

CANADA / JUDGMENT

R. v. Miller

[1985] 2 SCR 613

COURT

Supreme Court of Canada

DECIDED

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R. v. Miller

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Date

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Report

[1985] 2 SCR 613

Case number

17333

Judges

Dickson, Robert George Brian; Beetz, Jean; Estey, Willard Zebedee; McIntyre, William Rogers; Lamer, Antonio; Wilson, Bertha; Le Dain, Gerald Eric

On appeal from

Ontario

Subjects

Prerogative writs

Notes

SCC Case Information: 17333

Decision Content

R. v. Miller, [1985] 2 S.C.R. 613

Her Majesty The Queen Appellant;

and

Robert Miller Respondent.

File No.: 17333.

1984: October 12; 1985: December 19.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Lamer, Wilson and Le Dain JJ.

on appeal from the court of appeal for ontario

Prerogative writs -- Habeas corpus -- Jurisdiction -- Superior courts -- Inmate confined in a special handling unit -- Application for habeas corpus and certiorari in aid in a superior court -- Whether a provincial superior court has jurisdiction to issue certiorari in aid of habeas corpus to determine the validity of an inmate's confinement in a special handling unit of a federal penitentiary -- Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 18.

Prerogative writs -- Habeas corpus -- Availability of remedy -- Inmate confined in a special handling unit following a disturbance in a federal penitentiary -- Whether habeas corpus lies to challenge the validity of a particular form of confinement in a penitentiary.

Prerogative writs -- Habeas corpus -- Procedure -- Affidavit evidence -- Whether affidavit evidence admissible on habeas corpus application to show jurisdictional error.

Following a disturbance in the penitentiary, respondent inmate was transferred to another institution and placed in administrative segregation in a "Special Handling Unit". This unit was reserved for particularly dangerous inmates and was characterized by a more restrictive confinement and the loss of several privileges or amenities enjoyed by the general inmate population. Respondent was advised that he had been placed there because of his participation in the disturbance, but was never given any opportunity to confront the evidence, if any, of his involvement in the incident. Respondent's application for habeas corpus with certiorari in aid was dismissed by the Ontario Supreme Court. The Court of Appeal allowed respondent's appeal and returned the matter to the High Court to determine the issue on the merits. This appeal is to determine (1) whether a provincial superior court has jurisdiction to issue certiorari in aid of habeas corpus against a federal board, commission or other tribunal despite the exclusive jurisdiction in respect of certiorari of the Federal Court of Canada under s. 18 of the Federal Court Act ; (2) whether, on an application for habeas corpus alone, a court may consider affidavit evidence to determine whether a detention is unlawful by reason of an absence or excess of jurisdiction; and (3) whether habeas corpus will lie to determine the validity of confinement in a special handling unit, and if such confinement is found to be unlawful, to secure the release of the inmate into the general population of the institution.

Held: The appeal should be dismissed.

- (1) A provincial superior court has jurisdiction to issue certiorari in aid of habeas corpus notwithstanding s. 18 of the Federal Court Act . The provisions of the Federal Court Act indicate a clear intention on the part of Parliament to leave the jurisdiction by way of habeas corpus to review the validity of a detention imposed by federal authority with the provincial superior courts. While s. 18 confers an exclusive and very general review jurisdiction over federal authorities by the prerogative and extraordinary remedies, to which specific reference is made, it deliberately omits reference to habeas corpus. This omission was not an oversight but a well considered decision. Considering the importance of certiorari in aid to the effectiveness of habeas corpus, a remedy included as a guaranteed right in s. 2(c)(ii) of the Canadian Bill of Rights and s. 10 (c) of the Canadian Charter of Rights and Freedoms , it cannot have been intended that the reference to certiorari in s. 18 should have the effect of undermining or weakening the habeas corpus jurisdiction of the provincial superior courts by the exclusion or denial of certiorari in aid. To avoid such a construction, it is possible to conclude that, because of the association in that section of certiorari with the other prerogative and extraordinary remedies, the reference to certiorari in s. 18 is to the independent remedy of certiorari to quash the decision of an inferior tribunal and not to certiorari as an ancillary procedure used to serve an essentially evidentiary purpose. Indeed, it is unlikely that Parliament intended to confer an exclusive jurisdiction to issue certiorari in aid when it had clearly withheld the jurisdiction to issue habeas corpus.
- (2) It is well established that affidavit evidence is admissible on certiorari to show jurisdictional error. Subject to the limitation arising from the conclusive character of the records of courts of superior or general common law jurisdiction, a court may also on an application for habeas corpus without certiorari in aid consider affidavit or other extrinsic evidence to determine whether there has been an absence or excess of jurisdiction. The proposition that this Court was limited on habeas corpus to an examination of the warrant of committal in determining whether there had been a jurisdictional error goes beyond the true basis of the Court's jurisprudence on this question.
- (3) Habeas corpus lies to determine the validity of a particular form of confinement in a penitentiary notwithstanding that the same issue may be determined upon certiorari in the Federal Court. The proper scope of the availability 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. Confinement in a special handling unit or in administrative segregation is a form of detention that is distinct and separate from that imposed on the general inmate population. It is in fact a new detention of the inmate, purporting to rest on its own foundation of legal authority. There is no reason in principle, in view of the nature and role of habeas corpus, why that remedy should not be available to challenge the validity of such a distinct form of detention in which the actual physical constraint, as distinct from the mere loss of certain privileges, is more restrictive or severe than the normal one in an

institution.

