*, *supra* note 152 at paras 26 and 30; *Jackson*, *supra* note 152 at para 21; *Wiszniowski*, *supra* note 181 at para 15; *Simms*, *supra* note 181 at para 17; *Rivest*, *supra* note 152 at paras 14 and 28; *Illes*, *supra* note 152 at paras 6, 7, and 14; *Pervez v Correctional Service of Canada (Grande Cache Institution)*, 2020 ABQB 95 at para 8; *Newman*, *supra* note 254 at para 13. It was also mentioned in *Vandette*, *supra* note 152 at para 12, but did not seem to be part of the reason for the decision.
[293] *Brown*, *ibid* at para 54. In *Simms*, "extortion" and "intimidating" were also used to describe actions relating to the "subculture", *ibid* at para 42. In *Rivest*, the subculture was described partially as "collecting debts" and "using threats and intimidation," *ibid* at para 14. In *Wiszniowski*, it was described as "charging other inmates "rent" for protection and intimidation of inmates," supra note 181 at para 20.

information" to support the conclusion that Mr. Simms was part of the subculture, despite prison administrators stating that he was an "active" and "integral" member.[294]

Within the parallel punishment system, gang membership, whether alleged or actual, seemed to be used as a tool by prison administrators to connote catch-all undesirable prisoner behaviour. Again, this stands in stark contrast to how disciplinary hearings would operate. The mere suggestion of gang membership would not be enough to secure the conviction of a disciplinary offence.

2.4 Understanding the sources of the shadow system: conclusion

2.4.1 Legal framework

One source of this problem is the wide discretion operating in security reclassification and transfer decisions. Wide discretion also operated in decisions made under the former administrative segregation regime. The statute and regulations allow for this level of discretion. There is no requirement for a prison administrator to justify why they chose to use the security reclassification path instead of the formal disciplinary path.

2.4.1.1 Legal grey and black holes

As a rule, if a policy can cause a prisoner to be punished, the rights conferred under that policy to prisoners should also be capable of being enforced by prisoners. As Justice Arbour stated about the Kingston Prison for Women, "the rule of law is absent although rules are everywhere."[295] For improvement to be made in this dynamic, it must be made clear to what extent policies such as Commissioner's Directives have the force of law. Breach of a commissioner's directive should be considered an illegality for the purposes of *habeas corpus*. However, if that is not feasible, violation of directives should lead to some other type of remedy for a prisoner.

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[294] *Simms*, *ibid* at paras 54, 45, and 42.
[295] Arbour Report, *supra* note 22.

There is a distinction between "rules" and "soft law." Rules "are legally binding requirements and, as such, the legislature has to expressly grant to the decision-maker in a statute the power to make rules."[296] In contrast, "soft law" is not legally binding, but is also created by administrative decision-makers.[297] Soft law can include guidelines or policies and the power to create it "does not have to be expressly provided for in a statute."[298] Delegating power through the creation of these rules or soft laws can have inherent risks. The legislator's "views and values" may not be followed by the party making the rules or soft laws.[299] Additionally, the "administrative agent may not even be attempting to further the public interest."[300]

An example of when administrative agents in a prison setting overstepped their delegated powers was in a Yukon territorial prison, in *Sheepway v Hendriks*.[301] In that case, a slightly modified form of solitary confinement (the "Secure Living Unit") was created through a policy manual.[302] Justice Veale held that the policy creating the Secure Living Unit was *ultra vires* the enabling legislation.[303] While the *Corrections Act* allows the person in charge of the prison to "establish rules" for "the safe, secure and efficient operation of the correctional centre" the Secure Living Unit had overstepped what was authorized by law.[304] In fact, the Secure Living Unit had been created under the policy to circumvent the statutory procedural protections for "separate confinement," their more official form of solitary confinement.[305]

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[296] Andrew Green, "Delegation and Consultation: How the Administrative State Functions and the Importance of Rules" in Colleen Flood and Lorne Sossin (eds), *Administrative Law in Context*, 3rd (Toronto: Emond Montgomery, 2018) 308-340 at 309.
[297] *Ibid*, at 310.
[298] *Ibid*.
[299] *Ibid*, at 314.
[300] *Ibid*.
[301] *Sheepway*, *supra* note 94. This case was not part of my official study.
[302] The unit created through the policy manual allowed for three to six hours outside of one's cell per day, with minimal meaningful human contact: *ibid*, at para 68.
[303] *Ibid*, at para 106.
[304] *Ibid*, at para 109.
[305] *Ibid*.

If the Commissioner's Directives do not have the force of law, I recommend that there must be "an actual order of positive laws" introduced into the prison system.[306] When rules are only enforceable in one direction (that is, to punish the prisoner), they do not form a system that regulates the relationship between the prisoner and the state. Justice Arbour's 1996 groundbreaking Report holds insights into prison dynamics which still apply today. According to Justice Arbour, "the very multiplicity of rules "largely contributed to the applicable law or policy being often unknown, or easily forgotten and ignored."[307]

In *Ewert*, the SCC used section 4(g) of the *CCRA* to interpret CSC's obligations under section 24 of the *Act*.[308] Section 4(g) is about "correctional policies, programs and practices" respecting differences and being responsive to the needs of different groups.[309] Similarly, section 4(d) of the *CCRA* should be used by reviewing judges to interpret CSC's obligations under the *CCRA*, *CCRR*, and Commissioner's Directives. Section 4(d) of the *CCRA* holds prisoners "retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted."[310] A similar statement was expressed by Justice Dickson in *Solosky*.[311]

Justice Arbour suggested adopting a concept "reflected in the old legal maxim: *nullum crimen sine lege, nulla poena sine lege* – there can be no crime, nor punishment, without law."[312] In the correctional context, "no punishment without law" means there must also be legal authority for all State actions enforcing punishment."[313] The apparent shadow system of punishment is an example of punishment without law, in the sense that prison administrators do not recognize that punishment is occurring. Since there is no such recognition, the outcome of this punishment

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[306] *British Columbia v Imperial Tobacco Canada Ltd.*, 2005 SCC 49 [*Imperial Tobacco*], citing *Reference re Manitoba Language Rights*, [1985] 1 SCR 721, 19 DLR (4th).
[307] Arbour Report, *supra* note 22.
[308] *Ewert*, *supra* note 28 at paras 51-66.
[309] *CCRA*, *supra* note 27 at section 4(g).
[310] *Ibid*, at section 4(d).
[311] *Solosky v The Queen*, [1980] 1 SCR 821 at 823, 105 DLR (3d) 839: "a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law."
[312] Arbour Report, *supra* note 22.
[313] *Ibid*.

(what would normally be some form of "sentencing" in the *official* disciplinary system) is unclear and largely insulated from scrutiny.

The notion that the Correctional Service of Canada cannot reform itself has been made clear by the preliminary report released by Anthony Doob and Jane Sprott in October 2020 regarding the use of Structured Intervention Units.[314] According to Doob and Sprott:

> To use just one example, the data show that a large number of people did not routinely receive their four hours out of cell or their two hours of meaningful human activity. Overall, 79% (or 1,303 person-stays in SIUs) did not get the 'required' four hours out of their cell on half or more of their days. A little over half (54%; 889 person-stays in SIUs) did not receive their two hours of meaningful human contact outside of their cell on half or more of their days.[315]

Justice Arbour found that for CSC, "even if the law is known, there is a general perception that it can always be departed from for a valid reason, and that, in any event compliance with prisoners' rights is not a priority."[316] This view that prisoners' rights can be departed from seems to have been extended to some reviewing judges, as discussed in chapter 4.[317] Michael Jackson described how laws similarly did not apply equally to prisoners and prison administrators pre-*CCRA*:

> In a way symbolic of the extent to which prisoners remained outside the protective umbrella of the law, Canadian courts ruled that Commissioner's Directives did not have the force of law, in contrast to the provisions of the Penitentiary Act and the Penitentiary Service Regulations. Therefore, there was no legal duty owed by a staff member of the Penitentiary Service to a prisoner to adhere to the directives (*R v Institutional Head of Beaver Creek Correctional Camp ex parte McCaud* (1969), 2 DLR (3d) 545; *Martineau v Matsqui Institution Inmate Disciplinary Board*, [1978] 1 SCR 118). But, as if to drive home the asymmetrical relationship between the keeper and the kept, the Penitentiary

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[314] Anthony Doob & Jane Sprott, "Understanding the Operation of Correctional Service Canada's Structured Intervention Units: Some Preliminary Findings" (2020), online: <https://johnhoward.ca/wp-content/uploads/2020/10/UnderstandingCSC_SIUDoobSprott26-10-2020-1.pdf> [Doob/Sprott Report].
[315] *Ibid*, at page 29.
[316] Arbour Report, *supra* note 22.
[317] See, for example, pages 104-114

> Service Regulations made in a disciplinary offence for a prisoner to contravene a directive (s. 2.29(n)).[318]

The House of Commons Sub-Committee on the Penitentiary System in Canada, Report to Parliament, 1977 "recommended that the Commissioner's Directives be consolidated into a consistent code of regulations having the force of law for both prisoners and staff."[319]

Some cases only considered Commissioner's Directives as policies or guidelines. The judge in *Antinello* described Commissioner's Directives as "policy guidelines" which "play a role in the security classification of inmates."[320] In *Brown*, Commissioner's Directives were not considered to have the force of law but were "policies that cannot be easily discarded and that must be observed."[321] The judge in *Bromby* was similarly unclear about the status of Commissioner's Directives, calling one of them "part of the security classification process."[322] However, in that case, the fact that the timelines in the Directives were not followed by prison administrators did not render the decision unlawful and the application was denied.[323] In *Wiszniowski*, the judge said, "timelines were established as guidelines."[324] In *Maillet*, a policy bulletin from CSC was considered a "best practices" document which Mr. Maillet could not rely on because it did not have the force of law.[325]

The Commissioner's Directives were considered to have the force of law in some cases.[326] In *Keiros-Meyer*, the prisoner's application was granted entirely because prison administrators did not comply with a Commissioner's Directive.[327] In that case, the Commissioner's Directive is

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[318] *Justice Behind the Walls*, *supra* note 8, at 49, citing *Regina v Institutional Head of Beaver Creek Correctional Camp, Ex parte MacCaud*, [1978] 1 SCR 118, 2 DLR (3d) 545 (ONCA) and *Martineau v Matsqui Institution Inmate Disciplinary Board*, [1978] 1 SCR 118, 74 DLR (3d) 1.
[319] *Justice Behind the Walls*, *ibid*, at 53.
[320] *Antinello*, *supra* note 168 at para 23.
[321] *Brown*, *supra* note 152 at para 62.
[322] *Bromby v Warden of William Head Institution*, 2020 BCSC 1119 at para 43 [*Bromby*].
[323] *Ibid*, at paras 63-64 and 70.
[324] *Wiszniowski*, *supra* note 181 at para 34.
[325] *Maillet*, *supra* note 152 at paras 45-46.
[326] One example was *Germa* 2019, *supra* note 152 at para 29. Another example was *Howdle*, *supra* note 194 at para 74.
[327] *Keiros-Meyer*, *supra* note 175 at paras 77-95.

said to set "out the procedure that must be followed by the institution" for security reclassification.[328] In *Simms*, the judge considered the Directives to have the force of law, while CSC described them as being only "policies."[329] Similarly to *Keiros-Meyer*, Mr. Simm's application was granted because CSC did not show that it complied with the Directives.[330]

In one case, a provincial prison in Nova Scotia implemented a policy where federal prisoners who were temporarily housed in a provincial facility would all be placed in solitary confinement.[331] That policy was created simply through an email by the Assistant Deputy Supervisor of Operations.[332] It ordered that federal prisoners in that institution would be held in their cells for 23 hours per day.[333] The respondent argued that this was a "policy grievance" and did not constitute a basis for a *habeas corpus* application.[334] The fact that such a severe restriction of liberty could be ordered through an email raises concerns about the rule of law, as the relationship between the individual (the prisoner) and the state did not appear to be regulated by law but by the whims of the person in charge. The policy in question was declared unlawful in that case. Confusingly, in *Pratt* (NSCA), the Nova Scotia Court of Appeal said provincial correctional services policies do *not* have the force of law.[335] However, it appears that in practice, these policies can significantly impact prisoners' liberties.[336]

2.4.1.2 Remedies and Enforcement of Rights

According to Peter Hogg, the rule of law requires "a society in which government officials must act in accordance with the law. For this to be a reality, remedies must be available to citizens when officials act outside the law."[337] Section 4(f) of the *CCRA* says it is a principle that

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[328] *Ibid*, at para 80.
[329] *Simms*, *supra* note 181 at paras 20, 22-25, 32 and 63.
[330] *Ibid*.
[331] *Gogan v Nova Scotia (Attorney General)*, 2015 NSSC 360, at para 3 [*Gogan* 2015].
[332] *Ibid*, at para 4.
[333] *Ibid*, at para 41.
[334] *Ibid*, at para 19.
[335] *Pratt* NSCA, *supra* note 207 at para 91.
[336] See also *Chung*, *supra* note 183 at para 44.
[337] Peter W Hogg, *Constitutional Law of Canada* (Toronto; Thomson Reuters, 2019) at 1.1.

prisoners can access "an effective grievance procedure".[338] In *Ewert*, a principle in section 4 of the *CCRA* was used to interpret a different section of the Act, suggesting the principles are of high importance.[339] In Justice Arbour's Report, she determined that "the enactment of the *CCRA*, the existence of internal grievance mechanisms, and the existing forms of judicial review had not been successful in developing a culture of rights within the Correctional Service of Canada."[340]

The internal grievance system in federal prisons does not provide a meaningful opportunity for prisoners to assert their rights. It is apparent from case law and the Audit of Offender Redress (2018) that the offender grievance system is, overall, not satisfactory for resolving instances where prisoners allege a breach of their rights.[341] For example, in *Johnson v Canada (Attorney General)*, there was a period of over two years between the date of Mr. Johnson's final grievance and receiving a decision from CSC.[342] If a prisoner is not satisfied with the internal grievance system, their only real option is to apply to the Federal Court for judicial review, a much more difficult process to navigate, which takes longer to access, and where judges have the discretion as to whether or not judicial review will happen.[343] In *Ewert*, the Supreme Court of Canada recognized that CSC's grievance system had not been effective at addressing Mr. Ewert's concerns.[344] Since it took almost 20 years for his concerns to be addressed, it was necessary for the Court to make a declaration instead of telling Mr. Ewert to begin the grievance process over.[345] If a staff member breaches the rules, it should be made clear to the persons involved what the consequences are. When the force of policies only flow in one direction (rules applied to prisoners) and prisoners do not, in turn, have enforceable rights, it creates distrust and can cultivate a culture where staff are free to act in an arbitrary manner.

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[338] *CCRA*, *supra* note 27 at section 4(f).
[339] *Ewert*, *supra* note 28.
[340] *Justice Behind the Walls*, *supra* note 8, at 373.
[341] Canada, "Audit of Offender Redress" (Ottawa: Correctional Service of Canada, 2018), online: <https://www.csc-scc.gc.ca/publications/005007-2545-en.shtml#3.0>. See especially, the great amount of delay and low compliance with timelines issued in Commissioner's Directives.
[342] *Johnson v Canada (Attorney General)*, 2018 FC 582.
[343] *Khela*, *supra* note 4, at para 61.
[344] *Ewert*, *supra* note 28 at para 84.
[345] *Ibid*, at para 87.

In Justice Arbour's Report, she called for a legal remedy where prisoners could apply to a judge for a reduction in sentence if the prisoner could show "illegalities, gross mismanagement or unfairness in the administration of a sentence renders the sentence harsher than that imposed by the court."[346] When considering Bill C-83, that created the legislation to replace the administrative segregation regime in 2019, the Senate approved two amendments that would have increased judicial oversight of federal prison conditions. One provision would have required that a prisoner's placement in a structured intervention unit must come before a Superior Court after 48 hours for authorization to extend their placement. Another would have allowed the prisoner to apply to the court for a reduction of their prison sentence or parole ineligibility if the court found there was "unfairness in the administration of a sentence" (essentially the remedy recommended by Justice Arbour).[347]

Prison sentences can already be reduced (or charges dropped) due to state misconduct. However, to date it has only been done very rarely *after* a sentence has been started.[348] Both of the amendments made by the Senate were rejected by the House, and since the Senate did not insist on them, the legislation passed without them. This was a missed opportunity for introducing judicial oversight, and by extension, the rule of law into Canadian federal prisons. Canada has chosen not to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).[349] OPCAT has a preventative function and could perhaps help Canada's penal culture follow the rule of law.

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[346] Arbour Report, *supra* note 22.
[347] Bill C-83 Senate Amendments (June 2019).
[348] *R v Nasogaluak*, 2010 SCC 6; in *R v Capay*, 2019 ONSC 535, a first degree murder charge was stayed due to state misconduct (an extremely harsh imposition of solitary confinement). In *R v Prystay*, 2019 ABQB 8, the applicant's prison sentence was reduced under section 24(1) of the *Charter* due to being unlawfully held in solitary confinement for 13.5 months.
[349] UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 9 January 2003, A/RES/57/199.

2.4.2 Decision makers and the judiciary

Decision makers in prison require more legal expertise and training than they currently have. In the words of Lisa Kerr, "prison is a punitive context where key decisions are made not by elected public figures or legal advisors but by low-level officials who are not well-positioned to interpret and honour constitutional norms."[350] This has parallels to the immigration law context.[351] The impact of immigration decisions on the individual is undoubtedly high, as is the impact of security reclassification/transfer decisions and solitary confinement. In the next chapter, I will highlight how this presents problems at judicial review because of the deference that is shown to this unique institutional environment and the particular form of decision-making. These factors are problematically integral to the SRS 'tool'.

[350] Contesting Expertise, *supra* note 20 at 49.
[351] See, for example, *Baker*, *supra* note 69.

Chapter 3: 'Expertise' and Deference on *Habeas Corpus* Review

3.1 Expertise and deference on judicial review generally

Prior to the *Vavilov* case in 2019, *Dunsmuir* provided guidance about the standard of review and the framework for conducting reasonableness review.[352] In *Dunsmuir*, the SCC described reasonableness as "a deferential standard."[353] When determining whether the proper standard of review was correctness or reasonableness, one consideration was where the level of expertise of the decision maker.[354] If the decision maker had "special expertise," greater deference would be granted.[355] Expertise is not determined by evaluating any particular decision maker, but rather, on an institutional level.[356] The expertise of the decision maker as an institution is compared to the relative expertise of the judiciary.[357]

In *Dunsmuir*, one of the factors under the standard of review analysis was the expertise of the tribunal.[358] The SCC held, "deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system."[359] According to Mary Liston, deference is "a requirement of the law of judicial review and supports the separation of powers."[360]

Justices Bastarache and LeBel in *Dunsmuir* drew upon the notion of "deference as respect," including "respectful attention to the reasons offered or which could be offered in support of a

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[352] *Dunsmuir*, *supra* note 11.
[353] *Ibid*, at para 47.
[354] *Ibid*, at paras 54-55.
[355] *Ibid*, at para 55.
[356] *Ibid*, at para 68.
[357] *Ibid*.
[358] *Ibid*, at para 64.
[359] *Ibid*, at para 49.
[360] Administering the Rule of Law, *supra* note 3, at 161.

decision."[361] *Vavilov* seems to be a fundamental shift from *Dunsmuir* in that reviewing judges will no longer be concerned about what reasons *could* be offered in support of a decision, but what reasons were offered and whether they were justified. In *Vavilov*, the SCC described reasonableness review as being "robust." Paul Daly identified four "strands" of this review: reasoned decision-making,[362] responsiveness,[363] demonstrated expertise,[364] and contextualism.[365] Daly argued that the majority's approach in *Vavilov* "represents a repudiation of claims to authority based on political legitimacy, expediency and technocratic expertise."[366] According to Daly:

> A culture of authority – not a culture of justification – began to creep onto substantive review. Decisions issued between *Dunsmuir* and *Vavilov* echoed older decisions in which Canadian courts recognized that some decision-makers enjoyed (almost) exclusive authority within their areas of jurisdiction.[367]

I argue that the culture of authority as described by Daly was demonstrated during substantive review of prison law decisions during the post-*Dunsmuir*, pre-*Vavilov* period in my study. This culture of authority mostly took the form in the courts' application of the related concepts of deference and expertise.

