SUPREME COURT OF NOVA SCOTIA

Citation: *Pratt v. Nova Scotia (Attorney General)*, 2019 NSSC 6

Date: 2019-01-10
Docket: *Hfx.* No. 481808
Registry: Halifax

Between:

Maurice Pratt

v.

The Attorney General of Nova Scotia, representing Her Majesty in the right of the Province of Nova Scotia and Central Nova Scotia Correctional Facility

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LIBRARY HEADING

Judge: The Honourable Justice Peter P. Rosinski

Heard: November 6, 2018, in Halifax, Nova Scotia

Subject: *Habeas Corpus* procedures and law

Summary: Mr. Pratt filed an application for *habeas corpus* while he was in disciplinary and administrative close confinement. He sought release from close confinement. At the hearing date, he only remained in administrative close confinement.

Issues:

(1) What is the process governing the handling of an application for *habeas corpus*?

(2) What is the test to determine whether an application for *habeas corpus* will proceed to a hearing on the merits?

(3) What is the appropriate outcome here?

Result:

(1) An initial application for *habeas corpus* may be conditionally rejected by the prothonotary with a judge's concurrence where the documentation is illegible or unintelligible;

(2) An application for *habeas corpus* generally should only proceed to a hearing on the merits if the matter in issue is not moot, and the applicant has satisfied the court that there is an "arguable case" or "legitimate basis" for the court to find that there has been a *material* deprivation of liberty, *and* the relevant circumstances realistically bring into question the legality of the decision. Generally speaking, the unlawfulness of the decision can be the result of alleged lack of procedural fairness, jurisdictional errors, or errors in the interpretation of the relevant legislation, or that the decision was unreasonable or not justifiable. A decision will be "reasonable" if it is one that is "within an appropriate range of outcomes" given the circumstances.

(3) The most notable cases from the Supreme Court of Canada and Nova Scotia Court of Appeal reference inmates in federal penitentiaries, serving sentences of two or more than two years, and arguably to offenders on "federal remand", and not inmates in provincial correctional facilities, serving sentences of up to two years less a day, and offenders on "provincial remand" in relation to existing criminal proceedings. The significant differences in their institutional and legislative frameworks and characteristics of their inmate populations require an adjustment of the principles of *habeas corpus* in the provincial correctional facility context.

(4) Specifically:

(a) I believe they do, but even if existing provincial correctional services policies do not have the force and effect of law, generally speaking, if an institution has, fundamentally fair policies made applicable to it, as in existence at present, or internal rules, and it follows those in any particular case, an inmate will have presumptively received fundamentally fair treatment and process;

(b) If an inmate has received fundamentally fair

treatment, and absent other valid grounds for review, *the court will not examine the merits of any disciplinary findings or sanctions imposed*, including disciplinary close confinement permitted by s. 74(c) of the *Correctional Services Act*;

(c) If an inmate is placed in administrative close confinement (i.e. non—disciplinary) per s. 74(b) of the *Correctional Services Act*, and has received fundamentally fair treatment, absent other valid grounds for review, the court should be reluctant to examine the reasonableness of the merits of the decision to impose administrative close confinement.

(5) In cases like this one pursuant to s. 74(b) of the *Correctional Services Act*, administrative close confinement is relied upon "to protect the security of the correctional facility or the safety of other offenders", and a written SMP (Security and Sentence Management Plan) is customized to an offender, based on a recent history of violence within the correctional services context, and *the court should be reluctant to examine the reasonableness of the merits underlying the confinement*, for similar reasons relevant to disciplinary close confinement. By Regulation 79(3) – close confinement is available to the Superintendent in such situations, and the legislation offers no other alternative; furthermore, Regulation 80 mandates 24 hour/5 day reviews be conducted and no confinement beyond 10 days is permitted without permission from the Executive Director of Correctional Services.

(6) At the time of the hearing, Mr. Pratt's disciplinary close confinement arising from events on or before the date he filed his notice of application for *habeas corpus* was moot; his administrative close confinement continued, but there was no realistic ground, which if established, would be of sufficient substance to satisfy the court that it need go on to a hearing

on the merits;

(7) Therefore, the application was dismissed at stage one.

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Heard: November 6, 2018, in Halifax, Nova Scotia

Counsel: Maurice Pratt, Applicant
Duane Eddy, for the Respondents

By the Court:

Introduction

[1] On October 25, 2018 Maurice Pratt filed a Notice for *habeas corpus*.[1] On November 6, 2018, I dismissed his application at stage one of the process.

[2] This application is typical of many filed by self-represented inmates. While there is extensive treatment of substantive legal issues in this area, little attention has been dedicated to matters of procedure. To elaborate on those matters generally, and in order to explain my conclusion herein, I have reduced my reasons to writing.

Background

[3] Mr. Pratt's application contained the following statements.

[4] Under the subtitle, **Applicant is detained,** Mr. Pratt says:

> 1. Applicant is detained without reason being given; and
>
> 2. It is impossible for the applicant to leave detention because I am in closed confinement and I have not been given a date for discharge. The applicant says the detention is illegal.

[5] Under the subtitle **Grounds for Review,** he writes:

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[1] See the *Liberty of the Subject* Act, RSNS 1989, c. 253, and attached as Appendix "A", the relevant portions of Civil Procedure Rules (CPR) 7 and 64. The court has been the beneficiary of the extraordinary efforts of Justice G.R.P. Moir and the late Justice John D. Murphy, and others, who led the wholesale revision of our Civil Procedure Rules, which came into force January 1, 2009. I remain mindful that, as Justice MacAdam stated in *R. v. Van den Elsen-Finck*, 2005 NSSC 171: "not all failures by a court, Correction Services, or other persons involved in the administration of justice are necessarily, even when substantiated, appropriate matters for *habeas corpus*. [citing LeDain J. in *Miller* (1985), 23 CCC (3d) 97 (SCC), at p. 18: "I do not say that *habeas corpus* should lie to challenge any and all conditions of confinement… including the loss of any privilege enjoyed by the general inmate population. But, it should lie… 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". – at paras. 45-46; see also para. 78. Moreover, while an inmate has a right of appeal per s. 784(3) *Criminal Code*, the Crown does not- s. 784(4) - regarding the issuance of the writ of *habeas corpus ad subjiciendum* which I describe herein as "stage one"; however any party can appeal a "judgment… issued on the return of a writ of *habeas corpus ad subjiciendum*, per s. 784(5), which I describe herein as "stage two".

> The applicant says the detention is illegal because I am down here past the described ten-day maximum and have not been given a discharge date. That is not in the legislation and goes against the [Nelson] Mandela rules.

The *habeas corpus* application process in Nova Scotia

[6] In Nova Scotia, Civil Procedure Rule 7 works in tandem with the jurisprudence and informal practice of the court in determining how the court processes these applications.

[7] Applications are received by the prothonotary, in the form used in this case.

[8] Rule 7.12(7) reads:

> A prothonotary must not refuse to file or act on a document purporting to seek review by way of *habeas corpus* unless a judge concurs in writing, but a prothonotary in one district who receives a notice for *habeas corpus* to review detention in a provincial correctional facility or a federal penitentiary located in another district in Nova Scotia may deliver the notice to the office of the prothonotary in that other district, unless a judge directs otherwise.

[9] In my opinion, after consultation with the prothonotary, a judge may concur in the prothonotary refusing to file or act on a document purporting to seek review by way of *habeas corpus*, where the documentation is illegible or so unintelligible that it is in the interests of justice to require further clarification from the inmate.

[10] Once a legible and intelligible notice is received by the court, counsel for the Attorney General, and the relevant institution, the matter is set down for consideration as a motion for directions per CPR 7.13.

<u>Stage One</u>

Procedure and threshold

[11] At that first appearance, what I will call part of "stage one,"[2] an in-court recorded video-linked telephone conference is held with counsel for the Attorney

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[2] This is a reference to the process in Ontario which was commented on in *R. v. Olson*, [1989] 1 S.C.R. 296, where the Rules required the court to determine whether "probable and reasonable ground" for the complaint exists before (dispensing with the formality of actually issuing the writ and) moving on to a hearing on the merits, which I suggest has much to recommend it to this court. See also prior to the January 1, 2019, advent of the new *Civil Procedure Rules*, Chief Justice MacKeigan's comments in *Bell v. Springhill Institution*, [1977] N.S.J. No. 457, at paras. 31-33.

