NOVA SCOTIA COURT OF APPEAL

Citation: *Springhill Institution v. Richards*, 2015 NSCA 40

Date: 20150430
Docket: CA 426372; CA 426375; CA 425346
Registry: Halifax

Between:

Warden (Springhill Institution), Correctional Service of Canada, and the Attorney General of Canada

Appellants

v.

Ryan Richardo Richards

Respondent

-and-

Warden (Springhill Institution), Correctional Service of Canada, and the Attorney General of Canada

Appellants

v.

Ryan Richardo Richards

Respondent

-and-

Warden (Springhill Institution), Correctional Service of Canada, and the Attorney General of Canada

Appellants

v.

Shawn Peters

Respondent

Judges:	Fichaud, Beveridge and Bryson, JJ.A.
Appeal Heard:	October 10, 2014, in Halifax, Nova Scotia; Written submissions filed March 20, 2015
Held:	Appeals dismissed, per reasons for judgment of Beveridge, J.A.; Fichaud and Bryson, JJ.A. concurring
Counsel:	Lori Rasmussen and Jill Chisholm, for the appellants Professor Alan Young, *amicus curiae*

Reasons for judgment:

INTRODUCTION

[1] Two inmates, housed in the medium security penitentiary in Springhill, Nova Scotia, applied for writs of *habeas corpus*. A justice of the Nova Scotia Supreme Court decided that she had jurisdiction to hear one of those applications, despite the fact that the applicant inmate was no longer in Nova Scotia. Ultimately, the application was allowed.

[2] In the other, the same justice ordered the appellant not to remove the applicant from Nova Scotia pending the opportunity for a justice of the Nova Scotia Supreme Court to hear the application. The appellant complied. The justice subsequently found no merit to his complaint, and dismissed the application.

[3] The Attorney General of Canada is the appellant in three appeals generated by the two applications for the writ of *habeas corpus*. All appeals were heard concurrently by this Court. Ryan Richards is the respondent in two of them; Shawn Peters is the respondent in the other.

[4] Mr. Richards is self-represented. He filed materials and made oral submissions as respondent. Mr. Peters was served with notice and documents. He chose not to participate in any aspect of the appeal proceedings.

[5] As I will explain later, all of the issues engaged by these appeals are moot. Nonetheless, the appellant urges this Court to grant leave to appeal where necessary, and rule on the issues.

[6] Given the complexity of these issues, and the lack of counsel for both respondents, this Court took the somewhat exceptional step of appointing Professor Alan N. Young as *amicus curiae*.

[7] There are three main issues engaged by these appeals: does a justice of the Nova Scotia Supreme Court have the jurisdiction to hear an application for an order in the nature of *habeas corpus* where the applicant is no longer within the province of Nova Scotia?; does a justice of that court have the power to order that an applicant for an order in the nature of *habeas corpus* not be removed from the

province of Nova Scotia pending the outcome of the application?; and, is it proper to name the Correctional Service of Canada (CSC) as a party?

[8] We heard oral submissions on October 10, 2014. On February 12, 2015 we wrote to the parties and the *amicus*, requesting submissions by March 20, 2015 on the issue of the jurisdiction of the Nova Scotia Court of Appeal to entertain these appeals.

[9] For both applications for leave to appeal interlocutory orders, I would grant leave to appeal, but dismiss the appeals. In relation to the claimed appeal as of right in the proceedings involving Mr. Richards, I would dismiss the appeal for want of jurisdiction.

[10] To properly understand the significance of the issues, and my reasons for the proposed resolution of them, it is useful to set out the procedural history of the proceedings and the relevant facts.

PROCEDURAL HISTORY

Ryan Richards

[11] Mr. Richards is an inmate. For more than three years, he was serving his sentence at the medium security penitentiary in Springhill, Nova Scotia. On October 27, 2013 four inmates attacked a fellow prisoner. Another attack on the same prisoner occurred the following day. Based on information from unconfirmed sources, prison officials believed that Mr. Richards orchestrated both attacks.