3.2 Treatment of deference in cases in my study

In *Khela*, the SCC did not limit reasonableness review or prevent it from being robust. The lower court decision from the BC Court of Appeal used the language of "considerable deference."[368] This language was both noted to exist and *not* adopted by the SCC.[369] Additionally, an approach from case law in the United Kingdom that limits review to whether a decision was outside the

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[361] *Ibid*, at para 48 [emphasis added].
[362] Paul Daly, "Vavilov and the Culture of Justification in Contemporary Administrative Law" (2020) 100:2 SCLR 279 at 6.
[363] *Ibid*, at 7.
[364] *Ibid*, at 8.
[365] *Ibid*, at 10.
[366] *Ibid*, at 2.
[367] *Ibid*, at page 4.
[368] *Khela v Mission Institution (Warden)*, 2011 BCCA 450, at para 70.
[369] *Khela*, *supra* note 4, at para 19.

decision maker's jurisdiction was explicitly considered and rejected.[370] The SCC only provided a small amount of guidance for how to conduct reasonableness review of prison decisions, with the most explanatory quote perhaps being:

> 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.[371]

While Justice LeBel did state that decision-makers are entitled to a "margin of deference" regarding whether information should be withheld under section 27(3) of the *CRRA*, the decision overall supports a robust reasonableness review.[372]

Seventy-three of the 90 cases in the study mentioned "deference." Many cases simply quoted sections of *Khela* and provided no commentary on the subject.[373] Some cases used the term "significant deference."[374] Other cases used the term "considerable deference,"[375] and even "very considerable deference."[376] Similarly, the term "substantial degree of deference" was also used.[377] Respondents used this language in their submissions in *Simms*, *Howdle*, *MacNeil*, *Gogan v Nova Scotia (Attorney General)*, and *Jackson*.[378] Applying a level of deference above and beyond the

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[370] *Ibid*, at para 68.
[371] *Ibid*, at para 74.
[372] *Ibid*, at para 89; *CCRA*, *supra* note 27 at section 27(3).
[373] *Paul c Lalande (Archambault Establishment)*, 2020 QCCA 632, at para 11; *Cox v Nova Scotia (Attorney General)*, 2020 NSSC 81, at para 30 [*Cox*]; *Bell v Canada (Attorney General)*, 2019 ONSC 540, at para 27; *Yaworski v The Attorney General of Canada*, 2018 ONSC 1734 at para 22 [*Yaworski*]; *Cliff v Kent Institution*, 2016 BCSC 1525, at para 25 [*Cliff*]; *Maloney*, *supra* note 238 at para 26; *Kreko v Canada (Attorney General)*, 2015 ONSC 6343 at para 7 [*Kreko*]; *Muir*, *supra* note 152 at para 33; *Surujpal*, *supra* note 152 at para 13; *Maillet*, *supra* note 152 at para 11; *Jordan*, *supra* note 260 at para 59.
[374] *Rivest*, *supra* note 152 at para 68
[375] *Doan*, *supra* note 272 at para 59; *Wood v Canada (Attorney General)*, 2019 ONSC 2697, at para 11 [*Wood* 2019], citing *Doan*, *ibid*; *Vandette*, *supra* note 152 at para 11; *Gogan 2*018, *supra* note 143 at para 56; *Antinello*, *supra* note 168 at para 14; *Ryan v Nova Scotia*, 2015 NSSC 286, at paras 24 and 25 [*Ryan*]; *Germa* 2014 NS, *supra* note 180 at para 15.
[376] *Keiros-Meyer*, supra note 175 at para 90.
[377] *Howdle*, *supra* note 194 at para 62; *MacNeil*, *supra* note 141 at para 28.
[378] *Simms*, *supra* note 181 at para 71; *Howdle*, *ibid* at para 47; *MacNeil*, *ibid* at para 15; *Gogan* 2015, *supra* note 331 at para 17; *Jackson*, *supra* note 152 at para 21.

text of *Khela* is a misapprehension of the law. Justice LeBel in *Khela* noted how prison cases "will often be moot before making it to the appellate level, and are therefore 'capable of repetition, yet evasive of review.'"[379] This partly helps to explain how the same mistakes can be repeated over and over.

A case decided before *Khela* has been cited since 2014, stating there is a "high degree of deference" owed.[380] Other cases have made the same statement, sometimes using *Khela* as an authority.[381] In *Pratt v Nova Scotia (Attorney General)* the lower court used the term "very deferential."[382] However, that decision was later overturned, mainly because the judge misapplied principles relating to deference. Changing the standard from "deference" to "significant," "considerable" or "substantial" deference is a doctrinal shift in the law and should be corrected.

Deference because of expertise was used in the respondent's submissions in *Bromby*, *Simms*, *Tuckanow,* and *R v Elliot*.[383] However, it is very likely used in most respondent's submissions given the argument's apparent success. In one case, judges referred to wardens as "special decision-makers."[384] In another case, the judge simply said, "deference is owed to the experts."[385] According to Lisa Kerr, "the state should be put to the usual burdens of justifying an infringement, rather than benefiting from undue deference to the unquestioned expertise of prison officials."[386] While Kerr was talking about the *Charter*, this should apply to *habeas corpus* proceedings also.

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[379] *Khela*, *supra* note 4 at para 14.
[380] *Thilson v Mountain Institution*, 2011 BCSC 874 at para 50, cited in *Howdle*, *supra* note 194 at para 90 and in *Richards*, *supra* note 152 at para 10.
[381] *Anderson*, *supra* note 152 at para 24: "an appropriately high degree of deference;" *Tyler*, supra note 152 at para 15; *Richards*, *ibid* at para 77.
[382] *Pratt* 2019, *supra* note 207 (overturned on appeal).
[383] *Bromby*, *supra* note 322 at para 36; *Simms*, *supra* note 181 at para 17; *Tuckanow*, *supra* note 152 at para 18; *Elliott* 2014, *supra* note 152 at para 130.
[384] *Blackmer*, *supra* note 152 at para 42.
[385] *Larabie v Canada (Attorney General)*, 2019 ONSC 1973 at para 30 [*Larabie*].
[386] Contesting Expertise, *supra* note 20 at 48.

In *Bromby*, the judge saw the decision-maker as "directly engaging" their "statutory mandate," which was considered a reason for deference.[387] In *Bromby*, the judge found the decision is reasonable precisely because the warden is "entitled to deference in the decision-making process."[388] In *Nagle-Cummings*, the seemingly unrestricted use of lockdowns was upheld in part because of the Deputy Superintendent's "relative expertise in the management and administration of correctional facilities (generally)."[389] In *Downey*, the court came to the opposite conclusion as in *Nagle-Cummings*, despite affording the institution "considerable deference."[390] Other cases also mentioned that they found the decision to be unreasonable despite granting deference.[391] In particular, the judge in *Richards* noted that "deference is not a complete protective shield."[392]

3.2.1 'Micromanagement' as proxy language

In *Khela*, Justice LeBel stated, "an involuntary transfer decision is nonetheless an administrative decision made by a decision maker with expertise in the environment of a particular penitentiary. To apply any standard other than reasonableness in reviewing such a decision could well lead to the micromanagement of prisons by the courts."[393] The language in *Khela* was likely simply referring to the appropriate standard of review (reasonableness) and was not meant to have the broader implications that it did. Forty-four out of the 90 cases in this study specifically mentioned the term "micromanagement" in the judgment. Two judgments mention that the Respondent made submissions warning against micromanagement.[394] When the "micromanagement" quote was used, judges seemed less likely to intervene. I posit that the use of the micromanagement quote is proxy language for judges being uncomfortable with their

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[387] *Bromby*, *supra* note 322 at para 66.
[388] *Ibid*, at para 63.
[389] *Cox*, *supra* note 373 at para 31; *Nagle-Cummings*, *supra* note 192 at para 69.
[390] *Downey and Gray v Attorney General (Nova Scotia)*, 2020 NSSC 213 at para 19 [*Downey*].
[391] *Raju*, *supra* note 39 at para 23; *Keiros-Meyer*, *supra* note 175 at para 90; *Anderson*, *supra* note 152 at para 43; *Richards*, *supra* note 152 at para 77.
[392] *Richards*, *ibid*.
[393] *Khela*, *supra* note 4 at para 75.
[394] *Bromby*, *supra* note 322 at para 36; *Wynter*, *supra* note 152 at para 18.

jurisdiction and not wanting to interfere with the powers granted to decision makers through Parliament or the provincial legislatures.

One case mentioned the term micromanagement three times. [395] In *Larabie*, the judge says Mr. Larabie "seeks to have me micromanage the prison."[396] In the 2019 *Wood* case, where the judge says they should not "re-weigh the decision made by the acting Warden or attempt to micromanage the prison."[397] Judges made similar statements in *Yaworski* and *Wynter*.[398] In the 2014 *R v Elliott* case, the judge says that despite the warning against micromanagement in *Khela*, "Mr. Elliott, even as a serving prisoner, is entitled to procedural fairness and for decisions affecting his liberty to be reasonable."[399] The judge in *R v Elliott* seemed to acknowledge their discomfort with their jurisdiction and proceed despite it.

In *Loughlin*, the judge seems to conflate *habeas corpus* with judicial review.[400] That judge said, "a judge hearing a *habeas corpus* application does not have the authority to substitute his or her own conclusion for what might be right or wrong in a given circumstance."[401] This is a legal error. The judge then said "any deeper intrusion" into CSC's operations would lead to "micromanagement."[402] *Khela*'s prohibition against micromanagement through deference was described as a "principle" in *Tuckanow*.[403]

A case called *Biever* regarding a provincial prison has been cited in several other Alberta decisions for the statement that:

> The Director, by statute, is entitled to place inmates as he sees fit, provided he does so *reasonably*. This is a multifaceted mandate. The Director must protect the inmates, the physical plant of the institution, and the many people who are employed there. That is a

[395] *Blackmer*, *supra* note 152 at paras 30, 42 and 66.
[396] *Larabie*, *supra* note 385 at para 29.
[397] *Wood* 2019, *supra* note 375 at para 26.
[398] *Yaworski*, *supra* note 373 at para 28; *Wynter*, *supra* note 152 at para 29.
[399] *Elliott* 2014, supra note 152 at para 140.
[400] *Loughlin*, *supra* note 262 at para 37.
[401] *Ibid*.
[402] *Ibid*.
[403] *Tuckanow*, *supra* note 152 at para 25.

> difficult balancing task. It requires sensitivity, integrity, and ingenuity. The Court should be reluctant to micromanage through the prerogative writ of *habeas corpus*, or judicial declaration, the day-to-day workings of the ERC.[404]

The entire statement from *Biever* was usually included when cited. Alberta has had an influx of *habeas corpus* applications since *Khela*, with prisoners sometimes assisting each other in their applications.[405] The Alberta Court of Queen's Bench has created an "Accelerated *Habeas Corpus* Review Procedure" in order for prisoners to "show cause" when the government applies to strike their application.[406] Out of all the provinces in the study, Alberta judges seemed the most receptive to the micromanagement concept and more skeptical of prisoners' claims overall.[407] This may be due in part to the high number of cases deemed "meritless" as reported by the Court.[408]

3.2.2 Conclusion on deference

Courts cannot simply ignore the principle of deference during *habeas corpus* review, mainly due to separation of powers concerns for both the executive and legislative branches. However, courts can exercise their own discretion to give the principle of discretion less weight in review of prison decisions. The micromanagement language, widely quoted, is code for discomfort with the court's jurisdiction. *Khela* has been misquoted by many lower courts for the proposition that a high level of deference should be granted to prison decision makers.

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[404] *Biever v Edmonton Remand Centre*, 2015 ABQB 609 [*Biever*], at para 41 [emphasis added], cited in *Chung*, supra note 183 at para 40; *MacKinnon v Bowden Institution*, *supra* note 154 at para 29, *Loughlin*, *supra* note 262 at para 39, *Getschel v Canada (Attorney General)*, 2018 ABQB 409 at para 54 [*Getschel*]; *Shoemaker*, supra note 86 at para 43 (overturned on appeal); *Blackmer*, *supra* note 152 at para 30.
[405] *Latham v Her Majesty the Queen*, 2018 ABQB 69 at para 5 [*Latham*].
[406] *Ibid*, at para 15.
[407] See, for example, *Shoemaker*, *supra* note 86 (overturned on appeal) and the other cases citing *Biever*, *supra* note 404: *Voisey v Canada (Attorney General)*, 2016 ABQB 316 [*Voisey*]; *Getschel*, *supra* note 404; *Vandette*, *supra* note 152.
[408] *Latham*, *supra* note 405 at paras 5, 7 and 8.

3.3 Treatment of expertise in cases in my study

3.3.1 The SRS and expertise

In security reclassification and transfer, the SRS is considered by reviewing courts to be part of the decision makers' expertise. On the one hand, on an institutional level, wardens have more practice with the day-to-day operations of prisons. However, the SRS is far from an infallible tool and can be influenced by the people administering it. The widespread use of tools such as the SRS is arguably part of a broader trend in the Canadian criminal justice system towards actuarial risk assessments and risk-averse decisions more generally.[409]

The shadow system is partly obscured through the technical-sounding nature of the SRS. Lisa Kerr sums up this phenomenon very nicely:

> From the outset and throughout the litigation, the defendant wears a cloak of expertise, typically attempting to justify the impugned law or conduct by pointing to the security concerns and limited resources that constrain the prison context. Judges are at risk of yielding uncritically in the face of their own corresponding lack of "correctional expertise". The prospect of excessive judicial deference to the claims of prison administrators poses a chronic threat to the scope and viability of prisoners' rights.[410]

There is a growing concern about security classifications in federal prisons discriminating against Indigenous prisoners. In the 2016 Auditor General's Report, the results found that male and female Indigenous prisoners were overrepresented in higher security levels, with similar rates over the past three years.[411] Indigenous prisoners in federal prisons serve a higher amount of their sentence in prison before being released on their first day parole and full parole compared to non-Indigenous prisoners.[412] In *Ewert*, the SCC held that CSC breached its statutory duty to

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[409] M. Feeley & J Simon, "New Penology: Notes on the Emerging Strategy of Corrections and its Implications" (1992) 30:4 Criminology 449; Pat O'Malley, "Globalizing Risk? Distinguishing Styles of "Neoliberal" Criminal Justice in Australia and the USA" (2002) 2 Crim Just 205; K. Stenson & R. Sullivan (2001), *Crime, Risk and Justice: The Politics of Crime Control in Liberal Democracies* (London: Willan, 2001).
[410] Contesting Expertise, *supra* note 20 at 45.
[411] Canada, 2016 Fall Reports of the Auditor General of Canada (Ottawa, Office of the Auditor General of Canada: 2016), online: <https://www.oag-bvg.gc.ca/internet/English/parl_oag_201611_03_e_41832.html#p92>.
[412] Office of the Correctional Investigator, "Annual Report 2018-2019" (2019), online: <https://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20182019-eng.aspx?pedisable=true>.

"take all reasonable steps to ensure that any information about an offender that it uses is as accurate as possible" because it used assessment tools not validated for use for Indigenous populations.[413]

3.3.1.1 SRS: a "mere" actuarial tool

The SRS scale has been shown to be vulnerable to influence by the person inputting the information. According to Kelly Hannah-Moffat, "Although risk assessment techniques are readily available and proliferating, the process of administering and assessing risk remains highly discretionary and is often misunderstood."[414] CSC has partly acknowledged this in some cases, saying it is "just a tool", all the while using it widely and relying on it during *habeas corpus* review. In one case, both happened. In *Bromby*, CSC said the SRS was just a tool,[415] but then relied on the fact that at one point, the score was at an even higher security classification to say that their decision was lawful.[416]

Three of the cases in the study showed that the SRS score is open to tampering by correctional administrators. In *Jordan*, the Warden asked the parole officer to seek out old information from the police to increase Mr. Jordan's score and transfer him to a different institution.[417] In *Wiebe*, a parole officer convinced a psychologist to change their opinion based on inaccurate information.[418] This misinformed opinion by the psychologist was in turn used by the parole officer to support their conclusion that Mr. Wiebe's security classification should be increased.[419] While a forensic psychologist is someone with expertise, their opinions are limited based on the accuracy of the information used.

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[413] *Ewert*, *supra* note 28 at para 80.
[414] Kelly Hannah-Moffat, "The Uncertainties of Risk Assessment: Partiality, Transparency, and Just Decisions." (2015) 27:4 FSR 244, at 244 [Uncertainties of Risk].
[415] *Bromby*, *supra* note 322 at para 48.
[416] *Ibid*, at para 64.
[417] *Jordan*, *supra* note 260 at paras 52 and 56.
[418] *Wiebe*, *supra* note 152.
[419] *Ibid*, at para 13.

A third case where a correctional administrator was seen to have tampered with an SRS score was *Antinello*.[420] The judge in *Antinello* was highly critical of CSC's reliance on the SRS.[421] In particular, the judge held the SRS results were "substantially influenced by the people that conduct these assessments."[422] The parole officer called this influence the "Clinical Judgment" factor.[423] According to the parole officer, if the SRS score does not "adequately reflect the offender's risk level," "Clinical Judgement" can increase the level of risk.[424] The judge noted that this "Clinical Judgment" almost always results in an increase in the prisoner's score.[425] The judge stated how there was "just enough discretion and latitude available to the Institution staff and agents to essentially produce whatever numbers or rating these people may be looking for to support whatever decision they may have had in mind."[426] While SRS scores were, on first impression, "objective,"[427] they were considered by the judge "no more than a "Red Herring" in that case.[428]

In *Horton*, Mr. Horton asked the court a logical question, but seems to have been met with annoyance from the judge, who called it "singularly unhelpful."[429] He asked that if "the majority of questions are completed by manual entries and can be modified by the user, how do I know my score was recalculated justly and fairly?"[430] The judge criticized Mr. Horton for not cross-examining the parole officer on scoring when he had the opportunity.[431] However, Mr. Horton seemed to be asking about a more fundamental problem with the test than could be answered through cross examination. A similar idea was brought up in *Haug*, where the self-represented Mr. Haug said that many points on the SRS test are "open to interpretation" of the parole officer

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[420] *Antinello*, supra note 168.
[421] *Ibid*, at para 32.
[422] *Ibid*.
[423] *Ibid*.
[424] *Ibid*, at paras 33 and 34.
[425] *Ibid*, at para 34.
[426] *Ibid*, at para 35.
[427] *Ibid*, at para 32.
[428] *Ibid*, at para 38.
[429] *Horton*, *supra* note 152 at para 13.
[430] *Ibid*.
[431] *Ibid*.

administering it.[432] Specifically, "Correctional Plan Progress and Correctional Plan Motivation. These two items have a capacity of increasing or decreasing an inmates [*sic*] security score by seven full points."[433] The judge in *Haug* was not receptive to this point. Hannah Moffat stated, "Risk assessment tools structure what evidence is recorded and how it is recorded, but practitioners exercise substantial judgment in determining what additional information to collect, the case-file information or collateral sources that are deemed relevant or significant, and the facts that are selected as examples of risk."[434]

In *Young*, the number of "recorded incidents" had been inflated to generate an artificially high outcome for Mr. Young's security score.[435] In that case, the Manager of Assessments and Warden acknowledged that the number had been inflated and neither "made any attempt to come to grips with those observations."[436] Another issue with the use of the SRS is that sometimes, the prisoner will not be provided with the scoring matrix/guide to comprehend the score, rendering the score indecipherable.[437] This, notably, was the case in *Khela* and *May*.[438]

In some cases where the use of the SRS appears to have been improperly administered, lawyers for CSC will say that it is "just a tool." For example, in *Anderson*, the SRS was called a "tool" by CSC that was "not definitive."[439] CSC also stated there are "frequent cases in which the score on this tool and the inmate's actual classification do not end up being the same."[440] In *Maillet*, the SRS score was described by CSC as a "mere starting point."[441] In *Newman*, it was called "only one factor."[442] When the SRS score did not match what the Warden thought was the appropriate classification in *Yaworski*, it was called "an assessment tool."[443] Similarly, in *Loughlin*, it was