Cases Cited

Mitchell v. The Queen, [1976] 2 S.C.R. 570; Re Shumiatcher, [1962] S.C.R. 38; Re Trepanier (1885), 12 S.C.R. 111; Goldhar v. The Queen, [1960] S.C.R. 431; Re Sproule (1886), 12 S.C.R. 140, considered; Re Cardinal and Oswald and The Queen (1982), 67 C.C.C. (2d) 252, rev'd [1985] 2 S.C.R. 643; Re Morin and Yeomans (1982), 1 C.C.C. (3d) 438, [1982] C.A. 464, rev'd [1985] 2 S.C.R. 662; Ex parte McCaud, [1965] 1 C.C.C. 168; Howarth v. National Parole Board, [1976] 1 S.C.R. 453; R. v. London Borough of Hillingdon, ex parte Royco Homes Ltd., [1974] 2 All E.R. 643; Martineau v. Matsqui Institution Disciplinary Board, [1980] 1 S.C.R. 602; Ex parte Macdonald (1896), 27 S.C.R. 683; Re Henderson, [1930] S.C.R. 45; Schtraks v. Government of Israel, [1964] A.C. 556; Ex parte Rogers (1843), 7 Jur. 992; R. v. Governor of Wandsworth Prison; ex parte Silverman (1952), 96 Sol. J. 853; Berrouard v. The Queen, S.C. Longueuil, No. 505-01-001299-789, November 30, 1981; Solosky v. The Queen, [1980] 1 S.C.R. 821; Stevenson v. Florant, [1927] A.C. 211, aff'g [1925] S.C.R. 532; Dugal v. Lefebvre, [1934] S.C.R. 501; Re Cadeddu (1982), 4 C.C.C. (3d) 97; Swan v. Attorney General of British Columbia (1983), 35 C.R. (3d) 135; Re Frejd (1910), 22 O.L.R. 566; Re Bell and Director of Springhill Medium Security Institution (1977), 34 C.C.C. (2d) 303; McNally v. Hill, 293 U.S. 131 (1934); Jones v. Cunningham, 371 U.S. 236 (1963); Peyton v. Rowe, 391 U.S. 54 (1968); Johnson v. Avery, 393 U.S. 483 (1969); Wilwording v. Swenson, 404 U.S. 249 (1971); Preiser v. Rodriguez, 411 U.S. 475 (1973); Coffin v. Reichard, 143 F.2d 443 (1944); McCollum v. Miller, 695 F.2d 1044 (1982); Krist v. Ricketts, 504 F.2d 887 (1974); Bryant v. Harris, 465 F.2d 365 (1972); Dawson v. Smith, 719 F.2d 896 (1983); Streeter v. Hopper, 618 F.2d 1178 (1980), referred to.

Statutes and Regulations Cited

Canadian Bill of Rights, R.S.C. 1970, App. III, s. 2(c)(iii).

Canadian Charter of Rights and Freedoms, s. 10 (c).

Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, ss. 2 "federal board, Commission or other tribunal", 17(5), 18.

Authors Cited

Cromwell, T. "Habeas Corpus and Correctional Law" (1977), 3 Queen's L.J. 295.

Note. "Developments in the Law--Federal Habeas Corpus", 83 Harv. L.R. 1038 (1970).

Sharpe, R. J. "Habeas Corpus in Canada" (1975), 2 Dalhousie L.J. 241.

Sharpe, R. J. The Law of Habeas Corpus, Oxford, Clarendon Press, 1976.

APPEAL from a judgment of the Ontario Court of Appeal (1982), 141 D.L.R. (3d) 330, 39 O.R. (2d) 41, 70 C.C.C. (2d) 129, 29 C.R. (3d) 153, 29 C.P.C. 159, allowing respondent's appeal from a judgment of Steele J.1, dismissing his application for habeas corpus with certiorari in aid. Appeal dismissed.

1 Summarized at (1982), 7 W.C.B. 294.

R. W. Hubbard, for the appellant.

Fergus J. O'Connor, for the respondent.

The judgment of the Court was delivered by

1. Le Dain J.--This appeal raises the question whether, having regard to the role of habeas corpus and the exclusive jurisdiction of the Federal Court of Canada under s. 18 of the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, in respect of certiorari against any federal board, commission or other tribunal, a provincial superior court has jurisdiction by way of habeas corpus with certiorari in aid to determine the validity of the confinement of an inmate of a federal penitentiary in a "special handling unit", a particularly restrictive form of segregated detention, and if such confinement be found unlawful, to order his release into association with the general inmate population of the penitentiary.
2. The appeal is by leave of this Court from the judgment of the Ontario Court of Appeal on August 25, 1982 allowing an appeal from the judgment of Steele J. of the Supreme Court of Ontario on March 5, 1982, which dismissed the respondent's application for habeas corpus with certiorari in aid to determine the validity of his confinement in the Special Handling Unit of Millhaven Institution, a federal penitentiary, on the ground that the Court lacked jurisdiction to issue certiorari in aid of habeas corpus because of the exclusive jurisdiction of the Federal Court in respect of certiorari against a federal board, commission or other tribunal and on the further ground that on habeas corpus alone the Court was precluded by the jurisdiction of the Federal Court from considering anything but the warrants of committal, which were regular on their face and had not been challenged.

I

3. According to the respondent's affidavit in support of his application for habeas corpus with certiorari in aid, he was an inmate in Matsqui Penitentiary on June 2, 1981 when a "disturbance" occurred in the dining area where he was employed. He claimed that he was not in the dining area at the time and that he was not responsible in any way for the disturbance. He was, nevertheless, placed in administrative segregation in Matsqui on June 5th and in segregation in Kent Institution and Millhaven, to which he was subsequently transferred, on July 11th and July 23rd respectively. On July 29, 1981 he was placed in the Special Handling Unit at Millhaven.
4. Confinement in a special handling unit is reserved for particularly dangerous inmates, as indicated by s. 5 of Commissioner's Directive 274 of December 1, 1980, which defines "Special Handling Unit" as follows: " `Special Handling Unit' (SHU) is a facility established to deal exclusively with inmates who, in addition to requiring maximum security, have been identified as being particularly dangerous." According to the Directive, a special handling unit program of confinement consists of four phases, the first of which is a period of

assessment in administrative segregation. According to the respondent's affidavit, which describes the nature of the confinement in the various phases in considerable detail, in the first phase consisting of administrative segregation the inmate is cut off from all association with other inmates and is confined to his cell for all but one hour of the day. In subsequent phases of the program limited association with other inmates and somewhat longer periods outside the cell are permitted, but speaking generally, it may be said that confinement in a special handling unit is a significantly more restrictive form of detention than the normal one in a penitentiary, involving the loss or denial of several privileges or amenities enjoyed by the general inmate population.

