SUPREME COURT OF CANADA

CITATION: Dorsey *v.* Canada (Attorney General), 2025 SCC 38

APPEAL HEARD: May 13, 2025
JUDGMENT RENDERED: November 21, 2025
DOCKET: 41132

BETWEEN:

Frank Dorsey and
Ghassan Salah
Appellants

and

Attorney General of Canada
Respondent

- and -

Attorney General of Quebec,
Attorney General of British Columbia,
John Howard Society of Canada,
Canadian Council for Refugees,
Alberta Prison Justice Society,
Aboriginal Legal Services,
West Coast Prison Justice Society,
British Columbia Civil Liberties Association,
Canadian Association of Elizabeth Fry Societies,
Canadian Association of Refugee Lawyers,
Black Legal Action Centre,
Pivot Legal Society,
Margaret Lee Cole,
Canadian Civil Liberties Association and
Canadian Prison Law Association

Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: (paras. 1 to 90)	Moreau J. (Wagner C.J. and Karakatsanis, Martin, Kasirer and O'Bonsawin JJ. concurring)
JOINT DISSENTING REASONS: (paras. 91 to 208)	Côté and Rowe JJ. (Jamal J. concurring)

Frank Dorsey and
Ghassan Salah *Appellants*

v.

Attorney General of Canada *Respondent*

and

Attorney General of Quebec,
Attorney General of British Columbia,
John Howard Society of Canada,
Canadian Council for Refugees,
Alberta Prison Justice Society,
Aboriginal Legal Services,
West Coast Prison Justice Society,
British Columbia Civil Liberties Association,
Canadian Association of Elizabeth Fry Societies,
Canadian Association of Refugee Lawyers,
Black Legal Action Centre,
Pivot Legal Society,
Margaret Lee Cole,
Canadian Civil Liberties Association and
Canadian Prison Law Association *Interveners*

Indexed as: Dorsey *v.* Canada (Attorney General)

2025 SCC 38

File No.: 41132.

2025: May 13; 2025: November 21.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Prerogative writs — Habeas corpus — Availability of remedy — Deprivation of liberty — Inmate — Reclassification and transfer to lower security facility — Whether writ of habeas corpus is available to challenge refusal by carceral authority to reclassify and transfer inmate to lower security facility.

Two federal inmates applied to be transferred from medium- to minimum-security institutions. Despite having been recommended for reclassification and transfer to minimum-security facilities, in each case an administrative decision-maker rejected their reclassification. Both inmates filed applications for *habeas corpus ad subjiciendum* with *certiorari* in aid, seeking orders that they either be transferred to minimum-security institutions or that their continued detention in medium-security settings be justified.

The inmates' applications were joined for the limited purpose of determining a common threshold legal issue: whether *habeas corpus* is available to challenge a refusal to reclassify an inmate to a lower security facility. The application judge concluded that the inmates' circumstances did not fall within the third category — a continuation of a deprivation of liberty that has become unlawful — set out in *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459. Because there was no change in status

quo, she was satisfied that the inmates' residual liberty had not been reduced. *Habeas corpus* was therefore not available to them. The Court of Appeal dismissed the inmates' appeal. The majority held that the third category of *Dumas* is only available if an inmate becomes entitled to greater liberty than that afforded by their continued detention, and that the inmates could only have access to that category if that status was obtained and they were not transferred. At the time the appeal before the Court was heard, both inmates had been reclassified and transferred to minimum-security facilities following review at the statutorily-required date.

Held (Côté, Rowe and Jamal JJ. dissenting): The appeal should be allowed.

Per Wagner C.J. and Karakatsanis, Martin, Kasirer, O'Bonsawin and **Moreau** JJ.: The decision to deny an inmate a lower security reclassification is reviewable by way of *habeas corpus*, because it has the qualitative effect of restricting liberty. Broad and effective access to *habeas corpus* is paramount for those who suffer an unlawful and continued deprivation of their residual liberty and seek to challenge the legality of their confinement. The decision to continue a particular, more restrictive form of confinement instead of placing an inmate in a lower security facility results in a deprivation of liberty. Establishing a deprivation of liberty is not contingent on a change in status quo or on proof of an entitlement to the less restrictive state.

The criteria for a successful *habeas corpus* application are well established, requiring two elements: (1) a deprivation of liberty and (2) that the deprivation be unlawful. The application for *habeas corpus* proceeds in three stages. As a threshold

matter, legal access to the writ requires that an applicant establish that they have been deprived of liberty. This first stage functions to filter out frivolous claims where there is no qualitative difference in liberty as between two states of confinement. In *Dumas*, the Court outlined three possible deprivations of liberty within the correctional context: (1) the initial deprivation of liberty, (2) a substantial change in conditions of confinement amounting to a further deprivation of liberty, and (3) a continuation of the deprivation of liberty. The third category is assessed on temporal length, unlike the first and second categories which are grounded in a sudden change in the status quo. It is only if the continuation of an initially valid deprivation of liberty becomes unlawful that it can be challenged by way of *habeas corpus*. These categories are not exhaustive — the actual analysis of whether a deprivation has occurred must always be undertaken from a qualitative perspective. Establishing the first element of a *habeas corpus* application requires that an inmate prove that their current state of confinement is more restrictive of their liberty that the state of confinement they allegedly ought to be in.

At the second stage of the application, once a deprivation of liberty is proven, the applicant must raise a legitimate ground upon which to question the legality of their current state of liberty deprivation. This means that the applicant's allegations and grounds pleaded must disclose some basis in fact and law that would allow the court to conclude that the continued deprivation of liberty is unlawful. At the third stage, after the applicant has discharged the burden of establishing a deprivation of liberty and raising a legitimate ground to question the lawfulness of that deprivation, the onus shifts to the detaining authority to prove the deprivation was lawful.

The analysis must inquire into whether there is a restriction on liberty as between two states of confinement. Not all carceral conditions will constitute deprivations of liberty: carceral conditions which do not result in a deprivation of liberty cannot form the basis for *habeas corpus* review. It is important not to conflate the three *Dumas* categories, which assist solely in determining the nature of the deprivation. The analysis of deprivations of liberty does not merely assess whether a change has occurred; if that were so, it would effectively eliminate the third *Dumas* category. The analysis must focus on whether the inmate is currently in a state of confinement that is relatively more restrictive of his liberty than where he allegedly ought to be.

For the third *Dumas* category, an inmate will establish a deprivation of liberty if they demonstrate that their current continuing state of incarceration is more restrictive of their liberty in comparison to the allegedly lawful state they seek to be released to. Entitlement to the less restrictive state does not form part of the analysis for a deprivation of liberty; rather, a legal entitlement to a certain form of incarceration is the outcome of a successful *habeas corpus* application, after being heard on its merits. A requirement of entitlement at the first stage of an application would preclude an arbitrarily detained applicant from ever having their application heard.

It is clear that the effect of security reclassification decisions within the federal correctional system may be to unlawfully detain an inmate in a higher, more restrictive facility than they lawfully ought to be detained in. Federal inmates' security

classifications and placements have a profound impact on their qualitative experience of incarceration and, in many instances, also on its duration. An inmate unlawfully held for an extended period at a higher security facility, having been wrongly denied a reclassification, faces the same deprivation of liberty as an inmate who has been unlawfully transferred to a higher security facility. Whether a security reclassification results in a deprivation of liberty is context-dependent and will depend on whether the decision results in actual physical constraints or deprivations of liberty that are more restrictive or severe than another, less restrictive security classification.

Within the context of a denied lower security reclassification, it is at the second stage that a court could decline to proceed to a hearing on the merits. An application that fails to establish proper grounds, which provide a legal basis for the claim of unlawfulness, will not proceed to stage three. Permitting access to *habeas corpus* in these circumstances will not open the floodgates. Courts can, and have, guarded against a flood of cases by declining applications that lack a legal basis. However, once a sound legal basis is established, courts should not be reluctant to allow such applications to proceed. The second stage is not concerned with the capacity of correctional institutions to justify the seemingly unlawful detention; rather, it is focused on ensuring meaningful access to justice to protect inmate's liberty rights.

Per **Côté**, **Rowe** and Jamal JJ. (dissenting): The appeal should be dismissed. While *habeas corpus* must remain available and accessible when its use is warranted, its scope is not unlimited. *Habeas corpus* is not, and should not become, an

unrestricted remedy used to challenge every feature in the correctional system otherwise left to the administrative state. *Dumas* established a requirement that the applicant must have a legal entitlement to reclassification and transfer to lower security in order to bring an application for *habeas corpus* based on a continued deprivation of liberty. When the current law as set out in *Dumas* is properly applied, resort to *habeas corpus* is not available for the inmates in the instant case to challenge the administrative decisions denying reclassification or transfer to lower security, as they had no legal entitlement to reclassification or transfer to lower security.

Habeas corpus does not extend to administrative correctional decisions which deny an inmate's transfer or reclassification request to a lower security classification. *Dumas* remains the precedent to determine whether a deprivation of residual liberty exists. *Dumas* emphasized that the deprivation of liberty crystallizes at the moment one's legal status changes, such as when parole is granted or a reclassification decision is to take effect. Accordingly, *habeas corpus* is only available to a federal inmate where they have been granted a reclassification or a transfer to a lower security facility but they have not yet been transferred. Entitlement to the less restrictive form of liberty is a prerequisite to establishing an unlawful deprivation of liberty under the third category of *Dumas*.

Furthermore, *habeas corpus* should not extend to administrative correctional decisions which deny an inmate's transfer or reclassification request to a lower security classification. *Habeas corpus* is an extraordinary remedy available to

those who are held in unlawful detention by agents of the state. In relation to inmates, the remedy should continue to be limited to challenge further deprivations of liberty within a prison, notably an inmate's unlawful transfer to a higher security facility or a more restrictive condition of imprisonment. Its expansion to reviewing decisions which do not alter an inmate's residual liberty nor impose a greater deprivation of liberty is unwarranted; it interferes with Parliament's scheme for the operation of institutions; and it sidesteps the administrative law framework. It is a procedure well suited to remedy unlawful deprivations of liberty, but ill suited as a substitute for internal review and judicial review of the operation of correctional institutions. The use of *habeas corpus* overrides the deference given to administrative decision-makers under the general law of judicial review.

While *habeas corpus* has been interpreted expansively, it cannot be used to challenge a deprivation of an anticipated right to residual liberty, one that has yet to occur. Expanding the availability of *habeas corpus* to denials of transfer to lower security levels risks distorting it into an alternative venue to challenge decisions of correctional administrators, undermining both the integrity of the writ and the orderly administration of the correctional system. It will also result in an unwarranted interference by superior courts with Parliament's legislative scheme.

The majority's approach will improperly expand access to *habeas corpus* and invite *ad hoc* decision making. The first stage of the *habeas corpus* analysis requires a true deprivation of liberty. However, the majority's approach removes the

requirement that an applicant alleging unlawful continued detention demonstrate an existing legal entitlement to greater residual liberty. This risks undermining one of the defining features of *habeas corpus*, namely, that it is an expeditious remedy. The first risk is practical: courts have limited capacity, and applicants who are unlawfully deprived of their liberty may face delays in obtaining relief while the courts address *habeas corpus* applications that do not involve genuine deprivations of liberty and that raise matters better left to correctional administrators. The second risk is normative: lowering the threshold for what constitutes a deprivation of liberty diminishes the importance of the interest at stake and, in turn, weakens the imperative of prompt resolution of *habeas corpus* applications. In addition, *habeas corpus* is not a tool by which to address systemic issues. It is focused on the individual claim of unlawful detention, so expanding its scope to tackle the larger issue of over-classification is a perilous endeavour.

The second stage in the *habeas corpus* analysis must be strengthened and explained if it is to filter out frivolous claims. There is disagreement with the majority's claim that the expanded scope of *habeas corpus* it proposes will not open the floodgates because courts are able to decline to hear a case on its merits if the applicant fails to raise a legitimate ground at the second stage of the analysis. It is now almost inevitably the case that the hearing of the application for a writ of *habeas corpus* becomes the substantive hearing. Further, it is doubtful that courts will consider *habeas corpus* applications concerning denials of transfers to a lower security facilities frivolous, given that inmates will easily demonstrate a deprivation of liberty. The second stage of

the *habeas corpus* analysis will not prevent the misuse of the writ that the majority reasons invite since an applicant need only identify an arguable issue and present a sound legal basis. The majority does not explain what this standard means or how to apply it.

Reasonableness review of administrative correctional decisions should remain the exclusive purview of the Federal Court as provided for by Parliament. Existing review mechanisms are adequate, and the familiarity of the Federal Court with such review in the operation of correctional facilities enables proper deference to be given to decisions by correctional administrators. Provincial superior courts' jurisdiction to issue writs of *habeas corpus* in the correctional context has never been wholly concurrent with the Federal Court's jurisdiction in the same context. Moreover, in adopting the majority's interpretation, there would be no way to resolve inconsistencies in the application of *habeas corpus* and its related jurisprudence, short of an appeal to the Court, given that appeals from the superior courts lie to the provincial courts of appeal.

There is disagreement with the majority's statement that superior court judges retain discretion to issue remedies beyond the standard remedy of release to a less restrictive security facility. The remedy of *habeas corpus* is non-discretionary; once the court has determined the detention is unlawful, it must remedy the unlawfulness. On a successful *habeas corpus* application in the carceral context, the

superior court would be obliged to release the inmate into a less restrictive security facility.

Cases Cited

By Moreau J.

Applied: *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502; *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459; **considered:** *R. v. Miller*, [1985] 2 S.C.R. 613; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; **referred to:** *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29, [2019] 2 S.C.R. 467; *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809; *Jones v. Cunningham*, 371 U.S. 236 (1962); *John Howard Society of Saskatchewan v. Saskatchewan (Attorney General)*, 2025 SCC 6; *Moldovan v. Canada (Attorney General)*, 2012 ONSC 2682, 291 C.C.C. (3d) 123; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662; *R. v. Gamble*, [1988] 2 S.C.R. 595; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Mapara v. Ferndale Institution (Warden)*, 2012 BCCA 127, 318 B.C.A.C. 139; *Lord v. Coulter*, 2007 BCSC 1758, 72 Admin. L.R. (4th) 264, aff'd 2009 BCCA 62, 266 B.C.A.C. 122; *Rain v. Canada (Parole Board)*, 2015 ABQB 639; *Ewanchuk v. Canada (Attorney General)*, 2017 ABQB 237, 354 C.C.C. (3d) 119; *Mennes v. Canada (Attorney General)*, 2008 CanLII 6424; *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165; *Reza v. Canada*, [1994] 2 S.C.R. 394; *Ogiamien v. Ontario (Community Safety and*

Correctional Services), 2017 ONCA 839, 55 Imm. L.R. (4th) 220; *Leinen v. Mission Institution (Warden)*, 2025 BCCA 257.

By Côté and Rowe JJ. (dissenting)

Dumas v. Leclerc Institute, [1986] 2 S.C.R. 459; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *R. (L.V.) v. Mountain Institution*, 2016 BCCA 467, 346 C.C.C. (3d) 254; *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502; *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809; *Phillip v. D.P.P.*, [1992] 1 A.C. 545; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *R. v. Miller*, [1985] 2 S.C.R. 613; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662; *Jones v. Cunningham*, 371 U.S. 236 (1962); *Peiroo v. Canada (Minister of Employment and Immigration)* (1989), 69 O.R. (2d) 253; *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29, [2019] 2 S.C.R. 467; *R. v. Gamble*, [1988] 2 S.C.R. 595; *Mapara v. Ferndale Institution (Warden)*, 2012 BCCA 127, 318 B.C.A.C. 139; *Lord v. Coulter*, 2007 BCSC 1758, 72 Admin. L.R. (4th) 264; *Ewanchuk v. Canada (Attorney General)*, 2017 ABQB 237, 354 C.C.C. (3d) 119; *Rain v. Canada (Parole Board)*, 2015 ABQB 639; *Latham v. Her Majesty the Queen*, 2018 ABQB 69, 72 Alta. L.R. (6th) 357; *R. v. Olson*, [1989] 1 S.C.R. 296; *Mackinnon v. Warden of Bowden Institution*, 2016 FCA 14; *Forner v. Professional Institute of the Public Service of Canada*, 2016 FCA 35, 481 N.R. 159; *Nova Scotia (Attorney General) v. Diggs and Wilband*, 2025 NSCA 20; *R.*

v. Haug, 2011 ABCA 153, 502 A.R. 392; *Moldovan v. Canada (Attorney General)*, 2012 ONSC 2682, 291 C.C.C. (3d) 123; *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 839, 55 Imm. L.R. (4th) 220; *Scotland v. Canada (Attorney General)*, 2017 ONSC 4850, 139 O.R. (3d) 191; *Ali v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 ONSC 2660, 137 O.R. (3d) 498.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 9, 10(c), 12, 24(1).