General, the Institution, and the inmate. The court will inquire into the initial review criteria, including asking itself:

1. What decision or action by correctional officials is being challenged?
    a. Is it one of the two exceptions identified by the jurisprudence which preclude the jurisdiction of the Superior Court;[3]
    b. Is it moot?[4]
2. What explanation (reasons) were given by correctional officials for what was done?
3. On what basis is the decision or action being disputed? Is it alleged to be unlawful or unreasonable and, if so, on what basis?
4. Has the situation changed since the initial Notice was filed with the court?
5. What remedy is being requested from the court?

[12] At this stage, the court should ask itself whether there is "an arguable case"[5] regarding the merits of the complaint. I find helpful the jurisprudence where a party seeks to extend the time to appeal a criminal matter, and must also establish that there are "arguable grounds" for the appeal. In *R. v. White*, 2016 NSCA 20, Bryson J.A. stated:

> 20 A party seeking to extend the time to appeal must establish that there are "arguable grounds" for the appeal. In *M.(R.E.)*, Justice Beveridge adopted the "arguable issue" test expressed by Justice Cromwell in *S.E.L. v. Nova Scotia (Community Services)*, 2002 NSCA 62:
>
> > [15] One relevant consideration is the merits of the proposed appeal. Of course, **it is not appropriate at this very preliminary stage of a proposed appeal to attempt a searching examination of the merits but, where, as here, the material before the Court permits it, consideration**

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[3] Namely, in criminal matters where a statute confers jurisdiction on a Court of Appeal to correct the errors of a lower court, and release the applicant (*R. v. Gamble* [1988] 2 S.C.R. 595); or where there is a complete, comprehensive procedure for a review of an administrative decision (*Khela v. Mission Institution*, 2014 SCC 24, at para. 42).

[4] *Richards v. Springhill Institution*, 2015 NSCA 40. See also *Coaker v. Nova Scotia (Attorney General)*, 2018 NSSC 291, regarding Regulation 79 of the *Correctional Services Act* Regulations vis-à-vis "lockdowns".

[5] Which is the wording used by the court in *United States of America v. Desfosses*, [1997] 2 S.C.R. 326, at para. 9; in *R. v. Gogan*, 2017 NSCA 4, the court uses the descriptor "a *legitimate basis* upon which to challenge the decision and reasonableness/lawfulness of the… decision itself", per Van den Eynden J.A., at para. 33.

> **of whether arguable grounds of appeal exist is appropriate. An arguable ground of appeal has been defined as a realistic ground, which, if established, appears of sufficient substance to be capable of convincing a panel of the Court to allow the appeal**: Coughlan v. Westminer Canada Ltd. (1993), 125 N.S.R. (2d) 171 (C.A. Chambers) at 174 - 175.
>
> [Emphasis added]

[13] In summary, the law in Nova Scotia requires the judge at this first stage "to determine whether there is merit to" the inmate's complaints – namely: is there a realistic ground, which if established, appears of sufficient substance to be capable of convincing the court to grant the *habeas corpus* remedy sought?

The law regarding *habeas corpus* applications

[14] I will reiterate what I said in *Coaker v. Nova Scotia (Attorney General)*, 2018 NSSC 291:

> 14 It is important to recall that even if the court hears an application for *habeas corpus*, there is an element of residual discretion which permits a court to refuse a remedy. While there is no discretion to refuse to hear a *habeas corpus* application where an inmate has demonstrated that there has been a material deprivation of their liberty and makes an arguable case that the deprivation was unlawful, as Justice Blair stated for the court in *R. v. Boone*, 2014 ONCA 515, leave to appeal refused, [2014] SCCA No. 430:
>
> > 45 It is true that *habeas corpus* is a remedy that issues as of right (*ex debito justitiae*) once the unlawful nature of the detention is established. It cannot be denied because another, equally effective remedy - such as judicial review - exists. That was the issue debated in *May* and *Khela*. As LeBel J. affirmed in *Khela*, however, *the non-discretionary nature of the writ relates to whether the applicant has raised a legitimate basis for questioning the legality of the detention, not to the ultimate determination of whether, on the whole of the record, the unlawful nature of the detention is established. There remains a residual discretion in this regard*. At paras. 77 and 78, he said:
> >
> > > First, the traditional onuses associated with the writ will remain unchanged. Once the inmate has demonstrated that there was a deprivation of liberty *and casts doubt on the reasonableness of the deprivation*, the onus shifts to the respondent authorities to prove that the transfer was reasonable in light of all the circumstances.
> > >
> > > *Second, the writ remains non-discretionary as far as the decision to review the case is concerned.* If the applicant raises a legitimate doubt as to the reasonableness of the detention, the provincial

> superior court judge is required to examine the substance of the decision and determine whether the evidence presented by the detaining authorities is reliable and supports their decision. Unlike the Federal Court in the context of an application for judicial review, a provincial superior court hearing a *habeas corpus* application has no inherent discretion to refuse to review the case (see Farbey, Sharpe and Atrill, at pp. 52-56). *However, a residual discretion will come into play at the second stage of the* habeas corpus *proceeding, at which the judge, after reviewing the record, must decide whether to discharge the applicant*.
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> [my italicization added]

[15] Ultimately, an inmate will be arguing that this Court should outright release the individual from imprisonment, or quash a decision that has effected a material deprivation of their "residual liberty".[6]

[16] For this reason, it is important at this stage one, as I call it, to look to the jurisprudence regarding the ultimate decision to be made in the event that the matter proceeds to that second stage.[7]

[17] In *Gogan*, Mr. Gogan complained about initially being classified as a "maximum security" offender. The reviewing judge saw as a roadblock to entertaining Mr. Gogan's application the fact that he had no previous security classification, and therefore, there was "no previous level of liberty" to which he could be returned. Justice Van den Eynden elaborated on the general principles applicable:

> Legal Principles
>
> 27 The importance of *habeas corpus* and an inmate's choice of forum, when a deprivation of liberty is experienced, is well-settled in law. However, the circumstances of what constitutes a "deprivation of liberty" has not been exhaustively set out in the jurisprudence. Nor, in my view, can it be. It is clear the Supreme Court of Canada has directed that provincial superior courts should

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[6] I say "material deprivation" because not all changes in the circumstances of the detention of an inmate will amount to "deprivation of residual liberty". I note in *Gogan* this is discussed at paras 47-51. At para. 46, Justice Van den Eynden used the phrase "a new and distinct change in his form of detention" to describe what would amount to a "deprivation of residual liberty". In *Dumas*, at para. 11 Justice Lamer (as he then was) referred to it as "a substantial change in conditions amounting to a further deprivation of liberty".

[7] To avoid any confusion, I note that at para. 33 of *Gogan*, Justice Van den Eynden refers to "Step 1" as the inmate establishing a deprivation of liberty, and "step 2" as the opportunity for an inmate to challenge the decision and reasonableness/lawfulness of the decision in issue on the merits.

guard against unduly narrowing the scope of *habeas corpus*--which is a constitutionally protected right.

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

> [22] *Habeas corpus* is a crucial remedy in the pursuit of two fundamental rights protected by the *Canadian Charter of Rights and Freedoms*: (1) the right to liberty of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (s. 7 of the *Charter*); and (2) the right not to be arbitrarily detained or imprisoned (s. 9 of the *Charter*). Accordingly, the *Charter* guarantees the right to *habeas corpus: ...*
>
> ...
>
> [44] To sum up therefore, the jurisprudence of this Court establishes that prisoners may choose to challenge the legality of a decision affecting their residual liberty either in a provincial superior court by way of *habeas corpus* or in the Federal Court by way of judicial review. As a matter of principle, a provincial superior court should exercise its jurisdiction when it is requested to do so. *Habeas corpus* jurisdiction should not be declined merely because another alternative remedy exists and would appear as or more convenient in the eyes of the court. The option belongs to the applicant. **Only in limited circumstances will it be appropriate for a provincial superior court to decline to exercise its *habeas corpus* jurisdiction. For instance, in criminal law, where a statute confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be, *habeas corpus* will not be available** (i.e. *Gamble*, [1988] 2 S.C.R. 595). **Jurisdiction should also be declined where there is in place a complete, comprehensive and expert procedure for review of an administrative decision** (i.e. *Pringle* [1972] S.C.R. 821 and *Peiroo).*
>
> ...
>
> [50] Given the historical importance of *habeas corpus* in the protection of various liberty interests, jurisprudential developments limiting *habeas corpus* jurisdiction should be carefully evaluated and should not be allowed to expand unchecked. The exceptions to *habeas corpus* jurisdiction and the circumstances under which a superior court may decline jurisdiction should be well defined and limited. ...