5. According to the respondent's affidavit, he was advised by letter about two weeks after he was placed in the Special Handling Unit that he had been put there because of his involvement in the disturbance at Matsqui and specifically because he had broken windows in the kitchen and had manufactured an explosive device. The respondent states that he was never given an opportunity to confront the evidence, if any, of his involvement in the incident at Matsqui on which the decision to confine him in the Special Handling Unit was based. He was never charged with a disciplinary offence arising out of that incident nor was any criminal charge laid against him. He was not given a psychological examination, and there was nothing in his background or in the nature of the offences of which he was convicted to suggest that he was a particularly dangerous inmate. In October 1981 he attended a hearing of the National Special Handling Unit Review Committee, but he was not informed of the evidence against him nor given any opportunity to meet it. He was told that he could only secure his release from the Special Handling Unit into normal association with the general population of the penitentiary by good behaviour. In the respondent's submission there was no basis nor justification whatever for placing him in the Special Handling Unit.
6. In his application for habeas corpus with certiorari in aid the respondent contended that confinement in the Special Handling Unit at Millhaven is not authorized by statute or regulation and is therefore unlawful, and further or alternatively, that his confinement in the Special Handling Unit was carried out in a manner that denied him procedural fairness. The respondent conceded that he was lawfully required to be detained in a penitentiary. His mandatory supervision release date was July 3, 1983, and we were informed at the hearing of the appeal that he had been released.
7. The unanimous judgment of the Court of Appeal (1982), 141 D.L.R. (3d) 330, 39 O.R. (2d) 41, 70 C.C.C. (2d) 129, 29 C.R. (3d) 153, 29 C.P.C. 159, allowing the appeal from the judgment of Steele J. and referring the matter back to the High Court for determination of the merits was delivered by Cory J.A., with whom Martin and Goodman JJ.A. concurred. In his reasons for judgment Cory J.A. addressed three issues in the following order: (a) whether habeas corpus will lie to determine the validity of confinement in a special handling unit, and if such confinement is found to be unlawful, to secure the release of the inmate into the general population of the institution; (b) whether, on an application for habeas corpus alone, a court

may consider affidavit evidence to determine whether a detention is unlawful by reason of an absence or excess of jurisdiction; and (c) whether a provincial superior court has jurisdiction to issue certiorari in aid of habeas corpus against a federal board, commission or other tribunal despite the exclusive jurisdiction in respect of certiorari of the Federal Court of Canada under s. 18 of the Federal Court Act . The Court of Appeal gave an affirmative answer to each of these questions. The appellant directs its attack chiefly against the Court's conclusions on the first and third questions, which are the principal issues in the appeal. The Court of Appeal appears to have treated the second question as an alternative issue, which it may or may not be necessary to deal with in this appeal.

8. There are two other appeals involving some or all of these issues which were heard at the same time as this appeal: *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. The judgment of the British Columbia Court of Appeal in *Cardinal*, which is reported at (1982), 67 C.C.C. (2d) 252 (sub nom. *Re Cardinal and Oswald and The Queen*), and the judgment of the Quebec Court of Appeal in *Morin*, which is reported at [1982] C.A. 464 (sub nom. *Morin c. Comité national de l'examen des cas d'U.S.D. (Unité spéciale de détention)*) and (1982), 1 C.C.C. (3d) 438 (sub nom. *Re Morin and Yeomans*), were both rendered before the judgment of the Ontario Court of Appeal in the case at bar. In *Cardinal* the British Columbia Court of Appeal came to the same conclusions as the Ontario Court of Appeal on the three questions of jurisdiction considered by it. Indeed, Cory J.A. relied particularly on the reasoning of Anderson J.A. in the British Columbia Court of Appeal on these issues. In addition, however, the Court of Appeal in *Cardinal* dealt with the merits of the contention that there had been a breach of the duty to act fairly in the manner in which the administrative dissociation or segregation of the appellant had been imposed or continued, and it was from the disposition of the appeal on this issue, rather than on the issues of the court's jurisdiction, as in the case at bar, that the appeal was brought to this Court. For this reason the issues of jurisdiction on which both Courts of Appeal came to the same conclusions will be dealt with first in this appeal. In *Morin*, where the appellant sought by an application for habeas corpus without certiorari in aid to challenge his confinement in a special handling unit, the main issue appears to be the one that is common to the three appeals--whether, having regard to the judicial review jurisdiction of the Federal Court, habeas corpus should lie to review the validity of such confinement.

II

9. The question whether a provincial superior court has jurisdiction to issue certiorari in aid of habeas corpus to review the validity of a detention imposed by federal authority arises, as has been indicated, because of the terms of s. 18 of the Federal Court Act , which confers on the Trial Division of the Federal Court of Canada an exclusive original jurisdiction to issue certiorari against any federal board, commission or other tribunal. Section 18 reads as follows:

18. The Trial Division has exclusive original jurisdiction
 - (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
 - (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

Section 2 of the Federal Court Act defines "federal board, commission or other tribunal" as follows:

"federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867 .

It is not disputed that the decision to place the respondent in the Special Handling Unit at Millhaven was the decision of a federal board, commission or tribunal within the meaning of s. 2 of the Act.

10. Courts which have had to consider this issue of jurisdiction have been confronted by the conflicting opinions on it of members of this Court in *Mitchell v. The Queen*, [1976] 2 S.C.R. 570. Steele J. based his conclusion on this issue on the opinion of Ritchie J. in *Mitchell*. The Ontario Court of Appeal, as did the British Columbia Court of Appeal in *Cardinal*, followed the contrary opinion of Laskin C.J. in that case.
11. In *Mitchell*, the appellant sought, by an application for habeas corpus with certiorari in aid, to challenge the validity of his detention following the suspension and revocation of his parole by the National Parole Board. He raised several grounds of alleged jurisdictional error related to the proceedings and decisions of the Board which he supported by affidavit evidence. A majority of this Court dismissed his appeal, finding that his detention was not invalid by reason of absence or excess of jurisdiction. The issue of the availability of certiorari in aid arose because the Manitoba Court of Queen's Bench had issued a writ of habeas corpus to determine the validity of the detention, but the order had not included relief in the nature of certiorari in aid. Although, as Ritchie J. observed, the sufficiency of the order of the Manitoba Court of Queen's Bench had not been challenged below, opinion were nevertheless expressed in this Court on the jurisdiction of a provincial superior court to issue certiorari in aid of habeas corpus to review the validity of a detention imposed by federal authority. Ritchie J. was first of all of the view, which may be assumed to have been that of a majority of the Court, that certiorari would not lie in any event because the decisions of the National Parole Board suspending and revoking the appellant's parole were not decisions of a judicial or quasi-judicial nature amenable to certiorari. In support of this