Code of Civil Procedure, CQLR, c. C-25.01, s. 399.

Corrections and Conditional Release Act, S.C. 1992, c. 20, ss. 4(c), 28, 30, 97, 98.

Corrections and Conditional Release Regulations, SOR/92-620, ss. 17, 18(b), (c).

Criminal Code, R.S.C. 1985, c. C-46.

Federal Courts Act, R.S.C. 1985, c. F-7, s. 18.1(2).

Federal Courts Rules, SOR/98-106, rr. 301 to 314.

Habeas Corpus Act, R.S.O. 1990, c. H.1, s. 1(1), (2).

Habeas Corpus Act, 1679 (Eng.), 31 Cha. 2, c. 2.

Authors Cited

Blackstone, William. *Commentaries on the Laws of England*, Book III. Oxford: Clarendon Press, 1768.

Canada. Correctional Service. *Commissioner's Directive 081: Offender Complaints and Grievances*, June 28, 2019 (online: https://www.canada.ca/en/correctional-service/corporate/acts-regulations-policy/commissioners-directives/081.html; archived version: https://www.scc-csc.ca/cso-dce/2025SCC-CSC38_1_eng.pdf).

Canada. Correctional Service. *Commissioner's Directive 705-7: Security Classification and Penitentiary Placement*, January 15, 2018 (online: https://www.canada.ca/en/correctional-service/corporate/acts-regulations-policy/commissioners-directives/705-7.html; archived version: https://www.scc-csc.ca/cso-dce/2025SCC-CSC38_2_eng.pdf).

Canada. Correctional Service. *Commissioner's Directive 710-6: Review of inmate security classification*, November 30, 2019 (online: https://www.canada.ca/en/correctional-service/corporate/acts-regulations-policy/commissioners-directives/710-6.html; archived version: https://www.scc-csc.ca/cso-dce/2025SCC-CSC38_3_eng.pdf).

De Smith's Judicial Review, 9th ed. by Ivan Hare, Catherine Donnelly and Joanna Bell, eds. London: Sweet & Maxwell, 2023.

Duker, William F. *A Constitutional History of Habeas Corpus*. Westport, Ct.: Greenwood Press, 1980.

Farbey, Judith, and Robert J. Sharpe, with Simon Atrill. *The Law of Habeas Corpus*, 3rd ed. New York: Oxford University Press, 2011.

Parkes, Debra. "The 'Great Writ' Reinvigorated? *Habeas Corpus* in Contemporary Canada" (2012), 36:1 *Man. L.J.* 351.

Salhany, R. E. *Canadian Criminal Procedure*, 6th ed. Toronto: Thomson Reuters, 2025 (loose-leaf updated April 2025, release 1).

APPEAL from a judgment of the Ontario Court of Appeal (Simmons, Harvison Young and George JJ.A.), 2023 ONCA 843, 169 O.R. (3d) 417, [2023] O.J. No. 5696 (Lexis), 2023 CarswellOnt 19927 (WL), affirming a decision of Speyer J., 2022 ONSC 2107, 513 C.R.R. (2d) 90, [2022] O.J. No. 3030 (Lexis), 2022 CarswellOnt 9414 (WL). Appeal allowed, Côté, Rowe and Jamal JJ. dissenting.

Adriel Weaver, *Jessica Orkin*, *Simon Borys* and *Kate Mitchell*, for the appellants.

John Provart and *Anusha Aruliah*, for the respondent.

Abdou Thiaw and *Christophe Achdjian*, for the intervener Attorney General of Quebec.

Freya Zaltz and *Davin Wong*, for the intervener Attorney General of British Columbia.

Paul Quick, for the intervener John Howard Society of Canada.

Jennifer Dagsvik and *Jamie Liew*, for the intervener Canadian Council for Refugees.

Amy Matychuk, for the intervener Alberta Prison Justice Society.

Emily Hill and *Matthew Malott*, for the intervener Aboriginal Legal Services.

John Trueman and *Danielle Wierenga*, for the intervener West Coast Prison Justice Society.

Frances Mahon and *Ga Grant*, for the intervener British Columbia Civil Liberties Association.

Jessica Rose and *Emma Arnold*, for the intervener Canadian Association of Elizabeth Fry Societies.

Molly Joeck and *Kes Posgate*, for the intervener Canadian Association of Refugee Lawyers.

Saneliso Moyo, *Geetha Philipupillai* and *Demar Kemar Hewitt*, for the intervener Black Legal Action Centre.

Nana Yanful and *Simone A. Akyianu*, for the intervener Pivot Legal Society.

Jessica Zita and *Jeffrey Hartman*, for the intervener Margaret Lee Cole.

Dan Goudge, for the intervener Canadian Civil Liberties Association.

Alison Craig, for the intervener Canadian Prison Law Association.

The judgment of Wagner C.J. and Karakatsanis, Martin, Kasirer, O'Bonsawin and Moreau JJ. was delivered by

MOREAU J. —

I. Introduction

[1] Over the past four decades, this Court has been resolute in its application of *habeas corpus* to the modern carceral context. Long revered as the great writ of liberty, *habeas corpus* review remains an essential safeguard against unlawful detention and a cornerstone for the protection of prisoner's rights. This Court has repeatedly stated that "*[h]abeas corpus* has never been 'a static, narrow, formalistic remedy'; rather, over the centuries, it 'has grown to achieve its grand purpose — the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty'" (*Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29, [2019] 2 S.C.R. 467, at para. 19, citing *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 21, and *Jones v. Cunningham*, 371 U.S. 236 (1962), at p. 243; *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, at para. 54).

[2] This Court has recognized that the writ, as both a right and remedy, must remain flexible and purposive in order to respond to unlawful deprivations of liberty. Moreover, the writ must remain available and accessible to those individuals whose liberty has been most restricted living within penitentiary walls. These individuals, already facing significant deprivations of their liberty, should have access to the expedient and effective relief long offered by *habeas corpus* where the deprivation of liberty becomes unlawful. A qualitative approach must be taken when assessing the meaning of "deprivation of liberty" which focuses on the actual effect of a particular form of confinement.

[3] This appeal requires the Court to decide a narrow question: whether inmates who are denied a lower security classification may *access* the writ of *habeas corpus*. Many such denials will, of course, be lawful, just as many decisions increasing an inmate's security classification are lawfully made. Yet the writ exists precisely for those occasions when carceral authorities exceed their lawful bounds. Broad and effective access to *habeas corpus* is paramount for those who suffer an unlawful and continued deprivation of their residual liberty and seek to challenge the legality of their confinement.

[4] Recently, in *John Howard Society of Saskatchewan v. Saskatchewan (Attorney General)*, 2025 SCC 6, this Court has reiterated the importance of taking a functional, rather than formalistic, approach when dealing with rights of inmates. To acknowledge that reality does not require altering the established framework of *habeas corpus*. The test remains as reiterated in *Khela*: to access the writ of *habeas corpus*, there must be a deprivation of liberty, and legitimate grounds to question the legality of the deprivation (para. 30). Applying that same test to a denial of a lower security classification that results in an unlawful continuation of more restrictive confinement is consistent with both precedent and principle.

[5] The appellants, two federal inmates, both applied to be transferred from medium- to minimum-security institutions. Despite both appellants having been recommended for reclassification and transfer to minimum-security facilities, in each case an administrative decision-maker rejected their reclassification. As a result, both

appellants continued to be confined in medium-security facilities until the next statutory date for their reclassification review. At the time this appeal was heard, both appellants were reclassified and transferred to minimum-security facilities following review at the statutorily-required date.

[6] In my view, the decision to continue a particular, more restrictive form of confinement instead of placing an inmate in a lower security facility results in a deprivation of liberty. The effect of being continually held in a higher security facility is substantially the same as an inmate being involuntarily transferred to a higher security facility. Both inmates face greater restrictions on their daily lives and both are deprived of their liberty relative to the facility in which they potentially ought to be placed. As I outline, any distinction between the two is erroneously based on a formalistic understanding of a deprivation of liberty.

[7] Furthermore, the existence of alternative procedures does not impact the threshold availability of *habeas corpus* when a lower security classification is denied to an inmate. Should an inmate prove a deprivation of liberty and raise a legitimate ground to question the legality of the deprivation, a hearing on the merits must follow. The writ is non-discretionary and release, in this case to a lower security facility, remains the remedy, however, courts have a degree of flexibility to impose appropriate conditions on release in the case before them.

[8] I would allow the appeal.

II. Background

A. *Statutory Scheme*

[9] This appeal concerns the federal correctional statutory scheme. The security classification of inmates in the federal correctional system is governed by the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("*CCRA*"), and the *Corrections and Conditional Release Regulations*, SOR/92-620 ("*CCRR*"). Additionally, detailed rules for applying the *CCRA* are set out in Commissioner's Directives — binding internal policies issued by the Commissioner of Corrections pursuant to ss. 97 and 98 of the *CCRA*. In this appeal, three such directives are particularly relevant: *Commissioner's Directive 705-7: Security Classification and Penitentiary Placement* (January 15, 2018 (online)) ("CD 705-7"), *Commissioner's Directive 710-6: Review of inmate security classification* (November 30, 2019 (online)) ("CD 710-6"), and *Commissioner's Directive 081: Offender Complaints and Grievances* (June 28, 2019 (online)) ("CD 081").

[10] Under s. 30 of the *CCRA*, Correctional Service Canada ("CSC") must assign each inmate one of three security levels (maximum, medium, or minimum) and place them in an appropriate penitentiary. Placement must be consistent with s. 28 of the *CCRA*, which requires CSC to take reasonable steps to ensure that an inmate is held in the least restrictive environment appropriate to their case. These decisions are guided by s. 17 of the *CCRR*, which sets out the factors to be considered, including the seriousness of the offence, institutional behaviour, and potential for violent behaviour.

[11] The *CCRR* defines the thresholds for each security level. Referring to the security levels relevant to the appeal, a minimum-security classification is reserved for inmates who present "a low probability of escape and a low risk to the safety of the public" and require "a low degree of supervision and control" (s. 18(c)); a medium-security classification is reserved for inmates who present "a low to moderate probability of escape and a moderate risk to the safety of the public" and require a "moderate degree of supervision and control" (s. 18(b)). These definitions inform both initial placement and any future reclassification.

[12] Further, detailed rules in the Commissioner's Directives govern CSC's assessment of classification. Pursuant to CD 705-7, CSC is required to use a combination of actuarial tools and individualized analysis in all classification decisions. At intake, staff must complete a Custody Rating Scale to guide initial placement. At review or reclassification, a Security Reclassification Scale is used (CD 710-6). In all cases, staff must prepare a written Assessment for Decision that includes ratings on three mandatory factors: institutional adjustment, escape risk, and risk to public safety (CD 705-7, s. 6). These ratings must be explained and any divergence from the scale must be justified in writing.

[13] In most cases, the final decision-maker is the institutional head — the person normally in charge of the penitentiary and typically the warden (CD 705-7, s. 5; CD 710-6, s. 3(2)). However, when the inmate is a dangerous offender, there are additional layers of review. In such cases, the institutional head's decision must be

supported by the Regional Deputy Commissioner ("RDC") and approved by the Assistant Commissioner, Correctional Operations and Programs ("ACCOP"), who serves as the final authority (CD 705-7, s. 5; CD 710-6, s. 3(2)).

[14] Inmates in medium- or maximum-security are entitled to a review of their security classification at least every two years, with earlier reviews triggered by the completion of a correctional program for Indigenous inmates (CD 710-6, ss. 7 and 8). Once a decision is made, the inmate must be informed in writing within five working days, along with the reasons and the information relied upon (CD 710-6, s. 5). Inmates must also be informed of their right to grieve the decision (*ibid.*).

[15] The grievance process is set out in CD 081. Reclassification decisions, as decisions of the institutional head or higher, are appealed directly to the final, national level of the inmate grievance system (CD 081, s. 7; CD 710-6, s. 3). These national level grievances are decided by the Assistant Commissioner, Policy, or an equivalent or higher-ranking designate (CD 081, s. 8). Grievance decisions can be judicially reviewed in the Federal Court. In addition, inmates may bring concerns to the Office of the Correctional Investigator, an independent oversight body with the power to investigate and report on CSC practices (CD 081, s. 15).

B. *Frank Dorsey and Ghassan Salah*

[16] Frank Dorsey is a 64-year-old Black Canadian who has been incarcerated since 1999, first pending trial and then as a federal prisoner following conviction. He was designated as a dangerous offender and received an indeterminate sentence.

[17] In 2019, Mr. Dorsey requested a security reclassification in order to be transferred from a medium-security institution to a minimum-security institution. His request was supported by his case management team ("CMT"), the Manager of Assessment and Intervention ("MAI"), and the Warden, all of whom concluded that he met the criteria for a minimum-security placement. However, reclassification decisions for dangerous offenders must also be approved by the RDC and the ACCOP. On September 9, 2019, the RDC concluded that Mr. Dorsey posed a "moderate" public safety risk and denied his reclassification request.

[18] In Mr. Dorsey's subsequent security classification review two years later in 2021, his CMT and the Warden again recommended that he be reclassified as minimum security. This time, the RDC concurred in that recommendation and, on October 25, 2021, the ACCOP gave the final approval, reclassifying and transferring Mr. Dorsey to minimum security.

[19] Ghassan Salah is a Jordanian citizen who has been incarcerated since 2004 and began serving concurrent life sentences in 2006 with no eligibility for day parole until 2026. Given his citizenship status, he is subject to a deportation order.

[20] In 2019, Mr. Salah requested a security reclassification in order to be transferred from a medium-security institution to a minimum-security institution. His request was initially supported by his parole officer and the MAI. However, a new MAI was later assigned to his file and, on November 11, 2019, reassessed him as a moderate escape risk based on the existence of a deportation order. The Warden accepted this assessment and denied the request. Mr. Salah was advised that he could not reapply until two years before his parole eligibility date. This time, in May 2024, Mr. Salah was reclassified as minimum security and transferred accordingly.

C. *Judgments Below*

[21] Prior to being reclassified as minimum security, both appellants filed applications in 2019 for *habeas corpus ad subjiciendum* with *certiorari* in aid, seeking orders that CSC either transfer them to minimum-security institutions or justify their continued detention in medium-security settings. Although their applications were not formally brought under the *Canadian Charter of Rights and Freedoms*, the appellants alleged that their continued classification engaged their ss. 7, 9, 10(c) and 12 *Charter* rights.

(1) Ontario Superior Court of Justice, 2022 ONSC 2107, 513 C.R.R. (2d) 90 (Speyer J.)

[22] On consent, the applications were joined on January 25, 2021 for the limited purpose of determining a common threshold legal issue: Is *habeas corpus* available to challenge CSC's refusal to reclassify an inmate to a lower security level?

[23] The application judge concluded that the appellants' circumstances did not fall within the third *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459, category (a continuation of a deprivation of liberty that has become unlawful). Citing a series of cases from the Ontario Superior Court of Justice, starting with *Moldovan v. Canada (Attorney General)*, 2012 ONSC 2682, 291 C.C.C. (3d) 123, the application judge concluded that she was bound by horizontal *stare decisis* to conclude that there is no deprivation of liberty when an inmate is denied a reclassification. In her view, these cases had overtaken an earlier line of Superior Court decisions preceding *Moldovan* that concluded *habeas corpus* was available.