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

> [34] Le Dain J. also held in *Miller* that relief in the form of *habeas corpus* is available in a provincial superior court to an inmate whose "residual liberty" has been reduced by a decision of the prison authorities, and that this relief is distinct from a possible decision to release the inmate entirely from the correctional system (*Miller*, at p. 641**). Decisions which might**

> **affect an offender's residual liberty include, but are not limited to, administrative segregation, confinement in a special handling unit and, as in the case at bar, a transfer to a higher security institution.**

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

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

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

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

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

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

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

> **grounds**. Deference will be shown to a determination that evidence is reliable, but the authorities will nonetheless have to explain that determination.
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> [my bolding added]
>
> 33 As noted, the issue before the application judge was whether Mr. Gogan could get over the hurdle of establishing a deprivation of his liberty resulted from his initial classification decision (Step 1 in a *habeas* application). Whether Mr. Gogan raised a legitimate basis upon which to challenge the decision and the reasonableness/lawfulness of the classification decision itself (Step 2) was not decided during the May 11, 2015 hearing.
>
> 34 …For the reasons set out at para 18, I hold the view that any Step 2 analysis is not properly before this Court. It is for the application judge to determine whether there is merit to Mr. Gogan's complaints of procedural fairness and whether the classification decision is unreasonable, and to do so once the record has been supplemented, as was the intent should Mr. Gogan's application move on to the Step 2 analysis. Although the Crown has been vocal about the need to supplement the record, this may also be a concern to Mr. Gogan given the restricted nature of the hearing in the court below. Mr. Gogan must also be given a full and fair opportunity to put his best foot forward during the Step 2 analysis.

[18] At stage one, the onus is on an inmate to establish that there is a legitimate basis or arguable case for the court to find that there has been a material deprivation of liberty and that the relevant circumstances bring into question the legality of the decision.[8] Typically, at this stage, counsel for the Attorney General provides fulsome, though not always exhaustive, documentation in support of their position vis-à-vis the merits of the matter (stage two).

[19] Moreover, regarding the deference owed to correctional services staff decision- making, it is important to keep in mind that in relation to procedural fairness, jurisdictional issues, and the interpretation of the relevant legislation, given the liberty interest involved, the decision-makers should be held to a standard of correctness for each.[9]

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[8]The unlawfulness of the decision can be the result of lack of procedural fairness [see e.g. *Cardinal v. Kent Institution* [1985] 2 S.C.R. 643, at paras. 14, 21 and 24]; errors in the interpretation of the relevant legislation, including lack of the decision-makers' jurisdiction to act; and that the decision was "unreasonable" or not justifiable. Notably, the reasonableness of *a disciplinary sanction is not a question that a court* hearing a *habeas corpus* application *is generally entitled to consider* – see *R. v. Van den Elsen-Finck*, 2005 NSSC 71, at paras. 129 – 133, per MacAdam J. Such cases usually turn on the level of procedural fairness, accorded to the inmate.

[9] E.g. albeit in another context, see the court's statements in *Waterman v. Waterman*, 2014 NSCA 110, per Justice Beveridge, at paras. 23, 63, and 72.

[20] Regarding the reasonableness of a decision, even bearing in mind that strictly speaking this is not a "judicial review", that test does appear to best articulate the standard appropriate to the reasonableness assessment by a superior court in a *habeas corpus* application. I adopt my comments from *R. v. NBP*, 2017 NSSC 77[10]:

> Why the decision taken by the provincial director was reasonable
>
> 100 I bear in mind that the Attorney General need only demonstrate that the provincial director's decision was one that was "within an appropriate range of outcomes" given the circumstances. Considerable deference must be afforded to prison administrators, as they have access to very specific information, sometimes protected by "privilege", which they are not always able to fully articulate, and because they also have specific education, training, and experience in relation to the administration of correctional facilities. I have no hesitation in agreeing with the sentiment stated by Justice Sirois in *Maltby v. Saskatchewan (Attorney General*), (1982) 2 CCC (3d) 153 (QB), at para. 20:
>
>> Prison officials and administrators should be accorded wide ranging deference in the adoption and execution of policies and practices that in their judgments are needed to preserve internal order and discipline and to maintain institutional security. Such considerations are peculiarly within the province and professional expertise of corrections officials, and in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to the expert judgment in such matters -- *Bell v. Procunier*, 417 US at 827. The unguided substitution of judicial judgment for that of the expert prison administrators on matters such as this would to my mind be inappropriate.

[21] In relation to whether there has been procedural fairness, I repeat what I said in *NBP*,[11] albeit speaking in terms of the stage two analysis:

> 79 I must correctly define the content of that duty, and apply it to the circumstances of this case, to assess whether there was a breach of NBP's right to procedural fairness - *Waterman*, 2014 NSCA, at para 23.
>
> 80 As indicated earlier, I have found that in transferring NBP to North Nova, the provincial director did not change his level of custody. Therefore, s. 86 *YCJA* does not apply. If I am wrong about that, then NBP had the right to request a

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[10] Which I believe are consistent with paras. 74-75 of *Khela*, regarding when a decision is "unreasonable".

[11] A more comprehensive and authoritative statement regarding procedural fairness requirements for incarcerated inmates who are in "administrative dissociation or segregation" flowing from disciplinary incidents may be found in Justice MacAdam's reasons in *R. v. Van den Elsen-Finck*, 2005 NSSC 71, at paras. 145-197. In summary, a fundamentally fair process demands that inmates are entitled "to be informed of the nature of the allegations and [to have] an opportunity, however informal, to make representations" (paras. 153, 183 and 197).

> review of that decision under s. 87 *YCJA*. There is no evidence that he requested such review.
>
> 81 Before his initial transfer to North Nova, NBP was provided with an opportunity to present his position, and did receive a copy of the disciplinary report regarding the so-called "riot" which was the basis for transferring him.
>
> 82 In *Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817, at para. 22, Justice L'Heureux-Dube for the majority, wrote that "the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected".
>
> 83 She went on to list five non-exhaustive general factors that have been recognized in the jurisprudence is relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. These are:
>
> > 1.The nature of the decision being made and the process followed in making it;
> >
> > 2.The nature of the statutory scheme and the "terms of the statute pursuant to which the body operates";
> >
> > 3.The importance of the decision to the individual or individuals affected;
> >
> > 4.The legitimate expectation (that a certain procedure would be followed), of the person challenging the decision;
> >
> > 5.The choices of procedure made by the authorized decision maker itself (particularly when the legislation leaves to the decision maker the ability to choose its own procedures or when the decision-maker has an expertise in determining what procedures are appropriate in the circumstances).

[22] I bear in mind especially Justice Van den Eynden's reminder in *Gogan:* "It is clear the Supreme Court of Canada has directed the provincial superior courts should guard against unduly narrowing the scope of *habeas corpus* – which is a constitutionally protected right" (para. 27).

[23] Justice Van den Eynden's comments in *Gogan* , are binding on this Court, however I will go on to suggest that they may be adjusted in the case at bar and still respect the spirit of binding precedent.[12]

[24] The most notable cases from the Supreme Court of Canada and the Nova Scotia Court of Appeal all concern *habeas corpus* applications arising in the federal penitentiary context.

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[12] To be clear, I am speaking only for myself, and not on behalf of any other members of the court.

[25] The complexity and sophistication of the federal penitentiary scheme is reserved exclusively for "sentenced" inmates.[13]

[26] In the federal penitentiary context, the inmates are serving sentences of two or more years, and their applications typically involve profound matters such as the initial classification, or reclassification of an offender's status- whereas in the provincial correctional facility context, we find a mix of offenders serving sentences of up to two years less a day, and a large number of offenders on "provincial remand", whose applications necessarily involve less profound and more short-term matters, such as the imposition of disciplinary and administrative close confinement.

[27] Although the decisions of the Supreme Court of Canada and the Nova Scotia Court of Appeal are binding upon this Court, at least insofar as the *ratio decidendi* of each of their decisions, and they are persuasive beyond the *ratio decidendi*, in my opinion, because there are significant differences between the factual and legal nature of the *habeas corpus* applications arising in the federal penitentiary context, as contrasted with the provincial correctional facility context, it is appropriate to adjust the principles applicable to the Nova Scotia provincial correctional facility context.