conclusion he cited the decisions of this Court in *Ex parte McCaud*, [1965] 1 C.C.C. 168, and *Howarth v. National Parole Board*, [1976] 1 S.C.R. 453. Speaking for himself and three other members of the full Court (Judson, Pigeon and Beetz JJ.), he was also of the opinion, however, that the jurisdiction of a provincial superior court to issue certiorari in aid of habeas corpus against a federal board had been removed by s. 18 of the Federal Court Act. The other members of the Court (Martland and de Grandpré JJ.) who agreed that the appeal should be dismissed did not express an opinion on this issue. Laskin C.J., who would have allowed the appeal, held that certiorari was not confined in its application to decisions of a judicial or quasi-judicial nature, citing *R. v. London Borough of Hillingdon, ex parte Royco Homes Ltd.*, [1974] 2 All E.R. 643, as indicating the wider application of the remedy, and that s. 18 of the Federal Court Act had not removed the jurisdiction of a provincial superior court to issue certiorari in aid of habeas corpus against a federal board, commission or tribunal. The opinion of Laskin C.J. on this question of jurisdiction was concurred in by Dickson J., as he then was. Spence J., who agreed in separate reasons that the appeal should be allowed, does not appear to have addressed this issue.

12. It is, of course, clear since the decision of this Court in *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, that certiorari is not confined to decisions required to be made on a judicial or quasi-judicial basis, but that it applies, in the words of Dickson J., as he then was, at pp. 622-23, "wherever a public body has power to decide any matter affecting the rights, interests, property, privileges, or liberties of any person".
13. On the question of jurisdiction to issue certiorari in aid of habeas corpus I am in respectful agreement with the conclusion of Laskin C.J. in *Mitchell*, essentially for the reasons given by him, which I understand to be the importance of making the habeas corpus jurisdiction of the provincial superior courts an effective one and the distinction between certiorari to quash and certiorari in aid, regarded as a procedural or evidentiary device to make habeas corpus more effective. With reference to this distinction Laskin C.J. said at p. 578:

It is quite clear to me that there is a marked difference between certiorari, used to quash a conviction or an order by its own strength, and certiorari in aid of habeas corpus to make the latter remedy more effective by requiring production of the record of proceedings for that purpose.

14. One must approach this issue, I think, from the same point of departure as was adopted by Laskin C.J.--that the provisions of the Federal Court Act indicate a clear intention on the part of Parliament to leave the jurisdiction by way of habeas corpus to review the validity of a detention imposed by federal authority with the provincial superior courts. While s. 18 of the Federal Court Act confers an exclusive and very general review jurisdiction over federal authorities by the prerogative and extraordinary remedies, to which specific reference is made, it deliberately omits reference to habeas corpus. That this was not an oversight but a well considered decision is indicated by s. 17(5) of the Act, which expressly confers exclusive jurisdiction on the Federal Court with respect to an application for habeas corpus by a member of the Canadian Forces serving outside Canada. I agree with Laskin C.J. that

because of its importance as a safeguard of the liberty of the subject habeas corpus jurisdiction can only be affected by express words. One may think of reasons why it was thought advisable to leave the habeas corpus jurisdiction with respect to federal authorities with the provincial superior courts, including the importance of the local accessibility of this remedy. The important thing, as I see it, is that the decision to create this exception to the exclusive review jurisdiction of the Federal Court, with whatever problems arising from concurrent or overlapping jurisdiction it might cause, is really determinative of the question of jurisdiction to issue certiorari in aid. There can be no doubt that certiorari in aid is important, if not essential, to the effectiveness of habeas corpus. This was emphasized by both Anderson J.A., with whom the other members of the British Columbia Court of Appeal agreed on this issue in *Cardinal*, and by Cory J.A. in the case at bar. In many cases it may not be possible for a court to determine whether there has been an absence or excess of jurisdiction if the record of the tribunal which imposed or authorized the detention is not brought before it. The importance of habeas corpus itself, and by implication the importance of maintaining it as a fully effective remedy is, as Laskin C.J. observed, given particular emphasis by its inclusion as a guaranteed right in s. 2(c)(iii) of the Canadian Bill of Rights. To this recognition may now be added the constitutional guarantee of the right to habeas corpus in s. 10 (c) of the Canadian Charter of Rights and Freedoms . Because of the clear intention to leave the habeas corpus jurisdiction over federal authorities with the provincial superior courts and the importance of certiorari in aid to the effectiveness of habeas corpus, it cannot, in my opinion, have been intended that the reference to certiorari in s. 18 of the Federal Court Act should have the effect of undermining or weakening the habeas corpus jurisdiction of the provincial superior courts by the exclusion or denial of certiorari in aid. Certainly such a construction is to be avoided if at all possible. It can be avoided by application of the distinction emphasized by Laskin C.J. between certiorari as an independent and separate mode of review having as its object to quash the decision of an inferior tribunal and certiorari as an ancillary procedure used to serve an essentially evidentiary purpose. A very full discussion of this distinction, with reference to many of the decisions in which it has been noted and applied, is to be found in *Cromwell, "Habeas Corpus and Correctional Law"* (1977), 3 Queen's L.J. 295 at pp. 320-23. Applying the distinction to the reference to certiorari in s. 18 of the Federal Court Act , it is reasonable to conclude, because of the association in that section of certiorari with the other prerogative and extraordinary remedies, that the reference is to the independent remedy of certiorari to quash. It is unlikely that Parliament intended to confer an exclusive jurisdiction to issue certiorari in aid when it had clearly withheld the jurisdiction to issue habeas corpus. For these reasons I conclude that a provincial superior court has jurisdiction to issue certiorari in aid of habeas corpus to review the validity of a detention authorized or imposed by a federal board, commission or other tribunal as defined by s. 2 of the Federal Court Act , and that accordingly the Ontario Court of Appeal did not err in concluding as it did on this issue.