[24] After distinguishing a series of appellate cases, the application judge concluded that the third *Dumas* category only "appears to have been applied in cases of extended detentions or detentions of uncertain duration" or "in criminal cases where the sentence imposed has become unlawful" (para. 73). Because there was no change in status quo, the application judge was satisfied that the appellants' residual liberty had not been reduced. *Habeas corpus* was therefore not available to them and their applications were dismissed.

(2) Ontario Court of Appeal, 2023 ONCA 843, 169 O.R. (3d) 417 (Harvison Young and George JJ.A., Simmons J.A. Dissenting)

[25] George J.A., writing for the majority, dismissed the appeal. The appellants renewed their argument that CSC's refusal to reclassify them as minimum security amounted to a continuation of an unlawful deprivation of liberty, falling within the third category established in *Dumas*. George J.A. held that the third category of *Dumas* is only available if an inmate becomes entitled to greater liberty than that afforded by their continued detention. Access to the third *Dumas* category required the appellants to have acquired the "status" of a minimum-security classification. Only if that status was obtained and they were not transferred could it be said that they were subject to an unlawful continuation of a deprivation of liberty.

[26] George J.A. relied on this Court's decisions in *May* and *Khela*, noting that both decisions reaffirmed that "a deprivation of residual liberty under the third *Dumas* category will only arise when the conditions of an inmate's continued detention have somehow changed" (para. 48). A change in the nature of a continued detention is a prerequisite to questioning its legality.

[27] Simmons J.A. dissented, concluding that the appellants could avail themselves of *habeas corpus*. In her view, *Dumas* did not establish a "general rule concerning the point at which an initially valid deprivation of liberty becomes unlawful", and noted that *Dumas* linked unlawfulness to a "particular status" in the context of a decision concerning parole (para. 106). In other words, *Dumas* did not prevent continuations of a deprivation of liberty from being challenged in

circumstances other than those where the inmate obtains a greater liberty interest or where there is a change in the status quo.

[28] She determined that there was no reason to deny access to *habeas corpus* where there are grounds for concluding that the refusal of a lower security classification was unreasonable. On the majority's reading, prison officials could unlawfully exceed their authority in depriving inmates of a lower security classification, but inmates would not be able to challenge such unlawfulness by way of *habeas corpus*. In her view, when inmates are unlawfully denied reclassification, a continuation of their deprivation of liberty is made out and they should have resort to *habeas corpus* if they can show that legitimate grounds exist for questioning the lawfulness of the denial of a lower security classification such that the reclassification would otherwise have been made. She observed that "[p]ermitting resort to *habeas corpus* in such circumstances does not presume an entitlement to a lower security classification", which would be determined on the ultimate assessment of the lawfulness of the denial (para. 114).

III. Issue on Appeal

[29] The appeal raises a single issue: Is *habeas corpus* available to challenge CSC's refusal to reclassify an inmate to a lower security level?

[30] This appeal is now moot as both appellants have been reclassified and transferred to minimum-security facilities. Nonetheless, all parties ask the Court to

exercise its discretion to hear the appeal. I agree that it is in the interests of justice for this Court to resolve this outstanding legal issue of public importance, given the disagreement and full argument of the parties on the issue, and the temporal nature of *habeas corpus* applications renders them evasive of review (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; see, e.g., *Khela*, at para. 14).

IV. Analysis

A. *General Principles of Habeas Corpus*

[31] Historically, *habeas corpus* was a means to ensure that a defendant in an action was brought physically before the Court (J. Farbey and R. J. Sharpe, with S. Atrill, *The Law of Habeas Corpus* (3rd ed. 2011), at p. 16). Over time, the writ transformed into a vehicle for reviewing the justification for a person's imprisonment. Blackstone described *habeas corpus* as the "great and efficacious writ in all manner of illegal confinement" (W. Blackstone, *Commentaries on the Laws of England* (1768), Book III, at p. 132.). The remedy of *habeas corpus* was codified for the first time in 1641 in England, and then for a second time in the *Habeas Corpus Act* of 1679 (Eng.), 31 Cha. 2, c. 2 (*Khela*, at para. 28). The purpose for doing so was to address delays in obtaining the writ, ensure prisoners were provided with copies of their warrants to understand the grounds for their detention, and ensure that prisoners "would not be taken to places beyond the reach of the writ" (Farbey and Sharpe, at p. 16).

[32] Subsequently, Canadian law has sought to preserve the objects of the *Habeas Corpus Act*, which "embodied the evolving purposes and principles of the writ" (*Khela*, at para. 29). This Court has recognized that the writ is "the strongest tool a prisoner has to ensure that the deprivation of his or her liberty is not unlawful" and that it "should develop over time to ensure that the law remains consistent with the remedy's underlying goals" (paras. 29 and 54).

[33] *Habeas corpus* is now enshrined in s. 10(c) of the *Charter*, but it also intersects and protects two of our most fundamental rights: 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); and the right not to be arbitrarily detained or imprisoned (s. 9) (*Khela*, at para. 29; *May*, at para 22). Courts must never lose sight of the underlying liberty interest of the applicant and are not bound to limited categories or definitions of review (*Khela*, at para. 55). Access to the remedy should rarely be subject to restrictions (*Khela*, at para. 54).

[34] Given that *habeas corpus* safeguards against wrongful restraints on liberty, the jurisprudence has remained resolute in upholding the broad and accessible character of the writ. This Court has consistently held that "jurisprudential developments limiting *habeas corpus* jurisdiction should be carefully evaluated and should not be allowed to expand unchecked. The exceptions to *habeas corpus* jurisdiction . . . should be well defined and limited" (*May*, at para. 50). Broad and unobstructed access to the writ has

animated the past 40 years of jurisprudence on *habeas corpus* as this Court has expanded the grounds for reviewing the legality of deprivations of liberty.

[35] Despite its antiquity, *habeas corpus* remains the strongest tool for prisoners in ensuring that a deprivation of their residual liberty is not unlawful (*Khela*, at para. 29). Four decades ago, this Court clarified the scope of *habeas corpus* in the trilogy of *R. v. Miller*, [1985] 2 S.C.R. 613, *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, and *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662 (collectively, the "*Miller* trilogy") confirming that the writ was available to inmates challenging their administrative segregation, noting these restrictive forms of custody are a "prison within a prison" (*Miller*, at p. 668). The *Miller* trilogy recognized that a deprivation of liberty within the carceral context constricts what little residual liberty inmates have left and that *habeas corpus* is available to challenge unlawful deprivations of their residual liberty, despite inmates not being released back into the public.

B. *Legal Framework for Habeas Corpus Applications*

[36] The criteria for a successful *habeas corpus* application are well established, requiring (1) a deprivation of liberty and (2) that the deprivation be unlawful (*Khela*, at para. 30).

[37] The application for *habeas corpus* proceeds in three stages.

[38] As a threshold matter, legal access to the writ requires that an applicant establish that they have been deprived of liberty. Once a deprivation of liberty is proven, the applicant must raise a legitimate ground upon which to question its legality. If the applicant has raised such a ground, the onus shifts to the respondent authorities to show that the deprivation of liberty was lawful (*Khela*, at para. 30; Farbey and Sharpe, at p. 85; *May*, at para. 74). If the applicant meets this onus, the onus for establishing the lawfulness of the deprivation of liberty shifts to the detaining authority (*May*, at para. 74; *Khela*, at para. 30). As stated by this Court in *Khela*, this shifting onus plays a crucial and historically significant role in *habeas corpus* applications:

> This particular shift in onus is unique to the writ of *habeas corpus*. Shifting the legal burden onto the detaining authorities is compatible with the very foundation of the law of *habeas corpus*, namely that a deprivation of liberty is permissible only if the party effecting the deprivation can demonstrate that it is justified. [para. 40]

[39] Lastly, inmates may apply for *certiorari* in aid of *habeas corpus*, which permits the institutional decision-making record to be brought before the judge (*Khela*, at para. 35).

(1) Stage One: Deprivation of Liberty

[40] In *Dumas*, this Court outlined three possible deprivations of liberty within the correctional context: ". . . the initial deprivation of liberty, a substantial change in conditions [of confinement] amounting to a further deprivation of liberty, and a continuation of the deprivation of liberty" (p. 464). This appeal focuses on the third

category, a "continuation" of liberty deprivation. Examples of continued deprivations — both in and outside the carceral context — can be found in *Chhina* and *Cardinal*, where the initial detention was valid, but due to the extended length or uncertainty of the duration of the detention, it became unlawful. As the Court confirmed in *Dumas*, it is only if the continuation of an initially valid deprivation of liberty becomes unlawful that it can be challenged by way of *habeas corpus* (*ibid.*). The third *Dumas* category is assessed on temporal length, unlike the first and second categories which are grounded in a sudden change in the status quo.

[41] I note that these categories are not exhaustive, but rather they assist "in pinpointing the nature of a challenge to a deprivation of liberty for reasons beyond those underlying an initial order" (*Chhina*, at para. 23). This Court has applied these categories broadly to frame a particular type of deprivation, but the actual analysis of whether a deprivation has occurred must always be undertaken from a qualitative perspective (*R. v. Gamble*, [1988] 2 S.C.R. 595, at p. 644). As stated in *Gamble*, any distinctions regarding the availability of *habeas corpus* review that are "uncertain, technical, artificial and, most importantly, non-purposive should be rejected" (p. 640).

[42] Within the carceral context, a deprivation of liberty is always relative, often dealing with various restrictions on an inmate's residual liberty. As emphasized in *Miller*, "a prisoner has the right not to be deprived unlawfully of the *relative or residual* liberty permitted to the general inmate population of an institution" (p. 637 (emphasis added)).

[43] Establishing the first element of a *habeas corpus* application therefore requires that an inmate prove that their current state of confinement is more restrictive of their liberty than the state of confinement they allegedly ought to be in. For example, an inmate in segregation is deprived of his liberty *relative* to those inmates not placed in segregation. The case law has now recognized certain obvious relative restrictions as between states of confinement, such as segregation in contrast to general population and the tiered restrictions on liberty as between minimum-, medium-, and maximum-security federal facilities (see, e.g., *Cardinal*, *May*, and *Khela*).

[44] The writ of *habeas corpus* exists to release a person from an unlawful deprivation of their liberty. Care must be taken not to lose sight of this objective. The first stage functions to filter out frivolous claims where there is no qualitative difference in liberty as between two states of confinement. All applications for *habeas corpus*, irrespective of a particular *Dumas* category, face further filtering at the second stage: raising a legitimate ground to question the lawfulness of the deprivation of their liberty.

(2) Stage Two: Legitimate Ground for Questioning the Lawfulness of the Deprivation of Liberty

[45] Once an applicant has proven a deprivation of their liberty, they must next raise a legitimate ground for questioning the legality of their current state of liberty deprivation. In order for a detention to be lawful, the decision maker must have jurisdictional authority to order the detention, the decision-making process must be procedurally fair, and the decision to detain must be both reasonable and *Charter*-

compliant (*Chhina*, at para. 17; *May*, at para. 77). A detention will be unreasonable if it is arbitrary or lacking an evidentiary foundation (*Khela*, at para. 67).

[46] With respect to the second stage, the applicant must establish a basis for the alleged grounds of unlawfulness. This means that, as preliminary matter, the applicant's allegations and grounds pleaded must disclose some basis in fact and law that would allow the court to conclude that the continued deprivation of liberty is unlawful (see *Khela*, at para. 41; *May*, at para. 33).

[47] It bears repeating that the writ of *habeas corpus* is non-discretionary, meaning that "the matter *must* proceed to a hearing if the inmate shows some basis for concluding that the detention is unlawful" (*Khela*, at para. 41 (emphasis in original)). Therefore, if an inmate "raise[s] an arguable issue there is no room for discretion: the matter should proceed to hearing so that a full and proper determination can be made" (Farbey and Sharpe, at p. 53).

[48] Both appellants initially sought relief pursuant to Ontario's *Habeas Corpus Act*, R.S.O. 1990, c. H.1. I should point out that s. 1(1) of the Act requires "reasonable and probable ground for the complaint" as opposed to requiring a "legitimate ground" for questioning the legality of the deprivation of liberty. Whether these requirements are conceptually different, or impose a different burden on the applicant, is not a question before this Court. As such, a technical analysis of the implications of this linguistic difference is not necessary to resolve this appeal. As neither of the parties presented arguments on this subject, I will refrain from further comment.

(3) Stage Three: Burden Shifts to Detaining Authority To Justify the Detention

[49] After the applicant has discharged the burden of (1) establishing a deprivation of liberty and (2) raising a legitimate ground to question the lawfulness of that deprivation, the onus shifts to the detaining authority to prove the deprivation was lawful.

[50] Although this appeal is concerned solely with access to *habeas corpus* where a reclassification request is refused, I note with respect to the ultimate merits that it is for the hearing judge to determine whether a particular breach of the *CCRA* is unfair or whether a decision was truly unreasonable, having reviewed the full evidentiary record. As this Court stated in *Khela*, "not all breaches of the *CCRA* or the *CCRR* will be unfair. . . . [T]he reviewing judge must determine whether that error or that technicality rendered the decision procedurally unfair" (para. 90). Likewise, decisions are not unreasonable merely because certain indicia point in the opposite direction, and it is for a hearing judge, with access to the full record, to make a holistic determination (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 102 and 105).

C. *Availability of Habeas Corpus for Security Reclassification*

[51] With this legal framework in mind, I next consider whether the decision to deny a lower security reclassification is reviewable by way of *habeas corpus*. As I will explain, such a decision has the qualitative effect of restricting liberty.

(1) Denial of Lower Security Reclassification Is a Deprivation of Liberty

[52] The first question is whether a denial of lower security reclassification is a deprivation of liberty.

(a) *Relative Restrictions in Liberty*

[53] A security reclassification decision has three possible outcomes: a transfer to a higher security facility, a transfer to a lower security facility, or no transfer. Of course, inmates who are reclassified to a lower security facility will not require access to the writ. Both *May* and *Khela* dealt with reclassification decisions where the outcome was a transfer to a higher security facility. Here, the outcome of the reclassification decision is a continuation of a current security classification.

[54] As noted above, the analysis must inquire into whether there is a restriction on liberty as between two states of confinement. For example, the relational focus in *Miller* was on administrative segregation versus the general population within one federal facility; however, in my view, the same relative comparison applies as between two separate facilities (i.e., an inmate being held in a maximum-security facility is more deprived of his liberty than if he was placed in a medium-security facility). In *Miller*, establishing a deprivation of liberty required proof of "a distinct form of confinement or detention in which the actual physical constraint or deprivation of liberty, as distinct from the mere loss of certain privileges, is more restrictive or severe than the normal one in an institution" (p. 641). Transposing this logic onto security reclassifications,

the salient comparison is between a current restrictive classification in contrast to another, less restrictive, classification.

[55] Undoubtedly, not all carceral conditions will constitute deprivations of liberty. My colleagues note that "*habeas corpus* is not an unrestricted remedy to challenge an ever-widening range of conditions of incarceration" (para. 160). I do not contend otherwise. Again, in *Miller*, this Court explained that *habeas corpus* is not meant "to challenge any and all conditions of confinement in a penitentiary or prison, including the loss of any privilege enjoyed by the general inmate population" (p. 641).

[56] Since the *Miller* trilogy, courts have held that denial of or inability to access rehabilitative programming does not constitute a deprivation of liberty (*Mapara v. Ferndale Institution (Warden)*, 2012 BCCA 127, 318 B.C.A.C. 139, at paras. 12-15; *Lord v. Coulter*, 2007 BCSC 1758, 72 Admin. L.R. (4th) 264, at paras. 60-63, aff'd 2009 BCCA 62, 266 B.C.A.C. 122; *Rain v. Canada (Parole Board)*, 2015 ABQB 639, at para. 15). Furthermore, in *Ewanchuk v. Canada (Attorney General)*, 2017 ABQB 237, 354 C.C.C. (3d) 119, the court held that *habeas corpus* does not apply in situations involving temporary lock downs and other intermittent forms of detention; rude, abusive, or inattentive staff; exposure to dangerous inmates; complaints about food, medical accommodations, and hygiene; complaints that the inmate grievance procedures are ineffective; inadequate mail services and searches of mail; inadequate access or excessively expensive telephone communications; and restrictions that impede legal research, document preparation, and litigation activities (para. 65).

