NOVA SCOTIA COURT OF APPEAL
Citation: ***Wilson v. Correctional Service Canada***, 2011 NSCA 116

Date: 20111209
Docket: CA
Registry: Halifax

Between:

Karl Anthony Wilson

Appellant

v.

Correctional Service Canada

Respondent

Judge: The Honourable Mr. Justice Jamie W.S. Saunders in Chambers

Held:

Counsel: appellant in person
Sarah Drodge, for the respondent

Decision:

[1] This matter came before me in Chambers when the Registrar sought my directions as to how she ought to proceed. The case has some rather unusual antecedents. I will start with the background.

Background

[2] In 2007 Mr. Wilson entered a guilty plea to a charge of manslaughter for which he was sentenced to eight years imprisonment, less twenty-one months credit for pre-trial custody, leaving him with a six-year three-month sentence. Mr. Wilson subsequently entered guilty pleas to various drug, stolen property and weapon offences resulting in sentences that ran concurrent with the manslaughter sentence. He was incarcerated at the Springhill Institution penitentiary.

[3] On October 9, 2009 Mr. Wilson applied to the National Parole Board ("NPB") for day parole. After hearing Mr. Wilson on March 25, 2010 and gathering information from Correctional Service Canada ("CSC"), a two-member panel of the NPB denied Mr. Wilson's application for day parole as they found him to be an undue risk to reoffend and not suitable for day parole.

[4] On May 17, 2010 Mr. Wilson filed an appeal with the Appeal Division of the NPB under the statutory appeal process outlined in the **Corrections and Conditional Release Act**, S.C. 1992, c. 20 ("**CCRA**"). The grounds of appeal related to allegedly flawed psychological and other institutional reports that suggested he was involved in the institutional drug trade. Ultimately on November 8, 2010 the Appeal Division denied the appeal, affirming the NPB's initial decision to deny day parole, finding it reasonable and based on the facts and information available.

[5] In the interval between the initial NPB hearing and the hearing before the Appeal Division, Mr. Wilson filed a number of grievances with Correctional Service Canada. These grievances urged that the CSC correct certain records respecting his alleged involvement with the institutional drug trade. At the present time the status of Mr. Wilson's grievances is unknown, but one remained outstanding when Justice Robert W. Wright of the Nova Scotia Supreme Court

rendered his decision (which will be described in more detail later in these reasons).

[6] On January 26, 2011, Mr. Wilson pursued an additional avenue of review by filing an application in the Supreme Court of Nova Scotia for *habeas corpus* with *certiorari* in aid, with respect to the NPB's Appeal Division's decision to deny him day parole. Following a hearing in Amherst on April 8, 2011 Wright, J. delivered an oral decision declining to exercise the court's *habeas corpus* jurisdiction, finding that there were comprehensive review processes available to the appellant in Canada's federal courts. Justice Wright issued written reasons on April 13, 2011, now reported as 2011 NSSC 143.

[7] Undeterred, Mr. Wilson brought another (or renewed his earlier) application for *habeas corpus* with *certiorari* in aid before Nova Scotia Supreme Court Justice J.E. (Ted) Scanlan. At a hearing in Amherst on June 8, 2011, Scanlan, J. dismissed Mr. Wilson's application by order and without reasons.

[8] On July 12, 2011, Mr. Wilson filed with this Court a notice of criminal appeal of Scanlan, J.'s order using Form 91.05(b) under **Rule** 91 of the Nova Scotia **Civil Procedure Rules**, prompting the Registrar to open an appeal file, CAC No. 352264. That notice of appeal names "Correction (sic) Service Canada" as respondent, and identifies Ms. Sarah Drodge as "Crown Prosecutor at trial".

[9] In these reasons I have corrected the spelling of the respondent's name in the style of cause created by the appellant, to properly identify the respondent as Correctional Service Canada. I note, however, that the Attorney General of Canada is named as the respondent in the reported decision of Justice Wright. The notice lists four very general grounds of appeal, and a fifth ground specific to the decision of Scanlan, J. and goes on to describe the relief sought. It reads:

> The grounds of appeal are as follows:
>
> 1 - Questions within the expertise of the decision maker
>
> 2 - Questions of mixed fact and law
>
> 3 - Questions of Fact

4 - Questions the decision to dismiss the application did not benefit due process of justice

5 - In a copy of Judge Scanlan's decision, there is no acknowledgement of the reviewing the materials in the Habeas Corpus Application, File #349751

At the conclusion of the appeal the appellant will request an order that:

Request the Honourable Court order Corrections Service Canada, Springhill, N.S. to use all reliable and persuasive information to release the applicant in accordance with the sentence management requirements of Full Parole Eligibility to help the applicant cascade to a less restrictive sanction of liberty appropriate in the circumstances, such as a Community Based Residential Facility to be reintegrated back into the applicant's community.