III

15. In view of this conclusion on the question of jurisdiction to issue certiorari in aid of habeas corpus it may not be strictly necessary to deal with the question which was treated as an alternative issue by the British Columbia Court of Appeal in *Cardinal* and by the Ontario Court of Appeal in the case at bar--whether on habeas corpus without certiorari in aid a court may consider affidavit or other extrinsic evidence to determine whether there has been an absence or excess of jurisdiction. It is well established that affidavit evidence is admissible on certiorari to show jurisdictional error. Both courts of appeal were led, however, by their analysis of this question to reach a conclusion on it at variance with that of Ritchie J. in *Mitchell*, without much explicit consideration of the jurisprudence of this Court on which the opinion of Ritchie J. purported to be based. Moreover, this question may well be an issue in the *Morin* appeal. For these reasons it is probably desirable that it be dealt with here in order to remove the uncertainty which now necessarily exists concerning it.
16. In *Mitchell*, affidavit evidence was introduced in support of the appellant's contention that he was arrested without the previous issue of a warrant of suspension by the National Parole Board, as required by s. 16(1) of the Parole Act, R.S.C. 1970, c. P-2; that he was not informed of the reason for his arrest, as required by s. 2(c)(i) of the Canadian Bill of Rights; and that he was not afforded an opportunity to be heard on the suspension or revocation of his parole, as required by s. 2(e) of the Canadian Bill of Rights. These were clearly jurisdictional issues. Ritchie J. held that on the application for habeas corpus the Court was confined to the consideration of what appeared on the face of the following documents: the warrant of committal purporting to be based on the suspension of the appellant's parole; the warrant of apprehension issued by the Board upon revocation of the appellant's parole; and the warrant of committal based on the revocation and the warrant of apprehension. He said, with reference to these documents, at p. 590:

On the return of the writ before him, Chief Justice Dewar was confined to a consideration of the facts disclosed on the face of the documents relating to the cause of the taking and detaining of the said Fred Mitchell.

and further with reference to this question, he said at p. 594:

As I have pointed out, Chief Justice Dewar in the hearing before him on the return of the writ of habeas corpus, was confined to a consideration of the facts contained on the face of the warrants then produced, and in my view the statements made in the appellant's affidavits were not properly before him and it is apparent from his reasons for judgment that he did not take them into consideration. The law in this regard is set out in the judgment of Judson J. in *Re Shumiatcher*, [1962] S.C.R. 38, an application for habeas corpus in which, after having reviewed the relevant cases and having observed that the jurisdiction of this Court was concurrent with that of the judges of the superior Courts of the Provinces in matters of habeas corpus, he went on to say:

My jurisdiction is limited to a consideration of the warrant of committal and the other material that I have referred to--the recognizances and the order of Judge Hogarth. I cannot look at evidence, whether a transcript of the evidence at the preliminary hearing or evidence sought to be introduced by way of affidavit identifying a portion of such evidence.

17. In *Re Shumiatcher*, [1962] S.C.R. 38, the relevant issue was whether the Court could look at certain solemn declarations which the applicant for habeas corpus was charged with having induced a person to make, knowing them to be false, and thereby being a party, by virtue of s. 22(1) of the Criminal Code, to the offence defined by s. 114 (now s. 122). The application for habeas corpus challenged the validity of the committal for trial on the ground that the person making the solemn declarations was not a person permitted, authorized or required by law to make them, within the meaning of s. 114. The solemn declarations made reference to a statement of claim. Judson J. framed the issue as follows at p. 45:

This brings me to the question of what use may be made of this material on a motion for habeas corpus before a judge of this Court.

The Crown's submission is that I am limited to looking at the warrant of committal and that I cannot look at these declarations and the statement of claim any more than I can look at the evidence--seven or eight volumes of it--given on the preliminary hearing.

18. After quoting from the judgments of this Court in *Re Trepanier* (1885), 12 S.C.R. 111, *Ex parte Macdonald* (1896), 27 S.C.R. 683, and *Goldhar v. The Queen*, [1960] S.C.R. 431, with reference to habeas corpus against a warrant of committal after conviction, and observing that this Court did not have jurisdiction to issue certiorari in aid of habeas corpus, Judson J. concluded on this issue as follows at p. 47:

In my opinion the jurisdiction of this Court is similarly limited in an inquiry into a committal for trial. In the absence of power to issue a writ of certiorari in aid of habeas corpus, a judge of this Court has no power to look at the evidence at the preliminary hearing or to receive affidavit evidence relating to it.

My jurisdiction is limited to a consideration of the warrant of committal and the other material that I have referred to--the recognizances and the order of Judge Hogarth. I cannot look at evidence, whether a transcript of the evidence at the preliminary hearing or evidence sought to be introduced by way of affidavit identifying a portion of such evidence.

I am founding my reasons on this branch of the case entirely on that principle and I am expressing no opinion on the point on which I heard full argument--whether there does exist, by virtue of provincial legislation, permission to take a declaration of this kind.

19. In Goldhar, the issues raised on the application for habeas corpus were the regularity on its face of a Calendar of Sentences as a certificate of the appellant's conviction and the applicable maximum penalty, having regard to a change that had taken place in the law. Fauteux J. (as he then was), with whom Taschereau, Abbott and Judson JJ. concurred, expressed the rationale for the exclusion of extrinsic evidence on an application for habeas corpus as follows at p. 439:

The question, which counsel for the appellant admittedly sought to be determined by way of habeas corpus proceedings, is stated in the reasons for judgment of other members of the Court. In my view, it is one which would require the consideration of the evidence at trial and which, in this particular case, extends beyond the scope of matters to be inquired under a similar process. To hold otherwise would be tantamount to convert the writ of habeas corpus into a writ of error or an appeal and to confer, upon every one having authority to issue the writ of habeas corpus, an appellate jurisdiction over the orders and judgments of even the highest Courts. It is well settled that the functions of such a writ do not extend beyond an inquiry into the jurisdiction of the Court by which process the subject is held in custody and into the validity of the process upon its face.

I agree with the view that the appellant has been convicted and sentenced by a Court of competent jurisdiction, that the Calendar is a certificate regular on its face that the appellant has been so convicted and sentenced and that, with the material before him, Martland J. rightly dismissed the application for a writ of habeas corpus.

20. The above passage, in my respectful opinion, reflects the true distinction or criterion respecting the consideration of extrinsic evidence on an application for habeas corpus--the distinction between issues going to the merits and issues going to jurisdiction. The issues in both Shumiatcher and Goldhar were clearly issues going to the merits. The same is true of Re Trepanier, where the applicant alleged that the convicting magistrate erred on the facts in convicting him. He sought a writ of habeas corpus with certiorari in aid to bring up the record of the proceedings to ascertain whether there was sufficient evidence to convict. This was clearly an attempt to employ habeas corpus to review the merits of a conviction. Ritchie C.J. said at p. 113:

The jurisdiction of the magistrate being unquestionable over the subject-matter of complaint and the person of the prisoner, and there being no ground for alleging that the magistrate acted irregularly or beyond his jurisdiction, and the conviction and warrant being admitted to be regular, the only objection being that the magistrate erred on the facts and that the evidence did not justify the conclusion as to the guilt of the prisoner arrived at by the magistrate, I have not the slightest hesitation in saying that we cannot go behind the conviction and inquire into the merits of the case by the use of the writ of habeas corpus.