[28] Bearing in mind that at stage two *habeas corpus* applications will examine the lawfulness of a material deprivation of liberty by reference to whether there has been a lack of procedural fairness, errors in the interpretation of the relevant legislation, or lack of the decision-maker's jurisdiction to act (all of which attract a correctness standard of review), and the reasonableness of the decision made (which attracts a reasonableness standard of review), I suggest that it is appropriate

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[13] And only rarely does it pertain to offenders exceptionally on "federal remand" pending existing criminal proceedings, as described in *R. v. Melvin*, 2016 NSSC 130. An example of the vastly different legal environments is captured by the mere existence of a formal recognition in federal penitentiaries of an inmate's "right to counsel", immediately upon being placed in administrative segregation – see Commissioners Directive 709, pursuant to s. 97(2), *Corrections and Conditional Release Regulations*, which reads in part: "Without delay, upon admission to administrative segregation, an inmate will be: (a) informed of their right to legal counsel pursuant to subsection 97(2) of the CCRR and given an opportunity to contact counsel…". Recently, the federal government has proposed new legislation, Bill C-83, regarding "solitary confinement" in federal institutions; and the British Columbia Court of Appeal extended a stay of a decision [*B.C. Civil Liberties Assn. v. Canada (Attorney General)*, 2018 BCSC 62; see also *Canadian Civil Liberties Assn. v. Canada (Attorney General)*, 2018 ONCA 1038] to find the existing provisions to be unconstitutional, and ordered new conditions on the use of "solitary confinement" in the meantime to limit the violations of inmates' constitutional rights. Longer term periods of segregation are being exceptionally scrutinized.

in the provincial correctional facility context to adjust the governing principles as follows:

a. Although provincial correctional services policies do appear have the force and effect of law (per s. 39 *Correctional Services Act*, S.N.S. 2007, c. 35 and *Jivalian v. Nova Scotia*, 2013 NSCA 2, at para. 31) even if they do not have the force of law (as I wrongly suggested at footnote 4 in *Coaker v. Nova Scotia (Attorney General)*, 2018 NSSC 291), generally speaking, if an institution has fundamentally fair policies made applicable to it, as I find are in existence at present, or internal rules to similar effect, and it follows those in any particular case, an inmate will have presumptively received fundamentally fair treatment and process, and not be able to make out an arguable case otherwise;

b. If an inmate has received fundamentally fair treatment, absent other valid grounds for review, *the court will not examine the merits of any disciplinary findings or sanctions imposed*, including disciplinary close confinement permitted by s. 74(c) of the *Correctional Services Act* (*R. v. Van den Elsen-Finck*, 2005 NSSC 71, at paras. 145-197 per MacAdam J.);

c. If an inmate is placed in administrative close confinement (i.e. non—disciplinary) per s. 74(b) of the *Correctional Services Act*, and has received fundamentally fair treatment, absent other valid grounds for review, *the court should be reluctant to examine the reasonableness of the decision to impose administrative close confinement.*

[29] Taking into account these adjusted principles, if the court concludes that "an arguable case" exists, that there is a material deprivation of liberty and that the deprivation is "unlawful", then the stage two process involving examination of the merits is engaged.

[30] As Justice Van den Eynden pointed out in *Gogan*, it is only at stage two that the inmate is entitled to have the full record available, and to have "a full and fair opportunity to put his best foot forward" (para. 34).[14]

[14] Which may include affidavits and evidence from an inmate. Regarding the extent of "disclosure" required to effect an acceptable level of procedural fairness, see *Khela*, at paras. 81-90.

[31] It is important to recall that there is an element of residual discretion which permits a court to refuse a remedy in the case of a *habeas corpus* application. However, there is no discretion to refuse to hear a *habeas corpus* application where an inmate makes an arguable case that there was a material deprivation of liberty and the deprivation was unlawful at stage two.

Why application of the principles to the case at bar causes this application to be dismissed at stage one

[32] Mr. Pratt's application was filed October 25, 2018. At the hearing he referred to other alleged deprivations of residual liberty that had taken place after he filed his *habeas corpus* application. I agree with counsel for the Attorney General that, except in rare cases involving exceptional circumstances, the court should confine itself to the initial complaint in order to avoid what counsel appropriately described as "rolling-over [each other] *habeas corpus* applications". *Inter alia*, allowing rolling *habeas corpus* applications could put the court in a state of constant supervision of an inmate's status, which is a highly undesirable outcome. The adjudicative context must be restricted in order to allow the court to conduct its business in a timely fashion, which is particularly important in the context of *habeas corpus* applications. Moreover, when the parties have come to the court with a particular record of correctional decision-making, the court will be deprived of a proper context, and perhaps the parties themselves will be deprived of a proper opportunity to present their respective positions, if extraneous matters are introduced.[15]

[33] Therefore, I will confine my consideration to matters that arose on or before October 25, 2018.

[34] The record before me indicates that Mr. Pratt is presently on remand in relation to charges of uttering threats on April 23, 2018 (s. 264.1, *Criminal Code*), and two counts of assaulting a peace officer (s. 270(1)(a)) on July 10, 2018.[16]

[35] I reiterate here that Mr. Pratt alleged in his October 25, 2018, Notice :

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[15] Section 784(3) *Criminal Code* embodies these concerns: "where an application for *habeas corpus*… is refused… no application may again be made on the same grounds… unless fresh evidence is adduced…".

[16] See the October 30 and November 2, 2018, letters from counsel to the court. I will note here that the court has been exceptionally and consistently well served by Mr. Eddy, counsel for the Attorney General. He assembles necessary materials in a timely manner given the range of materials required, and presented them and the legal position of the Attorney General in a most fair manner, as his duty to the court requires, pointing out matters that were to the benefit of the inmate and which may prejudice the legal position of the Attorney General.

> The applicant is detained without reason being given. It is impossible for the applicant to leave detention because I am in closed confinement and I have not been given a date for discharge. I am down here past the described ten-day maximum and have not been given a discharge date. That is not in the legislation and goes against the [Nelson] Mandela rules.

[36] The preliminary record reflects the following:

1. On October 12, 2018 at 8:00 a.m. in the general population North 3 unit (cell 19) of the Burnside facility, Mr. Pratt received a level III notation – at that date he approached the North 3 workstation, handed a sealed envelope to one of the officers, and said in a tone that seemed like there would be consequences if the officer did not keep it a secret: "That's for you, but don't open it until you get home or you're alone"… "Don't tell or show [it to] anyone". Mr. Pratt was placed in close confinement pending the outcome of the adjudication relating to that level III notation. On October 17, the matter was adjudicated, Mr. Pratt having admitted what was done. Mr. Pratt indicated he had been housed in a CCU [close confinement unit] since October 12, 2018, and agreed to be involved in a mediation with the officer to whom the letter had been addressed. As a result he was confined to segregation for five days, less five days already confined leaving no balance of time in segregation outstanding for this breach. The disciplinary report also states: "offender has been previous[ly] addressed by this writer in regards to inappropriate communication with staff, as a result of this previous conversation an offender's continuous behavioural issues a loss of remission is being utilized as progressive discipline… Forfeiture of remission three days";
2. On October 13, 2018 at 7:44 p.m. - Mr. Pratt covered the camera in his CCU cell # 9. He received a level II notation. *His confinement was continued in segregation pending the investigation.* He admitted the misconduct. On October 17, the penalty adjudicated was that he be confined to segregation for one day (less one day already confined);
3. On October 18, 2018 at 9:00 a.m. – Mr. Pratt covered the camera in his CCU cell # 9. He received a level III notation. He was asked to uncover the camera, but refused, said to the student correctional officer, "Fuck this new student, skank-ass bitch," and called the writer of the report a "goof". *His confinement was continued in segregation pending the investigation.* He did not admit the misconduct. On October 20, he was found guilty and the penalty adjudicated required

that he complete five days of additional disciplinary confinement in CCU (less five days already confined). He also lost canteen privileges for five days ending on October 22, 2018. A notation was entered on October 20 that "inmate Pratt has a history of threats and abusive language towards correctional staff at CNSCF, in particular towards female staff. He is currently housed in CCU on another level";

4. On October 30, 2018, counsel's letter to the court, (in advance of an October 31 first appearance after Mr. Pratt's October 25 *habeas corpus* filing), attached an email from Deputy Superintendent Tracy Dominix, and a newspaper article by *Chronicle Herald* reporter Stuart Peddle dated October 24, 2018, referencing an incident that day in the Dartmouth Provincial Court where Mr. Pratt allegedly assaulted three sheriffs, two of whom required hospital treatment. In her email, Deputy Superintendent Dominix stated:

> Maurice Pratt has been placed on level and SMP [Sentence or Security Management Plan] and was removed from North 3 [the general inmate population unit] due to his behaviour towards a female officer. Last week he threatened Capt. Sisco and received a level. While in CCU his behaviour was uncooperative. Team was required to move him from CCU to admissions as he was refusing in court. That same day he acted out in court assaulting three sheriffs. *At this time, he is housed in CCU on an SMP. Mr. Pratt has been on levels and SMP requiring him to be housed in CCU.*
>
> [My italicization added]

[37] In summary therefore, on October 25, 2018, Mr. Pratt was in disciplinary *and* administrative close confinement (segregation) – i.e. CCU # 9. As Deputy Superintendent Dominix stated in her October 30, 2018 email: "at this time he is housed in CCU on an SMP [Sentence Management Plan]. Mr. Pratt has been on levels and SMP requiring him to be housed in CCU."[17]

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[17] For disciplinary breaches, inmates are assigned (based on increasingly serious incident circumstances) either level I, II, or III notations in their file. For more serious instances, the inmate is placed in close confinement pending review of the incident – see ss. 69-72, and 74, *Correctional Services Act*. Inmates can also be placed in close confinement if they agree; the superintendent concludes they are in need of protection; and the inmate "needs to be segregated to protect the security of the correctional facility or safety of the offender". – s. 74 and see *Ryan v. Nova Scotia*, 2015 NSSC 286, per Chipman J. I understand SMP to be a customized protocol for specific inmates in close confinement considered necessary to "protect the security of the staff, visitors and property of the correctional facility or safety of other offenders".

[38] Counsel for the Attorney General represented, and I accept, that on October 23-24, 2018, Mr. Pratt received two rules-breaches based levels notations involving the attack on the sheriffs in Provincial Court, and another matter in the institution, which caused him to be held in the CCU pending the adjudication, until October 29, when he received as the penalty, two days' time served in the CCU.

[39] Thus, from my perspective at the hearing on November 6, all indications are that as of October 25, 2018, Mr. Pratt was being held in the CCU pending the adjudication of outstanding disciplinary matters, *and* to protect the security of the correctional facility or the safety of other offenders. However, by November 6, he was only in administrative close confinement.

[40] "Close confinement" is referenced in s. 74-75 of the *Correctional Services Act*:

> 74 A Superintendent may, in accordance with the regulations, place an offender in close confinement in a correctional facility, if
>
> (a) in the opinion of the Superintendent, the offender is in need of protection;
>
> (b) *in the opinion of the Superintendent, the offender needs to be segregated to protect the security of the correctional facility or the safety of other offenders;*
>
> (c) *the offender is alleged to or has breached a rule of a serious nature*; or
>
> (d) the offender requests.
>
> 75 Where an offender has been placed in close confinement, the Superintendent
>
> (a) may restrict an offender's privileges; and
>
> (b) shall, in accordance with the regulations, conduct a review of the close confinement.

[41] "Close confinement" is also defined in the Policy and Procedure Subject 43.00.00[18] which allows the Superintendent of their own accord, to place offenders in close confinement for the following reasons:

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[18]See Appendix "B" attached. Mr. Pratt had sought *habeas corpus* as a result of a so-called "lockdown" starting on or about September 2, 2018, in the North 3 unit of the Central Nova Scotia Correctional Facility referred to as the "Burnside Jail". In Hfx. No. 479943 Justice Chipman ruled that the institution had proved that deprivation of residual liberty was lawful and reasonable, and dismissed his application on September 19, 2018 – 2018 NSSC 243. Therein, counsel for the Attorney General relied upon the September 13, 2018, affidavit of Brad Ross, Deputy Superintendent at the Burnside Jail. I am satisfied that Mr. Pratt received a copy of it before the hearing of the application. Deputy Superintendent Ross attaches Correctional Services Policy and Procedures re- Subject No.

1. *The security of the facility may be compromised* [including examples such as that the offender may be concealing contraband (dry cell); space limitations; intermittent offenders; to protect the safety of other offenders or staff where the offender poses a physical risk to other offenders or staff]; and
2. Where the offender has received an incident report and pending or following adjudication was sanctioned to close confinement *in accordance with the offender disciplinary system*.

[42] Notably, the Policy states in section 6:

> 6.1
>
> In accordance with sections 54(2), 55 and 56 of the *Correctional Services Act* and section 59(1) and 95(3) of the *Correctional Services Regulations* an offender placed in close confinement is permitted correspondence, telephone communication and visits with the following:
>
> 6.1.1 spiritual advisor
>
> 6.1.2 lawyer
>
> 6.1.3 representative from the Office of the Ombudsman
>
> 6.1.4 representative from the Human Rights Commission
>
> 6.1.5 the Nova Scotia Police Complaints Commissioner
>
> 6.1.6 the Nova Scotia civilian Director of the Serious Incident Response Team (SIRT)
>
> 6.1.7 individuals approved by the Superintendent.

[43] Furthermore, the Policy references:

Section 7 – Programs and Privileges

Section 8 – Disciplinary Close Confinement pending hearing by Adjudicator

Section 9 – Disciplinary Penalty – Close Confinement

Section 10 – Conditions of Disciplinary Close Confinement

Section 11 – Additional Measures, [which reads]:

> 11.1 a Security Management Plan [also referred to as a Sentence Management Plan (SMP)] may be utilized to provide direction to staff

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43.00.00 (most current revision date June 22, 2018). Even if such policies are not a legal instrument that has the force of law (*Jivalian v. Nova Scotia*, 2013 NSCA 2, at para. 31), they do serve to increase the likelihood that staff act in a manner consistent with its stated considerations and objectives.

> *regarding any additional security procedures that are required for the management of the offender while they are in close confinement*, such as restrictions around
>
> 11.1.1 contact with other offenders
>
> 11.1.2 offender movement
>
> 11.1.3 special precautions, such as "no sharps"
>
> 11.1.4 interaction with staff
>
> 11.1.5 escort protocols.

Section 12 – Close Confinement Review and Request for Extension[19]

[44] Given Justice Chipman's earlier determination that Mr. Pratt's detention was lawful as of September 19, Mr. Pratt's claim of relevant unlawful detention before me must relate to facts arising between September 20 and October 25, 2018. Within that timeframe, he has stated his complaint as: "… detained without reason being given… have not been given a date for discharge [from close confinement]". Mr. Pratt therefore seeks to be released from close confinement, and re-introduced into the general population.

[45] There would appear to be an arguable case for material deprivation of liberty established, since Mr. Pratt is in close confinement, as opposed to in the general population of the inmate cohort. Thus, next I consider whether there is an arguable case that, at stage two, the Attorney General could not establish that there has been procedural fairness, any necessary interpretation of legislation was correct, and the decision in issue was reasonable.[20]

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[19] Which policy relates to administrative *or* disciplinary close confinement of an offender, and requires reviews by the Superintendent or delegate at intervals of 24 hours initially, and 5 day periods thereafter; only the Executive Director or delegate can order more than 10 days' close confinement for an adult; the maximum per incident is 10 days for adults for disciplinary close confinement and 30 days for administrative close confinement; requests for continued placement in close confinement beyond those of the Superintendent's authority may be submitted and approved, but if close confinement has reached 30 consecutive days, and continued confinement has been approved, after every subsequent 30 day period, the offender will receive a formal letter from the Superintendent setting out the details of the time spent in close confinement and the reasons for initial and continued confinement. Although the legislative framework sets out reasonable review processes, there may still be cases where effectively extraordinarily long periods of close confinement will be allowable thereunder, and courts should remain vigilant to ensure no excessive overall periods of close confinement are thereby protected against proper judicial scrutiny.

[20] I bear in mind that courts generally will not review the reasonableness of disciplinary sanctions, including close confinement – see footnote 8. Beforehand, and specifically between October 30 and November 6, 2018, Mr. Pratt was in a CCU and not permitted interactions with other inmates, according to an SMP.

[46] When I ask whether there is a realistic ground, which if established, appears of sufficient substance to be capable of convincing the court to grant the *habeas corpus* remedy sought, I conclude there is not.[21]

[47] As of the appearance in court on November 6, 2018, Mr. Pratt remained in close confinement, but not as punishment for relevant disciplinary infractions,[22] since those punishments had expired by October 29. Those matters were rendered moot. Had Mr. Pratt argued that despite those matters being moot, the factors identified in the jurisprudence making it desirable for the court to rule on the legality thereof in any event, I find they are not compelling here.[23]

[48] Mr. Pratt also argued that his detention in CCU was "illegal because I am down here past the described 10 day maximum and have not been given a discharge date". There is no arguable case made out during the interval from October 29 to November 6, that Mr. Pratt was held in close confinement for a duration that is contrary to the legislation.