Likewise, in *Mennes v. Canada (Attorney General)*, 2008 CanLII 6424, the Ontario Superior Court of Justice held that housing an inmate in a double occupancy room instead of a single occupancy room does not engage a deprivation of liberty (paras. 27-28).

[57] Contrary to my colleagues' suggestion, access to *habeas corpus* has not undergone and, following this appeal, does not risk undergoing unrestrained expansion. The examples listed above demonstrate that *habeas corpus* is circumscribed to carceral conditions which amount to a deprivation of liberty. Carceral conditions which do not result in a deprivation of liberty cannot form the basis for *habeas corpus* review. This Court has previously recognized that "[t]he conditions of imprisonment have traditionally been understood as falling within the purview of correctional institutions, not courts" (*John Howard Society of Saskatchewan*, at para. 40). These reasons should not be read as departing from that established understanding. The mere loss of certain privileges is distinct from an unlawful decision to maintain a more restrictive form of incarceration (*Miller*, at p. 641).

[58] It is important not to conflate the three *Dumas* categories, which assist solely in determining the *nature* of the deprivation, with an analysis of whether there is a deprivation of liberty between two distinct forms of confinement. The analysis of deprivations of liberty does not merely assess whether a change has occurred; if that were so, it would effectively eliminate the third *Dumas* category. The analysis must

focus on whether the inmate is currently in a state of confinement that is *relatively* more restrictive of his liberty than where he allegedly ought to be.

[59] It is less difficult to identify when a deprivation has arisen with respect to the first and second categories, namely, when a change results in depriving the inmate of liberty relative to his prior state. These two categories require an overt change in liberty, so courts can readily establish a deprivation so long as the change is between relative states of liberty deprivation and not mere privileges. The analysis of a "deprivation of liberty" for these first two categories has tended to be straightforward. For instance, in *May*, this Court concluded in one pithy paragraph that a deprivation of liberty was established when inmates were transferred to a higher security facility (para. 76).

[60] Turning to the third category, a continual confinement that results in a deprivation of liberty, the analysis remains one of comparing two relative states. The analysis here is the same as above. An inmate will establish a deprivation of liberty if they demonstrate that their current continuing state of incarceration is more restrictive of their liberty than the allegedly lawful state they seek to be released to. For example, in *Cardinal*, where the applicants were lawfully placed in administrative segregation but it was their *continued* confinement in segregation, as opposed to the general population, that was found to be unlawful.

[61] Establishing a deprivation of liberty is not contingent on a change in status quo. A "change in status quo" speaks to the first and second *Dumas* categories and is

useful only as a proxy for comparing two distinct states of liberty restriction. Unlike the first and second categories of *Dumas*, which are defined by a change in conditions, the third category is marked by the distinct absence of any change. If it were necessary to show that an inmate had previously experienced a greater degree of liberty, and then was deprived of such liberty, there would conceptually be no space left for the third category.

[62] I can see no principled reason for permitting access to the writ based solely on an inmate having already experienced greater freedom (such as before being placed in segregation) but, conversely, prohibiting access to the writ because one seeks — but has not yet experienced — greater freedom. I reject the lower courts' and the respondent's assertion that, because an inmate has never enjoyed a less restrictive form of imprisonment, they have not been deprived of liberty. This formalistic, and unduly narrow, interpretation of liberty deprivation is discordant with both the general tenor of our Court's jurisprudence on *habeas corpus* and a purposive interpretation of *Charter* rights. As Justice Wilson stated in *Gamble*, "the effects of a deprivation of liberty or a continuation of a particular form of deprivation of liberty should be reviewed from a qualitative perspective" (p. 644). The concept of status quo serves no purpose when analyzing whether a continual state of confinement is a deprivation of liberty.

(b) *No Entitlement Necessary*

[63] In my view, the courts below erred in holding that an applicant must first prove an "entitlement" to the less restrictive state in order to establish a deprivation of liberty. The respondent echoed this line of reasoning, arguing that, for a continuation to be tantamount to a deprivation of liberty, it must involve circumstances where an initially lawful detention becomes "unlawful because of a change in the legal entitlement of the detainee" (R.F., at para. 60). Entitlement has never formed part of the analysis for a deprivation of liberty; rather, a legal entitlement to a certain form of incarceration is the outcome of a successful *habeas corpus* application, after being heard on its merits. A requirement of entitlement at the first stage of an application would preclude an arbitrarily detained applicant from ever having their application heard.

[64] Reliance on entitlement appears to come from a misinterpretation of *Dumas*, which dealt with an inmate challenging a continuation of his deprivation of liberty. In that case, Mr. Dumas was initially granted day parole by the National Parole Board ("NPB"), conditional on his acceptance into a community residential centre. In the interim, Mr. Dumas committed various disciplinary offences and, following a review, the NPB revoked their prior approval of day parole before it ever took effect. Mr. Dumas commenced a *habeas corpus* application challenging his denial of day parole. This Court concluded that he had no right to *habeas corpus*, holding that the "continuation of an initially valid deprivation of liberty can be challenged by way of *habeas corpus* only if it becomes unlawful" (p. 464). The Court noted that: "In the context of parole, the continued detention of an inmate will only become unlawful if

he has acquired the status of a parolee" (*ibid.*). When a decision to grant parole is conditional, an "inmate only becomes a parolee if and when the condition is fulfilled" (*ibid.*). In the case of Mr. Dumas, because the condition was never fulfilled: he was never granted parolee status and therefore had no right to *habeas corpus* (p. 465).

[65] Based on these facts, access to *habeas corpus* was denied because Mr. Dumas failed to raise legitimate grounds for challenging the legality of his deprivation of liberty — the second prerequisite for accessing a merits hearing. This Court was clear that Mr. Dumas had not alleged that the NPB acted without jurisdiction, deprived him of procedural fairness, or infringed the *Charter* (*Dumas*, at p. 465). In other words, Mr. Dumas failed to provide a legitimate ground for questioning the deprivation. I note that *Dumas* was decided well before this Court held in *Khela* that *habeas corpus* was available to challenge the substantive reasonableness of an administrative decision-maker.

[66] Moreover, there was no entitlement to the less restrictive state of liberty in *Cardinal*, a case dealing with a continuation of liberty deprivation. In *Cardinal*, the applicants were moved from a medium- to maximum-security facility following a hostage-taking situation. The applicants were immediately placed in segregation. The Segregation Review Board subsequently recommended that the applicants be moved to the general population, but the Director maintained the right to refuse this recommendation. This Court held that the Director's decision to *continue to hold* the applicants in segregation was unlawful because it was procedurally unfair (p. 661).

However, had the Director notified the applicants that he intended to reject the Segregation Review Board's recommendation and provided them with an opportunity to be heard, procedural fairness would have been met and the decision to continue the segregation could have been found to have been lawful (pp. 659-60). Therefore, importantly, at no point did the applicants have a crystallized entitlement to be transferred to the general population. Rather, a recommendation was made and a decision-maker declined that recommendation. Notably, the remedy for the procedural unfairness was to release the applicants into the general population of a new institution, despite having had no prior interaction with that population.

[67] As these cases demonstrate, the first stage requires an applicant to establish that their present state of liberty is restricted relative to that which they allegedly ought to lawfully be in, and does not require that they establish a formal entitlement. The focus is on the effect of a particular type or level of detention and must be reviewed from a qualitative perspective. This stage should not function to prevent access to the writ based on formalistic distinctions.

(c) *Impact of Security Reclassification*

[68] Turning to the impact of security reclassification decisions within the federal correctional system, in my view, it is clear that their effect may be to unlawfully detain an inmate in a higher, more restrictive facility than they lawfully ought to be detained in. Federal inmates' security classifications and placements have a profound

impact on their qualitative experience of incarceration and, in many instances, also on its duration.

[69] Security classification and placement will impact the degree of access an inmate has to correctional programs, rehabilitative opportunities, private family visits, work opportunities, and temporary absences, as well as the eventual timing of their release, all of which may well impact their successful reintegration into the community. For inmates serving life or indeterminate sentences, such as the appellants, transfer to a minimum-security facility is often the prerequisite to a conditional release.

[70] This Court has recognized the non-trivial and substantial liberty restrictions as between minimum-, medium-, and maximum-security federal facilities and established that a transfer to a higher security facility constitutes a deprivation of liberty (see, e.g., *May*; *Khela*). In my view, an inmate unlawfully held for an extended period at a higher security facility, having been wrongly denied a reclassification, faces the same deprivation of liberty as an inmate who has been unlawfully transferred to a higher security facility.

[71] Whether a security reclassification results in a deprivation of liberty is ultimately context-dependent. It will depend on whether the decision results in actual physical constraints or deprivations of liberty that are more restrictive or severe than another, less restrictive security classification. Security reclassification decisions that, in practice, result in an insignificant or trivial limitation on an inmate's rights would not constitute a deprivation of liberty for the purposes of *habeas corpus*.

[72] Moreover, as several interveners point out, marginalized Black and Indigenous inmates are more likely to be over-classified, meaning they are more likely to be assessed at a higher security level than their non-marginalized peers (see, e.g., I.F., Aboriginal Legal Services, at paras. 9-15; I.F., Black Legal Action Centre, at paras. 10-12; I.F., Canadian Association of Elizabeth Fry Societies, at para. 10). Over-classification disproportionately places Black and Indigenous inmates in higher, more restrictive security facilities with a lesser degree of access to rehabilitative opportunities that promote successful reintegration into the community upon release. Notably, the inability to reach a lower security classification can preclude inmates from qualifying for culturally responsive environments and programming, such as the Healing Lodge (*Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, at para. 65; A.F., at para. 40). In turn, impeding access to the writ will disproportionately impact these marginalized groups' ability to cascade to lower security levels and, ultimately, to rehabilitate and reintegrate.

[73] To summarize, the decision to increase a security classification is a deprivation of liberty, as is the decision to deny a lower security classification. However, in both situations, access to *habeas corpus* will still require an applicant to raise a legitimate ground for the unlawfulness of that particular decision. What amounts to legitimate grounds must be assessed on a case-by-case basis. As discussed above, at the second stage, an applicant must raise a legitimate ground to question the lawfulness of the denial of a lower security classification because it was either procedurally unfair, unreasonable, outside the decision maker's jurisdiction, failed to comply with the

Charter, or a combination of these reasons. Failure to raise a legitimate ground at the second stage will result in the dismissal of the *habeas corpus* application. This requirement ensures that only claims with a sound legal foundation proceed to the merits, thereby preventing misuse of the writ.

[74] Within the context of a denial of a lower security reclassification, it would be at this second threshold stage that a court could decline to proceed to a hearing on the merits. An application that fails to establish proper grounds, which provide a legal basis for the claim of unlawfulness, will not proceed to stage three of the *habeas corpus* process. I do not agree that permitting access to *habeas corpus* in these circumstances will open the floodgates as the respondent suggests (R.F., at para. 107, citing application judge's reasons, at para. 49). At this second stage, the applicant is required to raise a legitimate ground to question the lawfulness of the deprivation of their liberty. To do so, they must identify an arguable issue and present a sound legal basis for their claim (see Farbey and Sharpe, at p. 53). Importantly, this second stage engages the courts' gatekeeping function and courts should take care to decline to hear a case on its merits where the applicant does not meet this threshold (see *Khela*, at para. 41).

[75] The governing test, as articulated in *Dumas* and affirmed in *May*, *Khela*, and subsequent cases, remains unchanged. This Court has consistently applied the test in line with the expansive and purposive approach to *habeas corpus* recognized in *Dumas.* In the present context — where unlawful restraints on liberty arise from the wrongful denial of security reclassifications — the remedy clearly falls within the

established scope. The traditional onuses associated with the writ should remain unchanged; once the inmate demonstrates a deprivation of liberty, all that is required is that they cast a doubt on the lawfulness of the deprivation (*Khela*, at para. 77). To unduly narrow this scope would constitute a departure from the Court's settled jurisprudence. Should Parliament consider this application of the remedy too broad, it retains the authority to respond by enacting a complete, comprehensive and expert procedure for review of federal reclassification refusals (*May*, at paras. 40 and 44).

[76] Preventing applications with a proper legal basis from proceeding to the third stage out of fear of opening the floodgates would run contrary to the very foundation of the law of *habeas corpus*. Courts can, and have, guarded against a flood of cases by declining applications that lack a legal basis. However, once a sound legal basis is established, courts should not be reluctant to allow such applications to proceed. The second stage of the application is not concerned with the capacity of correctional institutions to justify the seemingly unlawful detention; rather, it is focused on ensuring meaningful access to justice to protect inmates' liberty rights.

[77] The purposive and qualitative approach to *habeas corpus* leads me to conclude that a deprivation of liberty is established when an inmate has been denied a lower security reclassification. Prematurely filtering out reclassification decisions that continue, rather than definitively alter, a particular form of confinement fails to assess the reality of inmates' lives within the walls of a prison. Whether or not that decision is lawful is a distinct and separate question in the analysis, with respect to which the

applicant must raise a legitimate ground. An unreasonable or arbitrary decision to refuse a lower security classification is an unlawful deprivation of liberty and the appropriate remedy is release to a lower security facility.

[78] *Habeas corpus* remains one of the few tools available for inmates to effectively challenge and remedy a wrongful restraint on their residual liberty. It would be antithetical to the purpose of the "great and efficacious writ" if courts were precluded from assessing the lawfulness of a particular, more restrictive form of continued confinement. In recognition of the courts' traditional role as a safeguard of the liberty of inmates, *Gamble* held that "[r]elief in the form of *habeas corpus* should not be withheld for reasons of mere convenience", reinforcing that access to the writ must not be subject to procedural roadblocks (p. 635).

[79] The above analysis answers the issue on appeal: a decision denying reclassification to a lower security institution is a deprivation of residual liberty reviewable by way of *habeas corpus*. It follows that the courts below erred in concluding that the appellants could not seek to challenge the reclassification refusals of the detaining authorities in their cases. Both appellants have now been reclassified and moved to minimum-security facilities, and therefore the application of *habeas corpus* to the legality of their particular detentions is now moot. However, the parties raised some additional concerns which I will briefly address.

(2) No Barrier to *Habeas Corpus* Posed by Other Avenues of Review or Remedial Jurisdiction

[80] There are only two instances where a provincial superior court may decline to hear a *habeas corpus* application on its merits. The first is when a detainee attacks the legality of their conviction or sentence, which should be challenged through the appeal mechanisms set out in the *Criminal Code*, R.S.C. 1985, c. C-46 (*Gamble*, at p. 636). The second is when a "complete, comprehensive and expert scheme provides for review that is at least as broad and advantageous as *habeas corpus* with respect to the challenges raised by the *habeas corpus* application" (*Chhina*, at para. 40). In *May*, this Court made it clear that the internal grievance procedure made available under the *CCRA* for reclassification decisions is not a "complete, comprehensive and expert statutory scheme" (para. 63; see also paras. 62 and 64; *Reza v. Canada*, [1994] 2 S.C.R. 394, at p. 405). Nor can provincial superior courts decline jurisdiction in favour of Federal Court jurisdiction (*May*, at paras. 65-72).

[81] Neither of the parties argued that decisions denying security reclassification fall within one of the two jurisdictional exceptions. This case is not about concurrent jurisdiction, nor is it about the scope of review for assessing the legality of the deprivation. Instead it hinges on the narrow issue of whether a particular security reclassification outcome is capable of triggering threshold access to the writ (R.F., at para. 88). Nevertheless, the respondent argues that inmates denied lower security reclassification still have several avenues available for remedying their continued detention, such as CSC's internal grievances procedure and judicial review in Federal Court.

[82] This argument has no bearing on whether *habeas corpus* is available to review decisions rejecting lower security reclassifications. As stated in *May*:

> The proper scope of the availability of *habeas corpus* must be considered first on its own merits, apart from possible problems arising from concurrent or overlapping jurisdiction. The general importance of this remedy as the traditional means of challenging deprivations of liberty is such that its proper development and adaptation to the modern realities of confinement in a prison setting should not be compromised by concerns about conflicting jurisdiction. [Emphasis deleted.]
>
> (para. 31, quoting *Miller*, at p. 641.)