21. In the subsequent case of *Re Sproule* (1886), 12 S.C.R. 140, the issues were jurisdictional but the Court held that extrinsic evidence could not be considered on habeas corpus to contradict the record of a superior court that is regular on its face. The conviction and sentence by the court of oyer and terminer and general gaol delivery had been confirmed by the Supreme Court of British Columbia and Ritchie C.J. spoke in terms of the conclusive character of the record of a superior court as follows at p. 191:

I venture to propound without fear of successful contradiction, that by the law of England and of this Dominion, where the principles of the common law prevail, that if the record of a superior court contains the recital of facts requisite to confer jurisdiction, which the records in this case did, it is conclusive and cannot be contradicted by extrinsic evidence; and if the superior courts have jurisdiction over the subject-matter and the person, as the court of oyer and terminer and general gaol delivery and the Supreme Court of British Columbia had in this case, the records of their judgments and sentences are final and conclusive, unerring verity, and the law will not, in such a case, allow the record to be contradicted.

and he emphasized the distinction in this respect between the records of inferior courts and those of superior courts as follows at p. 193:

And I venture humbly, and with all respect, to suggest that the difficulty in this case has arisen from a misapprehension of what can, and what cannot, be done under a writ of habeas corpus, but more especially from not duly appreciating the distinction between the validity and force of records of courts of inferior, and of courts of superior, jurisdiction, but treating records of superior and inferior courts as being of the same force and effect.

22. *Re Sproule* was applied by this Court in *Ex parte Macdonald*, *supra*, and *Re Henderson*, [1930] S.C.R. 45, where there were jurisdictional issues involved, in support of the more general or unqualified proposition that the Court was limited on habeas corpus to an examination of the warrant of committal in determining whether there had been an absence or excess of jurisdiction.
23. Thus the true basis of this Court's jurisprudence with respect to the admission or consideration of extrinsic evidence on an application for habeas corpus consists of two principles: the principle that extrinsic evidence must not be permitted to convert an application for habeas corpus into an appeal on the merits, and the principle that the record of a superior court is conclusive as to the facts on which the court's jurisdiction depends and cannot be contradicted by extrinsic evidence. It has been suggested that the Court was particularly concerned about the first principle when it was exercising an original jurisdiction in respect of habeas corpus, and that this may have led to the broad and unqualified expression of the rule respecting the consideration of extrinsic evidence on habeas corpus that is to be found in some of its decisions. See Sharpe, *The Law of Habeas Corpus* (1976), p. 51, note 2. With respect to the second principle, I agree with the suggestion in Sharpe, "Habeas Corpus in Canada" (1975), 2 Dalhousie L.J. 241 at p. 261, that it should apply only to the records of superior courts or courts of general common law jurisdiction. In

Mitchell, neither of these principles was applicable. As I have indicated, the grounds of attack were clearly jurisdictional, and the record, dependent as it was on the proceedings and decisions of an inferior tribunal, was not of the character entitled to be treated as conclusive of the facts of jurisdiction. In my respectful opinion, the view expressed in Mitchell that the affidavit evidence could not be considered went beyond the true basis of the Court's jurisprudence on this question. In fact, two members of the majority in the result (Martland and de Grandpré JJ.), as well as the minority (Laskin C.J., Spence and Dickson JJ.) did consider the affidavit evidence in deciding whether there had been an absence or excess of jurisdiction in ordering the detention.

24. As the British Columbia and Ontario Courts of Appeal pointed out in *Cardinal* and in the case at bar, it may only be possible to establish jurisdictional error on habeas corpus by affidavit evidence, even where the record is brought up by certiorari in aid. This is particularly true of a violation of natural justice or a denial of procedural fairness. This is a compelling reason, in my opinion, for confining the rule against consideration of extrinsic evidence of an application for habeas corpus within its proper boundaries.
25. Support for a broader approach to the admission or consideration of extrinsic evidence on habeas corpus to determine issues of jurisdiction may be found in the decision of the House of Lords in *Schtraks v. Government of Israel*, [1964] A.C. 556, which was relied on by the Courts of Appeal in *Cardinal* and the case at bar. There it was held that fresh evidence was admissible on an application for habeas corpus to show that the magistrate lacked jurisdiction to make the committal order in an extradition case because the offence was of a political character. Lord Hodson appears to have held in effect that the rule concerning the admission of affidavit evidence on habeas corpus is the same as it is on certiorari, as suggested by the following passage at pp. 605-06:

Proceeding by habeas corpus is analogous to that by certiorari to remove a conviction, see Short and Mellor's *Crown Practice* (1908), p. 319. Affidavits are not admissible to controvert facts found by the judgment of a court of competent jurisdiction, though they may be received to show some extrinsic collateral matter essential to jurisdiction or to show total want or excess of jurisdiction.

26. I am therefore of the opinion that, subject to the limitation arising from the conclusive character of the records of courts of superior or general common law jurisdiction, a court may on an application for habeas corpus without certiorari in aid consider affidavit or other extrinsic evidence to determine whether there has been an absence or excess of jurisdiction.

IV

27. I turn to the question whether habeas corpus will lie to determine the validity of the confinement of an inmate of a penitentiary in a special handling unit and to obtain his release from such confinement, if it is found to be unlawful, into normal association with the general population of the penitentiary.