[12] As a result of that belief, on October 29, 2013 Mr. Richards was removed from the general population, and placed in administrative segregation—more commonly known as solitary confinement. He vigorously denied any involvement in the attacks. He sought counsel. He didn't get access to counsel. He sought disclosure. What he received was vague and unhelpful. He identified to the authorities a concrete source of evidence that he said would exonerate him. The authorities did not examine or secure such evidence.

[13] On November 7, 2013, Mr. Richards' parole officer used her discretion to change his security classification from medium to maximum. There are no penitentiaries in Nova Scotia that house inmates with a maximum security

classification. The closest penitentiary, and the only one in Atlantic Canada, is in Renous, New Brunswick, known as Atlantic Institution.

[14] Mr. Richards filed his application on November 26, 2013 for *habeas corpus*, with *certiorari* in aid, with the prothonotary of the Supreme Court of Nova Scotia in Amherst. The application named the respondent as Correctional Service of Canada (Springhill Institution). Richards appeared in person on December 5, 2013 at the Amherst Courthouse. He had no lawyer then, or throughout the proceedings.

[15] Counsel for the Attorney General of Canada appeared, representing the respondent, CSC. Mr. Richards felt his *habeas corpus* application was deficient. He wanted to amend it. Dates were set for the filing of documentation by the applicant and respondent in December 2013 and January 2014. The application would be heard on February 20, 2014.

[16] Mr. Richards asked for an interim order to allow him to stay at the Springhill Institution pending resolution of his *habeas corpus* application. He gave reasons: if moved, he would not have proper access to relevant case law, and the policy directives issued by the CSC; furthermore, he did not have disclosure. In sum, a transfer would diminish his ability to advance his case against what he claimed were unlawful deprivations of his liberty.

[17] Counsel for the Attorney General objected. She said the court did not have the jurisdiction to grant the requested interim relief. Furthermore, if Mr. Richards were transferred to Renous, he would no longer be in administrative segregation, but in general population with attendant more liberty. During her submissions, she advised the court that Mr. Richards was on the transfer list for Renous.

[18] The presiding justice concluded that he did not have the jurisdiction to grant the requested interim relief. It was denied.

[19] Exactly one week later, on December 12, Mr. Richards was transported to Atlantic Institution in Renous, New Brunswick.

[20] On December 20, 2013, both parties appeared before Justice Van den Eynden (as she then was) via a recorded telephone conference call. Procedural issues were discussed. Mr. Richards explained that the amendment discussed at his earlier appearance on December 5, 2013 was to challenge the reclassification of

his security level which had triggered his transfer to a maximum security institution.

[21] Counsel for the Attorney General took the position that the Nova Scotia Supreme Court no longer had jurisdiction. If Mr. Richards wished to challenge his security reclassification, he must do so either in New Brunswick or through the grievance procedures available under the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (*CCRA*) including the opportunity for judicial review in the Federal Court.

[22] Written submissions were filed by the parties addressing the jurisdictional issue.

[23] Court was convened by way of telephone conference on February 20, 2014. Justice Van den Eynden delivered oral reasons that day. They were later released in writing on April 2, 2014 (2014 NSSC 120). The application judge made a number of findings of fact, and of mixed law and fact. None of these are challenged by the appellants.

[24] With respect to the technical argument that Mr. Richards did not, while he was still in Nova Scotia, formally challenge the legality of his heightened security classification, Justice Van den Eynden found as a fact that Mr. Richards intended to amend his *habeas corpus* application to include a challenge to his increased security classification, and had attempted to do so but was unable to do so despite his reasonable efforts before he was involuntarily transferred to Atlantic Institution. She said:

> [20] The Respondents argue Mr. Richards did not challenge his security application by actually filing his amended application while he was within the territorial jurisdiction of Nova Scotia. Technically I note that is correct. **That said, I accept and find as a fact, Mr. Richards, who is an unrepresented party, clearly intended to do so prior to his involuntary transfer out of the Province on December 12, 2013. He took timely and concrete steps; however, despite his reasonable efforts, he was not able to do so.**
>
> [21] As noted, it appears Mr. Richards identified the issue of his security reclassification being a live issue related to his intended amendment during the December 5, 2013 docket appearance. It is clear from the materials Mr. Richards filed, the recommendation to increase his security classification occurred near or around the time of his original *habeas corpus* application. He indicated his intention to challenge such reclassification to Springhill personnel. That fact was

> known to Springhill personnel. It came as no surprise to this Court that such an amendment would be forthcoming in these circumstances. Mr. Richards eventually did file his Amended Application which was not untimely in these circumstances.
>
> (2014 NSSC 120) [Emphasis added]

[25] The application judge accepted that the *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2nd Sess.), c. 2 (*CJPTA*) applied, with the burden on Mr. Richards to establish a real and substantial connection to Nova Scotia.