The denial of a lower security classification constitutes a deprivation of liberty and therefore falls within the proper scope of a *habeas corpus* review on the merits. I note that the decision of whether a statutory scheme constitutes a "complete, comprehensive and expert statutory scheme for review that is at least as broad and advantageous as *habeas corpus*" is also context-dependent (*Chhina*, at para. 40). The availability of other forms of relief is not an impediment to the availability of *habeas corpus* (see *May*, at paras. 65-72; *Khela*, at paras. 43-49; *Chhina*, at paras. 64-67).

[83] Moreover, the alternative forms of relief may be inadequate for inmates who have been denied lower security reclassifications because they lack a timely, independent review and the effective remedy of release to a lower security facility. This Court has consistently held that the writ of *habeas corpus* in provincial superior courts is more advantageous to detainees in comparison to judicial review in Federal Court (see *May*, at paras. 65-72; *Khela*, at paras. 43-49; *Chhina*, at paras. 64-67). The following differences are often highlighted: (1) a *habeas corpus* application can be

reviewed more rapidly (often within a week) whereas, in Federal Court, if the parties take the full time allotted at each procedural step, a hearing date cannot be set until 160 days after the impugned decision (*Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(2); *Federal Courts Rules*, SOR/98-106, rr. 301 to 314); (2) the remedy following a successful judicial review in Federal Court will generally be an order for redetermination, not release — there is no history of *mandamus* being used by the Federal Court to release a detainee (see *Chhina*, at para. 65); (3) the scope of review in *habeas corpus* is broader as it reviews the legality of the detention as a whole, rather than one particular administrative decision (see para. 64); (4) judicial review is discretionary and the onus remains on the applicant to prove unlawfulness, unlike the shifting onus at the third stage of the *habeas corpus* analysis; and (5) there is greater local access to provincial superior courts (*Khela*, at para. 47).

[84] The respondent also argues that provincial superior courts lack the remedial jurisdiction to order that inmates be placed in a lower security institution where they have never previously been housed. This is because provincial superior courts lack jurisdiction over *certiorari*, *mandamus*, or declaratory relief in relation to federal administrative bodies (R.F., at paras. 80-83).

[85] This argument adopts a very narrow understanding of *habeas corpus* relief that is contrary to this Court's jurisprudence.

[86] First, while a provincial superior court does not have an inherent discretion to refuse to conduct a review of a *habeas corpus* application, there is discretion at the

third stage of the proceeding, after a judge has reviewed the record (*Khela*, at para. 78). *Habeas corpus* is the review of the legality of the detention, and while the lawfulness of a particular decision may be the focal point of the review, the state can tender evidence as to why an applicant should nevertheless not be discharged. I agree with the intervener, the John Howard Society of Canada, that CSC may lead evidence with respect to the substantive overall legality of the detention and the judge can consider this evidence when determining whether to grant the remedy of release (transcript, at pp. 99-100).

[87] Second, while release remains the standard remedy for *habeas corpus*, courts are empowered under their inherent jurisdiction to attach strict conditions to such release. As Justice Sharpe explained in *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 839, 55 Imm. L.R. (4th) 220:

> I do not accept the general proposition . . . that a judge has never had authority to impose conditions when granting *habeas corpus*. I agree with the submission . . . that such a rigid view would unduly impair the inherent powers of the Superior Court to ensure that its orders are effective. It would also be inconsistent with the need to ensure that the fundamental common law and constitutional right to *habeas corpus* remains a flexible and effective remedy. [para. 47]

[88] In keeping with the flexible nature of *habeas corpus*, courts have crafted tailored conditions on release to reflect the specific circumstances before them. Upon determining that a decision denying an inmate's lower security classification is unlawful, a court retains discretion to order release to a less restrictive facility (with or without conditions) or, depending on the circumstances, maintain the inmate's present

classification. For example, in *Ogiamien*, conditions were placed on the applicant's release because "outright or unconditional release would be inappropriate" (para. 48; see also para. 49). Likewise, while the court in *Leinen v. Mission Institution (Warden)*, 2025 BCCA 257, rejected the imposition of conditions designed solely to avoid administrative inconvenience, it agreed that judges could impose conditions on release to address public safety concerns and promote respect for the law (para. 64).

[89] In sum, the availability of the writ is not circumscribed by alternative avenues of redress, and this Court has previously found that alternative paths are neither timely nor provide as effective relief as *habeas corpus*. The remedy following a successful application is release to a less restrictive security facility, but CSC may tender evidence during the third stage of *habeas corpus* application as to why a specific security classification is nonetheless justified and judges retain discretion to not discharge an applicant. Finally, as both a right and remedy, *habeas corpus* has always been flexible and adaptable to contemporary deprivations of liberty. Lower courts retain the ability to craft appropriate conditions when granting relief.

V. Conclusion

[90] For the foregoing reasons, I would allow the appeal. Given that the appeal is moot, I would make no further order. As the appellants do not seek costs, I would make no order as to costs.

The reasons of Côté, Rowe and Jamal JJ. were delivered by

CÔTÉ AND ROWE JJ. —

I. Overview

[91] This case is not a constitutional challenge. Rather, it concerns *habeas corpus*, an extraordinary common law remedy. While *habeas corpus* must remain available and accessible when its use is warranted, its scope is not unlimited. *Habeas corpus* is not, and should not become, an unrestricted remedy used to challenge every feature in the correctional system otherwise left to the administrative state.

[92] The essence of any *habeas corpus* application is to assess whether a *wrongful restraint* — or unlawful deprivation of liberty — has been imposed. In the instant case, the appellants are asking our Court to expand the writ of *habeas corpus* to allow its use by federal inmates to challenge the decisions of correctional administrators to deny reclassification and transfer requests from an inmate's existing level of security classification to a lower one.

[93] We must determine if such an expansion is warranted. The majority is of the view that it is (para. 6). We are not and, respectfully, our view is supported by the writ's historical background and evolution.

[94] While *habeas corpus* should be used readily to safeguard the liberty of individuals against unlawful detention, only in limited circumstances should it be used as a substitute for judicial review in the correctional system. In its contemporary form,

habeas corpus is a summary procedure, one that contemplates a judge substituting their decision for that of a public official. Although this iteration of *habeas corpus* is markedly different from the historical version of the writ, which protected individual liberty against state abuse, the evolution of *habeas corpus* has been incremental and always in keeping with its underlying rationale, i.e., to guard against unlawful restraints.

[95] In 1986, our Court in *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459, at p. 464, set out the contours of the application of *habeas corpus* to correctional settings by recognizing three categories of deprivations of liberty: (1) the initial deprivation; (2) a substantial change in conditions amounting to a further deprivation of liberty; and, (3) a continuation of the deprivation of liberty. The third category is engaged in this appeal. However, as a matter of law, its criteria have not been met.

[96] To meet the criteria of the third category, a federal inmate must have an existing legal entitlement to increased residual liberty. This is clear from *Dumas*, which remains good law and binding authority. There, an inmate seeking *habeas corpus* because of his "continued" detention despite having been granted parole was denied *habeas corpus* by our Court because a condition for his parole had not been fulfilled. In other words, he had not achieved the status of a parolee and as such, his residual liberty remained unchanged. Those facts stand in sharp contrast with the instant case. Neither appellant reached a stage comparable to that attained by Mr. Dumas — neither ever secured approval to be reclassified and transferred to a lower security facility,

whereas Mr. Dumas had been granted conditional parole. As the Court of Appeal rightly concluded, because Mr. Dorsey and Mr. Salah had no legal entitlement to reclassification, their residual liberty remained unchanged and, as such, resort to *habeas corpus* was unavailable to them.

[97] *Habeas corpus* is, of course, available to challenge an unlawful deprivation of liberty. This is well-settled law. However, while the majority claims that it does not alter the *habeas corpus* framework, its interpretation does so by dispensing with the requirement of a legal entitlement to increased residual liberty to meet the third category of *Dumas* (para. 4). It results in an expansion of *habeas corpus* beyond wrongful restraints on one's liberty. It strains the law of judicial review by allowing superior courts to bypass the usual remedies available on judicial review, such as remitting the matter for reconsideration by the decision maker, by granting release through *habeas corpus*. When the scope of *habeas corpus* applications becomes amorphous or too wide, the coherence of the law relating to review of administrative action is undermined.

[98] Our colleague begins her reasons by stating that "[l]ong revered as the great writ of liberty, *habeas corpus* review remains an essential safeguard against unlawful detention" (para. 1). We agree. But the unlawful deprivation of an inmate's residual liberty is not at issue in this appeal. Rather, the issue is whether the "Great Writ of Liberty" is to be used, first, as an end-run around procedures for the administration of prisons established by Parliament and, second, as a means to circumvent administrative

law procedures based on the prerogative writs of *mandamus*, *certiorari* and prohibition. What this Court provided for in *Dumas* was the use of *habeas corpus* to give effect expeditiously to an applicant's existing legal entitlement to greater liberty. Instead, the majority will transform *habeas corpus* from an extraordinary common law remedy into a means for judges to summarily substitute their own views for those of correctional administrators. Judges will create and bestow on an inmate an entitlement to be released into a lower security prison, where no such entitlement previously existed.

[99] It is important to be clear about the practical impact of this appeal on the correctional system. If the appellants succeed, superior courts will play a central role in the administration of the correctional system. This stands directly against the intention of Parliament, which, through the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("*CCRA*"), and related regulations, has established an alternative scheme of review for administrative decisions made by correctional administrators.

[100] Therefore, the majority's characterization of the question on appeal as "narrow" obscures that the consequences of its reasons will be wide-ranging. The majority's reasons unduly broaden the scope of *habeas corpus* in two ways: first, by removing the requirement of a legal entitlement to greater liberty in order to establish a deprivation of liberty; second, by requiring the applicant only to put forward an "arguable issue" to establish a legitimate ground challenging the lawfulness of the detention (para. 74).

[101] In this context, not only will inmates be able to invoke the writ to challenge denials of reclassification and transfer requests, but the decision opens the door to the writ's use in challenging a wider range of decisions concerning the conditions of their detention. This risks an ensuing surge of *habeas corpus* applications before the court, limiting their capacity to provide relief to genuine deprivations of liberty. The importance of the liberty interest at stake will also diminish and weaken the imperative of prompt resolution of *habeas corpus*.

[102] The expansion of *habeas corpus* so that it becomes a regular tool for judicial oversight in the correctional system should be avoided.

[103] We would dismiss the appeal, upholding the Court of Appeal's judgment that *habeas corpus* should not be available in the case of a federal inmate being denied reclassification and transfer to lower security facility. Rather, such decisions should be subject to review under procedures established by Parliament, as well as judicial review under the *Vavilov* framework (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653).

II. Facts

[104] In 2019, Mr. Dorsey and Mr. Salah both applied for transfers to minimum-security. Both requests were denied.

A. *Background Concerning Mr. Dorsey*

[105] Mr. Dorsey procured a 17-year-old victim into prostitution. Prior to his designation as a dangerous offender, he had 26 criminal convictions. A psychiatrist diagnosed him with severe anti-social personality disorder in the psychopathic range and stated that he represents a substantial risk of reoffending. A 2018 psychological assessment further concluded that Mr. Dorsey was a high risk for violent recidivism.

[106] In 2019, while incarcerated at a medium-security facility, Mr. Dorsey requested a transfer to a minimum-security facility. Mr. Dorsey's case management team, his Manager of Assessment and Intervention ("MAI"), and his Warden, all agreed that he met the criteria for reclassification to minimum-security but, because of his dangerous offender status, his transfer request had to be approved by the Regional Deputy Commissioner ("RDC") and the Assistant Commissioner, Correctional Operations and Programs ("ACCOP").

[107] The RDC rejected the Warden's recommendation in favour of reclassification and maintained Mr. Dorsey's medium-security status, stating that he was assessed as a high risk for violent recidivism and a moderate risk of general recidivism.

[108] At the subsequent security classification review, his case management team and the Warden again recommended reclassification as minimum-security. This time, the RDC concurred in that recommendation, with the result that it was forwarded to the ACCOP. On October 25, 2021 — while Mr. Dorsey's *habeas corpus* application

was pending — the ACCOP approved his classification as minimum-security and he was transferred.

B. *Background Concerning Mr. Salah*

[109] Mr. Salah firebombed a family home in the middle of the night while two children, aged 7 and 10, were asleep inside. He did so in an attempt to kill their mother in order to silence her. The mother escaped but the children were killed. Mr. Salah was convicted of two counts of first degree murder and was sentenced to concurrent life sentences.

[110] In August 2019, while incarcerated at a medium-security facility, Mr. Salah requested a transfer to a minimum-security facility. Mr. Salah's case management team, his parole officer, and his initial MAI recommended reclassification and transfer to a minimum-security facility. He was rated as a low escape risk despite a deportation order. His case management team noted that he intended to return to Jordan, his home country, on full parole and has a detailed resettlement plan.

[111] In October 2019, a new MAI was assigned to Mr. Salah's file and assessed him as a moderate escape risk on the basis of the deportation order. The Warden accepted the new MAI's assessment and issued a decision denying the transfer request. The Warden told him that he would have to wait to re-apply closer to his day parole eligibility date.

[112] Mr. Salah was reclassified and transferred to minimum-security in May 2024.

C. *Applications for a Writ of Habeas Corpus*

[113] Mr. Dorsey and Mr. Salah each applied under the *Habeas Corpus Act*, R.S.O. 1990, c. H.1, for a writ of *habeas corpus ad subjiciendum* with *certiorari* in aid, on the basis that the decisions were substantively unreasonable and unlawful. They also alleged that the denial of their transfer requests engaged ss. 7, 9, 10(c) and 12 of the *Canadian Charter of Rights and Freedoms*.

[114] On consent, the applications were joined for the purpose of determining a common threshold legal issue: whether Mr. Dorsey and Mr. Salah could resort to *habeas corpus* to challenge the denials of their applications for transfer to lower security prisons.

III. Judicial History

A. *Ontario Superior Court of Justice, 2022 ONSC 2107, 513 C.R.R. (2d) 90 (Speyer J.)*

[115] The application judge concluded that *habeas corpus* is not available to the applicants to challenge the denials of their applications for reclassification to minimum-security and their requests for transfers to minimum-security prisons. While a decision may be disadvantageous to an inmate, that does not amount to a deprivation

of residual liberty unless it is characterized by a reduction in the prisoner's liberty. Here, there was no such reduction in liberty.

[116] The application judge noted that the question raised by the appellants is not novel, as it has been considered by the Ontario Superior Court of Justice numerous times in the last decade. She found that the preponderance of the jurisprudence during the preceding decade concluded that "a refusal to reclassify an offender from higher to lower security does not amount to a deprivation of liberty" — it is not a deprivation of an offender's residual liberty (para. 35).

B. *Court of Appeal for Ontario, 2023 ONCA 843, 169 O.R. (3d) 417*

[117] The Court of Appeal's decision was split. George J.A., with Harvison Young J.A. concurring, dismissed the appeal. Simmons J.A. dissented; she would have allowed the appeal.

(1) Majority Reasons (George J.A., Harvison Young J.A. Concurring)

[118] George J.A. noted that, while *habeas corpus* is available when an inmate is deprived of their residual liberty, the appellants' arguments presumed that they were entitled to reclassification to a minimum-security institution. But there is no "standalone entitlement to a minimum-security classification" simply because the *CCRA* directs Correctional Service Canada ("CSC") to take all reasonable steps to

ensure that inmates are placed in the least restrictive environment (para. 40, citing *R. (L.V.) v. Mountain Institution*, 2016 BCCA 467, 346 C.C.C. (3d) 254, at para. 39).

[119] George J.A. concluded that the appellants' situation did not fall within the third *Dumas* category because they had not acquired the status of a minimum-security classification. Had CSC refused to transfer Mr. Dorsey after reclassifying him, *habeas corpus* would have been available (para. 46). He noted that using *habeas corpus* for these decisions "would effectively make [it] available to every federal inmate in respect of every security classification decision" (para. 43). He saw "nothing to compel or warrant opening this floodgate" (*ibid*.).