[10] In a letter to the Registrar dated July 12, which accompanied his notice of appeal, the appellant says:

RE: Habeas Corpus Appeal / Court File #349751

Please note that Robert Gregan of (Nova Scotia Legal Aid) will be representing the applicant at the hearing for the Habeas Corpus Appeal.

A notice of service will also need to be provided to Mr. Gregan to allow the case preparation and date of hearing for his itinerary schedule.

Furthermore, it will not be necessary to complete a transfer order for the applicant to leave Springhill Institution to attend the hearing in Halifax, as council will be present.

If you have any further questions please do not hesitate to contact me at the above address.

Thank you for your attention to this matter.

Sincerely,

K. Wilson

[11] Upon receipt of the appellant's letter the Registrar contacted Mr. Gregan's office at Nova Scotia Legal Aid in Amherst and was advised that he was not representing Mr. Wilson on his appeal.

[12] As is the practice for criminal appeals in this Court, the Registrar notified counsel at the Public Prosecution Service of Mr. Wilson's appeal, as it appeared to be a prisoner's appeal taken pursuant to **Rule** 91. The Registrar's communication prompted an intervention by Ms. Sarah Drodge, counsel in the Civil Litigation and Advisory Services section of the Department of Justice (Canada). Ms. Drodge replied to the Registrar's letter on September 20, 2011. In her response, Ms. Drodge objected to the form of Mr. Wilson's notice of appeal, suggesting that it should properly be filed under **Rule** 90 governing civil appeals, not **Rule** 91 governing criminal appeals. For that reason Ms. Drodge said Mr. Wilson should be responsible for bringing a Chambers motion to have the appeal set down for hearing.

[13] Ms. Drodge added further helpful detail which clarified the nature and history of the proceedings to that point. She explained that what Mr. Wilson purported to appeal was the order of Justice Scanlan dated June 14, 2011, which dismissed his application for *habeas corpus*. Things went astray when the appellant filed a notice of appeal using Form 91.05(B). In her submission this was not a criminal matter. The appellant had mistakenly identified her as being the "Crown Prosecutor at trial". She did not appear at Mr. Wilson's criminal trial. Rather, she represented CSC at the hearing before Scanlan, J.

[14] In the Crown's view, *habeas corpus* is a civil remedy, which in this case, arose in an administrative context. In bringing the application, Mr. Wilson took exception to the fact that he had been denied a conditional release. That – in the Crown's submission – was an administrative decision made pursuant to the **CCRA**. As a consequence **Rule** 91 had no application. **Rule** 90 applied. Standard practice would make it Mr. Wilson's responsibility to acquire (and pay for) the transcript; produce the appeal books; and eventually bring a Chambers motion to have his appeal set down for hearing.

[15] Subsequent inquiries by the Registrar revealed further information relevant to this and other proceedings. There was no *decision* rendered by Scanlan, J. Rather, his order of June 14, 2011, recites that he dealt with the appellant's

"application" on June 8, 2011 and after hearing submissions and reviewing the earlier decision of Justice Wright, he dismissed the application in its entirety.

[16] The recital in Justice Scanlan's order led to a search for the decision of Justice Wright. That decision was found and has since been reported, 2011 NSSC 143. I need not refer in detail to Wright, J.'s reasons. Suffice it to say that they are extensive, and set out the background and nature of the application for which Mr. Wilson sought relief.

[17] It appears to me that Justice Scanlan saw the application before him on June 8 as being exactly the same as the one heard by Justice Wright on April 8. I suspect he came to the conclusion that he lacked the authority or jurisdiction to review or vary it. Accordingly, he dismissed the application on the basis of a preliminary motion made by Ms. Drodge, counsel for the respondent.

[18] After being advised of Ms. Drodge's response to the Registrar, Mr. Wilson filed two more notices of appeal, the first dated October 4, 2011, and the second dated October 6, 2011. Both used the civil appeal Form 90.06. The first notice seeks to appeal the decision of Wright, J. The second seeks to appeal the order of Scanlan, J.