[26] Justice Van den Eynden noted that Mr. Richards was not seeking an order requiring his return to the Springhill Institution, only that his security classification revert to medium. If successful, such a decision would not create an order directed to the authorities at Atlantic Institution in New Brunswick. It would be a remedy without regard to territorial borders (2014 NSSC 120 at ¶40).

[27] Given what she described as the overarching legal principles that animate *habeas corpus* proceedings, the application judge decided it was appropriate to undertake a real and substantial connection analysis. She referenced the factors set out in the leading case of *Muscutt v. Courelles* (2002), 60 O.R. (3d) 20; [2002] O.J. No. 2128 (C.A.). I will discuss these in more detail later. For now, it is sufficient to note her unequivocal determination that there was a real and substantial connection to the Province of Nova Scotia. She said:

> [49] I am satisfied and I find on the evidence, there exists a clear [*sic*] and substantial connection to the Province of Nova Scotia. This is not a case of a weak territorial nexus.
>
> [50] I find, in the circumstances of this case, the nexus to be much stronger to Nova Scotia than to New Brunswick. The main nexus to New Brunswick is that Mr. Richards was involuntarily transferred there shortly after he sought relief from this Court.
>
> 2014 NSSC 120

[28] Justice Van den Eynden recognized that New Brunswick could also exercise jurisdiction. She then analyzed, by reference to the factors set out in s. 12 of the *CJPTA*, which forum would be the more convenient.

[29] She found that Nova Scotia fit the bill. She concluded her analysis as follows:

> [60] I find the most convenient and appropriate forum is that of Nova Scotia. I retain jurisdiction to hear Mr. Richards' *habeas corpus* application without any further delay. His timely access to any potential remedy is a paramount factor. A decline of jurisdiction in the circumstances of this case would be offensive to the fair and efficient working of our Canadian legal system.

[30] Justice Van den Eynden then set expedited dates for further filings with the application to be heard on March 7, 2014. Extensive affidavits were filed by the appellant. The affiants were cross-examined. Mr. Richards testified, and was cross-examined. Decision was reserved.

[31] On April 2, 2014 written reasons for judgment were released (2014 NSSC 121) with respect to the substance of Mr. Richards' application for an order in the nature of *habeas corpus*. Justice Van den Eynden repeated her earlier conclusions that the Nova Scotia Supreme Court retained jurisdiction, and was the convenient forum to hear the application (¶2).

[32] The learned application judge canvassed the leading authorities that guide a *habeas corpus* application. She identified the legal principles she extracted from those authorities.

[33] Justice Van den Eynden found that CSC had acted unlawfully in increasing Mr. Richards' security classification. It had denied him procedural fairness in a number of ways. Two stand out: it failed to meet its disclosure obligation; and despite Mr. Richards' diligent attempts to exercise his right to counsel, that right was breached. The application judge summarized her reasons on this aspect of Mr. Richards' application precisely:

> [74] Mr. Richards's *habeas corpus* application could succeed on any of the above-noted material individual breaches of procedural fairness. Collectively, they are serious breaches; such that there was a clear denial of procedural fairness and natural justice. Accordingly, I find the decision to reclassify and involuntarily transfer unlawful.
>
> 2014 NSSC 121

[34] Justice Van den Eynden also found, applying the reasonableness standard of review, that the decision to reclassify and transfer Mr. Richards was unreasonable, and hence unlawful (¶75).

[35] The application judge issued an order that provided: that the security reclassification from medium to maximum security, and subsequent transfer to a maximum security penitentiary, were unlawful; that Mr. Richards be released from detention at Atlantic Institution and be incarcerated in a medium security institution to be dealt with therein as prison authorities consider appropriate.