[49] Sections 79 and 80 of the *Correctional Services Regulations* reference "conditions for confinement of offenders in custody" and "review of close confinement":

> 79 (1) A Superintendent may impose different conditions of confinement for different offenders within the correctional facility.
>
> (2) An offender held in a correctional facility may be restricted from associating with another offender held in the correctional facility.
>
> (3) For reasons of safety, security or order in the correctional facility, a Superintendent may restrict access to the correctional facility or part of it by

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[21] See also the *Correctional Services Act*, SNS 2005, c. 37, and the *Correctional Services Regulations* made under section 94 of the *Correctional Services Act*, OIC 2006 – 317 [June 28, 2006], NS Reg. 99/2006, as amended by OIC 2017 – 266 [October 31, 2017], NS Reg. 160/2017. Examining whether there is a "realistic" basis to believe an applicant will be able to convince the court to ultimately grant the *habeas corpus* remedy sought, is similar to a so-called *Vukelich* application. As Judge Derrick (as she then was) stated in *R. v. Hilchey*, 2015 NSPC 46 at para. 13: **"** A *Vukelich* application obtains its name from *R. v. Vukelich*, [1996] B.C.J. No. 1535, a decision of the British Columbia Court of Appeal. A *Vukelich* hearing allows the trial court to determine if a *Charter* application should proceed to be heard. *Charter* motions that do not have any possibility of success or where the remedy being sought could not possibly be granted can be dismissed, avoiding the expenditure of valuable and limited judicial and court resources."- see also paras. 14-20.

[22] Which are set out in sections 69 – 73 of the *Act*.

[23] Regarding this issue see for example: *Borowski v. Canada (Attorney General.)*, [1989] 1 S.C.R. 342; *Springhill Institution v. Richards*, 2015 NSCA 40, per Beveridge JA, at paras. 50 – 58

a) confining the offenders held in the correctional facility or those of them who are normally held in that part, as the case may be, to their sleeping areas; and

b) restricting entry to the correctional facility or that part, as the case may be.

80 (1) If an offender is placed on close confinement under section 74 of the Act, the Superintendent must conduct a preliminary review of the offender's case no later than 24 hours after the time that the close confinement began.

(2) After a preliminary review, if he Superintendent believes that the continued close confinement of the offender is not warranted, the Superintendent must release the offender from close confinement.

(3) If an offender remains in close confinement after a preliminary review, the Superintendent must review this offender circumstances at least once in every five-day period to determine whether the continued close confinement of the offender is warranted.

(4) If an offender remains in close confinement for a continuous period of 15 days, the Superintendent must request permission from the Executive Director before continuing the close confinement beyond the 15 days.[24]

[50] Thus, Mr. Pratt's complaint before me must be considered as focused on claims of procedural unfairness, or an unreasonable decision leading to his detention for non-disciplinary reasons. Consequently, I must ask myself whether there is a realistic basis to conclude that between October 30 and November 6, 2018, it was not reasonable for Mr. Pratt to be placed in close confinement "to protect the security of the correctional facility or safety of other offenders", or that he was not afforded fundamentally fair procedural rights and information.

[51] This is a decision to which the court should be very deferential, absent compelling evidence otherwise.[25]

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[24] See also for administrative close confinement Policy Subject No. 43.00.00, Section 12, which permits confinement up to 10 days and with the Executive Director's approval up to an initial 30 days period, with options for extensions.

[25] See my reference in *NBP*, at para. 100, citing Justice Sirois with approval in *Maltby*: "Prison officials and administrators should be accorded wide ranging deference in the adoption and execution of policies and practices that in their judgments are needed to preserve internal order and discipline and to maintain institutional security. Such considerations are peculiarly within the province and professional expertise of corrections officials, and in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to the expert judgment in such matters… The unguided substitution of judicial judgment for that of the expert prison administrators on matters such as this would to my mind be inappropriate".

[52] I find that Mr. Pratt was aware that he remained in administrative close confinement under an SMP from October 30 to November 6, and that he understood why. Given his recent misconduct in October, as recent as October 24, 2018, in the Dartmouth Provincial Court, the decision to detain him in administrative close confinement until he had a demonstrated willingness and ability to follow institutional rules and not accumulate further disciplinary findings and sanctions was, in my opinion, a reasonable basis for him to be in close confinement until November 6, 2018.[26]

Conclusion

[53] In these circumstances, I was satisfied that the disciplinary matters that arose on or before October 25 were fully moot on November 6, 2018, and that regarding his continued administrative close confinement detention between October 30 and November 6, 2018, the Respondents have discharged their onus to establish that there is no realistic ground which if established, would be of sufficient substance to convince the court that it should grant the remedy of *habeas corpus*.

[54] Therefore, the application for *habeas corpus* is dismissed at stage one.

Rosinski, J.

[26] A somewhat similar situation resulted in denial of the *habeas corpus* remedy at stage two – *Prystay v. Alberta*, 2018 ABQB 197, per Hillier J. Ultimately, his detention in segregation was found to be so prolonged as to constitute "cruel and unusual punishment" and he received an extraordinary pre-sentence remand credit – *R. v. Prystay*, 2019 ABQB 8, per Pentelechuk J. (as she then was).

APPENDIX A

Scope of Rule 7

7.02 (1) This Rule provides procedures for a judicial review by the court, or an appeal to the court.

(2) This Rule applies to each of the following: …

(c) *habeas corpus* for civil detention, and an application for *habeas corpus* to which the *Criminal Code* applies is started under Rule 64 – Prerogative Writ;

…

(3) A person may seek judicial review or bring an appeal, in accordance with this Rule.

7.03 (1) A person may seek judicial review, except *habeas corpus*, by filing a notice for judicial review under Rule 7.05.

(2) A person may start an application for *habeas corpus* by filing a notice for *habeas corpus* under Rule 7.12.

…

Notice for *habeas corpus*

7.12

(1) A person under detention may require the court to review the legality of the detention by filing a notice for *habeas corpus*.

(2) For the purpose of the *Liberty of the Subject Act*, a notice for *habeas corpus* is an application for an order in lieu of a writ of *habeas corpus ad subjiciendum*, including an order *nisi* and an order in the nature of *certiorari*.

(3) The Attorney General of Canada or the Attorney General of Nova Scotia, or both of them, must be respondents if the detention has any connection with the government of Canada, the government of Nova Scotia, or both.

(4) The notice must contain a standard heading written in accordance with Rule 82 - Administration of Civil Proceedings, be entitled "Notice for *Habeas Corpus*", be dated and signed by the applicant, the applicant's counsel, or an agent approved by a judge, and, unless the applicant cannot obtain the information, include all of the following:

(a) the name and place of detention;

(b) the names of, or offices held by, individuals holding the applicant on behalf of the respondent;

(c) any reasons given to the applicant for the detention;
(d) information about what prevents the applicant from leaving the place of detention;
(e) the request for *habeas corpus*;
(f) the grounds on which the applicant contends that the detention is illegal;
(g) a statement that information about the means for communicating with the applicant and the respondent have been given to the prothonotary.
(5) A notice for *habeas corpus* may be in Form 7.12.
(6) A notice for *habeas corpus* to review detention in a provincial correctional facility or a federal penitentiary in Nova Scotia must be filed at the office of the prothonotary in the district in which the facility or penitentiary is situate, unless a judge permits otherwise.
(7) A prothonotary must not refuse to file or act on a document purporting to seek review by way of *habeas corpus* unless a judge concurs in writing, but a prothonotary in one district who receives a notice for *habeas corpus* to review detention in a provincial correctional facility or a federal penitentiary located in another district in Nova Scotia may deliver the notice to the office of the prothonotary in that other district, unless a judge directs otherwise.

Order for *habeas corpus*
7.13 (1) *Habeas corpus* takes priority over all other business of the court.
(2) When a notice for *habeas corpus* is filed, a judge must immediately do all of the following:
(a) appoint the earliest practical time and date and a place for a judge to give directions on the course of the proceeding;
(b) order any person detaining the applicant to bring the applicant before the judge at the set time and date;
(c) order a respondent to produce all documents relating to the detention immediately to the court;
(d) cause the parties to be notified of the time, date, and place of the hearing for directions.
(3) An order to bring the applicant before a judge may include the statement, "Failure to obey this order may lead to contempt proceedings."
(4) The order may be in Form 7.13.