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[432] *Haug*, *supra* note 196 at para 1.
[433] *Ibid*.
[434] Uncertainties of Risk, *supra* note 414 at 245.
[435] *Young v Canada (Attorney General)*, 2015 ONSC 5012 at para 1.
[436] *Ibid*.
[437] *Cliff*, *supra* note 373 at paras 8 and 31.
[438] *Khela*, *supra* note 4 at paras 96-97; *May*, *supra* note 2 at para 7.
[439] *Anderson*, *supra* note 152 at para 7.
[440] *Ibid*.
[441] *Maillet*, *supra* note 152 at para 17.
[442] *Newman*, *supra* note 254 at para 19.
[443] *Yaworski*, *supra* note 373 at para 16.

described as "simply a classification tool, but not the only relevant and determinative mechanism to classify an inmate."[444]

In other cases, CSC will rely on the SRS as being a technical, accurate test that seems beyond reproach. For instance, in *Doan*, the Acting Warden tried to minimize a potential flaw in their assessment by saying the SRS is "an actuarial scale" and "the recommendation for transfer was based on an analysis of ratings in the area of Institutional Adjustment, Escape Risk and Public Safety."[445] However, CSC also said that the SRS score was not the basis for the decision.[446] The SRS was referred to as "actuarial" in several cases to bolster its authority.[447] According to Hannah-Moffat, "the use of these tools suggests the curtailment of discretion and subjective judgments, which are often viewed negatively and associated with errors."[448]

Some descriptions of the SRS were somewhere in between "just one factor" and "an actuarial scale." For instance, in *Rivest*, it was called a "research-based computerized score that generates a score suggesting a particular security classification."[449] Judges used similar language in *Brown*, *Howdle*, *Richer*, *Wiszniowski*, and *Wood v Atlantic Institution*.[450] In *Keiros-Meyer*, it was called "an important tool."[451]

Under the previous federal administrative segregation regime, a tool was used called the Structured Assessment for Administrative Segregation or ("SAT").[452] In *Simms*, inaccurate information was used during the SAT, but it was "presented as being accurate and a reliable tool."[453] The SAT in *Simms* seemed to be conducted haphazardly in order to hurry up the

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[444] *Loughlin*, *supra* note 262 at para 31.
[445] *Doan*, *supra* note 272 at para 34.
[446] *Ibid*, at para 55.
[447] *Anderson*, *supra* note 152 at para 7; *Tyler*, *supra* note 152 at para 45; *Jenkins*, *supra* note 243 at para 31; *Maestrello*, *supra* note 152 at para 12.
[448] The Uncertainties of Risk, *supra* note 414 at 244.
[449] *Rivest*, *supra* note 152 at para 19.
[450] *Brown*, *supra* note 152 at para 19; *Howdle*, *supra* note 194 at para 16; *Richer*, supra note 159 at para 14; *Wiszniowski*, *supra* note 181 at para 12; *Wood* 2014, *supra* note 227 at para 44.
[451] *Keiros-Meyer*, *supra* note 175 at para 24.
[452] *Simms*, *supra* note 181 at para 26.
[453] *Ibid*, at para 29.

administrative segregation process.[454] In CSC's arguments before the court, "counsel tried to minimize the use of the SAT stating it was only a tool."[455] This tool was also used in the *Hamm* case.[456]

3.3.1.1.1 If the SRS is a "tool", then is there a fettering of discretion?

If the SRS is relied upon a comprehensive tool, it may lead to the inappropriate fettering of discretionary decisions. An administrative decision maker is required to "exercise discretion 'according to law' and in accordance with the proper principles reflected in the 'policy and objects of the [governing] Act'."[457] The decision maker is said to have "fettered" their discretion if it does not exercise the discretion granted by the governing statute.[458] Fettering discretion will cause a tribunal to lose jurisdiction.[459]

The following principles were delineated in *Oakwood*:

> Discretionary administrative decisions must be "based upon a weighing of considerations pertinent to the object of the administration", per Rand J. in *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, 16 D.L.R. (2d) 689, at p. 140;
>
> The failure of an administrative decision maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration, per Lord Denning in *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*, [1959] A.C. 663 at p. 693;
>
> Taking into consideration matters which were not proper to be regarded, or omitting to consider matters which were of direct importance is wrong in law, per Danckwerts, J.A. *in R. v. Paddington Valuation Officer, Ex parte Peachey Property Corp. Ltd.*, [1966] 1 Q.B. 380 (C.A.).[460]

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[454] *Ibid*, at paras 30-31.
[455] *Ibid*, at para 31.
[456] *Hamm*, *supra* note 129 at Appendix A.
[457] *Heilman v The Workers' Compensation Board*, 2012 SKQB 361, at para 19 [*Heilman*], citing *Oakwood Development Ltd. v. Rural Municipality of St. François Xavier*, [1985] 2 SCR 164 [*Oakwood*].
[458] *Heilman*, *ibid*.
[459] *Ibid*, at para 22, citing David Jones & Anne de Villars, *Principles of Administrative Law*, 5th ed (Toronto: Thomson Carswell, 2009).
[460] *Heilman*, *ibid*, at para 22, citing *Oakwood*, *supra* note 457.

If a decision-maker made any of the three errors listed above and said their decision was based on the SRS, it may be an improper fettering of discretion.

3.3.2 Patterns disclosing lack of expertise in procedures and decision-making

Three patterns in my study showed a lack of expertise when it came to procedures and decision-making: (1) inexpert investigations, (2) mis-assessing the reliability of confidential sources, and (3) overweighing the safety of informants.

3.3.2.1 Inexpert investigations

Although the cases in my study are only a small sample, the staff conducting investigations in prison do not appear to have the expertise often attributed to them by reviewing courts. There were many examples where investigations were conducted in a manner that suggested a low level of training or practice.[461] In *Richards v Springhill Institution*, an investigation was conducted by a Security Intelligence Officer about stabbing attacks in the institution.[462] Mr. Richards was suspected of "directing" two of the attacks.[463] During the investigation, the Officer used three confidential sources who believed that Mr. Richards had done so.[464] Under cross examination, several flaws in the method of the investigation came to light:

> (a) She did not question or verify whether these sources received this information first hand.
> (b) She did not know (because she did not ask them) on what basis did they form their opinions. […]
> (c) [She] acknowledged that it would be fair to say she relied heavily on the opinions expressed by the confidential sources. […]
> (d) None of the four inmates directly involved implicated Mr. Richards in the attack. [She] did not specifically ask the several inmates directly involved in the attack any questions about Mr. Richards directing or orchestrating the attack.[465]

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[461] *Richards*, *supra* note 152; *Farhadi v Ferndale Institution*, 2014 BCSC 1175 [*Farhadi*]; *Simms*, supra note 181; *Wood* 2019, *supra* note 375; *Gogan 2*018, *supra* note 143.
[462] *Richards*, *ibid*, at para 47.
[463] *Ibid*, at para 48.
[464] *Ibid*.
[465] *Ibid*, at para 50.

The Security Intelligence Officer also did not consider the video evidence requested by Mr. Richards during their investigation.[466] The judge described the investigation as having "deficiencies" and "in effect no verification of the evidence against Mr. Richards."[467] The decision was determined to be both procedurally unfair and unreasonable.[468]

Another case, *Gogan* (2018), specifically said that the prison staff had a duty to investigate an alleged incident further.[469] In that case, an alleged incident of assault by Mr. Gogan in a provincial prison was used to increase his initial security classification in the federal system.[470] During the "investigation" stage of the security classification, Mr. Gogan said that the alleged assault had been blown out of proportion.[471] His parole officer conducting the investigation noted that "further inquiry was needed."[472] However, his parole officer made attempts to inquire further into the alleged assault but was not successful in doing so and allowed his security classification to remain higher.[473] In that case, the judge held that since the parole officer had himself identified the need to gather more information, "this ought to have been obtained before the final decision was taken or written confirmation received that no further information was reasonably available."[474] In other words, the investigation was inadequate. This is different from cases *Janjanin* and *Emonts*, where prisoners pointed out areas where prison administrators could have investigated further, but the judges held that there was no duty to do so.[475]

There are other examples of investigations that do not meet the expertise attributed to prison administrators. In *Farhadi*, a confidential source gave information against the accused.[476] In that

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[466] *Ibid*.
[467] *Ibid*, at paras 71 and 76.
[468] *Ibid*, at paras 69 and 75.
[469] *Gogan* 2018, *supra* note 143.
[470] *Ibid*, at paras 38-40.
[471] *Ibid*, at para 48.
[472] *Ibid*, at para 50.
[473] *Ibid*, at para 65.
[474] *Ibid*, at para 71.
[475] *Janjanin*, *supra* note 152 at paras 37 and 55; *Emonts*, *supra* note 152 at paras 25 and 45.
[476] *Farhadi*, *supra* note 461 at para 69.

case, the Security Intelligence Officer did not conduct an interview with the sole source.[477] In *Simms*, the Security Intelligence Officer admitted to his limitations: "Mr. Henwood was being truthful in saying that he just reports the information he gets. He is in no position to give any certainty to most of it. A lot of information is provided on a daily basis by "kytes" and try to classify it as to the truthfulness to the best of his ability. This is all he could do."[478] In the 2019 *Wood* case, the Manager of Assessment and Intervention said there was no determination of the reliability of information from confidential sources.[479] However, CSC documents later stated that the source had been "believed reliable."[480] The judge held that "deference will be shown to a determination that the information is reliable, but the authorities will nonetheless have to explain that determination."[481] The explanation provided was not satisfactory to the judge in *Wood*. In *Elliott* (2014), the judge ruled that the decision was unreasonable because there was "no apparent attempt to ascertain credibility and reliability."[482]

3.3.2.2 Mis-apprehending the reliability of confidential sources

In other contexts, prisoners acting as informants ("jailhouse informants") have been considered inherently unreliable. In one case, *Farhadi*, the Acting Warden stated in a letter about a confidential informant in a security reclassification and transfer case, "I can share with you that the individual is not assessed as being motivated by profit, revenge nor leniency. CSC does not provide benefit or compensation for information provided from human sources."[483] Michael Jackson said it was a "frequent claim by prisoners that prison informants had personal agendas and that some prisoners were easy targets since their reputations kept them under suspicion."[484] According to Jackson, "prisons are rife with rumours; within such a world, it is not difficult to find prisoners who are anxious to cascade down through the system, who wish to even old scores

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[477] *Ibid*, at para 81.
[478] *Simms*, supra note 181 at para 55.
[479] *Wood* 2019, *supra* note 375 at para 9.
[480] *Ibid*, at para 22.
[481] *Ibid*, at para 24.
[482] *Elliott* 2014, *supra* note 152 at para 138.
[483] *Farhadi*, *supra* note 461 at para 28.
[484] *Justice Behind the Walls*, *supra* note 8, at 471.

or remove potential or actual rivals, for whom a carefully revealed piece of information is a strategy for advancing their own interests."[485] The following quote comes from the Morin Inquiry:

> In-custody informers are almost invariably motivated by self-interest. They often have little or no respect for the truth or their testimonial oath or affirmation. Accordingly, they may lie or tell the truth, depending only upon where their perceived self-interest lies.[486]

Even stronger language was used by former Supreme Court Justice Peter Cory in the *Report of the Inquiry Regarding Thomas Sophonow*.[487] In the context of a criminal law trial, a Supreme Court of Canada case, *R v Brooks*, talked about the "dangers of relying on evidence of jailhouse informants."[488] The question of why prisoners would provide information to help investigate and punish other prisoners is a curious one, given the serious stigma and potential violence attached to informing.[489] According to Jackson states, it is rare for jailhouse informants to be used in criminal law proceedings, but such informants are commonplace in prison decision-making.[490] In *Maillet*, the judge held that since the prisoner's guilt or innocence was not on the line during security reclassification, the problems acknowledged with the use of jailhouse informants in criminal law are not as important.[491]

In *Cliff*, Mr. Cliff was accused of assaulting another prisoner. Another prisoner provided confidential information in support of Mr. Cliff's security reclassification and transfer. In his letter to the Warden, Mr. Cliff said, "I will not allow your informant to get credit for a manufactured story."[492] By this, he suggested that informants are rewarded in some way by prison administrators. In *Brown*, Mr. Brown said that "information on an offender comes to the

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[485] *Ibid* at 465.
[486] Morin Inquiry, *supra* note 284.
[487] *Justice Behind the Walls*, *supra* note 8 at 474: they "should as far as it is possible, be excised and removed from our trial process"; citing Manitoba, *Report of the Inquiry Regarding Thomas Sophonow* (Winnipeg: Manitoba Department of Justice, 2001) (Chair: Cory) at 40.
[488] *R v Brooks*, 2000 SCC 11 at para 134.
[489] *Justice Behind the Walls*, *supra* note 8 at 154, 504-505.
[490] *Ibid* at 475.
[491] *Maillet*, *supra* note 152 at para 36, citing *Caouette*, *supra* note 199.
[492] *Cliff*, *supra* note 373 at para 12.

SIO when the offender is placed in administrative segregation."[493] However, the Security Intelligence Officer testified that his department receives information daily.[494] He also said that "his department does not solicit information; SIOs receive information then classify it in terms of reliability then pass it on to the supervisors."[495] Mr. Brown suggested that other prisoners often give "information" when a prisoner is in administrative segregation in order to keep them there longer.[496]

In *Khela*, Justice LeBel held that "deference will be shown to a determination that evidence is reliable, but the authorities will nonetheless have to explain that determination."[497] The subsequent case law suggests that the standards for explaining the determination of reliability are not clear. In *Clark*, Mr. Clark was not provided with any information for why the institution considered its sources reliable.[498] In *Khela*, the SCC cited *Charkaoui* for the statement that, if an individual is to suffer a deprivation of liberty, "procedural fairness includes a procedure for verifying the evidence adduced against him or her."[499] The judge in *Clark* did not see a problem with the prisoner applicant's lack of information for why the sources were considered reliable.[500]

Only three cases in the study mentioned the use of "completely reliable" information.[501] Of these three cases, one decision was overturned for being unreasonable,[502] another was declared unlawful for not complying with disclosure requirements under section 27(3),[503] and the third decision was declared procedurally unfair by the Alberta Court of Appeal.[504] Another case

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[493] *Brown*, *supra* note 152 at para 36.
[494] *Ibid*.
[495] *Ibid*.
[496] *Ibid*, at para 48.
[497] *Khela*, *supra* note 4 at para 74.
[498] *Clark*, *supra* note 138 at para 49.
[499] *Khela*, *supra* note 4 at para 88, citing *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38, at para 56.
[500] *Clark*, *supra* note 138 at para 49.
[501] *Anderson*, *supra* note 152 at para 9; *Kreko*, *supra* note 373 at para 14; *Shoemaker*, *supra* note 86 at para 87 (overturned on appeal).
[502] *Anderson*, *ibid*, at para 43.
[503] *Kreko*, *supra* note 373 at paras 14-15.
[504] *Shoemaker* ABCA, *supra* note 86.

referred to "believed reliable" information provided by sources who had previously provided "completely reliable" information.[505] In *Raju*, the Warden relied on several sources of unknown reliability.[506] The judge said, "It is plain to me and would be clear to anyone reading the gist that each of the sources could have simply been repeating things heard via the prison rumour mill."[507]

In *Khela*, the SCC held that "vague statements regarding source information and corroboration" are not enough to meet disclosure requirements.[508] This standard does not appear to have not been met in many cases in my study. In *Earhart* (ONCA), the Ontario Court of Appeal accepted CSC's argument that Commissioner's Directive 568-2 (reproduced above, at page 39) explains the "standard, basis, for the assignment of a particular reliability code to specific information from an inmate."[509] Mr. Earhart had sought more information about how the confidential source's reliability was determined, but the ONCA held the simple reliability chart was explanation enough.[510] The categories are undeniably vague and are not, in themselves, descriptive enough to satisfy what is required under *Khela*.[511]

In *Tyler*, the confidential informants' reliability was bolstered by the fact that "in all three cases, the informant's past information was determined to be reliable and had led to disciplinary and/or transfer decisions."[512] The fact that their information had been used to transfer other prisoners seems like a weak guarantee of reliability, given the fact that confidential informants are not subject to cross-examination and the person accused of wrongdoing does not even know their identities for the purposes of challenging their evidence. Similarly, in *Richards*, the Security Intelligence Officer believed confidential informants to be reliable "because they had been in the

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[505] *Maestrello*, *supra* note 152 at para 10.
[506] *Raju*, *supra* note 39 at para 12.
[507] *Ibid*.
[508] *Khela*, *supra* note 4 at para 94.
[509] *Earhart* ONCA, *supra* note 239 at para 48, citing Commissioner's Directives, *supra* note 30 at CD 568-2, Annex B.
[510] *Ibid*, at paras 47-48.
[511] *Khela*, *supra* note 4 at para 94.
[512] *Tyler*, *supra* note 152 at para 62.

past."[513] On the reliability scale, "believed reliable" information is not confirmed, only in line with other intelligence the office has.[514] If an informant has previously given "believed reliable" information, the veracity of their new information may be bolstered by that fact. However, it would be stacking unconfirmed evidence with more unconfirmed evidence.

In *Khela*, Justice LeBel held "the warden and the Commissioner are in the best position to determine whether a given source or informant is reliable."[515] In *Clark*, the judge used the concept of expertise when saying the Warden in that case could prefer the confidential source information over Mr. Clark's account.[516] Importantly, the judge held that the Warden's determination that the confidential source information was "believed to be true and reliable" deserved deference.[517] In *Emonts*, the judge held that the Warden could "rely on the information provided by the informants who were believed to be reliable and on the information provided by the informants of unknown reliability" in order to weigh and dismiss Mr. Emonts' rebuttal.[518] In *Larabie*, the judge said, "deference is owed to those prison authorities who are in the best position to determine whether a given source or informant is reliable and to what extent."[519]

In *Richards*, the judge found the information withheld in the confidential affidavit was not sufficient to "reliably ground the very serious allegations against Mr. Richards."[520] However, it was rare for a judge to find that the confidential affidavit material was insufficient to warrant withholding under section 27(3) of the *CCRA*. The reviewing judge has no meaningful way of knowing whether the information provided in the affidavit is true, so it seems like they must test whether, if true, the information provided by the prison administrators would be enough to justify withholding information.

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[513] *Richards*, *supra* note 152 at para 50.
[514] Commissioner's Directives, *supra* note 30 at CD 568-2, Annex B.
[515] *Khela*, *supra* note 4, at para 89.
[516] *Clark*, *supra* note 138 at para 57.
[517] *Ibid*, at para 64.
[518] *Emonts*, *supra* note 152 at para 47.
[519] *Larabie*, *supra* note 385 at para 15.
[520] *Richards*, *supra* note 152 at para 69.

3.3.2.3 Overweighing the safety of informants

In the cases in this study, judges often gave great weight to concern over the safety of confidential informants, with this concern taking priority over the rights of the prisoner accused of wrongdoing. In *Khela,* the SCC said, "The Commissioner, or his or her representative, is in the best position to determine whether such a risk could in fact materialize" so they are owed a "margin of deference on this point."[521] While it is likely that confidential informants, if discovered, could be in danger, prison administrators appeared to apply this concern in a sweeping manner. If this danger was present, it also stands to reason that prison administrators should perhaps *not* use the parallel system of punishment with confidential informants except in the most serious of cases due to the inherent risks. However, the more serious the alleged wrongdoing, the less appropriate the parallel system of punishment appears to be, due to its lack of procedural protections. Prison administrators do not appear to take much responsibility over the alleged risks for these confidential informants when they are used in the parallel punishment system, except to say that details should not be disclosed.

This generalized use of concern for confidential informants as a basis for withholding disclosure can be found in *Omoghan*.[522] Mr. Omoghan was "informed that some of the information that had been provided by confidential sources and that in a penitentiary, the safety of a person is in jeopardy if they are known to be, or suspected, rightly or wrongly, of being a confidential source."[523] This statement applies to all penitentiaries, and therefore, all confidential informants within them, which does not suggest the expertise in the environment of a *particular* penitentiary mentioned in *Khela*.[524]

When confidential informants are always in danger if identified, the logical next step is that confidential informants can never be identified, no matter what the facts are, because of safety.

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[521] *Khela*, *supra* note 4, at para 89.
[522] *Omoghan*, *supra* note 152 at para 14.
[523] *Ibid*.
[524] *Khela*, *supra* note 4, at paras 75 and 89.

In *Karafa*, the judge held "it is obvious on the materials before me that an immediate transfer was required once the applicant was made aware of confidential information made known to the authorities by fellow inmates in the minimum security environment."[525] The logical endpoint of this reasoning is that, once the institution has used a confidential informant, the prisoner *must* be transferred due to the potential danger to the informant should the prisoner figure out who that person is. However, should the information provided by the confidential informant be proven false, it might make more sense for the informant to be transferred to a different institution instead of the original prisoner.