[19] These notices of appeal contain more particularized grounds of appeal and list ten legislative sources of authority, including the **Habeas Corpus Act**, 1679 (U.K.), 31 Car. II, c. 2. The Registrar has not yet accepted for filing either notice of appeal, preferring to delay such action until she has received my directions.

[20] On October 7, 2011 Mr. Wilson withdrew his request for state-funded counsel pursuant to s. 684 of the **Criminal Code**, impliedly accepting that this is a civil appeal, but not yet having actually withdrawn his initial criminal appeal of Justice Scanlan's order, that appeal bearing file # CAC 352264.

[21] I turn now to the issues, as I see them.

Issues

[22] There are three-inter-related issues that need to be resolved:

(i) Is this a criminal or civil *habeas corpus* application?

(ii) What is the appropriate procedure and "who should pay" for this appeal and have it set down?

(iii) How are the multiple notices of appeal to be resolved?

[23] I fully recognize that because the appellant is incarcerated, not legally trained, and representing himself, and because neither party has appeared to make submissions, my reasons and the directions that follow are given without the benefit of thorough argument which might explain, expand or test the parties' respective positions. In that context, my intention is to deal with the Registrar's request summarily so that she will be able to deal with the matter expeditiously. I must also do so sparingly, so as not to be presumed to comment upon the substance of Justice Wright's decision, or the merits of Mr. Wilson's appeal.

(i) Is this a criminal or civil *habeas corpus* application?

[24] To answer that question, I have considered a host of cases on criminal, administrative, and constitutional law regarding the issues this file provokes. They include: **In Re: Storgoff**, [1945] S.C.R. 526; **M.N.R. v. Lafleur**, [1964] S.C.R. 412; **R. v. Lapierre** (1976), 15 N.S.R. (2d) 361 (S.C., App. Div.); **Bell v. Director of the Springhill Medium Security Institution** (1977), 19 N.S.R. (2d) 216 (S.C., App. Div.); **R. v. Martin** (1977), 20 O.R. (2d) 455 at 482,41 C.C.C. (2d) 308 at 336 (C.A.), aff'd [1978] 2 S.C.R. 511; ; **R. v. Robar** (1978), 27 N.S.R. (2d) 459 (S.C., App. Div.); **R. v. Meltzer**, [1989] 1 S.C.R. 1764; **Kourtessis v. M.N.R.**, [1993] 2 S.C.R. 53; **Mooring v. Canada (National Parole Board)**, [1996] 1 S.C.R. 75; **Vukelich v. Mission Institution**, 2005 BCCA 75; **May v. Ferndale Institution**, 2005 SCC 82; **Canadian Broadcasting Corp. v. Newfoundland and Labrador**, 2006 NLCA 21; **Ross v. Riverbend Institution (Warden)**, 2008 SKCA 19; **Finck v. Canada (National Parole Board)**, 2008 NSCA 56; and **R. v. Latham**, 2009 SKCA 26.

[25] I am mindful of the special circumstances that inform *habeas corpus* procedures in at least Nova Scotia and Ontario by virtue of their pre-Confederation status and the *habeas corpus* practices and statutes which applied within their borders. See, for example, **Lapierre**; **Bell**; **Robar**; and **Martin**, **supra**.

Reiterating the *caveat* I expressed earlier regarding the lack of argument on the issues confronting the Registrar, I am inclined to the view that the application brought by Mr. Wilson in this case is a civil *habeas corpus*, and therefore a civil appeal. I say that for several reasons.

[26] **CPR** 91 governs criminal appeals to this Court. This is not a criminal appeal. In **Rule** 91 "appeal" is defined as follows:

> "appeal" means an appeal under Part XXI of the Code [the *Criminal Code of Canada*], section 839 of the Code, or legislation that incorporates provisions of the Code for procedure on an appeal and includes an application for leave to appeal and an appeal contingent on leave being granted.

[27] This appeal is not brought under the **Criminal Code**. The application heard first by Justice Wright and then by Justice Scanlan were not argued in criminal court. No "prosecutor" appeared on those applications. Further, there was no "judgment" within the meaning of **Rule** 91 which is defined as:

> "judgment" means a conviction, finding of guilt, acquittal, order staying a proceeding, sentence, verdict of unfit to stand trial, verdict of not criminally responsible on account of mental disorder, a decision or order of a summary conviction appeal court, and includes any other decision or order from which an appeal is available to the Court of Appeal.