28. This issue turns on the view that one takes of the proper role of habeas corpus and the extent to which it should be adapted to the reality of the various forms of confinement or detention within penal institutions. An important policy consideration, in the context of the exclusive review jurisdiction of the Federal Court, is the extent to which the use of habeas corpus to determine the validity of a particular form of detention amounts to an indirect assumption of the Federal Court's review jurisdiction with respect to the administrative decisions of federal correctional authorities.
29. Those who oppose the resort to habeas corpus to challenge the validity of a particular form of confinement or detention in a penal institution contend that it fails to meet two essential conditions of the traditional availability of this remedy: (a) that there be a deprivation of liberty; and (b) that what is sought is the complete liberty of the applicant and not merely his or her transfer to another form of detention or restraint of liberty. This view of the traditional role of habeas corpus is reflected in the decisions in *Ex parte Rogers* (1843), 7 Jur. 992, and *R. v. Governor of Wandsworth Prison; ex parte Silverman* (1952), 96 Sol. J. 853. In *Rogers* a prisoner applied for habeas corpus to obtain his release from a part of a prison "where the confinement was stricter and the food more scanty" to the place in the prison where he had been confined before the transfer. In dismissing the application Denman C.J., with whom Williams, Coleridge and Wightman JJ. concurred, said: "It is quite clear that we cannot entertain this application. The object of the writ of habeas corpus is, generally, to restore a person to his liberty, not to pronounce a judgment as to the room or part of a prison in which a prisoner ought to be confined." In *Silverman*, a prisoner in preventive detention complained that he was not receiving the special treatment which the applicable statute required to be provided, and he sought by an application for habeas corpus to be transferred to a place where such treatment was provided. In dismissing the application for habeas corpus Hilbery J. is reported to have held that if a writ of habeas corpus were issued, "the only question would be whether the applicant should be released or not; and the prison governor's return would state that he was being detained under a sentence of preventive detention, which would be a perfectly good answer".
30. These cases were relied on by Hugessen A.C.J. (as he then was) in *Berrouard v. The Queen*, an unreported judgment of November 30, 1981, and related unreported decisions (referred to by the Quebec Court of Appeal in *Morin*) in dismissing applications for habeas corpus to challenge the validity of confinement in what appears from the expressions used to have been a special handling unit. I quote from an English version of what he said, as reported in *Re Morin and Yeomans* (1982), 1 C.C.C. (3d) 438 at p. 441:

[TRANSLATION] These six motions for habeas corpus each raise the same point of law. In each case, the applicant alleges that he is at present serving a sentence and that he has been unjustifiably transferred into a special detention unit, or a special segregation unit.

An essential pre-condition to the granting of the remedy of habeas corpus is the privation of the subject's liberty: *Masella v. Langlais* (1955), 112 C.C.C. 1, [1955] 4 D.L.R. 346, [1955] S.C.R. 263. Similarly, in a motion for habeas corpus, the principal object of this remedy is the obtaining of

liberty for the subject; *R. v. Governor of Wandsworth Prison; Ex p. Silverman* (1952), 96 Sol. Jo. 853 (Queen's Bench Div. Ct., Hilbery, Streatfeild and McNair JJ.); *Ex parte Rogers* (1843), 7 Jur. 992 (Court of Queen's Bench, Denman C.J., Williams, Coleridge and Wightman JJ.). I have read with much interest the judgment of my colleague Chief Justice McEachern, of the Supreme Court of British Columbia, in *Cardinal and Oswald v. Attorney-General*, an unreported judgment delivered on December 30, 1980. With all respect which I have for my colleague, I am not in agreement with his position that the writ of habeas corpus can be used to modify the conditions of a detention since, even if the writ is granted, the prisoner's detention will continue after the final judgment is delivered. This is also our case.

It accordingly follows that I am in agreement with the decision of my colleague Mr. Justice Jean-Paul Berge-ron in the *Morin v. Yeomans* case, an unreported judgment delivered on November 18, 1981.

31. In *Morin*, which, as I have said, was a case of habeas corpus without certiorari in aid, Bergeron J. referred to the conclusion of McEachern C.J.S.C. in *Cardinal* that habeas corpus would lie to determine the validity of a particular form of detention in a penitentiary and said he could not agree with it. He held that judicial review of the administrative decisions of the federal correctional authorities fell within the exclusive jurisdiction of the Federal Court by way of certiorari. In his view, the conditions of detention of a person who was otherwise lawfully imprisoned under a valid warrant of committal could not give rise to habeas corpus. In dismissing the appeal from the judgment of Bergeron J., the Quebec Court of Appeal noted that the appellant had taken proceedings by way of certiorari in the Federal Court to challenge the validity of his confinement in the Special Handling Unit and that there would therefore be the danger of conflicting judgments if it were held that the superior court had jurisdiction to issue habeas corpus to determine the same issue. The Court of Appeal concluded that proceedings to challenge administrative action within federal penitentiaries was within the exclusive jurisdiction of the Federal Court. Thus it would appear that the Superior Court and the Court of Appeal in *Morin* were influenced in the view which they took of the proper application of habeas corpus by the implications of a concurrent or overlapping review jurisdiction with respect to the administrative decisions of the federal correctional authorities.
32. The British Columbia courts in *Cardinal* and the Ontario Court of Appeal in the case at bar applied the notion of a "prison within a prison" in holding that habeas corpus would lie to determine the validity of confinement in administrative segregation or a special handling unit, and if such confinement be found unlawful, to order the release of the inmate into the general population of the penitentiary. The concept of a "prison within a prison" is referred to by Sharpe, *The Law of Habeas Corpus* (1976), p. 149, where he speaks in favour of such an application of habeas corpus, and by Dickson J., as he then was, in *Martineau*, *supra*, where, with reference to the decision of the disciplinary board which sentenced the inmate for a disciplinary offence to 15 days in the penitentiary's special corrections unit, he said at p. 622:

Moreover, the board's decision had the effect of depriving an individual of his liberty by committing him to a 'prison within a prison'. In these circumstances elementary justice requires some procedural protection. The rule of law must run within penitentiary walls.

This statement reflects the perception that a prisoner is not without some rights or residual liberty (see also *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at p. 839) and that there may be significant degrees of deprivation of liberty within a penal institution. The same perception is reflected in the reasons for judgment of McEachern C.J.S.C. and Anderson J.A. in *Cardinal and Cory J.A.* in the case at bar on this issue. In effect, a prisoner has the right not to be deprived unlawfully of the relative or residual liberty permitted to the general inmate population of an institution. Any significant deprivation of that liberty, such as that effected by confinement in a special handling unit meets the first of the traditional requirements for habeas corpus, that it must be directed against a deprivation of liberty.