The Richards Appeals

[36] On April 15, 2014, the Attorney General of Canada commenced appeal proceedings in this Court by filing a Notice of Appeal from the written decision of Justice Van den Eynden of April 2, 2014 (2014 NSSC 121), and an Application for Leave to Appeal from the oral decision of Justice Van den Eynden of February 20, 2014, which, as noted earlier, was also released in writing on April 2, 2014 (2014 NSSC 120). Each of these decisions were later encapsulated in Orders issued on April 30, 2014.

[37] There are but two grounds of appeal in the appeal as of right: the judge erred in law by hearing and determining an application for *habeas corpus* for an applicant who was in the custody and control of the Warden of Atlantic Institution in New Brunswick; and, the judge erred in law by adding "Correctional Service Canada" as a respondent when it is not a legal person.

[38] The appellant does not dispute any of the findings made by Justice Van den Eynden or the legal principles she identified and applied in her ultimate conclusion that the heightened security classification, and consequent involuntary transfer to a maximum security institution, were unlawful.

[39] The Notice of Application for Leave to Appeal has three proposed grounds of appeal. Although worded differently in the respective notices, in essence, both appeal proceedings engage the exact same issues. The proof of this is in the pudding. Both *facta* articulate the issues as being:

> Did the motion judge err in finding that a provincial superior court has jurisdiction over the keeper of an inmate incarcerated beyond its territorial boundaries?
>
> Did the motion judge err in naming "Correctional Service of Canada" as a Respondent to the application?

[40] The only difference is that in the application for leave to appeal, there is the preliminary question of whether leave to appeal should be granted.

Shawn Peters

[41] On February 18, 2014 Mr. Peters filed an application for *habeas corpus* with *certiorari* in aid with the prothonotary of the Nova Scotia Supreme Court in Amherst. He challenged the lawfulness of his detention in segregation at the Springhill Institution. The named respondent was "Correctional Service of Canada (Springhill Institution)".

[42] A recorded appearance by way of telephone conference was held on February 21, 2014, with Justice Van den Eynden presiding. The application was amended in two respects. First, it was changed to reflect the Warden (Springhill Institution) and the Attorney General of Canada as respondents. Second, Mr. Peters also sought to challenge the change in his security classification from medium to maximum.

[43] Justice Van den Eynden proposed an order that Mr. Peters not be removed from the Province of Nova Scotia pending the outcome of the application. The implications were known; if such an order issued, Mr. Peters would not be transferred to Atlantic Institution, where presumably he would be out of segregation. He voiced a preference to stay in Nova Scotia.

[44] Counsel for the Attorney General raised concerns about the consequences of such an order in light of his client's obligation to house Mr. Peters in the least restrictive environment as soon as possible. The application judge invited further submissions on the jurisdiction of the Court to make the order.

[45] The Attorney General filed written submissions on February 26, 2014 why the Nova Scotia Supreme Court could not, nor should, make an order preventing Mr. Peters' transfer. On February 27, 2014 Justice Van den Eynden issued her formal order. The relevant parts of the recitals and formal order are as follows:

> AND WHEREAS the Respondents take the position that if the Applicant is transferred out of the jurisdiction of Nova Scotia prior to March 6, 2014 this Court loses territorial competence/jurisdiction to hear Mr. Peters' application;
>
> AND WHEREAS Mr. Peters is currently being held in administrative segregation at the Springhill Institution (which is a medium security institution) pending a

> transfer to Atlantic Institution in Renous, New Brunswick (which is a maximum security institution);
>
> AND WHEREAS the Respondents are unable to advise the Court when Mr. Peters' expected transfer date might be;
>
> AND WHEREAS Mr. Peters' requests to have his security reclassification issue heard in the Province of Nova Scotia;
>
> AND WHEREAS to prevent frustration of Mr. Peters' application and/or any delay in having his security reclassification issue heard, which security reclassification was determined while he was incarcerated at the Springhill Institution;
>
> NOW UPON MOTION:
>
> IT IS ORDERED:
>
> 1. The Applicant Shawn Peters, shall not be removed from the Springhill Institution prior to March 6, 2014 without advance notice to and approval of this Honourable Court.
> 2. In the interim, nothing in this Order prevents the Respondents from considering less restrictive measures than that of segregation.