[120] George J.A. noted that the Supreme Court's decision in *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, "could not be any clearer: the writ of *habeas corpus* is available to an inmate *only* when their residual liberty has been reduced or, put differently, deprived" (para. 57 (emphasis in original)).

(2) Dissenting Reasons (Simmons J.A.)

[121] Simmons J.A. concluded that whether an inmate is entitled to resort to *habeas corpus* under the third *Dumas* category must depend on whether they can show a legitimate ground for concluding that the only basis for withholding a minimum-security classification was unlawful such that a minimum-security classification would otherwise have been granted. She explained that, "[i]n these circumstances, if the reclassification decision is ultimately found to be unlawful, a

continuing deprivation of liberty under the third *Dumas* category will have crystallized as of the date of the reclassification decision and the finding of unlawfulness will also trigger entitlement to the lower-security classification" (para. 115).

[122] Simmons J.A. does not read *Dumas* as linking unlawfulness to acquiring a particular status. Instead, it is the refusal of lesser restrictive conditions without a lawful basis that crystallizes the deprivation of liberty.

IV. Analysis

[123] The appellants submit that the denial of reclassification or transfer to lower security is a deprivation of liberty such that it can ground an application for *habeas corpus*. They submit that this falls within the third category of *Dumas*: continuation of a deprivation of liberty. We disagree. As we explain below, *Dumas* established a requirement that the applicant must have a legal entitlement to reclassification and transfer to lower security in order to bring an application for *habeas corpus* based on the third *Dumas* category. The law as it stands does not allow for the interpretation offered by the majority, particularly regarding the third *Dumas* category.

[124] We cannot endorse the majority's expansion of the remedy of *habeas corpus* in the correctional context. As we explain below, the reach of *habeas corpus* into the correctional system strains modern administrative law. *Habeas corpus* is an extraordinary remedy that should not be used to challenge decisions denying transfer from medium- to minimum-security, unless the applicant has an existing legal

entitlement to that transfer and not simply an "arguable issue". Such an expansion will further entangle superior courts into the administration of correctional facilities. This is not their purview. *Habeas corpus* is not an unrestricted remedy and its availability must conform to its intended purpose and historical evolution, as we explain below.

A. *Evolution of Habeas Corpus From the 14th Century to the 1980s*

(1) Historical Origins

[125] *Habeas corpus*, also known as the "Great Writ of Liberty", was first used in the 14th century "as a device for compelling appearance [of defendants] before the King's judicial instrumentalities" (W. F. Duker, *A Constitutional History of Habeas Corpus* (1980), at pp. 3 and 62). In this first incarnation of the writ, it was used by courts to ensure appearance of the defendant in court. The writ commanded the sheriff to locate, arrest, and "to have the body" of the defendant appear in court (p. 24).

[126] From the 14th century onwards, in part due to jurisdictional battles between various courts in England and growing tension between Parliament and the servants of the monarch (i.e., the executive), *habeas corpus* "was transformed into an instrument that safeguards individual freedom" (Duker, at p. 62; see also *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 19). This new form of the writ demonstrated two "critical differences" in procedure from its earlier iteration: the proceeding was commenced "on the petition of the prisoner" and "it was implicit in the court's action that it intended to examine the cause of the imprisonment"

(Duker, at p. 24). As a result, the court "assumed a right to inquire into the nature of an incarceration" (*ibid.*). As Duker notes:

> By the middle of the fourteenth century, the use of habeas corpus in response to petitions on behalf of prisoners that they might be presented before the court was sufficiently common to have become a distinct form of habeas corpus: *habeas corpus cum causa* . . . . The writ ordered the sheriff to have the body of the prisoner brought before the court along with the cause of his arrest and detention. [pp. 24-25]

[127] By the 17th century, the case law had "confirmed that the writ of habeas corpus had assumed a new role. . . . The questioning of the validity of commitments, previously an incidental effect of the writ, now became the major object" (Duker, at p. 46).

[128] The form of *habeas corpus* that emerged in the 17th century is still used today:

> The writ is directed to the . . . person having custody or control of the applicant. <u>It requires that person to return to the court, on the day specified, the body of the applicant and the cause of his detention.</u> The process focuses upon the cause returned. If the return discloses a lawful cause, the prisoner is remanded; if the cause returned is insufficient or unlawful, the prisoner is released. The matter directly at issue is simply the reason given by the party who is exercising restraint over the applicant. [Emphasis added.]
>
> (J. Farbey and R. J. Sharpe, with S. Atrill, *The Law of Habeas Corpus* (3rd ed. 2011), at p. 21, citing *Phillip v. D.P.P.*, [1992] 1 A.C. 545 (P.C.), at p. 558.)

[129] In other words, the writ of *habeas corpus* developed to focus on assessing the legality of the state's initial commitment of individuals. Until 1985, courts did not use *habeas corpus* to review the legality of decisions of correctional administrators.

(2) Emergence of *Habeas Corpus* as a Remedy for Inmates and the Current Test for Deprivations of Liberty in the Correctional Context

[130] In 1980, our Court decided in *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, "that prisoners were entitled to procedural fairness and could seek judicial review of decisions by prison officials that deprived them of their 'residual liberty' (*i.e.*, through placement in segregation)" (D. Parkes, "The 'Great Writ' Reinvigorated? *Habeas Corpus* in Contemporary Canada" (2012), 36:1 *Man. L.J.* 351, at p. 353). In that case, our Court recognized that "[t]he rule of law must run within penitentiary walls" and that decisions of correctional administrators could have "the effect of depriving an individual of his liberty by committing him to a 'prison within a prison'" (*Martineau*, at p. 622; see also Parkes, at p. 353).

[131] The introduction of the concept of "residual liberty" created the conditions to recognize *habeas corpus* in the correctional system, serving as the rationale animating a trilogy of cases in 1985 in which our Court expanded the scope of *habeas corpus* in the correctional context by making it available to challenge not only the commitment to custody but also decisions by those running correctional institutions, i.e. administrative decision makers, where these decisions significantly deprive an inmate of the liberty available to the general inmate population: *R. v. Miller*, [1985] 2

S.C.R. 613; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; and *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662.

[132] In *Miller*, following a disturbance in a correctional facility, an inmate was transferred to another institution and placed in a special handling unit (i.e., administrative segregation). The reason for his segregation was explained to him as stemming from his participation in the disturbance, yet he was never afforded the opportunity to confront the evidence of his involvement. This was a case of an inmate lawfully incarcerated being placed in a more restrictive form of incarceration.

[133] In *Cardinal*, inmates were accused of being involved in a hostage-taking incident within their correctional facility, prompting criminal charges and transfer to another correctional facility where they were placed in segregation. The Director of the correctional facility declined to conduct an independent inquiry, relying instead on the opinion of a fellow warden. The inmates secured an order from the Segregation Review Board recommending that they be released from segregation into the general prison population, but the Director refused to comply. He did not inform the inmates of his reasons for refusal, nor did he give them an opportunity to be heard. They challenged their continued placement in segregation by applications for *habeas corpus*. In all three cases, the "actions involved deprivations of the prisoners' residual liberty interests" as the severity of the initial, lawful, incarceration was increased or continued (Parkes, at p. 354).

[134] In *Morin*, the inmate was placed in a special handling unit at a different institution than the one where he was normally housed after he was charged with the death of a fellow inmate. He went on to be acquitted of murder but remained in segregation and his request to be transferred back to a medium-security institution was refused. He challenged his continued placement in segregation by way of *habeas corpus*.

[135] A year later, Lamer J. (as he then was) brought together these strands of emerging case law to develop a framework to govern the application of *habeas corpus* in a correctional setting in *Dumas*. He described three deprivations of liberty that arise in the correctional setting at p. 464:

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

[136] It is from this perspective that we must address this appeal.

(3) Post-*Dumas* Jurisprudential Developments

[137] Subsequent treatments of *habeas corpus* in the correctional context came 20 years later, in *May* and *Khela*.

[138] In *May*, our Court affirmed concurrent jurisdiction of provincial superior courts and the Federal Court over the decisions of federal correctional administrators. Writing for the majority, LeBel and Fish JJ. concluded that provincial superior courts could hear *habeas corpus* applications in the correctional context, concurrent with the availability of judicial review in the Federal Court, as the internal review procedures which constitute part of the legislative scheme were not as broad as *habeas corpus* and less advantageous (paras. 63-65 and 72).

[139] In *Khela*, our Court reviewed an inmate's transfer to maximum-security from medium-security and found that it was unlawful on the basis of lack of procedural fairness. In reaching this conclusion, LeBel J., writing for the Court, stated that such a decision must be procedurally fair to be lawful; the failure by the correctional authorities to meet statutory disclosure requirements therefore rendered the inmate's transfer unlawful and he had been properly granted *habeas corpus*.

B. *Habeas Corpus Does Not Extend to Administrative Correctional Decisions Which Deny an Inmate's Transfer or Reclassification Request to a Lower Security Classification*

(1) *Dumas* Remains the Precedent To Determine Whether a Deprivation of Residual Liberty Exists

[140] As noted, this appeal concerns the application of the common law *habeas corpus* test in a correctional setting, specifically whether a federal inmate's denial of

reclassification or transfer to a lower security classification constitutes a deprivation of residual liberty. Do these constitute a deprivation of residual liberty?

[141] *Dumas* remains the leading authority as to this question. As noted, Lamer J. recognized three categories for a deprivation of liberty: (1) the initial decision requiring detention, (2) a change in the conditions of detention, and (3) the continuation of detention once it has become unlawful. The third category is at issue in the instant case, as it was in *Dumas*.

[142] Under the *Dumas* test, an inmate who is already lawfully detained must first demonstrate that there has been a deprivation of their residual liberty — something beyond the original, lawful incarceration — and must draw on one of the three *Dumas* categories as a recognized basis to challenge the legality of this deprivation. If this initial burden is met, the onus then shifts to the detaining authority to justify the legality of the deprivation on the inmate's liberty. Should the detaining authority fail to meet its burden, the court *must* release the inmate from the conditions that constitute the deprivation of liberty; the court cannot do anything different than to give effect to the transfer; in this respect, *habeas corpus* is a non-discretionary remedy. To say otherwise would be an over-extension and distortion of *habeas corpus*.

[143] In brief, the analysis on a *habeas corpus* application proceeds in three stages. At stage one, the applicant must establish a deprivation of liberty. At stage two, the application must establish a legitimate ground to question the lawfulness of the

deprivation of liberty. If the applicant meets their burden at stages one and two, then at stage three, the detaining authority must establish the deprivation was lawful.

[144] Not only does *Dumas* remain the leading authority for determining whether there is a deprivation of residual liberty in a correctional context, but both its reasoning and factual matrix are directly applicable in the present case.

[145] In *Dumas*, Lamer J. clarified that although the facts there involved parole, his reasoning was not confined to that. He emphasized that the deprivation of liberty crystallizes at the moment one's legal status changes — such as when parole is granted or a reclassification decision is to take effect. Lamer J. wrote, at pp. 464-65:

> The continuation of an initially valid deprivation of liberty can be challenged by way of *habeas corpus* only if it becomes unlawful. In the context of parole, the continued detention of an inmate will only become unlawful if he has acquired the status of a parolee. An inmate acquires that status as of the moment the decision to grant him parole takes effect. Thus, if parole is granted effective immediately, he becomes a parolee when the decision is rendered. If, for some reason, the restriction to his liberty continues, he may then have access to *habeas corpus*. If parole is granted effective at some later date, then the inmate acquires the status of parolee at that date and not at the date of the decision. Similarly, where a decision is made to grant parole but it is subject to the fulfilment of a condition, the inmate only becomes a parolee if and when the condition is fulfilled. If he is not released on parole when the term arrives or the condition is fulfilled, then he may resort to *habeas corpus*. Finally, if parole is refused, it is obvious that the inmate has not become a parolee and he cannot have recourse to *habeas corpus* to challenge the decision. [Emphasis added.]

[146] The majority writes that the conclusion in *Dumas* denying access to *habeas corpus* was based on Mr. Dumas' failure to raise a legitimate ground for challenging

the legality of his deprivation of liberty, and not on his entitlement to parole (see para. 65). This interpretation of *Dumas* is to the opposite of this Court's clear wording. Indeed, the majority's interpretation rests on the Court's discussion in *Dumas*, at p. 465, that "a detainee is [not] left without recourse in an appropriate case". The majority interprets this discussion as pertaining to whether Mr. Dumas raised a legitimate ground for challenging the legality of a deprivation of liberty on a *habeas corpus* application. This is not the case. In writing what it did, the Court was referring to alternative pathways for recourse, which are unrelated to Mr. Dumas' application for *habeas corpus*. The Court stated that, apart from his application for *habeas corpus*, Mr. Dumas may have had recourse to challenge the National Parole Board's jurisdiction to "review its earlier decision" or the way it conducted this review on the basis that it "may have infringed the rules of natural justice" or his *Charter* rights (p. 465). As the Court explained in *Dumas*, "[t]hese issues are not before the Court on an application for *habeas corpus*, but could be raised on an application under s. 18 of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, or s. 24(1) of the *Charter*" (p. 465).

[147] The Court's sole basis for denying Mr. Dumas' access to *habeas corpus* was because he was not legally entitled to the status of parolee. The Court did *not* deny him access to *habeas corpus* because he failed to raise a legitimate ground to challenge his deprivation of liberty. The Court repeated several times that the status of a parolee — in other words, entitlement to the less restrictive form of liberty — is a

prerequisite to establishing an unlawful deprivation of liberty under the third category of *Dumas* (see pp. 464-65).

[148] The majority's reliance on *Cardinal* for the proposition that an applicant need not demonstrate a legal entitlement to an increased residual liberty is also misplaced. In *Cardinal*, the Director exercised his authority under s. 40 of the *Penitentiary Service Regulations*, C.R.C. 1978, c. 1251, to continue certain inmates' segregation, contrary to the recommendation of the review board. In doing so, he failed to give notice to the inmates or provide them an opportunity to be heard. On the appeal of the inmates' applications for *habeas corpus*, this Court held the Director's decision to be unlawful as procedurally unfair.

[149] The majority reasons that the inmates did not have a "crystallized" legal entitlement to transfer into the general population because, had the Director observed the duty of fairness, his decision "could have been found to have been lawful" (para. 66).

[150] However, as Le Dain J. explained in *Cardinal*, "the denial of a right to a fair hearing must always render a decision invalid" (p. 661). Because the Director denied the inmates a fair hearing, his decision under the *Penitentiary Service Regulations* to keep them segregated was invalid. As a result, at the time of their applications for *habeas corpus*, the applicants' continued segregation rested on an invalid decision. In other words, as there was no lawful basis for their segregation, the applicants had a "crystallized" legal entitlement to less restrictive confinement.

[151] The Attorney General of Quebec submits that *habeas corpus* is not a means to guarantee a liberty that an incarcerated person has yet to acquire; rather it serves as a remedy against an unlawful restraint on a residual, existing liberty (I.F., at para. 22). We agree.

[152] At the moment an inmate's legal entitlement to an altered, less severe residual liberty vests, so too does their right to resort to *habeas corpus*, where correctional administrators do not give effect to that legal entitlement. This principle is applicable to the present cases; applying the reasoning of *Dumas* leads to the conclusion that *habeas corpus* is only available to a federal inmate where they have been granted a reclassification or a transfer to a lower security facility but they have not yet been transferred (see C.A. reasons, at para. 44).

(2) Facts and Holding of *Dumas* Are Analogous to the Instant Case

[153] In *Dumas*, the decision to grant parole was conditional on the inmate's acceptance by a community centre program; because that condition had yet to be fulfilled, although with no fault on his part, the applicant never acquired the status of a parolee. As such, he did not have a legal entitlement to parole and his residual liberty remain unchanged. As a result, *habeas corpus* was not available to him:

> The [National Parole Board] made a decision to grant him day parole, but the terms used are not precise and there is some uncertainty as to whether his day parole was simply delayed until appropriate arrangements could be made or whether it was conditional on his acceptance by the Centre. However, the [National Parole Board] subsequently delayed and later

> reversed this decision before the term arrived or the prerequisite condition was fulfilled. It is clear that the appellant never became a parolee, and he thus has no right to a *habeas corpus*. [Emphasis added; p. 465.]