In *Richer*, a person who worked at the prison testified to the danger, including the risk of murder, a prison informant (and their family) can face if discovered.[526] The judge accepted that evidence and held that "the names of the informants and the detailed specifics of their information" should be withheld for that reason.[527] Similarly, in *Larabie*, the judge said "There is evidence in the record before me sufficient to conclude that inmates are capable of piecing together seemingly insignificant bits of information sufficient to permit them to identify, either, rightly or wrongly, a confidential source."[528]

In *Cliff*, prison administrators would not tell him the name of the person he was alleged to have assaulted.[529] The Security Intelligence Officer tried to justify this by saying, "In my experience, information as seemingly innocuous as a date, time, or reference to particular items can lead to the identification of informers, thereby putting them at risk of serious harm."[530] The judge in *Cliff* did not accept that reasoning:

> In relation to informing Mr. Cliff of the "case he had to meet", the withholding of the names of the persons he is alleged to have assaulted is particularly troublesome. As a

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[525] *Karafa, supra* note 173 at para 38.
[526] *Richer*, *supra* note 159 at para 46.
[527] *Ibid* at para 47.
[528] *Larabie*, *supra* note 519 at para 17.
[529] *Cliff*, *supra* note 373 at para 3.
[530] *Ibid*, at para 20.

> general rule, without disclosure of the date, place, and a means for identifying the alleged victim in some fashion, the person who is accused will be unable to know the case against him or her and to respond to it. In any event, it would seem to defy logic to keep this sort of information secret from the very person to whom the act is attributed; if he or she is believed to be the perpetrator then it would also be believed that this "confidential" information would already be known to him or her.[531]

In *Farhadi*, the confidential informant said they overheard Mr. Farhadi make incriminating statements, which led to his security reclassification and transfer.[532] Neither prison administrators nor the judge in the reviewing application would allow Mr. Farhadi to know basic information such as when or where this alleged conversation took place.[533] In *Maestrello*, Mr. Maestrello was not provided information about where or when the alleged events took place.[534] This was considered acceptable by the judge.[535] Similarly, in *Janjanin*, dates and places were not provided,[536] which was accepted by the judge.[537] In *Leiding*, Mr. Leiding complained that he did not know when or where the alleged slashing occurred.[538]

3.3.2.4 Flawed administration of the SRS, including using it to bootstrap decision-making and permit circular reasoning

One example of the SRS being vulnerable to error is the fact that scores could be inflated due to actions of the prison beyond the prisoner's control. Most notably, placement in administrative segregation itself would increase a prisoner's SRS score. A judge described it this way: "the Respondent, once it has placed the Applicant in segregation, in connection with certain specific events, has gone to use that very new segregation status as a further factor to add numbers in the

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[531] *Ibid*, at para 43.
[532] *Farhadi*, supra note 461.
[533] *Ibid*, at paras 26 and 72.
[534] *Maestrello*, *supra* note 152 at para 19.
[535] *Ibid*, at paras 41-43.
[536] *Janjanin*, *supra* note 152 at para 30.
[537] *Ibid*, at para 53-54.
[538] *Leiding v Mission Institution (Warden)*, 2017 BCSC 1701 at para 7 [*Leiding*].

inmate's security system rating and all of that when, the specific events, that had lead [*sic*] to that same segregation had already been computed in the security risk numbers."[539]

Based on case law, placement in administrative segregation appeared to raise the "Institutional Adjustment" score.[540] In *Doan*, the Acting Warden agreed that the increase in his SRS score was due to his placement in segregation "and was not due to his behaviour."[541] Mr. Doan argued that this was an example of "bootstrapping."[542] The same was said to have happened in *Anderson* and *Antinello*.[543] In *Horton*, the applicant did not make that argument, but his placement in administrative segregation appears to have increased his Institutional Adjustment score.[544] Similarly, in *Wood v Atlantic Institution*.[545] The judges in *Horton* and *Wood* did not seem to find anything wrong with this practice.[546]

Using the same reasoning, the fact that the prisoner's Escorted and Unescorted Temporary Absence passes were revoked increased a prisoner's SRS score in *Antinello*,[547] The judge described this as type of reasoning as being "circular" or "self-feeding," and "being hit with a double whammy."[548] In *Brown*, the prisoner's SRS score was increased in part because he had already been transferred from minimum security to maximum security.[549] The judge in *Brown* did not criticize CSC for doing so.[550] In a 2020 case, CSC stated that the "segregation scoring factor" was recently eliminated from the SRS scoring matrix.[551]

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[539] *Antinello*, *supra* note 168 at para 40.
[540] *Wood* 2014, *supra* note 227 at para 50.
[541] *Doan*, *supra* note 272 at para 34.
[542] *Ibid*, at para 54.
[543] *Anderson*, *supra* note 152 at para 21; *Antinello*, *supra* note 168 at para 40.
[544] *Horton*, *supra* note 152 at paras 7 and 16.
[545] *Wood* 2014, *supra* note 227 at paras 46 and 50.
[546] *Horton*, *supra* note 152; *Wood*, *ibid*.
[547] *Antinello*, *supra* note 168 at para 41.
[548] *Ibid*, at paras 40 and 41.
[549] *Brown*, *supra* note 152 at paras 30 and 42.
[550] *Ibid*.
[551] *Bromby*, *supra* note 322 at para 27.

The circular reasoning identified in these cases has some parallels to the immigration context. Canada's immigration regime allows for the detention of non-citizens without protections comparable to imprisonment under criminal law, such as trials with the burden of proof of guilt beyond a reasonable doubt, sentencing hearings, or bail hearings. Even though some detainees are imprisoned in the same provincial jails as those on remand for criminal offences and sentences of less than two years' duration, the immigration detention scheme is considered an administrative regime, not a criminal one. In *Scotland v Canada (Attorney General)*, Mr. Scotland was held in immigration detention for 17 months.[552] Under the detention review process, each subsequent detention review would depend on the result of the first detention review, even though it was based on erroneous information. The judge in *Scotland* described it as "a closed circle of self-referential and circuitous logic from which there is no escape."[553]

3.3.3 Conclusion on expertise

When it comes to legal expertise, I contend that wardens, as an institution, do not have greater expertise compared to the judiciary. When making submissions for *Khela*, Michael Jackson pointed out that in 2008, CSC adopted an almost 200-page long policy paper called A Roadmap to Strengthening Public Safety as the basis for its "Transformation Agenda."[554] There was no mention of the *Charter*, human rights, or leading prison law court cases.[555] While wardens are practiced in applying rules, they are ill-equipped to interpret laws and uphold rights. *Vavilov* has lessened the role of expertise as a relevant factor for deference at judicial review,[556] so courts should be more vigilant to expertise claims.

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[552] *Scotland v Canada (Attorney General)*, 2017 ONSC 4850, at para 2 [*Scotland*]
[553] *Ibid*, at para 74.
[554] British Columbia Civil Liberties Association, "Factum of the Intervener, the British Columbia Civil Liberties Association" for Mission Institution v Khela, 2014 SCC 24, online: <https://www.scc-csc.ca/WebDocuments-DocumentsWeb/34609/FM030_Intervener_British-Columbia-Civil-Liberties-Association.pdf> at para 16.
[555] *Ibid*.
[556] *Vavilov*, *supra* note 12 at para 31.

3.4 Vavilovian possibilities

A properly justified decision is entitled to deference from a reviewing court in administrative law as it implicates the doctrine of the separation of powers.[557] *Vavilov* has the potential to ensure stronger judicial review of the substantive reasonableness of a decision to harm a prisoner's liberty interests without proper justification. Improper justification could include unreliable or insufficient evidence, irrelevant consideration, bad faith, or other grounds. The decision maker must explain how they came to their decision.

Since *Vavilov* provides that expertise will no longer formally be part of determining the standard of review, what role will it play during substantive review? In *Vavilov*, the SCC stated that "an administrative decision maker may demonstrate through its reasons that a given decision was made by bringing that institutional expertise and experience to bear."[558] The Court talked about expertise being demonstrated by a decision-maker through its reasons.[559] This could perhaps provide an opportunity for prisoners and their advocates to argue that this expertise has not been demonstrated by the Warden (or whomever the decision-maker was in their case). If this argument were taken seriously, it would be a sea change from the current level of deference to perceived expertise by judges applying reasonableness review. In *Cox*, the judge found expertise on the part of the Deputy Superintendent using the *Vavilov* analysis.[560] However, the applicants in *Cox* were self-represented and likely could not mount a meaningful challenge to the respondent's arguments on that point. If prisoners and their advocates pushed for *demonstrated* expertise, the perception that prison decision makers have specialized knowledge may be challenged.

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[557] Mary Liston, "'Alert, Alive and Sensitive': Baker, the Duty to Give Reasons, and the Ethos of Justification in Canadian Public Law" in David Dyzenhaus ed, *The Unity Of Public Law* (Oxford: Hart Publishing, 2004) 113; Beverley McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998-1999) 12 CJALP 171-89; Process/Substance Distinction, *supra* note 66.
[558] *Vavilov*, *supra* note 12 at para 93, citing *Dunsmuir*, *supra* note 11 at para 49.
[559] *Vavilov*, *ibid*.
[560] *Cox*, *supra* note 373 at paras 33-34.

The "internally coherent and rational chain of analysis" required under *Vavilov* for reasons during substantive review might assist prisoners in some cases.[561] For example, in *Raju*, the judge made the following comments:

> It seems clear that any analysis of the overall reasonableness of the decision would need to address, first, the reason for transfer to the SIU and the criteria for same, i.e., reasonable grounds to believe that the continued presence of the applicant in the general population would jeopardize the safety of other inmates. The analysis would then need to assess the reasonableness of the decision through the judicial review lens as set out in [*Vavilov*]. There are certainly aspects of the warden's decision that lend themselves to the argument that, "the decision maker has fundamentally misapprehended or failed to account for the evidence before it," per paragraph 126 of *Vavilov*. I say that because it is difficult to conceive of circumstances in which the reasonable grounds standard could be met by unconfirmed CI information from sources of unknown or unproven reliability. Something more would generally be required. In this case, that something more was the intercepted note and the CCTV footage. Apart from the failings of disclosure, the decision failed to account for potentially important evidence that cast doubt on the reliability of the note and misapprehended the substance of the video evidence.[562]

An aspect of *Vavilov* which could potentially assist prisoners and advocates is the fact that the context of the decision will now constrain decision-makers in the exercise of their delegated powers.[563] The SCC listed a number of factors for conducting reasonableness review,[564] but the one most likely to be relevant for prisoners is the impact of the decision on the affected individual.[565] While the impact of the decision on the individual was already a *Baker* factor during procedural fairness review, it is now part of substantive review also.[566] The SCC wrote:

> Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's

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[561] *Vavilov*, *supra* note 12 at para 85.
[562] *Raju*, *supra* note 39 at para 24.
[563] *Vavilov*, *supra* note 12 at para 105.
[564] *Ibid*, at para 106.
[565] *Ibid*, at para 133; Queen's University Law News, "Experts examine Supreme Court's game-changing judicial review rules" (2020), online: <https://law.queensu.ca/news/Experts-examine-Supreme-Courts-game-changing-judicial-review-rules>.
[566] *Vavilov*, *ibid*.

> intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood. Moreover, concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh, and a failure to grapple with such consequences may well be unreasonable […][567]

The "stakes" for prisoners facing higher security classification are undoubtedly high, as prisoners can face an increased risk of violence, lessened work opportunities, increased difficulty accessing programs and therefore completing their correctional plan, lessened chances of being released from prison, and a restriction in liberty in general. For federal prisoners subject to the new Structured Intervention Units and prisoners in provincial facilities facing lockdowns and different iterations of segregation, the stakes are also high, especially for prisoners with mental illness and other vulnerabilities.[568]

Prisoners and prison advocates in the cases in this study at times have argued that prison administrators have acted arbitrarily. The parallel punishment system through security reclassification and transfer can have elements of arbitrariness to it, as prison administrators hide behind the technical-sounding SRS tool, which is open to the influence of the person conducting the assessment. The scale for determining the reliability of information from confidential informants is not a foolproof tool, and based on the (albeit limited) cases in the study, it seemed rare for prison officials to rely on information that was confirmed ("completely reliable"). Instead of the more official disciplinary system, where prisoners know what they are being accused of, and with a relatively high burden of proof, prisoners under this parallel system of punishment are vulnerable to arbitrariness in decision-making. The SCC has held in the *Charter* context that "a discretion is arbitrary if there are no criteria, express or implied, which govern its exercise."[569] While the entire security reclassification system likely cannot be said to be arbitrary writ large, there is still a risk of arbitrariness in individual cases.

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[567] *Ibid*, at paras 133-134.
[568] See *CCLA*, *supra* note 16; *BCCLA*, *supra* note 16.
[569] *R v Hufsky*, [1988] 1 SCR 621, at 633.

Based on *Vavilov*, given the heightened vulnerability of prisoners, prison decision-makers have a corresponding "heightened responsibility" to "ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law."[570] The language in *Vavilov* seems like a shift from the deference which proliferated in the lower courts when assessing reasonableness under the *Dunsmuir* framework during *habeas corpus* reviews.[571] The *Vavilov* decision seems like an opportunity for prisoner advocates to argue for a less deferential stance from reviewing courts to prison administrators, given the vulnerability of prisoner applicants. This did not bear out in a post-*Vavilov* case, *Rivest*, where the New Brunswick Court of Queen's Bench accorded "significant deference" to CSC and the Warden.[572] However, the prisoner represented himself, and a *Vavilov*-specific argument was not likely advanced. A similar situation happened in *Bromby*, though Mr. Bromby was represented by counsel.[573] In *Downey*, the judge simply quoted sections of *Vavilov* and said the decision was not reasonable.[574] He did not talk about how *Vavilov* might have changed the reasonableness analysis, which is a legal error.[575]

In *Vavilov*, the SCC said where decision-makers enjoy discretion, "any exercise of discretion must accord with the purposes for which it is adopted."[576] *Habeas corpus* review of decisions involving discretion by the decision-maker should therefore pay particular attention to the purposes of the *CCRA* or comparable provincial/territorial statute. In *Vavilov*, the Court held: "a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion." In my theoretical framework in Chapter 1, I mentioned section 4(d) of the *CCRA*, which states that prisoners "retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted." This purposive

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[570] *Vavilov*, *supra* note 12 at para 135.
[571] See page 69 of this Chapter.
[572] *Rivest*, *supra* note 152 at para 68.
[573] *Bromby*, *supra* note 322 at para 59.
[574] *Downey*, *supra* note 390 at paras 16-18.
[575] *Ibid*.
[576] *Vavilov*, *supra* note 12 at para 108.

section should be used by reviewing judges to constrain the use of discretion by prison administrators on reasonableness review.

In *Vavilov*, the SCC also held that the "statutory scheme also informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion."[577] The possibility that CSC is fettering its discretion during security reclassification decisions through the SRS was discussed earlier in this thesis.[578]

It is not clear why *Doré*'s reasonableness analysis centred around proportionality has not been applied by judges in any of the cases in my study. The SCC has held that *habeas corpus* necessarily implicates sections 7 and 9 of the *Charter*.[579] Specifically, the Court said, "*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*)."[580] Applying the concept of "proportionality" from *Doré* , where the decision maker should balance the statutory objectives with the applicable *Charter* value, could perhaps further enrich the robust reasonableness review framework set out in *Vavilov*.

3.4.1 Judges currently lacking context

There were several cases where the judge suggested an unrealistic or unhelpful alternative avenue of redress. These cases indicate that some judges are not aware of the realities and limitations which constrain prisoners. In *Doan*, a security reclassification case turning on immigration considerations, the Acting Warden said if it turned out Vietnam did not issue travel documents, Mr. Doan was "encouraged to re-apply to return to minimum security."[581] This

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[577] *Ibid*, at para 108.
[578] At page 80.
[579] *May*, *supra* note 2, at para 22.
[580] *Ibid*.
[581] *Doan*, *supra* note 272 at para 33.

statement is problematic because prisoners in BC are not entitled to apply for *habeas corpus* review for applications to move to lower security.[582] If he applied for a reduction in his security classification and the decision was made in an unlawful manner, Mr. Doan would have to resort to the grievance system and, if he exhausted that avenue, the Federal Court.[583] This was acknowledged by the SCC in *May* and *Khela* to be a less advantageous avenue than *habeas corpus*.[584] The judge did not appear to find any error in the Acting Warden's statement and denied the application.

The judge in *Chung*, an Alberta provincial prison case, said that if Mr. Chung's "Administrative Detention" and "High Profile" status continues indefinitely, he can utilize "internal institutional procedures" or apply to the court for judicial review or *Charter* relief.[585] The judge also noted that if he were to use the options mentioned, the "onus would be on him."[586] It is interesting to note that *Chung* came out in July 2017, and the *CCLA* decision, striking down a very similar administrative segregation statutory scheme, was released in December 2017.[587] The options offered to Mr. Chung, which were paltry to begin with, seem even less realistic when considering that he represented himself during his *habeas corpus* application.[588]

Similarly, in *Karafa*, the judge seemed to uncritically accept the prison's version of events without considering the broader context.[589] In that case, Mr. Karafa was questioned about alleged wrongdoing by his Parole Officer and a Security Intelligence Officer during a meeting.[590] According to the judge, "He was free to leave the meeting at any time."[591] That assertion does not seem to be informed about the inherently coercive relationship between prison staff and

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[582] *L.V.R.*, *supra* note 36. The state of the law in Ontario is less settled on this issue, see, for example: *Canada (Attorney General) v White*, 2015 ONSC 6994, at para 10 [*White*]; *R v Moulton*, 2010 ONSC 2448. Nova Scotia is also unsettled in this area: *Gogan v Canada (Attorney General)*, 2017 NSCA 4.
[583] *L.V.R.*, *ibid*; *Khela*, *supra* note 4, at para 61.
[584] *May*, *supra* note 2, at paras 52-64; *Khela*, *ibid*, at paras 61-65.
[585] *Chung*, *supra* note 183 at para 61.
[586] *Ibid*.
[587] *Ibid*; *CCLA*, *supra* note 16.
[588] See also *Campbell*, *supra* note 229.
[589] *Karafa*, *supra* note 173.
[590] *Ibid*, at paras 2-6.
[591] *Ibid*, at para 4.

prisoners. Further, it does not seem to consider the well-established *Charter* principle that detention need not be physical, as psychological detention also exists.[592]

In *Jenkins*, the judge essentially admitted that the avenue proposed for remedy was ineffective.[593] In that case, Mr. Jenkins had reached a settlement agreement with CSC so that he would not pursue an earlier *habeas corpus* application.[594] One of the terms agreed upon was that CSC would remove "all references to the involuntary transfer and increase to maximum security that are at issue."[595] However, CSC later realized that it could not fulfill that promise as the documents were "locked down" in the system.[596] CSC placed a memorandum in his file stating that it would disregard those files when making decisions and not provide the files to the Parole Board.[597] Mr. Jenkins argued that CSC could still take the files into account when making decisions without explicitly stating that it is doing so.[598] CSC argued, and the judge ultimately agreed, that if Mr. Jenkins thought that the files were used in the future, he could apply for judicial review.[599] The judge acknowledged that there would be no way for Mr. Jenkins to prove the files were secretly considered by the decision-maker: "judicial review in these circumstances would be futile."[600]

3.4.2 Issue that could be improved by culture of justification under *Vavilov*: video footage

In terms of standards of evidence for prisoners facing reclassification and transfer, there is no consensus within the case law. The issue remains open as to whether the prison administrators need to disclose evidence which best captures the incident in question. In some cases, video footage of the alleged incident was not disclosed to the prisoner because the prison administrators said it would reveal the camera blind spots in the prison, which would affect

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[592] See, for example, *R v Therens*, [1985] 1 SCR 613; *R v Grant*, 2009 SCC 353, at paras 25-44.
[593] *Jenkins*, *supra* note 243 at para 24.
[594] *Ibid*, at para 6.
[595] *Ibid*.
[596] *Ibid*, at para 8.
[597] *Ibid*.
[598] *Ibid*, at para 20.
[599] *Ibid*, at paras 20 and 24.
[600] *Ibid*, at para 24.

safety.[601] In *Earhart* (2018), the lower court judge did not give case-specific reasons for withholding the videos, but withheld them for "general security prison reasons."[602] In *Maillet*, in addition to potentially causing "jeopardy to the security of the institution" through potential disclosure of blind spots, the judge also agreed with prison administrators that witnesses to the incident/informants might be made known to Mr. Maillet if the footage was disclosed and he might retaliate.[603]

In another case, *Elliott* (2014), the prisoner requested video footage.[604] The Warden acknowledged receipt of his request, stating staff had been directed to preserve the evidence, but when the prisoner later filed an access to information request, the footage was said to be missing.[605] The judge held that this was a denial of procedural fairness and a breach of section 27(1) of the *CCRA*.[606] According to the judge, the video evidence should have been disclosed, "Why it, being the most probative evidence of the incident, was not considered in the reassessment and transfer process is unexplained."[607] In *Raju*, video evidence was not disclosed to the prisoner but was described to Mr. Raju by a Security Intelligence Officer.[608] Like in *Elliott* (2014), some of the video footage was later found to be missing.[609] Unlike in *Earhart (2018)* and *Maillet*, prison administrators did not give any reasons for the non-disclosure of the video.[610] The judge in *Raju* found the non-disclosure of the video footage was "significant procedural unfairness."[611] This was especially so because the Warden had relied on the video footage when making her decision, and it impacted her analysis of Mr. Raju's credibility.[612]

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[601] *Maillet*, *supra* note 152 at para 42; *Earhart* 2018, *supra* note 239 at para 23; *Earhart* ONCA, *supra* note 239 at paras 64-68.
[602] *Earhart* 2018, *ibid*.
[603] *Maillet*, *supra* note 152 at para 42.
[604] *Elliott* 2014, *supra* note 152 at para 111.
[605] *Ibid*, at paras 34-35.
[606] *Ibid*, at para 111.
[607] *Ibid*.
[608] *Raju*, *supra* note 39 at paras 12 and 14.
[609] *Ibid*, at para 15.
[610] *Ibid*, at para 18.
[611] *Ibid*, at para 21.
[612] *Ibid*, at para 18.