[46] Mr. Peters' application for *habeas corpus* was heard by Justice Van den Eynden on March 6, 2014. On her own motion, Justice Van den Eynden noting that typically such applications name CSC as the respondent, added CSC back to the style of cause.

[47] At the hearing, Mr. Peters did not cross-examine the witness called by the Attorney General, testify, or make oral submissions. Justice Van den Eynden found that the Crown had met its burden to establish that the deprivation of Mr. Peters' residual liberty was lawful.

[48] In the course of delivering her oral reasons for judgment, which are unreported, she commented on the Order she had made:

> Under *Civil Procedure Rule* 7.14(i), a judge can make any order necessary to obtain the presence of an applicant -- in that case, you, Mr. Peters. I made an order on February 21st [formally issued February 27] directing that you not be removed from the province without notice and approval of the Court. The Respondents typically argue a loss of jurisdiction in the event of a transfer. To avoid any frustration or delay in Mr. Peters' application being heard by the Court, I made an order in these circumstances and I found that to be appropriate. Given that the hearing date was going to occur on today's date, I didn't want Mr. Peters'

> application to be frustrated and for him to start all over in New Brunswick. I did not and do not intend to interfere in anyway with the administration of the Correctional Services Canada or the Warden or any of the functions which they need to carry out under the applicable legislation and the regulations. When a *habeas corpus* application is in the face of the Court, as Mr. Peters' application was, the Court has a responsibility to protect against any frustration of that application. Such orders as I made in this case, Mr. Peters, to direct that you be maintained within the jurisdiction of Nova Scotia should only be made in appropriate circumstances.

The Peters Appeal

[49] On March 12, 2014 the Attorney General of Canada filed its Notice of Application for Leave to Appeal from the Order of February 27, 2014. The sole complaint, spread over four enumerated grounds of appeal, is that the application judge lacked the jurisdiction to order CSC not to remove Mr. Peters from Nova Scotia pending the hearing of his *habeas corpus* application.

THE ISSUE OF MOOTNESS

[50] The lawfulness of the current detention of Messrs. Peters and Richards are not in issue before this Court. Justice Van den Eynden found that the heightened deprivation of liberty by security reclassification and pending involuntary transfer to a maximum institution with respect to Mr. Peters to be lawful. There is no appeal by Mr. Peters from that determination.

[51] With respect to the Richards appeals, the Attorney General advised that even if this Court were to determine that Justice Van den Eynden did not have jurisdiction to hear and determine his application for *habeas corpus*, and issue the consequent order, it would have no impact on Mr. Richards' current medium security classification.

[52] Nonetheless, the Attorney General asks this Court to exercise its discretion to hear and decide these appeals. He relies on the principles set out by the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, and recently applied by that Court in *Mission Institution v. Khela*, 2014 SCC 24.

[53] Justice Sopinka, writing for the Court in *Borowski*, stressed that certain established principles guide how a court should exercise its discretion. These include whether: there is still an adversarial context; resolution will have some practical consequences on the rights of the parties; the cases that spark the controversy are of a recurring, but brief duration; it is in the public interest to expend judicial resources to mitigate the social cost of continued uncertainty in the law; adjudicating may be viewed as intruding into the role of the legislative branch (pp. 358-362).

[54] Not all of these factors favour departing from the Court's usual practice not to hear and decide cases in the absence of a live controversy. But on balance, we should pronounce judgment on the issues engaged by these appeals.

[55] I say this because both appeals engage issues about the jurisdiction of the Nova Scotia Supreme Court to hear and determine applications by individuals in Nova Scotia seeking to exercise their right, guaranteed by s. 10(c) of the *Canadian Charter of Rights and Freedoms*, to have the legality of their detention determined by way of *habeas corpus*. Rulings on jurisdiction are "of a recurring nature but brief duration".