[154] Applying the analysis from *Dumas* to the instant case, we must first ask whether the appellants had a legal entitlement to reclassification and/or transfer to lower security. The answer is no, they did not.

[155] This is contrary to submissions from the appellants, who argue that the language in the *CCRA* which directs CSC to use the "least restrictive measures consistent with the protection of society, staff members and offenders" gives federal inmates a legal entitlement to access the "least restrictive measures" (*CCRA*, s. 4(c); see also A.F., at para. 31). We agree with the Attorney General of Canada that this language must be read in its entirety and in the legislative scheme's broader context (R.F., at para. 77).

[156] Section 28 of the *CCRA* provides that, in placing inmates in the least restrictive environment, consideration is to be given to, *inter alia*, the kind of custody and control necessary for the safety of the inmate and of other people within the prison (R.F., at para. 76, citing *CCRA*, s. 28). The *CCRA* does not create a statutory entitlement to the least restrictive confinement divorced from these considerations. Instead, it mandates the CSC to place each inmate in the least restrictive placement having regard to the various factors set out in the statute. Lower security classifications are available to federal inmates as a *result* of CSC's assessment; they have no entitlement to them absent this.

C. *Habeas Corpus Should Not Extend to Administrative Correctional Decisions Which Deny an Inmate's Transfer or Reclassification Request to a Lower Security Classification*

[157] *Habeas corpus* is an extraordinary remedy available to those who are held in unlawful detention by agents of the state. The writ's expansive evolution from its inception to the modern day has led courts, including our own, to conclude that *habeas corpus* has never been "a static, narrow, formalistic remedy" (*Khela*, at para. 54, quoting *May*, at para. 21). We agree with the majority (at para. 1) that, since its inception, *habeas corpus* "has grown to achieve its grand purpose — the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty" (*May*, at para. 21, quoting *Jones v. Cunningham*, 371 U.S. 236 (1962), at p. 243).

[158] In relation to inmates, the remedy should continue to be limited to challenge further deprivations of liberty within a prison, notably an inmate's unlawful transfer to a higher security facility or a more restrictive condition of imprisonment, e.g. administrative segregation. The appellants seek to transform *habeas corpus* into a generalized alternative to the existing scheme of internal review and judicial review of decisions by administrative decision makers in correctional facilities. That would go well beyond the proper use of *habeas corpus*.

[159] As we will explain, its expansion to reviewing decisions which do not alter an inmate's residual liberty nor impose a greater deprivation of liberty is unwarranted;

it interferes with Parliament's scheme for the operation of correctional institutions; and it sidesteps the administrative law framework adopted in *Vavilov*.

[160] In our view, *habeas corpus* is not an unrestricted remedy to challenge an ever-widening range of conditions of incarceration; post-*Dumas* case law does not change that. While *habeas corpus* continues to be a flexible remedy, its use within prisons needs to be carefully constrained. As an extraordinary remedy, its remit needs to be tailored to its purpose (see *Peiroo v. Canada (Minister of Employment and Immigration)* (1989), 69 O.R. (2d) 253 (C.A.), at pp. 257 and 261-62). It is a procedure well suited to remedy unlawful deprivations of liberty, but ill suited as a substitute for internal review and judicial review of the operation of correctional institutions. The use of *habeas corpus* overrides the deference given to administrative decision makers under the general law of judicial review. Our Court should be mindful of the concerns raised by the Attorney General of Canada and by the provinces about expanding *habeas corpus*, as we will now explain.

(1) *Habeas Corpus* Is Not an Unrestricted Remedy To Challenge Ever-Widening Conditions of Incarceration; A Superior Court's Use of the Remedy Is Restricted by its Purpose

[161] If an application for *habeas corpus* is successful, the reviewing court will grant *habeas corpus* (*Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29, [2019] 2 S.C.R. 467, at para. 18; *May*, at para. 33). As a remedy, it has been referred to by our Court as "broad" and has been interpreted expansively as it is not "a static, narrow, formalistic remedy" (*Chhina*, at para. 21; *May*, at para. 21,

quoting *Jones v. Cunningham*, 371 U.S. 236 (1962), at p. 243; see also *Chhina*, at para. 19).

[162] This we accept. But the fact that *habeas corpus* has been interpreted "broadly" is not licence to "broaden" its application beyond its purpose. *Habeas corpus* cannot be used to challenge a deprivation of an *anticipated* right to residual liberty, one that has yet to occur. In *May*, LeBel and Fish JJ. cautioned that "jurisprudential developments limiting *habeas corpus* jurisdiction should be carefully evaluated and should not be allowed to expand unchecked" (para. 50). That would be so if superior courts get into the business of deciding challenges to administrative decisions, those being matters that are properly in the purview of the Federal Court.

[163] Were we to find the opposite — as the majority does — that would give rise to a reprioritization of access to the courts. Because of the seriousness of an unlawful deprivation of liberty, *habeas corpus* applications are heard swiftly; they place the onus on the state to prove that the deprivation of liberty is lawful. As such, expanding the availability of *habeas corpus* to denials of transfer to lower security levels will convert *habeas corpus* into a summary form of reverse onus judicial review for the security reclassification process. Such an approach risks distorting *habeas corpus* into an alternative venue to challenge decisions of correctional administrators, undermining both the integrity of the writ and the orderly administration of the correctional system.

[164] The practical consequence of this expansion and, *a fortiori*, its subsequent extension to a widening range of decisions said to relate to "residual liberty", will be unwarranted interference by superior courts with Parliament's legislative scheme, which balances *both* the interests of the inmates and others. These interests include the safety of correctional officials (e.g., measures to ensure the safety of correctional officials are more extensive in maximum-security facilities than in medium-security facilities) as well as the public (e.g., it is relatively easy for an inmate to escape from a minimum-security facility). The *CCRA* provides various avenues for redress that constitute, in Parliament's view, a suitable remedial structure. Accepting the majority's interpretation risks upsetting the balance the *CCRA* strikes in the mechanisms it provides by granting an alternative, fast-track judicial review in the form of *habeas corpus* proceedings.

(a) *The First Stage of the Habeas Corpus Analysis Requires a True Deprivation of Liberty*

[165] The majority's approach will improperly expand access to *habeas corpus* and invite *ad hoc* decision making. It does so, first, because it removes the requirement that an applicant alleging unlawful continued detention demonstrate an existing legal entitlement to greater residual liberty. Under this approach, an inmate whose conditions of incarceration have not changed, who has no legal entitlement to a change in those conditions, and whose detention continues on the same legal authority as their initial deprivation, would be considered to have suffered a deprivation of liberty. They would do so merely by demonstrating that some other state of confinement would be

qualitatively less restrictive than their current state (majority reasons, at paras. 41 and 43-44).

[166] Second, the majority's approach will expand access to *habeas corpus* and invite *ad hoc* decision making because its approach to the second stage of the *habeas corpus* analysis will not realistically filter out frivolous claims. The majority's approach provides no guidance on how this second stage should be applied, other than affirming that the threshold is low. We return to this point later in our reasons.

[167] The distortion of *habeas corpus* is exacerbated by the majority's limited guidance as to what alternative state of confinement will amount to a deprivation of liberty sufficient to engage the writ. In setting out a legal framework for the third *Dumas* category, the majority explains only that a deprivation of liberty requires a "qualitative difference in liberty" (para. 44; see also paras. 41, 51 and 62). Qualitative simply means that the court will look at whether the difference has *an* effect on the inmate's liberty interests (see *R. v. Gamble*, [1988] 2 S.C.R. 595, at p. 644). This approach does not establish a threshold for the relevant degree of that effect. In other words, this framework lacks a standard by which to determine that an effect on an inmate falls short of establishing a deprivation of liberty (majority reasons, at paras. 40-44).

[168] Then, in applying its framework, the majority indicates that, if there is such a standard, it is a low and indeterminate one. Its reasons suggest that a deprivation of liberty is made out by conditions that are simply "more restrictive" or that result in

limitations that are more than "insignificant or trivial", but that will in any case be "ultimately context-dependent" (para. 71). Further still, to the extent it is suggested that case law applying the second *Dumas* category of deprivations of liberty can be readily applied to the third *Dumas* category, which is at issue here, this does not address that those cases interpret the inherent limitation of the second category. Namely, the second category deals with decisions resulting in "a substantial change" in the inmate's conditions (*Dumas*, at p. 464 (emphasis added)). The third category contains no such qualifying language, and the majority has not recognized or introduced this necessary limitation. Instead, the majority has dismissed the requirement the applicant demonstrate existing legal entitlement to greater liberty.

[169] This unclear standard opens the door to results-based and unmethodical decision making. A clearer standard is required to ensure that denying an inmate's request for any more-than-trivial easing in their conditions of detention is not treated as a deprivation of their liberty.

[170] The majority points to post-*Miller* decisions that found certain carceral conditions do not amount to deprivations of liberty as proof that there is no risk of an unrestrained expansion of *habeas corpus* (para. 54). With respect, this misses the point: our concern is not with the state of the law hitherto, based as it has been on the reasoning in *Dumas*, but with the implications of the majority's new and unmoored approach. Indeed, the cases cited by the majority highlight our very concern. In *Mapara v. Ferndale Institution (Warden)*, 2012 BCCA 127, 318 B.C.A.C. 139, the appellants

had unsuccessfully brought a writ of *habeas corpus* alleging the denial of their requests for escorted temporary absences amounted to deprivations of liberty. The Court of Appeal rejected this argument on the basis that "a decision that denies an inmate access to less restrictive conditions does not constitute such a deprivation" (para. 16). Yet, the majority has now decided precisely the opposite. Similarly, in *Lord v. Coulter*, 2007 BCSC 1758, 72 Admin. L.R. (4th) 264, the court stated that the denial of a request for parole was not a deprivation of liberty, because the inmate "is not seeking to have that which was taken away from him restored, but is, rather, seeking the conferral of a new right or privilege" (para. 42). And in *Ewanchuk v. Canada (Attorney General)*, 2017 ABQB 237, 354 C.C.C. (3d) 119, the court stated that "*[h]abeas corpus* has no application where a person complains they were denied release or a reduced form of detention" (para. 24). Again, the majority's approach takes the contrary view.

[171] Further, the majority, asserting that its approach will not improperly expand the scope of carceral conditions that constitute deprivations of liberty, cites *Mapara*, *Lord*, and *Rain v. Canada (Parole Board)*, 2015 ABQB 639, as examples where courts have held that lack of access to rehabilitative programming does not constitute a deprivation of liberty. However, the majority also suggests that a "lesser degree of access to rehabilitative opportunities" is now part of the context for determining that a denial of security reclassification is a deprivation of liberty (para. 72). These cases might well have been decided differently if they had been considered in light of the majority's reasons.

[172] Since inmates with no legal entitlement to increased residual liberty will now be able to avail themselves of the remedy, this will result in an increase in the number of *habeas corpus* applications. Indeed, the majority has transformed this first stage in a way that makes it drastically easier to demonstrate a deprivation of liberty, despite recognizing its role in "filter[ing] out frivolous claims" (para. 44).

[173] An example supporting our assertion is the effect of our decision in *Khela* on Alberta courts. The *Khela* decision led to "an unusual, if not unprecedented, increase in *habeas corpus* applications" from inmates (*Latham v. Her Majesty the Queen,* 2018 ABQB 69, 72 Alta. L.R. (6th) 357, at para. 1). Many of these applications had no merit or were brought for illegitimate, alternative purposes rather than to obtain release. To address this surge of applications, the Alberta Court of Queen's Bench resorted to adopt an Accelerated *Habeas Corpus* Review Procedure (paras. 2-13). As such, and bearing in mind the more limited scope of the *Khela* decision compared to the majority's present ruling, this latter will lead to a similar surge in *habeas corpus* applications filed in courts across Canada.

[174] The majority's approach thereby risks undermining one of the defining features of *habeas corpus*, namely, that it is an *expeditious* remedy because "[t]he importance of the interests at stake militates in favour of a quick resolution of the issues" (*May*, at para. 69; see also *Khela*, at para. 61). The first risk is practical: courts have limited capacity, and applicants who are unlawfully deprived of their liberty may face delays in obtaining relief while the courts address *habeas corpus* applications that

do not involve genuine deprivations of liberty and that raise matters better left to correctional administrators. The second risk is normative: lowering the threshold for what constitutes a deprivation of liberty diminishes the importance of the interest at stake and, in turn, weakens the imperative of prompt resolution of *habeas corpus* applications.

[175] The majority reasons warrant an additional comment. *Habeas corpus* is not a tool by which to address systemic issues. The majority partly anchors its justification for broadening *habeas corpus* in the need to address the issue of "over-classification" of inmates from certain marginalized groups in the current administrative carceral system. However, the purpose of *habeas corpus* is to protect "individuals against erosion of their right to be free from wrongful restraints upon their liberty" (*May*, at para. 21, quoting *Jones*, at p. 243). The writ of *habeas corpus* is therefore focused on the individual claim of unlawful detention. The majority undertakes a perilous endeavour in expanding its scope to tackle the larger issue of over-classification, especially without delving into the complex roots of that issue.

(b) *The Second Stage in the Habeas Corpus Analysis Must Be Strengthened and Explained if It Is To Filter Out Frivolous Claims*

[176] The majority claims that the expanded scope of *habeas corpus* it proposes will not open the floodgates because courts are able to decline to hear a case on its merits if the applicant fails to raise a legitimate ground at the second stage of the analysis. With respect, we disagree.

[177] The majority fails to capture the procedural environment in which *habeas corpus* applications are presented. As we set out above, because a person's liberty is potentially at stake, courts deal with *habeas corpus* applications expeditiously (see, e.g., *Habeas Corpus Act*, s. 1(2); *Code of Civil Procedure*, CQLR, c. C-25.01, s. 399). In the past, the application for a writ of *habeas corpus* entailed a two-stage process whereby the judge to whom the application was presented would determine whether a legitimate ground for the complaint exists and, then, if so, the writ would issue and the merits would be determined on the return of the writ (*R. v. Olson*, [1989] 1 S.C.R. 296). However, it "is now almost inevitably the case that the hearing of the application for the writ becomes the substantive hearing" (Farbey and Sharpe, at p. 235; R. E. Salhany, *Canadian Criminal Procedure* (6th ed. (loose-leaf)), at § 10:5).

[178] Under these circumstances, it is doubtful that courts will consider a *habeas corpus* application like the present one frivolous, given that, in light of the majority's ruling, inmates will easily demonstrate a deprivation of liberty.

[179] Nor will the second stage of the *habeas corpus* analysis prevent the misuse of the writ that the majority reasons invite, since, according to the majority, an applicant need only "identify an arguable issue and present a sound legal basis" (para. 74). The majority does not explain what this standard means or how to apply it. Indeed, the jurisprudence — which largely addresses the second *Dumas* category or the third *Dumas* category as we interpret it (i.e., requiring an existing legal entitlement to greater liberty) — suggests that this is a low threshold. It demands no more than "cause to

doubt" the legality of the detention (*May*, at para. 71) or "some basis for concluding that the detention is unlawful" (*Khela*, at para. 41 (emphasis added)).

[180] A deprivation may be unlawful due to procedural unfairness, as was the case in *Cardinal* and *Khela*, or where the decision maker lacks the jurisdictional authority to order the detention, as was the case in *Dumas*. The majority even suggests an applicant can establish the decision was unlawful if it lacks an evidentiary foundation or is arbitrary or unreasonable (majority reasons, at para. 45, citing *Khela*, at para. 67). If all an inmate must do at stage two is to rely on one of these "sound legal bas[es]" and "identify an arguable issue" or "some basis" that the detention is unlawful, a court is unlikely to readily dismiss an application rather than hearing it on its merits (majority reasons, at paras. 46-47, 74 and 76-77 (emphasis added)). As a practical matter, the corrections authorities will be required to justify to the court any refusal of a lower security reclassification.

[181] Moreover, because the majority does not undertake the analysis of the second stage in the instant case, its reasons provide no guidance or demonstration on how to weed out frivolous claims at this stage. Instead, given the majority's directions, including as to the danger of "over-classification", courts may well be more likely to decide the case on its merits.