In *Gogan* (2018), the Nova Scotia Supreme Court suggested that there is not a standard that prisoners can rely on when it comes to whether there is a duty to disclose the best evidence of an alleged incident - video footage.[613] The judge said, "Every situation will depend on the individual circumstances," and it "will not always be the case" that video coverage will be "reasonable to obtain."[614] While the case law is not clear, section 24(1) of the *CCRA* holds that CSC "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."[615] However, the *Act* is written so that safety and security are paramount considerations,[616] which can likely override prisoners' interests, as evidenced in *Maillet* and *Earhart* (2018).[617] Under the culture of justification in *Vavilov,* it would be more difficult for decision makers to defend their unwillingness or inability to disclose video footage of an alleged incident. In order for the decision to be upheld on review, the decision maker must show "an internally coherent and rational chain of analysis […] that is justified in relation to the facts and law that constrain the[m]."[618]

3.4.3 Conclusion

The *Vavilov* decision, together with a move to interpret *Khela* as implying less deference than is currently being granted by lower courts can be beneficial for prisoners and their advocates. There is the potential to have a pivotal shift from the deferential stance adopted by many reviewing judges on *habeas corpus*. Applying the robust reasonableness review set out in *Vavilov* can permit challenges to and questioning of expertise of prison decision makers. This may lead to more successful *habeas corpus* applications for prisoners when it comes to substantive review. The enhanced reasons requirement in *Vavilov* is especially important where the interests of vulnerable persons are at stake and constitutional rights are implicated, such as in the prison context.

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[613] *Gogan* 2018, *supra* note 143 at paras 67 and 70.
[614] *Ibid*, at para 67.
[615] *CCRA*, *supra* note 27 at section 24(1).
[616] *Ibid*, at section 3.1; see also Contesting Expertise, *supra* note 20 at 93.
[617] *Maillet*, *supra* note 152; *Earhart* 2018, *supra* note 239.
[618] *Vavilov*, *supra* note 12 at para 85.

Chapter 4: Discourses of Rights Attenuation

4.1 Introduction

All the cases in this study were read with particular attention paid to language and whether judges used terms suggesting that prisoners were not deserving of full rights. In critical discourse analysis, there are three stages: "description of text, interpretation of the relationship between text and interaction, and explanation of the relationship between interaction and social context."[619] Sections in this chapter evaluate different themes in judicial discourse with attention paid to each of these stages. However, my analysis will be from the perspective of a legally trained person and not that of a linguist.

There were only a couple cases where the judge openly said that prisoners should not have full rights.[620] Much more common was use of language that qualified procedural rights granted to prisoners under the *CCRA*, *CCRR*, Commissioner's Directives and comparable provincial statutes. After examining language attenuating prisoners' rights, this chapter will also look at whether rights under statute are currently considered a ceiling or a floor by reviewing judges when it comes to procedural fairness. Using the normative frame that prisoners "do not hold attenuated, weaker versions of the rights enjoyed by other Canadians,"[621] this chapter will ultimately argue that statutory rights should be considered the floor, or minimum baseline, of what is owed to prisoners. Using qualified language is a means for prison administrators, and, ultimately, judges to water down prisoners' rights.

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[619] *Language and Power*, *supra* note 45 at 109 [emphasis omitted].
[620] For example, *Pratt* 2019, *supra* note 207 (overturned on appeal); *Shoemaker*, *supra* note 86 at paras 74 and 79 (overturned on appeal). In *Pratt* 2019, Justice Rosinski created what he called "adjusted principles" for evaluating *habeas corpus* applications made by prisoners in provincial prisons. One principle was that if a prison had "fundamentally fair" policies, there would be a presumption that a prisoner "received fundamentally fair treatment and process, and not be able to make out an arguable case otherwise." Perhaps most troubling was that Justice Rosinski also made a principle that "If an inmate is placed in administrative close confinement (i.e. non—disciplinary) per s. 74(b) of the *Correctional Services Act*, and has received fundamentally fair treatment, absent other valid grounds for review, the court should be reluctant to examine the reasonableness of the decision to impose administrative close confinement."
[621] Debra Parkes, "Prisoner Voting Rights in Canada: Rejecting the Notion of Temporary Outcasts" in Christopher Mele & Teresa A Miller, eds, *Civil Penalties, Social Consequences* (New York: Routledge, 2005), at 243.

4.2 Attenuating rights through qualified language

4.2.1 Breach

I found that in a number of cases in my study, the *CCRA* was not followed and yet the judge would rule that the breach was "immaterial," a mere "irregularity," or simply a "technical breach."[622] In the most general terms possible, breach means "The breaking of a command, rule, engagement, duty, or of any legal or moral bond or obligation; violation, infraction.[623] The door to this type of attenuation was opened by *Khela*, when Justice LeBel stated that a "strictly technical breach" would not offend the duty of fairness.[624]

The language of section 27(1) of the *CCRA* governing disclosure is "shall."[625] According to the *Interpretation Act*, "the expression "shall" is to be construed as imperative."[626] Imperative duties can be either mandatory or directory.[627] Mandatory duties are compulsory, whereas for a directory duty, noncompliance may not be a fatal error.[628] If duties under section 27(1) of the *CCRA* were simply directory, then the section would not hold much power for prisoners.[629] Also, the *CCRA* lists making correctional decisions "in a forthright and fair manner" among its principles that guide CSC in achieving its main purpose.[630] The requirements under section 27 of the *CCRA* do not appear to be optional, but are in fact mandatory. In one case, a prisoner applicant argued "compliance with the requirements of the *CCRA* must be maintained in order to provide a full and fair means for inmates to meaningfully participate in the process, and to ensure

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[622] See below starting at page 104.
[623] *Oxford English Dictionary* (Oxford: Oxford University Press, 2021).
[624] *Khela*, *supra* note 4, at para 90.
[625] *CCRA*, *supra* note 27 at section 27(1).
[626] *Interpretation Act*, RSC 1985, c I-21, at section 11.
[627] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014).
[628] Note that the distinction between the two is "often blurred": *Administrative Law: Cases, Text, and Materials*, *supra* note 82 at 1104.
[629] The purpose of the statute and consequences of ruling either way are important considerations in determining which type it is: (*Blueberry River Indian Band v Canada*, [1995] SCJ No 99, [1995] 4 SCR 344, at para. 42, citing *British Columbia (Attorney General) v Canada (Attorney General)*, [1994] SCJ No 35, [1994] 2 SCR 41, at para. 148.
[630] *CCRA*, *supra* note 27 at sections 3 and 4(f).

that deprivations of liberty are lawful."[631] As will be discussed immediately below, some judges appeared to view the requirements under section 27 as being open to attenuation.

4.3 Words limiting rights

The table immediately below highlights some of the uses of language that has the potential to attenuate prisoners' rights.

Table 2: Examples of Language Used to Attenuate Rights

Word or Phrase	Examples of Use in Decisions in the Study
Irregularity	• The timelines were established as guidelines and in my view failure to meet them constituted irregularities that did not affect the jurisdiction of the Warden to make his decisions or compromise the procedural fairness • I am further satisfied that any irregularities in the process or in the facts or information that the Respondent relied upon in completing his security classification process were not material or substantive enough to undermine that process • The Applicant's objection to the source of some of the information such as which parole officer provided the information was, at best, an irregularity only • The applicant invoked other irregularities he had noted in the process. I find that any deviations were not material and did not affect the fairness of the proceeding
"Material" Breach	• I find that the reference to s. 29 of the CCRA in the Notice of Involuntary Transfer was an immaterial error that did not affect the validity of the Notice or deprive the Institutional Head of the jurisdiction to proceed with the transfer. • There were several material breaches along the path of decision making which lead to a denial of natural justice. • The decision is void and illegal, and this court sets it aside as the procedure followed was incorrect and unfair in a material way.
"Technical" Breach	• I am persuaded that this breach of the legislation is of a technical nature and does not render the relevant decisions procedurally unfair • In the normal course of a process to reclassify an inmate, technicalities are usually not of great concern to this Court such as a report being filed a few days after a decision has been made • These documents refer to the assault occurring in Mr. Brauss' holding unit over a telephone issue as opposed to another location in the

[631] *MacNeil, supra* note 141 at para 12.

	institution. Although this information was acknowledged as incorrect, I find the error to be technical in nature.
Weighing of Interests	• [T]he discretion of those who manage incarcerated persons is exercised in a multifactorial manner, and balances many interests, practical restrictions, safety concerns, and logistical necessities: The Director, by statute, is entitled to place inmates as he sees fit, provided he does so reasonably.[…] The Court should be reluctant to micromanage through the prerogative writ of *habeas corpus*, or judicial declaration, the day-to-day workings of the ERC.
Prism of Index Offence	• [A]ny assessment must begin with the predicate offences for which the applicant is serving his sentences. These crimes are, by any measure, heinous; coldly executed murders and an attempted murder of his co-workers in a fast food restaurant in the course of a robbery with two accomplices. This is the prism through which the decision of the correctional authorities needs to be assessed and on the record before me was viewed by them.

4.3.1 "Irregularity"

One word used to attenuate statutory rights was "irregularity".[632] In one case, timelines set out in the *CCRR* and Commissioner's Directives were considered "guidelines" by the judge and "the failure to meet them constituted irregularities" which did not impact the lawfulness of the Warden's decision.[633] The term was also used in *Jenkins*, where the judge held, "the Applicant's objection to the source of some of the information such as which parole officer provided the information was, at best, an irregularity only."[634] While the use of the word in *Jenkins* did not appear to attenuate his rights, it is important for judges to care what sources of information provide the basis for the administrative decision being reviewed.

[632] *Wiszniowski*, *supra* note 181 at para 34; *Nagle-Cummings*, *supra* note 192 at para 81, citing *Cain v Canada (Correctional Services)*, 2013 NSSC 367 [*Cain*]; *Cox*, *supra* note 373 at para 77, citing *Cain*, *ibid*; *Pratt v Nova Scotia (Attorney General)*, 2018 NSSC 243 at para 32 [*Pratt* 2018], citing *Cain*, *ibid*; *Bromby*, *supra* note 322 at para 55, citing *Wiszniowski*, *ibid*; *Campbell*, *supra* note 229 at para 39; *Jenkins*, *supra* note 243 at para 41; *Maillet*, *supra* note 152 at para 48.
[633] *Wiszniowski*, *ibid*, at paras 17 and 34.
[634] *Jenkins*, *supra* note 243 at para 41.

In *Campbell*, the judge mentioned "any irregularities in the process or in the facts or information that the Respondent relied upon" as not being important enough to render the decision unlawful.[635] It is not clear from reading the case what these irregularities might be. Mr. Campbell was a self-represented applicant and did not seem to have a clear strategy for this application.[636] Similarly, in *Maillet*, it is not clear what the judge is referring to when they said, "the applicant invoked other irregularities he had noted in the process."[637] The judge in *Maillet* determined that these irregularities "did not affect the fairness of the proceeding."[638]

In *Pratt (2018)*, *Nagle-Cummings*, and *Cox*, the lawfulness of rotational lockdowns in Nova Scotia provincial prisons was in question.[639] In all three cases, the judges quote a 2013 case, *Cain*, and say they "adopt this analysis and rationale in the present case."[640] The quote from *Cain* had a high concentration of attenuating language in a short span of time:

> Although the process followed by the Respondents might not be perfect, I find that overall on balance, Mr. Cain's segregation placement was handled in a manner that, in the circumstances of this case, was generally compliant with the Respondents' obligation at law, including ensuring due process and procedural fairness was appropriately afforded to Mr. Cain.[641]

All three judges said that in *Cain*, "procedural irregularities had been strongly argued and were at the center of that application."[642] None of the three judges explained in detail how *Cain* applied to the case at hand except to say that the process was generally fair, as it was in *Cain*. The text of the decision in *Nagle-Cummings* appeared to be nearly identical to that of *Cox* in many parts and in its overall structure.[643] In *Pratt (2018)*, the applicant complained that, among other things, he

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[635] *Campbell*, *supra* note 229 at para 39.
[636] *Ibid*, at para 41.
[637] *Maillet*, *supra* note 152 at para 48.
[638] *Ibid*.
[639] *Pratt* 2018, *supra* note 632; *Nagle-Cummings*, *supra* note 192; *Cox*, *supra* note 373.
[640] *Pratt* 2018, *ibid*, at para 32; *Nagle-Cummings*, *ibid*, at para 81; *Cox*, *ibid*, at para 77.
[641] *Cain*, *supra* note 632 at para 47.
[642] *Nagle-Cummings*, *supra* note 192 at para 81; *Cox*, *supra* note 373, at para 77. In *Pratt* 2018, the judge said, "In the *Cain* case, procedural irregularities had been argued very strongly", *supra* note 632 at para 32.
[643] This was especially apparent in paras 76-77 and 81 of *Nagle-Cummings*, *ibid*.

was not provided with any reasons why the unit was in lockdown.[644] In *Nagle-Cummings*, the applicant complained that he was being kept in his cell for 23 hours a day, despite having already served his six day disciplinary segregation punishment.[645] The applicants in the *Cox* case made similar arguments.[646]

Bromby was the clearest case of attenuating prisoner rights through the word "irregularity."[647] In that case, the Warden had not followed section 13 of the *CCRR* because he only provided written reasons for transferring Mr. Bromby 30 days after the fact.[648] Section 13(2)(c) of the *CCRR* requires that written reasons be provided to the prisoner within five working days.[649] The judge in *Bromby* held that "it is not every irregularity that will amount to a finding of procedural unfairness" and the delay in providing reasons did not, in itself render the decision unfair.[650] The judge found that "the failure in this case was extremely close to the line."[651] It is unclear where this "line" would be. The language of "irregularity" helped the judge justify the attenuation of Mr. Bromby's statutory right to a written decision within a reasonable period of time. This dynamic allows for a level of discretion accorded to the reviewing judge, and in turn, signals to prison administrators that regulations do not need to be strictly followed, as failure to follow these provisions can be labelled irregularities.

In administrative law generally, a decision made unfairly cannot stand.[652] There is, however, a narrow exception for breaches to the duty of fairness if they are of a *de mimimis* (minor) nature. According to Kate Glover:

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[644] *Pratt* 2018, *supra* note 632 at para 5.
[645] *Nagle-Cummings*, *supra* note 192 at para 23.
[646] *Cox*, *supra* note 373.
[647] *Bromby*, *supra* note 322 at paras 55-56.
[648] *Ibid*, at paras 4-5; *CCRR*, *supra* note 30 at section 13(2)(c).
[649] *CCRR*, *ibid*.
[650] *Bromby*, *ibid*, at paras 55-56, citing *Wiszniowski*, *supra* note 181.
[651] *Bromby*, *ibid*, at para 56.
[652] Kate Glover, "The Principles and Practices of Procedural Fairness," in Colleen Flood and Lorne Sossin (eds), *Administrative Law in Context*, 3rd (Toronto: Emond Montgomery, 2018) 184-286 at 190, citing *Cardinal*, *supra* note 8, at 661.

> In exceptional cases, relief may be withheld if the procedural error is "purely technical and occasions no substantial wrong or miscarriage of justice"[653] […] Further, relief may be denied, despite a finding of procedural unfairness, if "the demerits of the claim are such that it would in any case be hopeless" and thus "impractical" and "nonsensical" to grant relief.[654]

4.3.2 "Material"

Another word used was "material".[655] In *Maillet*, the judge held "any deviations were not material and did not affect the fairness of the proceeding."[656] The judge in *Campbell* held that any errors made by prison administrators "were not material or substantive enough to undermine that process."[657] In one case, prison administrators referred to the wrong section of the *CCRA* as authority when transferring a prisoner.[658] The judge determined that was an "immaterial error."[659] In *Pratt (2019)*, the term was used in the context of whether "closed confinement" in a provincial prison met the first stage for a *habeas corpus* application.[660] The test used by the judge was that the prisoner must demonstrate a "material deprivation of their liberty."[661]

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[653] The Principles and Practices of Procedural Fairness, *ibid*, at 236, citing *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, citing obiter in *Pal v Canada (Minister of Employment and Immigration)* (1993), 24 Admin LR (2d) 68 at para 9; *Pannu v Canada (Minister of Employment and Immigration)* (1993), 42 ACWS (3d) 1064 (FCTD); *PascoPla v Canada (Minister of Citizenship and Immigration)*, 2012 FC 560.
[654] The Principles and Practices of Procedural Fairness, *ibid* at 236, citing *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202.
[655] *Keiros-Meyer*, *supra* note 175 at para 43; *Maillet*, *supra* note 152 at para 48; *Richards*, *supra* note 152 at paras 69 and 77; *Wiebe*, *supra* note 152 at para 18; *Campbell*, *supra* note 229 at para 39; *MacNeil*, *supra* note 141 at para 40; *Pratt* 2019, *supra* note 207 at para 14, citing *Coaker v Nova Scotia (Attorney General)*, 2018 NSSC 281 and para 15, citing *Gogan v Canada (Attorney General)*, 2017 NSSC 4, (overturned on appeal). In *Doan*, the judge found a change to his immigration situation was "a material change in circumstances," *supra* note 276 at para 56. In *Newman*, the judge found the record relied upon for his earlier reclassification to a lower security level as being "materially deficient," *supra* note 254 at para 21.
[656] *Maillet*, *supra* note 152 at para 48.
[657] *Campbell*, *supra* note 229 at para 39.
[658] *Keiros-Meyer*, *supra* note 175 at para 22.
[659] *Ibid*, at para 43.
[660] *Pratt* 2019, *supra* note 207 at paras 14-15, 18, 28-29, 31, and 45 (overturned on appeal).
[661] *Ibid*, at para 14.