[56] I agree with the suggestion of the Attorney General that the nature of adversarial *habeas corpus* applications that involve transfer and segregation of inmates and issues of jurisdiction are such that the factual circumstances of a given application can change quickly and will likely be moot before an appellate court can review the lower court's decision. This submission tracks closely the reasoning of LeBel J., for the Court in *Khela*:

> [14] Despite being moot, this appeal merits a decision in the circumstances of this case. The nature of *habeas corpus* applications involving the transfer and segregation of inmates is such that the factual circumstances of a given application can change quickly, before an appellate court can review the application judge's decision. This means that such cases will often be moot before making it to the appellate level, and are therefore "capable of repetition, yet evasive of review" (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 364). As was true in *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 14, and *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 652, the points in issue here are sufficiently important, and they come before appellate courts as "live" issues so rarely, that the law needs to be clarified in the instant case.

[57] This is particularly apt in Nova Scotia. A federally incarcerated male inmate is housed in but one institution – Springhill. There is no maximum security institution in this Province. If a decision is made to increase his security classification, he must be transferred out of Nova Scotia. In other words, every challenge by way of *habeas corpus* to the lawfulness of CSC decisions triggers two questions: can a justice order CSC not to transfer the applicant pending the resolution of the application for *habeas corpus*?; and if a transfer occurs before such an order can be made, is the Nova Scotia Supreme Court a court of competent jurisdiction to hear the *habeas corpus* application?

[58] These questions have not been answered consistently. Some have said once a transfer has occurred, the Court in Nova Scotia no longer has authority to adjudicate (see for example: *McKenna v. Correctional Services Canada (Springhill Institution)*, an unreported decision of Scanlan J., as he then was, dated October 12, 2012); others that there is such jurisdiction (see for example*: Bradley v. Attorney General of Canada (Correctional Service Canada*), 2012 NSSC 173 per Bourgeois J., as she then was, and *Nodrick v. Correctional Service of Canada,* 2014 NSSC 93).

TERRITORIAL JURISDICTION

[59] The principal position of the Attorney General is a simple one: a provincial superior court has no jurisdiction over the keeper of an inmate that is incarcerated outside its territorial boundaries. Since the writ is directed to the person who has custody of the applicant, only the New Brunswick superior court has jurisdiction. This argument dovetails into his other argument that the only proper respondent to an application for *habeas corpus* is the Warden of the institution where the applicant is physically located.

[60] I am unable to agree. The position of the Attorney General is tied to an unnecessarily technical approach to the writ, tethered to the ancient history of the writ, rather than its fundamental principles.

[61] It is correct that in early times, the writ was used to require the jailor to bring the detainee before the court. There was a two stage process, commenced by an *ex parte* application for the writ, directed to the person having custody, requiring him to bring the prisoner to court along with a return explaining the cause of the detention (Cameron Harvey, *The Law of Habeas Corpus in Canada,* Butterworth

& Co., Toronto, 1974). But as noted by MacKeigan, C.J.N.S. in *Bell v. Springhill Institution, et al*. [1977] N.S.J. No. 457 (C.A.), 19 N.S.R. (2d) 216, the actual physical presence of the prisoner is not only not required, the Court does not usually mandate it (para. 33).

[62] Over the course of time, the writ developed to enable an inmate to seek review of the legality of the conditions of his or her incarceration. In the 1980's, the Supreme Court of Canada released a trilogy of cases relating to an inmate's "residual liberty" while being held in detention.

[63] One of these cases was *R. v. Miller*, [1985] 2 S.C.R. 613. The Court held (at p. 641) that *habeas corpus* was available "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". The Supreme Court in *Khela* observed (at para. 34) that "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."

[64] In *May v. Ferndale Institution*, 2005 SCC 82 , the Court emphasized the importance of the writ:

> [20] From the 17th to the 20th century, the writ was codified in various *habeas corpus* acts in order to bring clarity and uniformity to its principles and application. The first codification is found in the *Habeas Corpus Act*, 1679 (Engl.), 31 Cha. 2, c. 2. Essentially, the Act ensured that prisoners entitled to relief "would not be thwarted by procedural inadequacy": R. J. Sharpe, The Law of *Habeas Corpus* (2nd ed. 1989), at p. 19.
>
> …
>
> [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*:**
>
> 10. Everyone has the right on arrest or detention
>
> ...