Directions to determine legality of detention
7.14
A judge giving directions as a result of an order for *habeas corpus* may provide directions necessary for a quick and fair determination of the legality of the applicant's detention, including any of the following:

(a) set a date for the court to determine the legality of the detention;
(b) order a person detaining the applicant to bring the applicant before the court for the hearing;
(c) set dates for filing affidavits and briefs;
(d) order production of a document not already produced;
(e) order attendance of a witness for direct examination, if the evidence is not obtained by affidavit;
(f) order attendance of a witness for cross-examination;
(g) determine what documents will constitute the record;
(h) start a proceeding, under Rule 89 - Contempt, against a person who receives an order to bring the applicant before the judge or produce a document and fails to make every reasonable effort to comply with the order;
(i) adjourn the proceeding and make any order necessary to obtain the presence of the applicant.

Interim release on *habeas corpus*
7.15 A judge may order bail for an applicant.

Final determination following *habeas corpus*
7.16
A judge may release or remand the applicant on determining whether or not the detention is legal.

Abuse of *habeas corpus*
7.17
(1) A person who applies for *habeas corpus* commits an abuse of process if both of the following apply:
(a) the detention has already been determined to be legal by the court;
(b) no new ground has arisen since the determination.
(2) The abuse may be dealt with under Rule 88 - Abuse of Process.

Other forms of *habeas corpus*
7.18
This Rule does not apply to the powers of the court or a judge regarding *habeas corpus ad testificandum*, the powers under Rule 50 - Subpoena, or any power of a judge or the court to order prisoners to be transported for attendance at court.
…
Scope of Rule 64
64.04 (1) This Rule is made under subsections 482(1) and (3) of the *Criminal Code*.

(2) A person may apply for a prerogative writ in relation to a criminal proceeding, or imprisonment, in accordance with this Rule.

Writ is granted by order

64.02 A judge may grant an order having the effect of *mandamus*, *certiorari*, prohibition, or *habeas corpus* in relation to a criminal proceeding, or imprisonment.

…

64.04 (1) A person under imprisonment, or other criminal detention, may obtain a review of the legality of the detention by filing a notice for *habeas corpus* in the form prescribed by Rule 7– Judicial Review and Appeal.

(2) Rules 7.12 to 7.17, of Rule 7-Judicial Review and Appeal, apply to *habeas corpus* brought in relation to a criminal proceeding or imprisonment, to the extent they are consistent with the *Criminal Code.*

Other Rules apply

64.05 All Rules outside of this Rule apply, to the extent that they provide procedures suitable to *mandamus*, *certiorari*, prohibition, or *habeas corpus* in connection with a criminal proceeding or imprisonment and are not inconsistent with the provisions of the *Criminal Code* or this Rule.

APPENDIX "B"

NOVA SCOTIA
Department of Justice

Correctional Services Policy & Procedures

Chapter:	**Close Confinement**	Classification:	**Public Document**
Subject:	**Administrative and Disciplinary Close Confinement**		
For:	**Correctional Facilities**	Authorized by Executive Director	

1. Policy

1.1 Correctional Services will place an offender in close confinement within a provincial correctional facility when it is required to assist in maintaining the safety of offenders, staff and the public.

1.2 Offenders placed in close confinement will be provided with offender privileges pursuant to Sections 54 to 58 of the *Correctional Services Regulations.*

2. Workplace Violence Prevention Plan

2.1 This policy and procedures, in addition to any facility Standard Operating Procedures (SOP), is part of the Correctional Services Division's overall workplace violence prevention plan as required by Section 7 of the Violence in the Workplace regulations.

3. Authority

3.1 The authority and requirements for placing an offender in close confinement is derived from Section 74 of the *Correctional Services Act* (CSA) and Sections 79 to 81, 88(2)(b), 89(c) and 95(1)(c) and (d) of the *Correctional Services Regulations* (CSR).

4. Close Confinement

4.1 For the purpose of this policy, close confinement is defined as a restriction imposed on an offender to a cell or isolated area (e.g. unoccupied dayroom, temporary housing unit)
- 4.1.1 that limits interaction with other offenders, or
- 4.1.2 when an offender chooses to withdraw from the general population of their own accord.

4.2 The Superintendent, or delegate is responsible to identify offenders who may require placement in close confinement for the following reasons
- 4.2.1 the security of the facility may be compromised, examples include
  - 4.2.1.1 concern the offender may be concealing contraband (dry cell)

4.2.1.2 space limitations
4.2.1.3 intermittent offenders
4.2.1.4 to protect the safety of other offenders or staff where the offender poses a physical risk to other offenders or staff

4.2.2 at the request of the offender, examples include
4.2.2.1 the offender has expressed concerns of physical assault from other offenders
4.2.2.2 the offender requires time alone due to a stressful or emotional event such as a death in their family

4.2.3 protection of the offender, examples include
4.2.3.1 other offenders have indicated intentions to harm the offender
4.2.3.2 a threat from outside the facility

4.2.4 where the offender has received an incident report and pending or following adjudication was sanctioned to close confinement in accordance with the offender disciplinary system

4.2.5 health of the offender, examples include
4.2.5.1 illness
4.2.5.2 recovering from a surgical procedure

4.2.6 safety of other offenders

4.3 Correctional Services staff will notify the captain, unit supervisor/officer in charge (OIC) or assistant deputy superintendent, operations (ADSO) when an offender requires close confinement for reasons identified in section 4.2 above.

4.4 Upon notification from Correctional Services staff, the captain, unit supervisor/OIC or ADSO

4.4.1 may approve the offender's placement in administrative close confinement by completing the Close Confinement Status Report form (43.00.00-A)

4.4.2 will forward completed forms to the deputy superintendent for review, at the completion of confinement

4.4.3 make a detailed note under the activity tab on JEIN, the JEIN note will be captured under the heading "offender confined"

4.5 Following the deputy superintendent review, the Close Confinement Status Report will be uploaded to the Justice Enterprise Information Network (JEIN) Custody Term Management section under the "Persons Documents" tab.

4.6 In youth facilities, Reintegration or Reset Program form will be
- 4.6.1 initiated by the unit supervisor/OIC
- 4.6.2 uploaded upon completion to Offender Case Management under the "Documents" on JEIN

4.7 When an offender is placed in close confinement, staff delegated by the superintendent will enter the reason for the close confinement on JEIN under the Custody Term Management "Location Assignment" tab. For further detail see JEIN User Manual Section 4.2.

5. Exercise

5.1 In accordance with Section 57 of the *Correctional Services Act* and Section 81 of the *Correctional Services Regulations*, offenders on close confinement will be provided with 30 minutes of fresh air exercise daily.

5.2 If in accordance with 5.1, access to exercise has been denied
- 5.2.1 staff will notify the superintendent or delegate of the request to deny exercise
- 5.2.2 the superintendent or delegate will review the request and document the reasons for denying the offender access on the Close Confinement Status Report form (43.00.00-A)

6. Communication and Correspondence

6.1 In accordance with Sections 54(2), 55 and 56 of the *Correctional Services Act* and Section 59(1) and 95(3) of the *Correctional Services Regulations,* an offender placed in close confinement is permitted correspondence, telephone communication and visits with the following
- 6.1.1 spiritual advisor
- 6.1.2 lawyer
- 6.1.3 representative from the Office of the Ombudsman
- 6.1.4 representative from the Human Rights Commission

6.1.5 the Nova Scotia Police Complaints Commissioner
6.1.6 the Nova Scotia Civilian Director of the Serious Incident Response Team (SIRT)
6.1.7 individuals approved by the superintendent

7. Programs and Privileges

7.1 An offender in close confinement will be permitted to participate in programs as identified in a case management plan, except where
- 7.1.1 participation has been restricted because of an adjudication
- 7.1.2 security is an issue
- 7.1.3 participation will put the offender or other offenders at risk
- 7.1.4 operational feasibility

7.2 Offenders placed in administrative close confinement for non-punitive reasons will be provided with all privileges including
- 7.2.1 canteen
- 7.2.2 personal visits
- 7.2.3 daily access to shower
- 7.2.4 daily access to phone
- 7.2.5 permitted time outside of cell for a period not less than 4 hours

7.3 Where an offender's access to programs and/or privileges has been restricted, the reasons for the restrictions will be documented on JEIN under Offender Case Management "Activity Notes".