In *MacNeil*, the judge found that there was a "significant and material deficiency in the disclosure."[662] In that case, another prisoner had said they took "full responsibility" for a cell phone found in their cell.[663] The judge determined "it was information that was material to his situation and so it ought to have been disclosed to him."[664] While the judge found in Mr. MacNeil's favour, the qualification of "material" implies there are *immaterial* breaches of section 27 of the *CCRA*.[665] A similar situation occurred in *Wiebe*: "the decision is void and illegal, and this court sets it aside as the procedure followed was incorrect and unfair in a material way."[666] The same language was used in *Richards*, where the judge found "several material breaches,"[667] and said there were "simply too many material shortcomings in the decision making process," rendering the decision unlawful.[668] The SCC in *Khela* did not describe breaches being material or immaterial, though it did mention the idea of a "technical breach," which will be discussed in the next section.[669]

4.3.3 "Technical breach"

Yet another word, taken from *Khela*,[670] was that the breach was simply a "technical breach" or determined to be *more* than a technical breach.[671] Justice LeBel said:

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[662] *MacNeil*, *supra* note 141 at para 40.
[663] *Ibid*, at para 39.
[664] *Ibid*.
[665] *CCRA*, *supra* note 27 at section 27.
[666] *Wiebe*, *supra* note 152 at para 18.
[667] *Richards*, *supra* note 152 at para 69.
[668] *Ibid*, at para 77.
[669] *Khela*, *supra* note 4, at para 90.
[670] *Khela*, *ibid*.
[671] *Emonts*, *supra* note 152 at paras 33, 55, 58 and 59; *Germa v Atlantic Institution*, 2014 NBQB 208 at para 23 [*German 2014 NB*]; *R v Elliott*, 2014 ABQB 429, at paras 76, 105, 107 and 137 [in that case, the breaches were determined to not be technical ones]; *Janjanin*, *supra* note 152 at paras 41, 67 and 79 [breaches were not technical in nature in that case, as had been argued by CSC]; *Brauss*, *supra* note 181 at para 20; *Kreko*, *supra* note 373 at paras 7 and 16 [the breaches were considered to not be technical in nature]; *Cliff*, *supra* note 373 at paras 25, 33 and 45 [breach was not merely technical]; *Shoemaker* ABCA, *supra* note 86 at paras 16 and 34 [not a mere technical breach]; *Rivest*, *supra* note 152 at para 55 [says no technical breach is alleged by prisoner applicant]; *Sedore*, *supra* note 152 at paras 10-11 [respondent argued the breach would be "only technical in nature", judge disagreed]; *MacNeil*, *supra* note 141 at para 57 [judge said others might think the issue was "technical" in nature]; *Simms*, *supra* note 181 at para 19. The term was also mentioned in the following cases: *Earhart* ONCA, *supra* note 239 at para 34; *R v Boone*, 2014 ONCA 515 at para 40 [*Boone*]; *Wiszniowski*, *supra* note 181 at para 33; *Omoghan*, *supra* note 152 at para 13; *Telfer*, *supra* note 180 at para 8 [used in argument by Respondent]; *Raju*, *supra* note 38 at para 10;

> I should point out that not all breaches of the CCRA or CCRR will be unfair. It will be up to the reviewing judge to determine whether a given breach has resulted in procedural unfairness. For instance, if s. 27(3) has been invoked erroneously or if there was a strictly technical breach of the statute, the reviewing judge must determine whether that error or that technicality rendered the decision procedurally unfair.[672]

Similar to the idea of using the language of "material" breach, when judges use the frame of whether the breach was "technical" or not, they are likely watering down prisoner rights under the *CCRA*. The judge in *Simms* gave an example of what a technical breach would be: "a report being filed a few days after a decision has been made on the premises that the report while not having been filed, it's content was known to everyone inclusive of the party concern such as Mr. Simms."[673] One example of a so-called technical breach was when no meeting occurred between the prisoner applicant and the Warden in the context of a security reclassification and transfer, as required by section 12(b) of the *CCRR*.[674] Another example was when the Warden did not meet with the prisoner applicant during his five day administrative segregation review.[675] In another case, the incorrect listed location of an alleged assault was considered to be a technical breach.[676]

4.3.4 Weighing different interests

In some cases, judges used language about how prison administrators must weigh several different interests and rights to come to their decisions. This relates to the principle of "polycentricity" – which is involved when a decision has "a large number of interlocking and interacting interests and considerations."[677] In *MacKinnon*, the judge said, "the discretion of those who manage incarcerated persons is exercised in a multifactorial manner, and balances many

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Charlie, *supra* note 41 at para 33, citing *Cardinal*, *supra* note 8, *Clark*, *supra* note 138 at para 39 [used as argument by Crown].
[672] *Khela*, *supra* note 4, at para 90 [emphasis added].
[673] *Simms*, *supra* note 181 at para 19.
[674] *Emonts*, *supra* note 152 at paras 32-33; *CCRR*, *supra* note 30.
[675] *Germa v Atlantic Institution*, 2014 NBQB 208, at paras 21-23 [*Germa* 2014 NB].
[676] *Brauss*, *supra* note 181 at para 20.
[677] *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, at para 36; *Baker*, supra note 69 at para 62.

interests, practical restrictions, safety concerns, and logistical necessities."[678] Mentioning a "weighing of interests" was most common in Nova Scotia provincial prison lockdown cases. The respondents in *Cox* used the fact that they were short-staffed to justify unit-wide lockdown where prisoners are confined for 23 hours per day.[679] The judge in that case said, "while I have concerns about what I have heard concerning short staffing, lack of access to lawyers, sanitary conditions and prior lack of time out of cell, I am satisfied, in the particular circumstances before me, that the decision to place the Applicants on West 4 IDR on rotation/gradual reintegration was justified."[680] The prisoner applicants were blamed by the judge for the lockdown rotation.[681] The lack of staff members would not likely be a good enough reason to curtail rights in a *Doré* analysis.[682] This type of reasoning was resisted in *Downey*.[683] The reviewing judge in that case said: "It is too easy to suggest that the Applicants have created this situation and, as such, have no standing to complain…[t]his is a misguided theory and this Court must guarantee that penal institutions do not adopt such an attitude."[684]

4.3.5 'Prism' of index offence

An example of rights attenuation through language was when judge said that prison decisions should be made through the "prism" of the prisoner's index offence. This was most strongly expressed in *Wood* (2014), where the judge said, "In my view, my assessment must begin with the predicate offences for which the applicant is serving his sentences"[685] The judge then said their predicate offence "is the prism through which the decision of the correctional authorities needs to be addressed."[686] *Wood* was cited in *Surujpal* on this point.[687] The same language was

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[678] *MacKinnon*, *supra* note 154 at para 29.
[679] *Cox*, *supra* note 373, at paras 57, 74, and 81. The prisoner applicants were being let out of their cells for longer periods later, however.
[680] *Ibid*, at para 81.
[681] *Ibid*, at para 78.
[682] *Doré*, *supra* note 81.
[683] *Downey*, *supra* note 390 at paras 6, 10, and 19-21.
[684] *Ibid*, at para 10.
[685] *Wood* 2014, *supra* note 227 at para 54.
[686] *Ibid*.
[687] *Surujpal*, *supra* note 152 at para 16.

used in *Emonts* and *Clark*.[688] This seemed to be a shortcut in logic, as a prisoner's index offence is part of their initial security assessment. Using their index offence as a further "prism" may result in attenuation of rights.

4.3.6 A "good" prisoner?

In some cases, there did not appear to be objective criteria used in the judge's analysis of the legality of the prisoner's detention. Instead, the focus was on the more general question of whether the applicant had been a good prisoner. The apparent lack of objective criteria speaks to the need for the "creation and maintenance of an actual order of positive laws" as mentioned in *Imperial Tobacco*.[689] Without objective criteria, there is a risk for arbitrary action by prison administrators.

The most examples of this dynamic occurring were found in provincial prisons, especially in Nova Scotia.[690] For example, in *Chung*, a solitary confinement case, Mr. Chung was described as "not an innocent actor."[691] The judge seemed to focus on Mr. Chung's character than whether objective criteria were met for long-term placement in segregation.[692] In *Diggs*, Mr. Diggs had been housed in solitary confinement for a long period of time.[693] The judge also focused on Mr. Diggs' behaviour instead of objective criteria: "I am satisfied that Mr. Diggs knows the path to living in a unit, but he cannot control his behaviour to achieve that goal within the framework of the institution."[694] This dynamic was also present in *Pratt* (2018) and *Pratt* (2019).[695] In *Pratt* (2019), the judge held, "the decision to detain him in administrative close confinement until he had a demonstrated willingness and ability to follow institutional rules" was reasonable.[696]

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[688] *Emonts*, *supra* note 152 at para 47; *Clark*, *supra* note 138 at para 55.
[689] *Imperial Tobacco*, *supra* note 306, citing *Manitoba Reference*, *supra* note 306.
[690] The main example in a federal prison was *Getschel*, *supra* note 404 at para 114. An example of it occurring in a provincial prison was *Cox*, *supra* note 373, at paras 20, 51, 53, 56-62, 68, 70, 72-73, 74, 76, 77, 78 and 81.
[691] *Chung*, *supra* note 183 at para 31.
[692] *Ibid*.
[693] *Diggs v Nova Scotia*, 2018 NSSC 200, at para 1 [*Diggs*].
[694] *Ibid*, at para 8.
[695] *Pratt* 2018, *supra* note 632; *Pratt* 2019, *supra* note 207 (overturned on appeal).
[696] *Pratt* 2019, *ibid*, at para 52.

In *Nagle-Cummings*, the judge said that "with good behaviour" the prison is gradually increasing the time out of lockdown, which "demonstrates the reasonableness of the Deputy Superintendent's decision."[697] This gradual increase in time out of lockdown does not seem to be connected to any objective criteria. The respondent in *Downey* made a similar argument.[698] The judge in that case rejected this reasoning: "it is too easy to suggest that the Applicants have created this situation and, as such, have no standing to complain."[699] The judge ruled that the indefinite nature of the applicants' segregation was unlawful.[700] In *Horton*, a federal prison case, Mr. Horton's reclassification was based on his "behaviour overall" and because he was "no longer manageable."[701]

In many cases examined in the study, prisoners were expected to 'take responsibility' for everything they could have been said to have done wrong.[702] There appeared to be a standard of near-perfect compliance with rules for prisoners in Minimum Security penitentiaries. In *Karafa*, the Security Intelligence Officer stated, "Due (to) the limited level of static security, <u>any deviation</u> from institutional rules and policies requires an immediate and effective response…."[703] In *Howdle*, the Assistant Acting Warden testified that "within minimum security units and institutions … both staff and inmates know that there is comparatively less tolerance for problematic behaviour."[704] The judge in that case accepted the Acting Warden's assertion.[705] The same sentiment was used by the respondents in *Yaworski*: "there is little tolerance for

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[697] *Nagle-Cummings*, *supra* note 192 at para 83.
[698] *Downey*, *supra* note 390 at para 6.
[699] *Ibid*, at para 10.
[700] *Ibid*, at paras 19-21.
[701] *Horton*, *supra* note 152 at para 17.
[702] *Elliott* 2014, *supra* note 152 at para 121 ["The Rebuttal as presented does explain some of the circumstances in the incidents leading up to his Emergency Transfer, but does not indicate that Mr. Elliott takes full responsibility...]; *Ryan*, *supra* note 375 at para 29 ["Daniel Angus Ryan continues to be detained in administrative close confinement under a sentence management plan due to his failure to take responsibility for his actions"]; *White*, *supra* note 582 at paras 24 and 25; *Voisey*, *supra* note 407 at para 28; *Raju*, *supra* note 39 at para 17 ["You appear to be minimizing and not accepting full accountability for your actions."]; *Getschel*, *supra* note 404 at para 106 ["Getschel accepted no responsibility for his actions."]; This attitude appears in a case outlined in *Justice Behind the Walls*, *supra* note 8 at 455.
[703] *Karafa*, *supra* note 173 at para 3 (emphasis added).
[704] *Howdle*, *supra* note 194 at para 8.
[705] *Ibid* at para 72.

deceitful behaviour or breaking institutional rules."[706] It was also accepted by the judge in that case.[707] *Howdle* was used as a precedent by respondents on this point in a 2020 case.[708]

There were examples where prisoners were expected by staff to display a superhuman level of patience and passivity to negative and, at times, unfair events. This was most noteworthy in the *Antinello* case, where an innocent misunderstanding escalated into a security reclassification and transfer to higher security.[709] The misunderstanding in *Antinello* was described by prison administrators as: "non-transparency."[710] When Mr. Antinello expressed anger and frustration about his work release privileges being revoked as a result of this misunderstanding, prison administrators immediately considered him a "serious cause of security concern."[711] In Justice Behind the Walls, Michael Jackson talked about a prisoner who had been treated unfairly and wrongfully accused of killing another prisoner.[712] According to the prisoner: "Under these circumstances, being dealt with as unfairly as I have, I don't know if I can guarantee my own behaviour to remain rational."[713] Prisoners were sometimes punished for intangible traits such as having a "negative attitude."[714] In *Newman*, Mr. Newman's security classification was increased in part because of his "disrespect for prison officials."[715] "Passive aggressive behaviour" was part of what prison administrators complained about in *Wynter*.[716]

4.4 Doctrinal developments

In addition to language, there were two areas which appear to be doctrinal developments in the common law that have the potential to attenuate prisoners' rights on *habeas corpus* review. The

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[706] *Yaworski*, *supra* note 373 at para 18.
[707] *Ibid* at para 29.
[708] *Bromby*, *supra* note 322 at para 34.
[709] *Antinello*, *supra* note 168.
[710] *Ibid*, at para 52.
[711] *Ibid*, at para 50.
[712] *Justice Behind the Walls*, *supra* note 8, at 441-443.
[713] *Ibid* at 443.
[714] See *Getschel*, *supra* note 152 at para 15; *Brown*, *supra* note 152 at paras 33 and 38.
[715] *Newman*, *supra* note 254 at para 13.
[716] *Wynter*, *supra* note 152 at para 9.

two developments are: first, a test where a prisoner would have to show they were prejudiced by a breach of a statute; and, second, a judge being able to use their "residual discretion" to not return a prisoner to their former level of liberty.

4.4.1 Prejudice test

In recent case law, it appears that counsel for CSC has tried to introduce a new test, where the prisoner applicant would have to show that the error or breach prejudiced them.[717] This revised test is contrary to the spirit and history of the writ of *habeas corpus*, because it confuses the reverse onus on the detaining authority. Justice Le Dain rejected a prejudice-based test in response to the applicant's right to a hearing in *Cardinal v Director of Kent Institution*, when he said, "the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision."[718]

The word "prejudice" does not appear in the text of either *Khela* or *May*.[719] CSC had unsuccessfully argued a version of this approach in front of the SCC in *Khela*. In their factum, CSC's lawyers said: "No critical or crucial information was withheld from Mr. Khela. As a matter of logic and common sense, the summary that the CSC provided of the information relied upon in making the decision to re-classify and transfer Mr. Khela to Kent allowed him to know the case he had to meet."[720]

In one case since *Khela, Bromby*, a court did apply this prejudice test.[721] The respondents made the argument for this test:

> Finally, regarding the delivery of late reasons, the respondents simply state that while there was some delay in the delivery of the written reasons, the applicant did not suffer

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[717] *Bromby*, *supra* note 322; *Raju*, *supra* note 39.
[718] *Cardinal*, *supra* note 8, at 661.
[719] *Khela*, *supra* note 4; *May*, *supra* note 2.
[720] CSC Factum, *supra* note 60 at para 116.
[721] *Bromby*, *supra* note 322.

> procedural fairness as a result. That is because, the respondent submits, the delay did not prejudice the applicant's position.[722]

Mr. Bromby argued that the "late delivery of the reasons constituted procedural unfairness because he was required to advance his *habeas corpus* application without the benefit of written reasons informing him about the basis for the decision."[723] The judge agreed with the respondents, finding Mr. Bromby did not show he was prejudiced by the late receipt of reasons for the decision.[724] The judge also used other language that potentially attenuates rights: "I must look at the process as a whole to determine whether it was fundamentally procedurally unfair."[725] The judge made a confusing statement: "It is not in all circumstances that prejudice must be shown."[726] It is unclear when, according to this judge, prejudice would need to be shown by the prisoner applicant. This is a potentially troubling development in the case law.

In *Raju*, the judge did not explicitly use or reject this test but disagreed with CSC's categorization.[727] In that case, lawyers for CSC argued that Mr. Raju did not suffer prejudice because of their failure to disclose material.[728] The judge disagreed and found that the disclosure failure was a breach of procedural fairness which rendered the decision unlawful.[729] However, the judge did not outright reject or accept the test of whether the prisoner had been prejudiced by the breach. One could argue that they tacitly accepted the test by responding to CSC's argument.[730]

In other cases, the judge will seem to use different terms to convey that the prisoner has not suffered any prejudice by the prison administrators' error. For instance, using language such as "on the whole…",[731] "at the end of the day…",[732] "viewing the matter globally…",[733] and finding

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[722] *Ibid*, at para 35.
[723] *Ibid*, at para 30.
[724] *Ibid*, at paras 55-57.
[725] *Ibid*, at para 56.
[726] *Ibid*, at para 55.
[727] *Raju*, *supra* note 39.
[728] *Ibid* at para 19.
[729] *Ibid* at para 21.
[730] *Ibid* at para 19.
[731] *Anderson*, *supra* note 152 at para 31.
[732] *Germa* 2014 NS, *supra* note 180 at para 24.
[733] *Horton*, *supra* note 152 at para 16.

the process was "fundamentally fair."[734] In *Keiros-Meyer*, the judge said Mr. Keiros-Meyer "was not prejudiced by the reference" to the wrong section of the *CCRA*.[735] In *Jenkins*, where a settlement agreement between Mr. Jenkins and CSC was the subject of his *habeas corpus* application, the court decided there had been "substantial compliance" with the agreement.[736] In *Doan*, the judge talked about what would happen if "the requirements of s. 27 are not complied with adequately…"[737]

In one case, *Gogan* (2018), the judge rejected the reasoning that a prisoner applicant should show how they were prejudiced in the prison administrators' error.[738] In that case, the judge said that it does not matter if re-running the security classification would have resulted in the same result, as that is a separate issue.[739] The judge granted the prisoner's *habeas corpus* application.[740] The Alberta Court of Queen's Bench in *Shoemaker (2018)* went with an approach similar to a prejudice test: "what really matters is whether, functionally, the appellant knew the basis for his possible transfer and had an opportunity to say his piece in response."[741] The Alberta Court of Appeal disagreed with that specific quotation and said, "With respect, this is an error."[742] The Court of Appeal described compliance with statutory requirements as an "essential consideration" to a determination of whether the decision was procedurally fair, not the more relaxed standard suggested by the lower court judge which did not require "strict" compliance.[743]

4.4.2 Residual discretion

In *Khela*, the SCC mentioned an element of "residual discretion" afforded to reviewing judges after they have reviewed the record.[744] While the reviewing court *must* review the record

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[734] *Maillet*, *supra* note 152 at para 48.
[735] *Keiros-Meyer*, *supra* note 175 at para 44.
[736] *Jenkins*, *supra* note 243 at para 25.
[737] *Doan*, *supra* note 276 at para 49 [emphasis added].
[738] *Gogan*, 2018 NSSC 18.
[739] *Ibid*, at para 75.
[740] *Ibid*, at para 89.
[741] *Shoemaker*, supra note 86 at para 79.
[742] *Shoemaker* ABCA, *supra* note 86 at paras 30 and 31.
[743] *Ibid*, at para 31.
[744] *Khela*, *supra* note 4, at para 78.

assuming the applicant has successfully shifted the burden to the respondent, "a residual discretion will come into play at the second stage of the *habeas corpus* proceeding, at which the judge, after reviewing the record, must decide whether to discharge the applicant."[745] For cases examined during the study, this "residual discretion" was only meaningfully taken on in *Boone*, by the Ontario Court of Appeal.[746] The *Boone* case dealt with solitary confinement in Ontario provincial jails.[747] The language used by the Court appeared to attenuate Mr. Boone's rights: "while the procedures followed did not fully comply with the principles of natural justice and with procedural fairness in some respects, the transfer procedure, overall, was not procedurally unfair…"[748] Mr. Boone's counsel had argued that once a breach of procedural fairness had been found by the judge, the prisoner applicant must be returned to their former level of liberty.[749] The Court found this was "too broad."[750] Because of the application judge's residual discretion, they could find that the detention itself was not procedurally unfair despite finding there was procedural unfairness with "aspects" of the transfer.[751] This "residual discretion" was not explained in *Khela*, and appears open to interpretation by reviewing judges.