[28] Mr. Wilson is not appealing the outcome of the criminal proceedings which led to his imprisonment. Rather, he seeks to appeal the order of Scanlan, J. (and/or the decision of Wright, J.) which dismissed his *habeas corpus* application concerning administrative decisions made within the prison regarding his request for parole.

[29] The appellant's complaint and claim for relief arises in an administrative context. Mr. Wilson took issue with the fact that he was denied a conditional release. That was an administrative decision made by the NPB pursuant to the **CCRA**. The distinction between *habeas corpus* to review the validity of decisions made within penitentiary walls, and criminal appeals from conviction was emphasized repeatedly by the Supreme Court of Canada in **May**, **supra**. Simply to illustrate the difference, I refer to the reasons of LeBel and Fish, JJ.(writing for the majority):

> 36 Strictly speaking, in the criminal context, *habeas corpus* cannot be used to challenge the legality of a conviction. The remedy of *habeas corpus* is not a substitute for the exercise by prisoners of their right of appeal: ...
>
> 44 ... Only in limited circumstances will it be appropriate for a provincial superior court to decline to exercise its *habeas corpus* jurisdiction. For instance, in criminal law, where a statute confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be, *habeas corpus* will not be available. ...
>
> 51 ... Neither of the two recognized exceptions to the general rule that the superior courts should exercise *habeas corpus* jurisdiction are applicable here. The first exception has no application in these cases because they do not involve a criminal conviction, but rather administrative decisions in the prison context. ...

[30] I also find support for my conclusion in the decision of the Saskatchewan Court of Appeal in **Ross**, **supra**. There, the two appellants were federally sentenced inmates serving custodial terms at the Saskatchewan Penitentiary. Each applied to the Court of Queen's Bench for an order in the nature of a writ of *habeas corpus* with *certiorari* in aid. Their applications were dismissed. Both prisoners filed notices of appeal. Prior to the hearing of their respective appeals they applied to the Court of Appeal to have state-funded counsel represent them pursuant to s. 684 of the **Criminal Code**. Writing for the court, Hunter, J.A. said:

> [3] ...I conclude the applications for court appointed counsel must be dismissed as the subject matter of the appeals are civil proceedings and not criminal matters. The *Criminal Code* does not apply to civil proceedings.

[31] In that case, the court considered whether s. 774 of the **Criminal Code**, in essence, transformed an application for *habeas corpus* in the context of a civil proceeding, into a criminal matter (para. 22). The court concluded that it did not.

> 26 The availability of a writ of *habeas corpus* was canvassed in *R. v. Storgoff*. The court concluded the nature of the prerogative writ of *habeas corpus* is a procedural writ which may apply in a criminal or civil matter. However, it is the proceeding under which the applicant is placed in custody which determines whether the character of the habeas corpus proceeding is criminal or civil.
>
> ...

> 30 In the notices of appeal filed by Ross and Latham, each is challenging the administrative decisions of the prison officials which caused them to be transferred from Riverbend to the Saskatchewan Penitentiary. In my view, these are matters related to the administration of the appellants' sentences. The custody of Ross and Latham at the Saskatchewan Penitentiary is based on decisions made by prison officials pursuant to the *CCRA* and *CCRR*. I agree with the decisions in *Shubley*, *Winters* and *Vukelich*, and find that the underlying nature of the decision with respect to the custody of Ross and Latham is a civil proceeding. Accordingly, s. 784(5) does not apply as this is not a proceeding in a criminal matter within the meaning of s. 774 of the *Criminal Code*.

[32] In the result, I find that **Rule** 91 has no application to this case and that **Rule** 90 properly governs this appeal. It should be catalogued as a civil appeal and given a new file and number under the civil Index. The Registrar should then close file CAC 352264. My decision and the Order that gives effect to it should bear the new file number. It will of course be easily traceable to the original CAC number and file, once that file is closed.

[33] I turn now to the second issue before me.

(ii) What is the appropriate procedure and "who should pay" for this appeal and have it set down?