8. Disciplinary Close Confinement Pending Hearing by Adjudicator

8.1 In accordance with Policy and Procedures, Subject No. 42.03.00, *Temporary Measures*
- 8.1.1 correctional staff may place an offender in close confinement, and
- 8.1.2 a captain, unit supervisor/OIC or ADSO may continue the disciplinary close confinement for a period not to exceed twenty-four (24) hours pending a
  - 8.1.2.1 review by the superintendent or delegate, or
  - 8.1.2.2 a hearing by the adjudicator

9. Disciplinary Penalty – Close Confinement

9.1 An offender may be placed in close confinement because of a level I disciplinary report for a period not to exceed three (3) hours.

9.2 An offender may be placed in close confinement because of a level II disciplinary report for a period not to exceed five (5) days for adults or three (3) days for youth.

9.3 An offender may be placed in close confinement because of a level III disciplinary report for a period not to exceed ten (10) days for adults or seven (7) days for youth.

10. Conditions of Disciplinary Closed Confinement

10.1 Once an adjudicator has imposed close confinement as a disciplinary restriction the offender may serve the sanction in
- 10.1.1 their current room/dormitory/cell in their unit/dayroom
- 10.1.2 the closed confinement unit (CCU)
- 10.1.3 another location, if security issues are identified, as determined by the captain/ADSO, unit supervisor/OIC

10.2 When an offender has been sanctioned to disciplinary closed confinement in their current room/dormitory/cell, and there are no security issues identified, they will
- 10.2.1 keep their personal belongings in their room/dormitory/cell
- 10.2.2 keep their mattress, pillow and bedding
- 10.2.3 have a minimum of thirty (30) minutes of open air recreation in the airing court (adult) or outside exercise area (youth) with other offenders from their unit/dayroom
- 10.2.4 participate in programs as identified in their case management plan
- 10.2.5 receive personal correspondence (mail)
- 10.2.6 participate in the regular medical distribution process
- 10.2.7 retrieve their meals when delivered to the dayroom and take the meal to their cell (adult)

10.2.8 participate in meals as identified in their offender behaviour plan (youth)
10.2.9 have a shower and be permitted to shave each day

10.3 When an offender has been sanctioned to disciplinary closed confinement in the CCU, and there are no security issues identified, they will
- 10.3.1 within three (3) hours of entering close confinement be provided with
  - 10.3.1.1 a mattress, pillow and bedding
  - 10.3.1.2 reading material such as religious material, a novel or a magazine
  - 10.3.1.3 personal amenities, including
    - 10.3.1.3.1 deodorant
    - 10.3.1.3.2 toothbrush and toothpaste
    - 10.3.1.3.3 soap
    - 10.3.1.3.4 shampoo
    - 10.3.1.3.5 comb
- 10.3.2 within twenty-four (24) hours of entering close confinement be provided with
  - 10.3.2.1 writing material
  - 10.3.2.2 receive personal correspondence (mail)
  - 10.3.2.3 educational material
  - 10.3.2.4 the opportunity to participate in programs as identified in their case management plan
  - 10.3.2.5 a minimum of thirty 30 minutes of open air recreation in the airing court (adult) or outside exercise area (youth)
- 10.3.3 within forty-eight (48) hours of entering close confinement be provided with
  - 10.3.3.1 one (1) personal phone call a day contingent upon having the adequate funds
  - 10.3.3.2 puzzles, games or playing cards
  - 10.3.3.3 a shower and be permitted to shave at a minimum of every 48 hours
- 10.3.4 within seventy-two (72) hours of entering close confinement be provided with the opportunity to have a personal visit

11. Additional Measures

11.1 A Security Management Plan may be utilized to provide direction to staff regarding any additional security procedures that are required for the management of the offender while they are in closed confinement, such as restrictions around
- 11.1.1 contact with other offenders
- 11.1.2 offender movement
- 11.1.3 special precautions, such as "no sharps"
- 11.1.4 interaction with staff
- 11.1.5 escort protocols

12. Close Confinement Review and Request for Extension

12.1 The administrative or disciplinary close confinement of an offender will be reviewed by the superintendent or delegate will access the JEIN Offenders Currently Confined Report daily to ensure offenders listed on the report are reviewed
- 12.1.1 no later than twenty-four (24) hours after the time the close confinement began
  - 12.1.1.1 the superintendent, or delegate, who conducts the twenty-four-hour close confinement review will document pertinent information (see 12.2) under the heading, "Close Confinement – 24 Hour", under the activity tab on JEIN
- 12.1.2 following the twenty-four (24) hour review, once every five (5) days
  - 12.1.2.1 the superintendent, or delegate, who conducts the five-day close confinement review will document pertinent information (see 12.2) under the heading, "Close Confinement Review – 5 Day", under the activity tab on JEIN

12.2 The close confinement activity note should detail
- 12.2.1 comments and observations from correctional officers, captains, case management officers and social workers who have been involved in conducting the review

12.2.2 in consultation with Health Care, a description of the physical and mental condition of the offender
12.2.3 any changes in the offender's behavior and attitude (positive or negative) since their admission to close confinement
12.2.4 efforts to move the offender from close confinement to a dayroom at the earliest opportunity
12.2.5 if the review determines an offender's behavior has worsened, the details of the offender's behavioural management plan that has been put in place
12.2.6 the offender's compliance with the management plan
12.2.7 the offender's program participation
12.2.8 physical condition of the cell

12.3 Requests for an offender to remain in close confinement beyond 10 days for adults and 7 days for youth will be submitted to the Executive Director, Correctional Services or delegated director. Upon receipt of the request for extension the Executive Director or delegate may approve an additional period of confinement not to exceed
12.3.1 7 days for youth and 10 days for adults for disciplinary close confinement
12.3.2 30 days for administrative close confinement

12.4 Requests for the offender continued placement in close confinement beyond the superintendent's authority in accordance with 12.2 above will be submitted
12.4.1 using the Request for Extension of Disciplinary Close Confinement form (43.00.00-B), or the Request for Extension of Administrative Close Confinement form (43.00.00-C)
12.4.2 for subsequent continued confinement beyond the Executive Director's or delegate's approved extension period

12.5 In cases where an offender's close confinement has reached 30 days and continued confinement has been approved, and after every subsequent 30-day period, the offender will receive a formal letter, a copy will be placed on the offender's file in accordance with 12.6 below, from the superintendent detailing
12.5.1 period spent in close confinement
12.5.2 reasons for initial confinement

12.5.3 reason for continued confinement
12.5.4 options that may have been presented to offender to allow for discontinue of close confinement
12.5.5 privileges and services to be provided/continued while the offender remains in close confinement

12.6 Upon receipt of a decision regarding the request for extension of close confinement, the form will be uploaded to Custody Term Management under the "Person Documents" tab on JEIN.

13. Discontinuing Close Confinement

13.1 Release from close confinement may be authorized by the superintendent, deputy superintendent, ADSO, captain or unit supervisor/OIC in conjunction with the twenty-four (24) hour and subsequent five (5) day reviews, see Section 12, when the condition that required the offender to be placed in close confinement no longer exists.

13.2 The staff member releasing the offender from close confinement will make a detailed note under the "activities" tab on JEIN detailing the reasons for the release. The JEIN note will be captured under the heading "confinement discontinued"

14. Close Confinement Review by the Office of the Ombudsman

14.1 The Director of Policy and Program Services, or designate will provide the Ombudsman's Office with a copy of the JEIN *Department of Justice Close Confinement History* report on a quarterly basis, i.e, October, January, April and July.

14.2 Upon receipt of the report the Ombudsman's office will select offender files for review.

14.3 The Director of Policy and Program Services, or designate will provide the selected offender's files and provide them to the Ombudsman's Office for review.

15. Standard Operating Procedures (SOP)

15.1 The superintendent is responsible to establish Standard Operating Procedures (SOPs) with respect to this policy as follows

- 15.1.1 details on placement
- 15.1.2 responsibility for review
- 15.1.3 supervision
- 15.1.4 treatment
- 15.1.5 privileges
- 15.1.6 additional measures
- 15.1.7 location(s) for close confinement
- 15.1.8 responsibility to enter the reason for the close confinement on JEIN
- 15.1.9 responsibility for documentation in JEIN Activity Notes (close confinement review) regarding close confinement
  - 15.1.9.1 approval to impose
  - 15.1.9.2 approval to discontinue
  - 15.1.9.3 twenty-four (24) hour review
  - 15.1.9.4 every five (5) day review
  - 15.1.9.5 requests to Executive Director for permission to exceed ten (10) days for adult or seven (7) days for youth
- 15.1.10 responsibility for uploading documents to the Custody Term Management under the "Person Documents" tab on JEIN