4.5 Level of scrutiny of prison administrators by reviewing judges

Somewhat unsurprisingly, prisoners were more likely to be successful on their application where judges were willing to question the truth behind the words of prison staff and officials. Similarly, in cases where judges adopt the language of the prison staff or officials, prisoners are less likely to be successful. As discussed in Chapter 3, judges in many *habeas corpus* cases adopted a highly deferential posture to prison administrators.[752] Based on the case law, it seems preferable for judges to take a respectful but less deferential stance towards prison administrators. By being

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[745] *Ibid*.
[746] *Boone*, *supra* note 671.
[747] *Ibid*.
[748] *Ibid*, at para 27.
[749] *Ibid*, at para 41.
[750] *Ibid*.
[751] *Ibid*, at paras 41 and 45.
[752] See page 69.

willing to go beyond what is baldly asserted by prison administrators, judges can better ensure prisoners' rights are upheld. The table immediately below illustrates some examples of critical and less-than-critical stances by reviewing judges.

Table 3: Examples of Language Illustrating Critical and Less-than-Critical Stances

Type of Stance	Examples
Judges Using Critical Stance Towards Prison Administrators	• Before moving on from Officer Harroun's evidence, I want to address another issue raised by the Applicant. The Applicant strongly asserts that the Court should not consider the views of Officer Harroun as they pertain to the credibility of Mr. Gogan. […] I agree with the Applicant to the extent these views tend to supplant the role of the Court. The Officer's expressed views on this issue will not play any role in the relevant determinations of the Court. • It is actually this Court's opinion that the Respondent (staff and other interveners), while in the process of conducting their investigation on Mr. Antinello, and in coming with the decision hereby disputed, have sometimes made use of pure speculation and have acted on misunderstandings about the facts and in what gets more concerning, have continued to do so, even after these facts or misunderstandings had been clarified (speculations and misunderstandings contradicted) and it gets even more concerning and somehow disappointing, when this Court sees that the Respondent (staff and interveners) have continued to do so during the hearing, before this Court, when the whole Record was there to prove them wrong. • Although there were several different sources providing information, each of them was of unknown reliability, having never before provided information to the SID. It is plain to me and would be clear to anyone reading the gist that each of the sources could have simply been repeating things heard via the prison rumour mill.

Judges Adopting Language from Prison Administrators and Lawyers Representing Prison	• Following an assault on another inmate, Mr. Hennessy was transferred from Matsqui Institution, a medium security facility, to the maximum security Kent Institution. He now applies for a writ of *habeas corpus*, seeking return to medium security. Mr. Hennessy says the acting warden who made the decision to transfer him unreasonably ignored evidence that he did not commit the assault. • Mr. Diggs has been on remand at the Central Nova Scotia Correctional Facility (also referred to as "Burnside") throughout 2018 and 2017. Since that time, he has constantly been housed in segregation (also referred to as "CCU") as a result of assaultive and threatening behaviour towards staff and other inmates.

There were several examples of judges questioning the truthfulness of what prison administrators said.[753] For example, in *Richards*, the judge accepted evidence from Mr. Richards and other corroborative sources that his Parole Officer tampered with his form.[754] The judge in that case noted how other prisoners had expressed the same concern in the past.[755] In *Jordan*, the judge did not accept the Warden's statement that he did not consider an important case conference meeting when making his decision.[756] The information from the case conference had not been disclosed to Mr. Jordan, and the judge held that the Warden's statement was not "fulsome and truthful."[757]

In *Wiebe*, the judge found the Parole Officer's deposition to be "unreliable" on a certain point.[758] From a basic reading of the case, it seems like the Parole Officer was trying to cover up the fact

[753] See, for example, *Gogan* 2018, *supra* note 143 at paras 46-47; *Antinello*, *supra* note 168 at paras 35, 39, 48, and 51; *Raju*, *supra* note 39 at paras 12 and 19-20; and *Charlie*, *supra* note 41 at para 34: "I have taken each of these examples of overly general information from a document given to Ms. Charlie, which purports to explain why she was placed in ESP."
[754] *Richards*, *supra* note 152 at paras 62-63.
[755] *Ibid*, at para 63.
[756] *Jordan*, *supra* note 260 at para 26.
[757] *Ibid*.
[758] *Wiebe*, *supra* note 152 at para 16.

that they did acted contrary to procedure.[759] In *Gogan* (2015), the judge was not willing to simply take the Nova Scotia government's word that the conditions in the prisoner applicants' unit were totally different from solitary confinement.[760] This was perhaps not difficult to do, as the prisoner applicants were confined to their cells 23 hours per day,[761] but the judge showed a willingness to be critical of what prison administrators said. The judge in *Hamm* showed a similar willingness at many parts of the judgment.[762]

In *Kreko*, the judge looked at the "gist" disclosed to Mr. Kreko and carefully compared it, line by line, to the evidence withheld from the prisoner.[763] The judge found that what was disclosed in the gist was "misleading."[764] In *Cliff*, the Assistant said they provided Mr. Cliff with a scoring matrix.[765] The judge held, "In these circumstances, something more than a bare assertion of disclosure is required."[766] In a couple cases, *Jackson* and *Simms*, the judges were highly critical of the investigations conducted against the prisoners.[767] The conclusion section of *Jackson* read: "this Court simply found nothing in the Respondent's material or in the Respondent's oral evidence that would somehow substantiate or make it a reasonable thing for the Respondent to reclassify the Applicant to a higher security level classification."[768] In *Wood (2019)*, the judge was critical of the testimony of a prison administrator.[769] In *MacNeil*, the judge acknowledged how "the relationship between the inmate and the institution is one of fundamental imbalance, both with respect to power and information."[770]

Some judges used language such as "alleged" or "purported" when discussing what wrongdoing prisoners were accused of and triggered their security reclassification or placement in

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[759] *Ibid*.
[760] *Gogan* 2015, *supra* note 331 at paras 12-13.
[761] *Ibid*, at para 1.
[762] *Hamm*, *supra* note 129 at paras 10, 99, 100, and 108.
[763] *Kreko*, *supra* note 373 at para 11.
[764] *Ibid*.
[765] *Cliff*, *supra* note 373 at para 31.
[766] *Ibid*.
[767] *Jackson*, *supra* note 152; *Simms*, *supra* note 181 at paras 25, 29-32, and 54-56.
[768] *Ibid*, at para 59.
[769] *Wood*, 2019 ONSC 2697, at paras 12 and 22.
[770] *MacNeil*, *supra* note 141 at para 47.

administrative segregation.[771] This was a positive sign, as it indicates that prison administrators are not more inherently trustworthy than prisoners. Some cases were noteworthy because the judge used especially respectful language when mentioning the prisoner applicant.[772] By contrast, in a few cases, the judges seem to have adopted prison administrators' language uncritically.[773] Similarly, prisoners appear to be *de facto* blamed when staff members are involved in smuggling contraband into the institution ("the Applicant had compromised a staff member") when it could have happened under the staff member's own initiative.[774]

There were two cases in the study where the warden's reasons were not sufficient because they did not say why they preferred the evidence of the staff over the prisoner.[775] In *Elliott* (2014), the judge talked about how the decision-maker did not weigh credibility despite there being competing accounts.[776] This rendered the decision unreasonable.[777] In *Illes*, the judge ruled the Acting Warden "should have provided some explanation of why he accepted the allegations in the Assessment over the Applicant's denials and explanations."[778] The judge in *Illes* found this error resulted in the decision being unreasonable.[779] When decision-makers automatically prefer other evidence against the prisoner's without saying why, it sounds like the warden views prisoners as being inherently unreliable.

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[771] *Surujpal*, *supra* note 152 at para 3; *Hamm*, *supra* note 129 at para 10; *Danvers*, *supra* note 151 at para 4; *Charlie*, *supra* note 41 at para 34; *Leiding*, *supra* note 538 at para 6; *Hickey v Attorney General of Canada*, 2017 ONSC 2100 at para 20 [*Hickey*]; *Wiszniowski*, *supra* note 181, at para 3.
[772] *Jordan*, *supra* note 260 at para 12; *Antrobus v Mission Institution*, 2014 BCSC 2345, at paras 69-70; *Elliot* 2014, *supra* note 152 (for example, para 8 and para 118); *Wiebe*, *supra* note 152 at para 18; *Anderson*, *supra* note 152 at para 42; *Simms*, *supra* note 181 at para 60; *Downey*, *supra* note 390 at paras 9-10.
[773] *Hennessy*, *supra* note 255 at para 1; *Telfer*, *supra* note 180 at para 15; *Diggs*, *supra* note 693.
[774] *Blackmer*, *supra* note 152 at para 2; *Simms*, *ibid* at para 43; *Shoemaker*, *supra* note 86 at para 19 (overturned on appeal).
[775] *Elliott* 2014, *supra* note 152; *Illes*, *supra* note 152 at para 51.
[776] *Elliott*, *ibid*.
[777] *Ibid*.
[778] *Illes*, *supra* note 152 at para 51.
[779] *Ibid*, at para 55.

In several cases, prisoner applicants requested for the judge to order that they be placed in a particular institution.[780] In every case where this occurred, the judge quickly dismissed their request. In three cases the prisoner applicants wished to stay in a certain province.[781] In a sense, the prisoners trying to stay in a certain province were attempting to make section 28(b) of the *CCRA* actionable.[782]

In *Hamm*, the prisoner applicants, who had been kept unlawfully in administrative segregation, requested to be transferred to Regional Treatment Centre, "a multi-security-level institution in British Columbia which they suggest could meet both the correctional services' legitimate security concerns and their rehabilitation concerns."[783] The judge agreed with the government lawyer that the court did not have the authority to order such a transfer.[784] In *Vandette*, Mr. Vandette was being transferred to a particular maximum security prison (Edmonton Institution) where he said he "feared for his safety."[785]

According to critical discourse analysis scholar Norman Fairclough, grammatical features such as passive voice can have "experiential values."[786] Experiential values refer to "a trace of and a cue to the way in which the text producer's experience of the natural or social world is represented."[787] There were some examples of judges using passive voice through language presumably introduced by respondents.[788] One example which stood out was in *Diggs*: "the result

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[780] *Germa 2014 NB*, *supra* note 675 at para 34; *Elliott* 2014, *supra* note 152 at para 142; *Jenkins*, *supra* note 243 at para 6; *Samaniego*, *supra* note 152 at para 12; *R v Hamm*, *supra* note 129 at para 109; *Hickey*, *supra* note 771 at para 1.
[781] *Earhart v Canada (Attorney General)*, 2015 ONSC 5218, at para 18; *Tyler*, *supra* note 152 at para 1; *Muir*, *supra* note 152 at para 5.
[782] *Muir*, *ibid*, at paras 5 and 40; *Earhart*, *ibid*; *CCRA*, *supra* note 27 at section 28(b). Section 28(b) holds "If a person is or is to be confined in a penitentiary, the Service shall take all reasonable steps to ensure that the penitentiary in which they are confined is one that provides them with the least restrictive environment for that person, taking into account […] (b) accessibility to (i) the person's home community and family, (ii) a compatible cultural environment, and (iii) a compatible linguistic environment."
[783] *Hamm*, *supra* note 129 at para 109.
[784] *Ibid*.
[785] *Vandette*, *supra* note 152 at para 4.
[786] *Language and Power*, *supra* note 45 at 111.
[787] *Ibid*, at 112.
[788] For example, in *Downey*, *supra* note 390, the respondent said, "Upon completion of their sanctions on May 26, 2020 they remained in close confinement" (para 6).

of these behaviours has been the placement of Mr. Diggs in segregation."[789] Another example was how a prisoner's security classification "came under review."[790] These uses of passive voice minimize the role that prison administrators played in these deprivations, and made the deprivations seem normal and inevitable. The term "segregation" itself is a gentler version of the term "solitary confinement" which helped to mask the severe deprivation of liberty inherent in the practice.[791] Even the stronger word "solitary confinement" does not adequately capture the brutality.

4.6 Statutory procedural protections: ceiling or floor?

The earlier sections bring up the question of whether procedural fairness protections written into the *CCRA* are sufficient to satisfy the common law duty to be fair, or if, depending on the *Baker* factors of a particular case, greater protections under the common law should be recognized.[792] That is, whether the rights included in the statute are the lower limit (the floor) or the upper limit (the ceiling) of the procedural fairness owed to the prisoner. If the statutory requirements are considered a floor for what is required, then the attenuating language and doctrinal developments identified above will not be able to become dominant. However, if the statutory requirements are considered a ceiling, prisoners' procedural rights will be open to interpretation. The 1979 SCC case *Martineau v Matsqui Institution* said:

> The question is not whether there has been a breach of the prison rules, but whether there has been a breach of the duty to act fairly in all circumstances. The rules are of some importance in determining this latter question, as an indication of the views of prison authorities as to the degree of procedural protection to be extended to inmates.[793]

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[789] *Diggs*, *supra* note 693 at para 3.
[790] See, for example, *Shoemaker*, *supra* note 86 at para 12 (overturned on appeal).
[791] This has been pointed out in Contesting Unmodulated Deprivation, *supra* note 18 at 127-128, citing *Justice Behind the Walls*, *supra* note 8, at 287, and Arbour Report, *supra* note 22 at 135.
[792] *Baker*, *supra* note 69.
[793] *Martineau v Matsqui Institution*, [1980] 1 SCR 602 at 630, 106 DLR (3d) 385.

The 2005 case SCC *May* seemed to take a stronger stance towards prisoner rights, stating that the privileges afforded through the common law duty of procedural fairness are "reflected in and bolstered by the disclosure requirements imposed by the *CCRA*."[794] In *Khela*, the SCC cited *May* for the statement that section 27 of the *CCRA* "guides the decision maker and elaborates on the resulting procedural rights."[795] Within the study, it was rare for a judge to conduct a *Baker* analysis to determine the level of procedural fairness owed to the prisoner applicant.[796] This suggests that prisoners and their advocates are not putting forward the argument that the judge should conduct such an analysis, and that Parliament intended greater procedural fairness in the circumstances of that case. A *Baker* analysis was done fully in *Hamm* and *Mercredi*,[797] and was partially done in *Biever*.[798] In both *Hamm* and *Mercredi*, the judges determined that a high level of procedural fairness was owed.[799] In *Mercredi*, the Saskatchewan Court of Appeal held "the court engages in a fresh inquiry to determine what fairness required in the circumstances and whether those requirements were met."[800] This conforms to what the SCC said in *Knight v Indian Head School Board Division No 19*: "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case."[801]

In *Shoemaker*, the Alberta Court of Appeal considered the statutory requirements to be an "essential consideration" in determining whether the duty of procedural fairness was met.[802] Compliance or non-compliance alone do not determine whether this duty was met, suggesting procedural fairness is not necessarily limited to the statute. However, other cases have made statements which point to the duty of procedural fairness being limited to what is included in the *CCRA*. For example, in *Clark*, the judge held "I conclude that, in this case, there was no breach

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[794] *May*, *supra* note 2 at para 94, citing *Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 SCR 311, 88 DLR (3d) 671.
[795] *Khela*, *supra* note 4 at para 82, citing *May*, *ibid* at para 94.
[796] *Baker*, *supra* note 69.
[797] *Hamm*, *supra* note 129 at para 9; *Mercredi*, *supra* note 40 at paras 27-29.
[798] *Biever*, *supra* note 404 at paras 45-48.
[799] *Hamm*, *supra* note 129; *Mercredi*, *supra* note 40 at paras 39-40.
[800] *Mercredi*, *ibid*, at para 28.
[801] *Knight v Indian Head School Board Division No 19*, [1990] 1 SCR 653 at 682 [*Knight*]
[802] *Shoemaker* ABCA, *supra* note 86 at para 31.

of the statutory requirements for procedural fairness under the *CCRA*."[803] In *Illes*, the judge said the *CCRA* and *CCRR* "outline the disclosure required for me to find the Transfer Decision fair."[804] The *CCRA* does not say anywhere in its text that procedural fairness is contained exclusively within the four corners of the statute. I propose that it is open to prisoners and their advocates to argue that Parliament intended greater procedural fairness that the bare-bones framework of the *CCRA* in the circumstances of a particular case. Additionally, Justice L'Heureux-Dubé suggested that a free-standing right to procedural fairness may exist: "There may be a general right to procedural fairness, autonomous of the operation of any statute."[805]

Provincial prisoners are generally governed by weaker procedural rights written into their statutes than the *CCRA*.[806] In two cases, in Saskatchewan and BC respectively, judges held that prisoners were owed greater procedural rights than what was specifically stated in the applicable statutes.[807] In *Charlie*, the *Correction Act* and *Regulation* did not provide procedural protections for prisoners in Enhanced Supervision Placement ("ESP").[808] Indeed, the judge found "there is no statutory authorization for ESP."[809] ESP is a classification given to prisoners where they are given a "plan" to "overcome their alleged misbehaviour."[810] They are confined to their cells more than the general population, often for 21 hours out of the day.[811] In the absence of statutory procedural rights, the judge provided four of their own "directions" for prison administrators to follow, and said that doing so was "within the court's traditional adjudicative role."[812]

In *Mercredi*, the Saskatchewan government argued that procedural fairness for prisoners is limited to what is in the statute, in the context of unit placements in provincial prisons.[813]

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[803] *Clark*, *supra* note 138 at para 51.
[804] *Illes*, *supra* note 152 at para 33, citing *Khela*, *supra* note 4, at para 4.
[805] *Knight*, *supra* note 801 at 668.
[806] *CCRA*, *supra* note 27; A Prisoners' Charter, *supra* note 15 at 638-639.
[807] *Mercredi*, *supra* note 40; *Charlie*, *supra* note 41.
[808] *Charlie*, *ibid*, at para 34, citing *Correction Act*, SBC 2004, c 46; *Correction Act Regulation*, BC Reg 58/2005.
[809] *Charlie*, *ibid*, at para 12.
[810] *Ibid*, at para 13.
[811] *Ibid*, at para 14.
[812] *Ibid*, at para 34.
[813] *Mercredi*, *supra* note 40 at para 38.

Specifically, they argued "the *Act* and *Regulations* provide the content of the duty of fairness in relation to security assessments and unit placements."[814] They said that the fact that written reasons were required for other types of decisions under the legislation ("security assessments, institutional transfers, administrative segregation and disciplinary charges"), but not for unit placements meant that the drafters of the legislation intentionally left it out because it was less important than other kinds of decisions.[815] The Saskatchewan Court of Appeal disagreed with this position.[816] The Court held that "the fact the *Act* does not deal expressly with the process for unit placement decisions does not mean procedural fairness does not apply."[817] The process provided by the prison administrators did not meet the common law duty of procedural fairness, despite the fact that there was no apparent breach of any statute.[818]

The *Chung* case dealt with Alberta provincial prison legislation and seemed to say that procedural rights are limited to what is written in the statute.[819] Mr. Chung appears to have pointed out to the judge the differences in procedural rights under the *CCRA* in comparison to Alberta's legislation, with Alberta having weaker procedural rights.[820] According to the judge in that case:

> What matters here is that the Edmonton Remand Centre operated inside the guidelines set for it by the Alberta Legislature, and I have not identified any breaches of those requirements. As the Attorney General noted, the Director has 'carte blanche' to make decisions that are rationally connected to safety and security concerns.[821]

Chung shows the type of analysis which can occur when procedural rights are limited to what is included in the statute (where the statute is the "ceiling").[822] Similarly, in *Cox*, the Nova Scotia

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[814] *Ibid*, citing *The Correctional Services Act*, 2012, SS 2012, c C-39.2; *The Correctional Services Regulations*, 2013, RRS c C-39.2 Reg 1.
[815] *Mercredi*, *ibid* at para 38.
[816] *Ibid*, at para 40.
[817] *Ibid*, at para 50.
[818] *Ibid*, at paras 40-51.
[819] *Chung*, *supra* note 183.
[820] *Ibid*, at para 43.
[821] *Ibid*, at para 44.
[822] *Ibid*.

provincial prison legislation is pointed to by the judge as giving wide discretion for the Superintendent to confine prisoners.[823] The judge did not seem to look beyond the statutes in their analysis: "I have concluded the Institution did meet its procedural duties under the governing statute and regulations."[824] The judge in *Nagle-Cummings* had a similar analysis, saying "no written reasons were provided by the decision maker, nor were they required by the statutory scheme."[825]

Judges should consider the procedural fairness provisions in statutes as the bare minimum, or the floor. This is mainly due to the very high impact of prison decisions on the individual, which is a factor under *Baker*.[826] When the procedural fairness provisions in the statute is considered the ceiling or upper limit, prisoners are vulnerable to gaps in legislation. This was especially apparent in the *Charlie* case, where the type of confinement Ms. Charlie faced was not even mentioned in the statute.[827]

4.7 Conclusion

This chapter examined language and doctrinal developments used by judges which have the potential to attenuate prisoners' statutory procedural rights. When judges accept breaches of *CCRA*, *CCRR*, Commissioner's Directives or provincial prison legislation, they signal to prison administrators that a relaxed standard of compliance is sufficient. This can add to a culture where the rule of law stops at prison walls. Statutory rights should be considered a floor, not a ceiling, for prisoners' rights. Based on the case law, it seems preferable for judges to take a respectful but less deferential stance towards prison administrators. By being willing to go beyond the text and, at time, conclusory statements of prison administrators, judges can better ensure prisoners' rights are upheld. There were some cases in the study where judges took a more critical look at what

[823] *Cox*, *supra* note 373 at para 64.
[824] *Ibid*, at para 73, see also paras 71-72.
[825] *Nagle-Cummings*, *supra* note 192 at para 67. See also para 55, where the Respondent noted that "there is no required amount of time out of an inmate's cell prescribed by the *Act*," *ibid*.
[826] *Baker*, *supra* note 69.
[827] *Charlie*, *supra* note 41.

prison administrators had to say. This was a better approach than the highly deferential analysis used by most judges.