> (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.
>
> [Emphasis added]

[65] More recently, in *Khela* the Court extended the reach of *habeas corpus* to include the ability of provincial superior courts to determine whether decisions of prison officials which deprive the residual liberty interests of inmates are reasonable. If not, the deprivation is unlawful and the applicant is entitled to relief.

[66] LeBel J., writing for the Court, emphasized that the availability of *habeas corpus* is crucial to those whose residual liberty has been taken away. Therefore, the writ must be developed in a meaningful way, and will rarely be subject to restrictions:

> [54] This Court has recognized in its decisions that *habeas corpus* should develop over time to ensure that the law remains consistent with the remedy's underlying goals: no one should be deprived of their liberty without lawful authority. **The significance of *habeas corpus* to those who have been deprived of their liberty means that it must be developed in a meaningful way** (Miller, at pp. 640-41). In May, the Court quoted with approval the statement by Black J. of United States Supreme Court that *habeas corpus* is "not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose -- the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty" (*May*, at para. 21; *Jones v. Cunningham*, 371 U.S. 236 (1962), at p. 243; see also the preface to R. J. Sharpe's *The Law of Habeas Corpus* (2nd ed. 1989)). **This remedy is crucial to those whose residual liberty has been taken from them by the state, and this alone suffices to ensure that it is rarely subject to restrictions.**
>
> [Emphasis added]

[67] The Attorney General says he recognizes these principles, but that only the superior court in the province where an inmate happens to be has jurisdiction to consider the lawfulness of the deprivation of his or her residual liberty—in this case, New Brunswick.

[68] The Attorney General does not dispute that the Nova Scotia Supreme Court had jurisdiction, but so the argument goes, lost it by the decision of CSC officials to move Mr. Richards before his application could be heard by the Nova Scotia Court.

[69] The Attorney General submits: "The writ of *habeas corpus* is directed to the detaining authority – the person who has physical care and custody of the prisoner", and cites J. Farbey, R. J. Sharpe and S. Atrill, *The Law of Habeas Corpus*, 3rd ed. (Oxford: Oxford University Press, 2011) at pp. 195-97 for this proposition. While this is no doubt the usual case, a more fulsome inspection of *Sharpe et al* supports a much broader principle—it is not the geographical location that informs the availability of the writ, it is who has sufficient control over the prisoner. This is what the learned authors say:

> The general rule is that the writ of *habeas corpus* should be directed to the person who has physical custody of the prisoner. The writ may, however be directed to several persons where there is some doubt as to who has custody or to some person other than the gaoler or actual custodian of the party detained. With respect to the latter possibility, problems may occur where it is doubted that the person to whom the writ is directed has sufficient custody or control of the prisoner.
>
> p. 195

[70] The principle that control governs, as opposed to geography, is illustrated by *R. v. Secretary of State for Home Affairs, ex. p. O'Brien*, [1923] 2 K.B. 361 (C.A.)[1]. In this case, the prisoner was transferred from England to the Irish Free State where he was imprisoned. The prisoner applied for *habeas corpus* directed against the Home Secretary in England. The application was successful on the basis that the order under which the applicant was being held was unlawful, and that although the Home Secretary certainly had no physical, or even legal control over the prisoner's detention, he nevertheless retained *de facto* control. This was sufficient.

[71] The learned authors add the following commentary:

> One of the great abuses remedied by the *Habeas Corpus Act*, 1679 was taking prisoners outside the jurisdiction to deprive them of the benefit of *habeas corpus*. The practice was made a serious offence.
>
> While it is doubtful that the mere physical presence within the jurisdiction of a person with control over the prisoner would be enough to enable the court to act, the fact that the place where the prisoner is held is outside the ambit of the writ

[1] An appeal to the House of Lords was dismissed on jurisdictional grounds [1923] A.C. 603. I discuss this appeal in more detail below, starting at ¶ 170.