33. Moreover, the principle that habeas corpus will lie only to secure the complete liberty of the subject is not invariably reflected in its application. There are applications of habeas corpus in Canadian case law which illustrate its use to release a person from a particular form of detention although the person will lawfully remain under some other restraint of liberty. Examples are the use of habeas corpus to recover the custody of children (*Stevenson v. Florant*, [1927] A.C. 211, aff'g [1925] S.C.R. 532; *Dugal v. Lefebvre*, [1934] S.C.R. 501); to release a person on parole where the parole has been unlawfully revoked (*Re Cadeddu* (1982), 4 C.C.C. (3d) 97; *Swan v. Attorney General of British Columbia* (1983), 35 C.R. (3d) 135); and to transfer an inmate from an institution in which he has been unlawfully confined to another institution (*Re Bell and Director of Springhill Medium Security Institution* (1977), 34 C.C.C. (2d) 303; *Re Frejd* (1910), 22 O.L.R. 566). In all of these cases the effect of habeas corpus is to release a person from an unlawful detention, which is the object of the remedy. The use of habeas corpus to release a prisoner from an unlawful form of detention within a penitentiary into normal association with the general inmate population of the penitentiary is consistent with these applications of the remedy.
34. An enlarged approach to the concept of custody for purposes of habeas corpus is reflected in American case law. Formerly American courts took the view that habeas corpus would only lie where a favourable judgment would result in immediate release from all forms of detention: *McNally v. Hill*, 293 U.S. 131 (1934). Since then the concept of custody has been greatly expanded to permit a wider use of habeas corpus for the protection of prisoners' rights. In *Jones v. Cunningham*, 371 U.S. 236 (1963), where habeas corpus was held to be available to an applicant who was not in physical custody but on parole, the Court said at p. 243 that habeas corpus is "not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose--the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty". In *Peyton v. Rowe*, 391 U.S. 54 (1968), habeas corpus was allowed to challenge the validity of a sentence yet to be served. In *Johnson v. Avery*, 393 U.S. 483 (1969), habeas corpus was allowed to challenge the validity of a condition of confinement in the form of a prison regulation which

limited the access of illiterate inmates to the courts by forbidding their fellow prisoners from serving as jailhouse lawyers. It was held that the unlawful regulations made the custody unlawful. In *Wilwording v. Swenson*, 404 U.S. 249 (1971), the United States Supreme Court reversed the Missouri courts which had held that habeas corpus would not lie where the object was not to secure the release of the petitioners from the penitentiary altogether but to challenge their living conditions and disciplinary measures. The Supreme Court affirmed the approach it had adopted in *Johnson v. Avery*. It should be noted, however, that in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), Stewart J., speaking for the majority, expressed himself in terms which might suggest that the question was regarded as still being open. He said at p. 499: "This is not to say that habeas corpus may not also be available to challenge such prison conditions. See *Johnson v. Avery*, 393 U.S. 483, (1969); *Wilwording v. Swenson*, supra, at 251. When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal. See Note, *Developments in the Law--Habeas Corpus*, 83 Harv. L. Rev. 1038, 1084 (1970)". The note to which Stewart J. referred approved the approach adopted in the leading case of *Coffin v. Reichard*, 143 F.2d 443 (6th Cir. 1944), where it was said at p. 445: "A prisoner is entitled to the writ of habeas corpus when, though lawfully in custody, he is deprived of some right to which he is lawfully entitled even in his confinement, the deprivation of which serves to make his imprisonment more burdensome than the law allows or curtails his liberty to a greater extent than the law permits." After referring to *Coffin* the note states at pp. 1085-86:

No other circuit purports to follow *Coffin*. Most courts instead believe that habeas jurisdiction is lacking when the petitioner is not asking for the invalidation of a custody imposed by sentence, on the theory that the petitioner is not seeking a present or future release. But this fails to recognize that the lawfulness of a custody depends, not merely upon the legal basis for some kind of custody, but upon the lawfulness of the specific type and manner of confinement in question. Where the specific detention abridges federally protected interests--by placing petitioner in the wrong prison, denying him treatment, imposing cruel and unusual punishment, impeding his access to the courts, and so on--it is an unlawful detention and habeas lies to release the petitioner therefrom. It is immaterial that the petitioner might then be placed in a different, lawful custody or that his being sentenced to a term of confinement might itself be lawful. The custody requirement, and the corresponding insistence on discharge from custody, do not prevent habeas corpus from being an appropriate remedy for the review of unlawful prison administration.

Since that note was written the point of view expressed in it has been adopted by federal courts of appeal. See, for example, the following cases recognizing the availability of habeas corpus to challenge the validity of various forms of segregated confinement in a prison on the ground of a violation of due process: *McCollum v. Miller*, 695 F.2d 1044 (7th Cir. 1982); *Krist v. Ricketts*, 504 F.2d 887 (5th Cir. 1974); *Bryant v. Harris*, 465 F.2d 365 (7th Cir. 1972); *Dawson v. Smith*, 719 F.2d 896 (7th Cir. 1983); and *Streeter v. Hopper*, 618 F.2d 1178 (5th Cir. 1980).

35. After giving consideration to the two approaches to this issue, I am of the opinion that the better view is that habeas corpus should lie to determine the validity of a particular form of confinement in a penitentiary notwithstanding that the same issue may be determined upon certiorari in the Federal Court. The proper scope of the availability 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. As I have said in connection with the question of jurisdiction to issue certiorari in aid of habeas corpus, these concerns have their origin in the legislative judgment to leave the habeas corpus jurisdiction against federal authorities with the provincial superior courts. There cannot be one definition of the reach of habeas corpus in relation to federal authorities and a different one for other authorities. Confinement in a special handling unit, or in administrative segregation as in *Cardinal*, is a form of detention that is distinct and separate from that imposed on the general inmate population. It involves a significant reduction in the residual liberty of the inmate. It is in fact a new detention of the inmate, purporting to rest on its own foundation of legal authority. It is that particular form of detention or deprivation of liberty which is the object of the challenge by habeas corpus. It is release from that form of detention that is sought. For the reasons indicated above, I can see no sound reason in principle, having to do with the nature and role of habeas corpus, why habeas corpus should not be available for that purpose. I do not say that habeas corpus should lie 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. But it should lie in my opinion to challenge the validity 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.

36. For these reasons I would dismiss the appeal.

Appeal dismissed.

Solicitor for the appellant: R. Tassé, Ottawa.

Solicitor for the respondent: Fergus J. O'Connor, Kingston.

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