[34] This is a question I decline to answer. Ordinarily **Rule** 90 would operate such that the onus would be on the appellant to perfect the appeal by, among other things, obtaining a transcript, preparing the appeal book, and bringing a motion in Chambers to set the matter down for appeal. However, I am concerned about the application of the **Liberty of the Subject Act**, R.S.N.S. 1989, c. 253 and, in particular, s. 14(1) which provides:

> 14 (1) Whenever the application, whether under the *habeas corpus* Acts or at common law or under this Act for the discharge of the prisoner has been once refused by any one judge sitting alone, it shall not be lawful to renew the application before him, or before any other judge, except upon some ground not taken on the former application, but such prisoner may appeal according to the existing practice from such refusal of the judge to the Appeal Division of the Supreme Court, and thereupon the writ of *habeas corpus* or order in lieu thereof under the provisions in this Act, the return thereto and all and singular the affidavits, depositions, evidence, conviction and all other matter used on such

> application shall be certified to the Appeal Division of the Supreme Court by the proper officer under the seal of the Court.
> (Underlining mine)

[35] I cannot imagine that the appellant would qualify as "the proper officer" who is then required to prepare the appeal record. In this case, I have no information as to how extensive that record might be. It could well be that Ms. Drodge, as counsel for the Department of Justice (Canada) is, upon reflection, prepared to take on this responsibility, such that once the record is complete and sufficient copies of the appeal book are produced and filed, the appellant would then be expected to bring a motion in Chambers to set the appeal down for hearing. It would seem to me, at least initially, that the responding Crown with its resources, is in the best position to step in at this stage.

[36] However, the parties should at least have the opportunity to be heard on the question of who bears the responsibility (and expense) of gathering and producing the record and getting this case ready for appeal.

[37] The Registrar will, of course, provide a copy of my decision to both the appellant and the respondent. She should do so with an indication that unless otherwise resolved, the parties may proceed to have this question settled by bringing a motion in regular Chambers, seeking directions in the normal course.

[38] I turn now to the remaining issue.

(iii) How are the multiple notices of appeal to be resolved?

[39] In my view, there should be only one notice of appeal to permit a full hearing of Mr. Wilson's complaints and claim for relief. Recalling s. 14(1) of the **Liberty of the Subject Act** quoted earlier, "it shall not be lawful" for Mr. Wilson to have "renewed" the application initially heard by Wright, J., and brought a second time before Scanlan, J. In substance it is the decision of Justice Wright, 2011 NSSC 143 which Mr. Wilson seeks to challenge. That is the decision which dismissed his application to have the Supreme Court of Nova Scotia consider his writ of *habeas corpus* seeking to set aside the decision of the NBP Appeal Division which denied him day parole. And that is the matter Mr. Wilson asks this Court to address.

[40] Accordingly, I will grant leave to extend the time within which Mr. Wilson can file his appeal from the decision of Wright, J., to Friday, December 16, 2011. This will enable the Registrar to accept the notice of appeal signed by Mr. Wilson on October 4, 2011, and assign to it a proper civil CA number and appeal file within the civil Index. As to the alternative notice of appeal signed by Mr. Wilson on October 6, 2011, in my respectful opinion, Scanlan, J. had no authority to consider Mr. Wilson's attempt "to renew the application" two months later (except upon some ground not taken on the former application, which did not occur here). In these circumstances, on my own motion, I will set aside the July 12, 2011 notice of appeal as failing to disclose any ground for an appeal pursuant to **Civil Procedure Rule** 90.40(1), and I will direct the Registrar not to accept the appellant's alternative notice of appeal signed by him on October 6.

Conclusion

[41] Whether an application for *habeas corpus* is characterized as criminal or civil in nature "will depend on the nature of the underlying proceedings giving rise to the detention which is being challenged". **Vukelich**, **supra** at para. 32 (*per* Prowse, J.A.). See also the reasons of McLachlin, J. (as she then was) in **R. v. Shubley**, [1990] 1 S.C.R. 3. Here, Mr. Wilson's complaint and the relief he seeks relates to an administrative decision made within the prison walls by the NPB which denied his request for a conditional release. That is a civil proceeding. **Rule** 90 applies. **Rule** 91 and the **Criminal Code** do not. The notice of appeal filed by the appellant on July 12, 2011, which precipitated the Registrar's request for directions will be set aside so as to permit the substance of Mr. Wilson's appeal from the impugned decision of Justice Wright to be heard as a civil appeal. Time is extended to Friday, December 16, 2011, so that the Registrar will be able to accept the notice of appeal Mr. Wilson signed October 4. That appeal will be assigned a civil appeal file and CA number in the civil Index. Mr. Wilson's alternative appeal from the order of Scanlan, J. signed October 6 will be rejected by the Registrar. She will then close criminal appeal file CAC 352264. If the parties are unable to resolve the issue as to who ought to take responsibility for producing the record on appeal, they may proceed to have that matter settled by bringing a motion in regular Chambers, in the normal course.

Saunders, J.A.