[182] As such, the second stage of the analysis will not effectively prevent a flood of applications being heard by the courts.

(2) Reasonableness Review Should Remain the Exclusive Purview of the Federal Court

[183] Reasonableness review of administrative correctional decisions should remain the exclusive purview of the Federal Court as provided for by Parliament. This is so for several reasons.

[184] First, the familiarity of the Federal Court with such review in the operation of correctional facilities enables proper deference to be given to decisions by correctional administrators. It must be borne in mind that *habeas corpus* as a remedy is narrow. It does not extend to reweighing the numerous quantitative and qualitative factors involved in security classifications. *Habeas corpus* is a very blunt instrument and its focus is singular: whether the deprivation of liberty is lawful. Deference is owed to the decisions of correctional administrators because, *inter alia*, they better understand the penitentiary culture and inmate behaviour that underlies classification decisions. This understanding derived from experience was acknowledged by LeBel J. in *Khela*, at para. 76:

> Like the decision at issue in *Lake*, a transfer decision requires a "fact-driven inquiry involving the weighing of various factors and possessing a 'negligible legal dimension'" (*Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, at paras. 38 and 41). The statute outlines a number of factors to which a warden must adhere when transferring an inmate: the inmate must be placed in the least restrictive environment that will still assure the safety of the public, penitentiary staff and other inmates, should have access to his or her home community, and should be transferred to a compatible cultural and linguistic environment (s. 28 *CCRA*). Determining whether an inmate poses a threat to the security of the penitentiary or of the individuals who live and work in it requires intimate knowledge of that penitentiary's culture and of the behaviour of

> the individuals inside its walls. Wardens and the Commissioner possess this knowledge, and related practical experience, to a greater degree than a provincial superior court judge. [Emphasis added.]

[185] While we endorse LeBel J.'s comments that correctional administrators are vested with particularized knowledge to a "greater degree" than a superior court judge, the same is true for Federal Court judges, given their extensive experience of judicial review in federal prisons. For practical reasons, reasonableness review for inmates challenging administrative decisions of correctional administrators is better left to the Federal Court as opposed to superior courts.

[186] Second, a further practical concern relating to consistency in jurisprudence emerges in the majority's interpretation, because there will be no way to resolve inconsistencies in the application of *habeas corpus* and its related jurisprudence given that appeals from the superior courts lie to the provincial courts of appeal while appeals from the Federal Court lie to the Federal Court of Appeal. Short of an appeal to our Court, there will be no way to resolve possible inconsistencies as among provincial courts of appeal. This may not only lead to administrative incoherence in the correctional system but also undermine the uniform development of the law governing liberty and detention across the country, at least as regards federal prisons.

[187] Third, the argument that resort to *habeas corpus* is required to challenge correctional security classification decisions because existing review mechanisms are insufficient is not compelling; to the contrary, the existing review mechanisms are adequate (in addition to being the mechanisms chosen by Parliament). This includes

the normal order of affairs — where an inmate's classification to maximum- or medium-security can be revisited every six months, where inmates can request file corrections for reliance on incorrect information, and where an inmate can file a complaint with the Correctional Investigator — as well as the internal grievance process and, finally, judicial review.

[188] The appellants in this case argue that reliance on judicial review before the Federal Court is insufficient because it can only be accessed after the grievance procedure provided for by Parliament is exhausted (A.F., at para. 45, citing *Mackinnon v. Warden of Bowden Institution*, 2016 FCA 14, at para. 6). During oral submissions, counsel for the appellants stated the Federal Court has relied on the doctrine of exhaustion to require inmates seeking judicial review of an administrative decision to complete the internal grievance procedure (transcript, at p. 7). We do not accept this as a reason to reject the Federal Court as the appropriate forum for reviewing security reclassification decisions made by correctional administrative decision makers. The Federal Court has the discretion to hear a judicial review even where internal grievance procedures are not exhausted; we have confidence that they will do so where circumstances warrant (see, e.g., *Forner v. Professional Institute of the Public Service of Canada*, 2016 FCA 35, 481 N.R. 159, at paras. 14-15).

[189] Fourth, concerning reasonableness review, we do not accept the majority's pronouncements on this issue as it relates to *Khela*. That case does not stand for the proposition that superior courts can engage in reasonableness review on *habeas corpus*

applications in a way parallel to the Federal Court on judicial review. The comments made by LeBel J. concerning reasonableness in *Khela* — a case decided on procedural fairness — were *obiter*; they are not part of his analysis leading to the disposition of this case (paras. 5, 80 and 98). These comments are not a proper basis for disturbing the balance our Court has set out for administrative review in *Vavilov*.

[190] Fifth, provincial superior courts' jurisdiction to issue writs of *habeas corpus* in the correctional context has never been wholly concurrent with the Federal Court's jurisdiction in the same context. For example, *habeas corpus* in the superior courts is not available to address changes to an inmate's conditions of detention unless the inmate has experienced a "substantial change in conditions amounting to a further deprivation of liberty" (*Dumas,* at p. 464). However, judicial review to the Federal Court remains available in regard to administrative decisions which otherwise affect an inmate's conditions and experiences (see, e.g., *Nova Scotia (Attorney General) v. Diggs and Wilband*, 2025 NSCA 20, at paras. 51-53; *R. v. Haug*, 2011 ABCA 153, 502 A.R. 392, at paras. 3 and 6; *Ewanchuk*, at paras. 10 and 71; *Moldovan v. Canada (Attorney General)*, 2012 ONSC 2682, 291 C.C.C. (3d) 123, at para. 15(ii)).

(3) Unconditional Release to a Lower Security Facility Is the Only Remedy Available on a *Habeas Corpus* Application

[191] The majority reasons that superior court judges "retain discretion" to issue remedies beyond the standard remedy of release to a less restrictive security facility (para. 89). The majority reasons that this remedial discretion arises from the superior

courts' inherent jurisdiction. We disagree. On a successful *habeas corpus* application, superior courts have at their disposal only one remedy: release to a less restrictive facility (*Chhina*, at paras. 1 and 65; *Miller*, at p. 635-36; Farbey and Sharpe, at p. 21).

[192] On applications for *habeas corpus*, the broad remedial powers under s. 24(1) of the *Charter* are not available. It is important to note that this appeal concerns the *common law* writ of *habeas corpus*. It does *not* concern a *Charter* challenge. The appellants alleged that the denial of their transfer requests engaged ss. 7, 9, 10(c) and 12 of the *Charter*, but did not bring *Charter* applications (see C.A. decision, at paras. 4 and 45). In other words, the appellants are not alleging breaches of *Charter* rights. *Habeas corpus* as a *Charter* remedy is available in response to a *Charter* breach (see *Gamble*, at pp. 639-40; see also *Khela*, at para. 29). As a result, *habeas corpus* in this case is not available as a *Charter* remedy under s. 24(1), but as a common law remedy. On applications for *habeas corpus* in the common law, it is not proper for courts to rely on s. 24(1) of the *Charter* to issue remedies beyond release and transfer.

[193] We agree that on *habeas corpus* applications, superior courts have inherent jurisdiction when issuing the remedy of release to impose additional conditions (*Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 839, 55 Imm. L.R. (4th) 220, at para. 48). This approach guarantees access to the remedy of *habeas corpus* for applicants, while protecting "public safety and respect for the law" through the imposition of appropriate conditions (para. 48). The context in which *Ogiamien* was decided is important for understanding Sharpe J.A.'s comments

about imposing additional conditions. Sharpe J.A. was writing in the context of release from immigration detention. Release in that context entails full release and additional conditions may include to "keep the peace and be of good behaviour", to "attend all immigration proceedings as and when required", or to "abstain absolutely from the possession and/or consumption of any drugs or other substances prohibited by law", among others (see, e.g., *Scotland v. Canada (Attorney General)*, 2017 ONSC 4850, 139 O.R. (3d) 191, at paras. 78-79; see also *Ali v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 ONSC 2660, 137 O.R. (3d) 498, at para. 41).

[194] That is not the context of this appeal and similar conditions and terms of release do not have the same logical impact on an inmate's release to a less restrictive security facility. The decision challenged by way of *habeas corpus* is the denial of reclassification and transfer to a less restrictive facility. Even if additional conditions are imposed by the court, the remedy of *habeas corpus* is non-discretionary; once the court has determined the detention is unlawful, it must remedy the unlawfulness. On a successful *habeas corpus* application in the carceral context, the superior court would be obliged to release the inmate into a less restrictive security facility. The majority does not articulate what types of conditions could be imposed upon release and, in our view, there are none. The impact that an inmate's transfer into a less restrictive security facility has on the staff and fellow inmates will not be markedly different if the court imposes conditions about, for example, activities that the inmate can undertake, or privileges that they can access in such facility.

[195] In addition to imposing conditions of release, the majority states that "CSC may tender evidence . . . as to why a specific security classification is . . . justified" and that courts can make such a determination on a *habeas corpus* application (para. 89). Given that there are generally only three levels of security (maximum, medium, and minimum), it is not clear how this line of reasoning could lead to anything but full release into the immediately lesser level of security. This highlights that the expansion of *habeas corpus* into this type of decision making will lead to the micromanagement of federal correctional facilities by superior courts.

[196] The prerogative writs, including *habeas corpus*, share a common goal: to ensure that authority is utilized in conformity with the purposes and constraints that govern it (*De Smith's Judicial Review* (9th ed. 2023), by I. Hare, C. Donnelly and J. Bell, eds., at p. 787). The reviewing court determines whether the authority has been properly exercised but it does *not* substitute its own preference, and then give effect to that preference by exercising an authority not conferred on the court. Therefore, on a successful *habeas corpus* application, the court gives effect to the claimant's legal rights which underlie that application; it cannot "ignore illegality simply because it seems that the applicant really ought to be detained" (Farbey and Sharpe, at p. 52). Asserting that a court's lack of statutory authority can be overcome by its inherent authority is to claim that courts possess authority to govern, in addition to their adjudicative role. They do not. Yet this is what the majority invites by asserting that "judges retain discretion to not discharge an applicant" even where the applicant's

detainment is unlawful, and that judges may issue any condition they see fit as a remedy on a successful *habeas corpus* application (paras. 85-86).

[197] The majority appears driven to make these sweeping claims of judicial power on a *habeas corpus* application in order to blunt the readily foreseeable consequences of its expansion of what constitutes a deprivation of liberty: a flood of claims by inmates with no legal entitlement to the new carceral conditions they seek. Instead, those very consequences should lead the majority to recognize that its reasoning will transform the writ of *habeas corpus* into an ill-suited substitute for internal review and judicial review of the operation of correctional institutions.

(4) Caution Is Warranted To Address Provincial Concerns

[198] The Attorney General of Canada, as the respondent, shares the caution of the application judge that accepting the position of the appellants would render every security reclassification decision reviewable by way of *habeas corpus* (R.F., at para. 107).

[199] The Attorney General of British Columbia, as an intervener, asks our Court to limit any holding stemming from this case to only federal institutions, given that provincial correctional facilities are governed by different statutes (I.F., at para. 10). It also makes a "floodgates" argument similar to that of the Attorney General of Canada (I.F., at para. 11). The Attorney General of Quebec advances a similar position (I.F., at paras. 42-43).

[200] It is important to be mindful of the impacts of this decision on provincial correctional systems. We agree with the Attorney General of British Columbia that a decision as to federal correctional facilities does not readily transpose onto a provincial scheme, which is tailored to deal with the different circumstances of provincial correctional facilities.

[201] The practical implications of this decision on judicial resources and access to justice are significant. Given the procedural advantages (including the high priority) that *habeas corpus* offers an applicant, there is every reason to expect that it will quickly supplant other available review mechanisms, leading to a surge of *habeas corpus* applications before superior courts, resulting in delays in other proceedings before those courts.

[202] Caution is warranted. Although *habeas corpus* is a broad and flexible remedy, it should remain targeted on the liberty of the subject. Expanding it beyond its proper confines risks imposing significant burdens on already strained provincial superior courts and disrupting correctional frameworks of Parliament's design. It would tend to draw superior courts more deeply into the day-to-day administration of correctional systems. These concerns underscore the need to preserve *habeas corpus* for its enduring purpose: safeguarding against unlawful deprivations of liberty, rather than serving as a generalized vehicle for reviewing administrative decisions within correctional institutions.

V. Application and Disposition

[203] This Court has undertaken an expansion of *habeas corpus* that stands at odds with modern administrative law remedies and procedures. Administrative decisions, which include those made within federal prisons, are subject to internal review as per the scheme set out in the governing statute, the *CCRA* backed up by judicial review before the Federal Court. A wide range of decisions made within a correctional facility regarding an inmate can be characterized as impacting their liberty. In the end, we conclude that *habeas corpus* is not available to challenge decisions denying transfer to lower security facilities.

[204] Neither Mr. Dorsey nor Mr. Salah ought to have had access to *habeas corpus* to challenge the administrative decisions denying reclassification or transfer to lower security.

[205] In Mr. Dorsey's case, his case management team, the MAI, and his Warden all recommended a transfer to minimum-security. However, the transfer was conditional on approval by the RDC and the ACCOP. Since that approval was not granted, the condition was not met, and Mr. Dorsey never acquired the legal status of a minimum-security inmate.

[206] Likewise, Mr. Salah's reclassification and transfer to lower security were recommended by his case management team and a parole officer, but a newly assigned MAI assessed him as being a moderate escape risk, leading the Warden to recommend denial of transfer. As in *Dumas*, Mr. Salah came close to acquiring a new status but did not achieve it. As a result, *habeas corpus* is not available. The factual parallels between

Dumas and these cases reinforce the conclusion that no unlawful deprivation of liberty (for which *habeas corpus* is a remedy) has occurred.

[207] As such, it is our view that when the current law as set out in *Dumas* is properly applied, resort to *habeas corpus* is not available for either Mr. Dorsey or Mr. Salah to challenge the administrative decisions denying reclassification or transfer to lower security.

[208] Accordingly, we would dismiss the appeal.

Appeal allowed, CÔTÉ, ROWE *and* JAMAL JJ. *dissenting.*

Solicitors for the appellants: Goldblatt Partners, Toronto; Borys Law, Kingston; Kate Mitchell, Toronto.

Solicitor for the respondent: Department of Justice Canada — National Litigation Sector, Toronto.

Solicitor for the intervener Attorney General of Quebec: Ministère de la Justice du Québec — Direction du droit constitutionnel et autochtone, Québec.

Solicitor for the intervener Attorney General of British Columbia: Ministry of the Attorney General of British Columbia — Legal Services Branch, Vancouver.

Solicitor for the intervener John Howard Society of Canada: Queen's Prison Law Clinic, Kingston.

Solicitors for the intervener Canadian Council for Refugees: Newcomer Legal Clinic, Thunder Bay; Jamie Liew, Ottawa.

Solicitor for the intervener Alberta Prison Justice Society: Prison & Police Law, Calgary.

Solicitor for the intervener Aboriginal Legal Services: Aboriginal Legal Services, Toronto.

Solicitors for the intervener West Coast Prison Justice Society: Allen/McMillan Litigation Counsel, Vancouver.

Solicitors for the intervener British Columbia Civil Liberties Association: Pender Litigation, Vancouver; British Columbia Civil Liberties Association, Vancouver.

Solicitors for the intervener Canadian Association of Elizabeth Fry Societies: PATH Legal, Dartmouth, N.S.

Solicitors for the intervener Canadian Association of Refugee Lawyers: Edelmann & Co., Vancouver; Kes Posgate Law, Toronto.

Solicitors for the intervener Black Legal Action Centre: Goldblatt Partners, Toronto; Black Legal Action Centre, Toronto.

Solicitors for the intervener Pivot Legal Society: Yanful Law, Toronto; Pivot Legal Society, Vancouver.

Solicitors for the intervener Margaret Lee Cole: Lockyer Zaduk Zeeh, Toronto.

Solicitors for the intervener Canadian Civil Liberties Association: Stockwoods, Toronto.

Solicitors for the intervener Canadian Prison Law Association: Posner Craig Stein, Toronto.