Chapter 5: Conclusion

This study examined *habeas corpus* prison decisions from *Khela* (March 27, 2014) to August 4, 2020. The types of administrative decisions reviewed were security reclassification and transfer and solitary confinement. *Habeas corpus* review of decision-making in the prison context should be more robust because of the special vulnerability of the affected individuals and the deeply problematic discretionary nature of these decisions and procedures. There are new possibilities set out in *Vavilov* to have robust reasonableness review and the accompanying culture of justification inform and reshape this area of administrative decision-making so that it better accords with the demands of the rule of law, protects and vindicates prisoners' rights, and redresses wrongs. The general body of case law in this area shows an underenforcement of prisoners' rights.

5.1 Contributions to the Literature and Areas for Further Research

I hope that my research can serve as a checkup for the state of *habeas corpus* in prisons in Canada. This moment has the potential to be a turning point, with the *Vavilov* and prison *Charter* decisions still relatively new. My research can be used to show the pitfalls of *Dunsmuir* reasonableness review in this context. Some of the research can be described as exploratory and serve as a jumping-off point for more focused inquiries.

It would be valuable to examine a random sample of security reclassification and transfer decisions and evaluate their compliance with statutory and common law rules. Something similar was done during the 2018 Immigration Detention Audit.[828] The SCC cited this audit during *Canada (Public Safety and Emergency Preparedness) v Chhina* [*Chhina*] to show that immigration detainees do not benefit from the full benefit of the statutory scheme in practice.[829]

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[828] Canada, "Report of the 2017/2018 External Audit (Detention Review)" (Ottawa: Immigration and Refugee Board of Canada, 2018), online: <https://irb.gc.ca/en/transparency/reviews-audit-evaluations/Pages/ID-external-audit-1718.aspx>.
[829] *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29, at para 63 [*Chhina*].

Prisons are notoriously resistant to outside scrutiny, so a study of this type would be illuminating.

My research did not look at *habeas corpus* applications in other situations, such as bail, extradition, immigration detention, and parole. The recent immigration detention decisions such as *Chhina* and *Scotland* demonstrate that immigration detention has many parallels to the problems identified in my study.[830]

5.2 Findings and Recommendations

In my study, I found:

1. The same behaviour can lead to either a formal disciplinary charge or security reclassification and transfer. The formal disciplinary system is advantageous to prisoners as it has more procedural safeguards and limited negative consequences. The reclassification and transfer process allows for problematic exercises of discretion by decision makers.
2. Security reclassification and transfer and the former administration segregation regime complemented and propped each other up in creating a parallel system of punishment to the formal system.
3. At an institutional level, prison administrators and decision makers did not demonstrate superior legal expertise relative to the courts in matters of statutory and rights interpretation in the cases in my study.
4. Many judges on *habeas corpus* review misinterpreted the text of *Khela* to mean that "significant" or "considerable" deference was owed to prison decision makers. The SCC explicitly did not adopt that language.
5. A phrase in *Khela* about the standard of review for substantive review being "reasonableness" because to use "correctness" would micromanage the prison took on a life of its own in lower courts.

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[830] *Chhina*, *ibid*; *Scotland*, *supra* note 552.

6. Some reviewing judges would say they did not want to "micromanage" the prison because they appeared to be uncomfortable exercising their jurisdiction. Reviewing judges are uncomfortable because they are fearful that if they engage in more robust review for reasonableness, they will be seen as an "activist" contrary to legislative intent and the jurisdiction of the legislative branch. This is why the separation of powers plays such a dominant role in the cases.
7. Reviewing judges have attenuated prisoners' rights by using qualifying language. There are also recently doctrinal developments where respondents are trying to introduce a test where a prisoner must show how they were prejudiced by the breach.
8. While considered "soft law" by reviewing courts, policies such as Commissioner's Directives effectively have the force of law when being applied *to* prisoners in prisons. A prisoner's noncompliance with a Commissioner's Directive can have serious impacts on their day-to-day life. However, upon *habeas corpus* review, prisoners cannot similarly rely on them as a standard for legality.
9. Based on the case law, it seems preferable for judges to take a respectful but less deferential stance towards prison administrators. By being willing to go beyond what is baldly asserted by prison administrators, judges can better ensure prisoners' rights are upheld.

The ultimate takeaway from this thesis is that political movement toward decarceration should take place. This would include removing mandatory minimum sentences and siphoning resources and people away from prisons. However, as this process is likely to be slow, reforms for decarceration within prisons to prevent further deprivations of liberty should be implemented as a means to reduce harms. In practical terms, these reforms should include:

1. Justice Arbour's remedy as drafted by Senator Pate should be passed into law, especially in light of the non-compliance with legislation as evidenced in Doob/Sprott Report.
2. The legal status of Commissioner's Directives must be made clear. If they do not have the force of law, then regulations must be created with reciprocal legal rights and responsibilities.

3. There must be some way of holding a prison administrator or decision maker accountable for their choice to use the parallel system of punishment (security reclassification and transfer and currently SIUs, due to the lack of compliance with legislation). This would likely have to be done through statute.
4. The scale to assess reliability of confidential informants in prison should be improved for greater congruence with the three *Debot* criteria in criminal law: compellability, credibility, and corroboration.
5. While perhaps not a reform in the traditional sense, prisoner advocates can use *Vavilov* to improve the generally unsatisfactory body of case law for prisoners, resulting in more successful *habeas corpus* reviews.

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Appendices

Appendix A Cases Included in Study

Acronyms	
R = Reasonableness (Substantive)	PF = Procedural Fairness
R = Security Reclassification	T = Transfer
S = Solitary Confinement	ETA = Escorted Temporary Absence

	Case Name	Citation	R Review?	PF Review?	What type of deprivation?
1	*Telfer v Canada*	2014 ONSC 6799	Yes	Yes	R+T (+S but judge did not address it)
2	*Doan v Canada (Attorney General)*	2014 BCSC 2388	Yes	Yes	R+T
3	*Richards v Springhill Institution*	2014 NSSC 121	Yes	Yes	R+T
4	*R v Boone*	2014 ONCA 515	Yes	Yes	S
5	*Germa v Canada (Correctional Service)*	2014 NSSC 273	Yes	Yes	R+T (+S)
6	*Antrobus v Mission Institution*	2014 BCSC 2345	Yes	Yes	R+T
7	*Yang v Millhaven Institution*	2014 ONSC 7067	Yes	No	R+T
8	*Tuckanow v Institutional Head of Bowden Penitentiary*	2014 ABQB 563	Yes	No	R+T
9	*Germa v Atlantic Institution*	2014 NBQB 208	Yes	Yes	S
10	*Maillet v Springhill Institution*	2014 NSSC 240	Yes	Yes	R+T
11	*Farhadi v Ferndale Institution*	2014 BCSC 1175	Yes	Yes	R+T

12	*Wood v Atlantic Institution*	2014 NBQB 135	Yes	Yes	Current security classification
13	*Jordan v Canada (Attorney General)*	2014 ONSC 2898	Yes	No	R+T
14	*R v Elliott*	2014 ABQB 429	Yes	Yes	R+T
15	*Mapara v Ferndale Institution*	2014 BCSC 748	Yes	Yes	ETA
16	*Maestrello v Mission Institution*	2014 BCSC 1116	No	Yes	R+T
17	*Jenkins v Canada (Correctional Service)*	2014 ONSC 6922	Yes	Yes	Transfer (not to higher)
18	*Young v Canada (Attorney General)*	2015 ONSC 5012	Yes	No	R+T
19	*Campbell v Canada (Correctional Service)*	2015 NSSC 371	Yes	Yes	S
20	*Hennessy v Kent Institution*	2015 BCSC 900	Yes	Yes	R+T
21	*Earhart v Canada (Attorney General)*	2015 ONSC 5218	Yes	Yes	R+T
22	*Wiebe v Stony Mountain Institution*	2015 MBQB 118	Yes	Yes	R+T
23	*Surujpal v Millhaven Institution*	2015 ONSC 473	Yes	No	R+T
24	*Tyler v Canada (Attorney General)*	2015 ONSC 1283	Yes	Yes	R+T
25	*Ryan v Nova Scotia*	2015 NSSC 286	Yes	No	S
26	*Anderson v Pacific Institute*	2015 BCSC 1789	Yes	Yes	R+T
27	*Biever v Edmonton Remand Centre*	2015 ABQB 609	Yes	Yes	S

28	*Wynter v Millhaven (Warden)*	2015 ONSC 6495	Yes	Yes	R+T
29	*Samaniego v Canada (Attorney General)*	2015 ONSC 6790	Yes	Yes	R+T
30	*Omoghan v Canada (Attorney General)*	2015 ONSC 7046	Yes	Yes	R+T
31	*Gogan v Canada (Attorney General)*	2015 NSSC 360	Yes	No	S
32	*Janjanin v Canada (Attorney General)*	2015 ONSC 964	Yes	Yes	R+T
33	*Emonts v Canada (Attorney General)*	2015 ONSC 852	Yes	Yes	R+T
34	*Muir v Canada (Attorney General)*	2015 ONSC 3593	Yes	Yes	Transfer (not to higher)
35	*Kreko v Canada (Attorney General)*	2015 ONSC 6343	No	Yes	R+T
36	*Canada (Attorney General) v White*	2015 ONSC 6994	Yes	No	Current security classification
37	*Lao v Canada (Attorney General)*	2016 ONSC 1273	Yes	No	Current security classification
38	*Danvers v Canada (Attorney General)*	2016 ONSC 4121	Yes	Yes	R+T
39	*Maloney v Fortin*	2016 QCCS 1864	Yes	Yes	S
40	*Cliff v Kent Institution*	2016 BCSC 1525	No	Yes	R+T
41	*Brauss v Canada (Attorney General)*	2016 NSSC 269	Yes	Yes	R+T (+ S)
42	*Karafa v Canada (Attorney General)*	2016 ONSC 380	Yes	Yes	R+T
43	*Richer v Canada (Attorney General)*	2016 SKQB 179	Yes	Yes	R+T (and S)

44	*Voisey v Canada (Attorney General)*	2016 ABQB 316	Yes	Yes	R+T
45	*Newman v Bath Institution*	2016 ONSC 3815	Yes	No	R+T
46	*R v Elliott*	2016 MBCA 70	Yes	Yes	R+T
47	*Sedore v Canada (Attorney General)*	2016 ONSC 4668	Yes	Yes	R+T
48	*Illes v Canada (Attorney General)*	2016 ABQB 426	Yes	Yes	R+T
49	*R v Hamm*	2016 ABQB 440	Yes	Yes	S
50	*Wiszniowski v Dorchester Institution*	2016 NBQB 146	Yes	Yes	R+T (+S)
51	*Charlie v British Columbia (Attorney General)*	2016 BCSC 2292	No	Yes	S
52	*MacNeil v Kent Institution*	2017 BCSC 30	Yes	Yes	R+T (+S was complained about, but not addressed by judge)
53	*Chung v Alberta (Attorney General)*	2017 ABQB 456	Yes	Yes	S
54	*Hickey v Attorney General of Canada*	2017 ONSC 2100	Yes	Yes	R+T
55	*Leiding v Mission Institution*	2017 BCSC 1701	Yes	Yes	R+T
56	*Loughlin v Her Majesty the Queen*	2017 ABQB 677	Yes	Yes	R+T
57	*MacKinnon v Bowden Institution*	2017 ABQB 654	Yes	Yes	R+T (+S was complained about, but not addressed by judge)
58	*Brown v Dorchester Institution*	2018 NBQB 179	Yes	Yes	R+T
59	*Earhart v Canada (Attorney General)*	2018 ONSC 7160	Yes	Yes	R+T

60	*Keiros-Meyer v Canada (Attorney General)*	2018 BCSC 1104	Yes	Yes	R+T
61	*Diggs v Nova Scotia*	2018 NSSC 200	Yes	No	S
62	*Horton v Attorney General of Canada*	2018 NBQB 5	Yes	No	R+T
63	*Shoemaker v Canada (Drumheller Institution)*	2018 ABQB 851	Yes	Yes	R+T
64	*Gogan v Canada (Attorney General)*	2018 NSSC 18	Yes	Yes	Initial security classification
65	*Getschel v Canada (Attorney General)*	2018 ABQB 409	Yes	Yes	R+T
66	*Haug v Warden Dorchester Institution*	2018 NBQB 126	Yes	Yes	R+T (+S was complained about, but deemed moot by judge)
67	*Vandette v Farmer*	2018 ABQB 153	Yes	Yes	R+T
68	*Yaworski v The Attorney General of Canada*	2018 ONSC 1734	Yes	Yes	R+T
69	*Howdle v Canada (Attorney General)*	2018 BCSC 1775	Yes	Yes	R+T (+S was complained about, but not addressed by judge)
70	*Clark v Canada (Attorney General)*	2018 ABQB 116	Yes	Yes	R+T
71	*Jackson v Warden of Dorchester Institution*	2018 NBQB 192	Yes	Yes	R+T
72	*Pratt v Nova Scotia (Attorney General)*	2018 NSSC 243	Yes	Yes	S
73	*Antinello v Dorchester Institution (Warden)*	2018 NBQB 9	Yes	Unclear	R+T (+S was complained about, but deemed moot by judge)
74	*Germa c Tremblay*	2019 QCCS 1764	Yes	Yes	R+T
75	*Mercredi v Saskatoon Provincial Correctional Centre*	2019 SKCA 86	No	Yes	Unit placement
76	*Simms v Canada (Attorney General)*	2019 NBQB 261	Yes	Yes	R+T (+S)

77	*Wood v Canada (Attorney General)*	2019 ONSC 2697	Yes	Yes	R+T
78	*Larabie v Canada (Attorney General)*	2019 ONSC 1973	Yes	Yes	R+T
79	*Bell v Canada (Attorney General)*	2019 ONSC 540	Yes	No	Current security classification
80	*Blackmer v Drumheller Institution*	2019 ABQB 771	Yes	Yes	R+T
81	*Wu v Canada (Attorney General)*	2019 ABQB 902	Yes	Yes	R+T
82	*Pratt v Nova Scotia (Attorney General)*	2019 NSSC 6	Yes	Yes	S
83	*Rivest v Gardien du Penitencier de Dorchester*	2020 NBQB 12	Yes	No	R+T
84	*Pervez v Correctional Service of Canada (Grande Cache Institution)*	2020 ABQB 95	Yes	Yes	Current security classification
85	*Cox v Nova Scotia (Attorney General)*	2020 NSSC 81	Yes	Yes	S
86	*Paul c Lalande (Archambault Establishment)*	2020 QCCA 632	Yes	Yes	R+T
87	*Nagle-Cummings v Nova Scotia (Attorney General)*	2020 NSSC 188	Yes	Yes	S
88	*Bromby v Warden of William Head Institution*	2020 BCSC 1119	Yes	Yes	R+T
89	*Raju v Warden of Kent Institution*	2020 BCSC 894	No	Yes	S
90	*Downey and Gray v Attorney General (Nova Scotia)*	2020 NSSC 213	Yes	No	S

Appendix B The SRS Framework as set out in CD 710-6, Annex B

Category[831]	Description	Ratings
Institutional Adjustment	Consider the following to assess institutional adjustment rating and update any relevant information since the completion of the most recent inmate security level review. Based on the individual adjustment factors and any other relevant considerations, assign a rating of either low, moderate or high.	**Low** - The inmate has demonstrated: • a pattern of satisfactory institutional adjustment; no special management intervention is required • the ability and motivation to interact effectively and responsibly with others, individually and in groups, with little or no supervision • motivation towards self-improvement by actively participating in a Correctional Plan designed to meet his/her dynamic factors, particularly those relating to facilitating his/her reintegration into the community **Moderate** - The inmate has demonstrated: • some difficulties causing moderate institutional adjustment problems and requiring some management intervention • the potential to interact effectively with others, individually and in moderately structured groups, but needs regular and often direct supervision • an interest and active participation in a Correctional Plan designed to meet his/her dynamic factors, particularly those which would lead to a transfer to a less structured environment and ultimately, to his/her reintegration into the community **High** - The inmate has demonstrated: • frequent or major difficulties causing serious institutional adjustment problems and requiring significant/constant management intervention • a requirement for a highly structured environment in which individual or group interaction is subject to constant and direct supervision • an uncooperative attitude toward institutional programs and staff and presents a potentially serious management problem within an institution

[831] Commissioner's Directives, *supra* note 30 at CD 710-6, note: references to "Aboriginal Social History" were omitted from the chart.

Escape Risk	Consider the following to assess the escape risk rating and update any relevant information since the completion of the most recent inmate security level review. Based on the preceding escape risk factors and any other relevant considerations, assign a rating of either low, moderate or high.	**Low** - The inmate: • has no recent serious escape and there are no current indicators of escape potential • has no significant history of breaches **Moderate** - The inmate: • has a recent history of escape and/or attempted escapes OR there are current indicator(s) of escape potential • is unlikely to make active efforts to escape but may do so if the opportunity presents itself • presents a definite potential to escape from an institution that has no enclosure **High** - The inmate: • has demonstrated a pattern of escapes and/or attempted escapes OR there are current indicator(s) of significant potential to escape OR could threaten the security of the institution in order to facilitate their escape
Public Safety Risk	Provide an analysis of the inmate's public safety risk and update any relevant information since the completion of the most recent inmate security level review. Based on the public safety factors and any other relevant considerations, assign a rating of either low, moderate or high.	**Low** - The inmate's: • criminal history does not involve violence • criminal history involves violence/sexually-related offence(s), but the inmate has demonstrated significant progress in addressing the dynamic factors which contributed to the criminal behaviour and there are no signs of the high risk situations/offence precursors identified as part of the offence cycle (where it is known) • criminal history involves violence, but the circumstances of the offence are such that the likelihood of reoffending violently is assessed as improbable **Moderate** - The inmate's: • criminal history involves violence, but the inmate has demonstrated some progress in addressing those dynamic factors which contributed to the violent behaviour • criminal history involves violence but the inmate has demonstrated a willingness to address the dynamic factors which contributed to the violent behaviour • there are current indicator(s) of moderate risk/concern **High** - The inmate's:

		• criminal history involves violence and the inmate has not demonstrated sufficient progress in addressing those dynamic factors which contributed to the violent behaviour or a willingness to attempt to address such factors • criminal history involves violence and the inmate has not demonstrated a willingness to address the dynamic factors which contributed to the violent behaviour • there are current indicators of high risk/concern
Overall Assessment	• Provide a short summary of the factors and consider the results of the mental health institutional assessment and/or psychological risk assessment as well as any recent professional opinions such as psychological, psychiatric, mental health and/or health care information, comments from the Elder, police comments and/or previous CSC decisions (if applicable) in the plan for managing the inmate at the proposed security level • Consider previous Parole Board of Canada decision (nature and purpose, all relevant comments, specific reference to relevant issues noted in the decision, including demonstrating how concerns/issues previously raised have/have not been addressed) • Consider the results of the most recent Correctional Plan Update, including any recent completion of National Correctional Programs or Pathways progress • Indicate the existence of co-convicted and/or incompatible inmates • Comment on discussions during case conferences, when it occurred and who was present, identify the Case Management Team's recommendations and how the recommendations meet the needs of the inmate while ensuring the safety of the public.	