> does not automatically deprive the court of the power to issue the writ. It is submitted that if there is a proper respondent within the jurisdiction with control over the prisoner and if the imprisonment bears a real and substantial connection to the law of the forum, the courts may entertain an application with respect to someone outside the territorial jurisdiction of the court, especially where the detainee is being held outside the jurisdiction precisely in order that the detention may avoid judicial scrutiny. The test is whether the intended respondent exercises de facto control over the prisoner and whether he or she was the power to bring the detention to an end.
>
> The leading English example is the *O'Brien* case, discussed above, where the Home Secretary had interned the applicant and delivered him to the Irish authorities. At the time of the application, O'Brien was imprisoned in Dublin and although the Home Secretary had to rely on the goodwill of the Irish authorities to secure his release in obedience to the court's order, the writ issued.
>
> p. 216

[72] Mr. Richards believes that CSC transferred him out of Nova Scotia for the purpose of depriving him of access to the writ of *habeas corpus* in Nova Scotia. In New Brunswick he would have to pay a filing fee, and even with the fee, the court office there apparently rejected his *habeas corpus* application (the same one he filed in Nova Scotia) as deficient. On the other hand, the Attorney General says he has no vested interest where such an application is heard.

[73] That may be, but the fact remains that if the Attorney General is correct, Mr. Richards' access to his constitutional right to have the legality of his detention determined by *habeas corpus* would at least be delayed, and perhaps as Justice Van den Eynden observed, frustrated:

> [28] If I were to accept the Respondents primary argument that a provincial superior court's territorial competence can be conclusively and forever defeated by simply moving an applicant inmate out of province, that would place the administrative decision makers in a most powerful position which arguably could not be checked by the Courts. CSC and the Institution could fully insulate against any *habeas corpus* application to a provincial superior court by simply shuffling a prisoner from province to province. That would not be a just result.
>
> [29] Inmates might be transferred for completely legitimate reasons after a *habeas corpus* application is filed but not heard. Even if the transfer was for a legitimate purpose, a loss of jurisdiction could still be prejudicial to the applicant inmate. If a transfer was used to strategically frustrate a *habeas corpus* application that would be an improper purpose. Although Mr. Richards believes such a tactic

> was deployed in this case, I make no such finding at this time. I have not heard all the evidence. I am not in a position to decide that issue at this time.

[74] As far as the suggestion by the Attorney General that it is the Warden of the institution who is the keeper of an inmate, and hence the *only* appropriate respondent to an application for *habeas corpus*, I am unconvinced.

[75] First, the position of 'Warden' does not appear to have been created by the *CCRA* or any of the regulations promulgated under that statute. Instead, s.5 of the *CCRA* directs that there will continue to be a service, known as the Correctional Service of Canada. It is that service which is responsible for the care and custody of inmates:

> 5. There shall continue to be a correctional service in and for Canada, to be known as the Correctional Service of Canada, which shall be responsible for
>
> (a) the care and custody of inmates;
>
> (b) the provision of programs that contribute to the rehabilitation of offenders and to their successful reintegration into the community;
>
> (c) the preparation of inmates for release;
>
> (d) parole, statutory release supervision and long-term supervision of offenders; and
>
> (e) maintaining a program of public education about the operations of the Service.

[76] Further, with respect to the transfer and placement of inmates, the *CCRA* directs that it is the CSC that shall take all reasonable steps to ensure that the penitentiary in which the inmate is confined provides them with an environment that contains only the necessary restrictions (s. 28). In addition, CSC is given the responsibility of "assigning a security classification for each inmate" and for giving reasons in writing to the inmate for changing his or her classification (s.30).

[77] It simply cannot be gainsaid that it is the CSC which is responsible for, and has the legal control over the issues concerning the deprivation of Mr. Richards' residual liberty.

[78] The *CCRA* does define "institutional head" of a penitentiary as the person who is normally in charge of the penitentiary. But I see nowhere in the *CCRA*

where control over security classifications or similar matters is delegated to the institutional head.

[79] Furthermore, there is a vast difference between the historical roots of *habeas corpus* and how the writ should operate today. The factum of the *amicus* makes this point nicely:

> 48. …To understand the proper development and adaptation of *habeas corpus* to the modern realities of prison settings, it is important to distinguish between the historical paradigm of *habeas corpus* and its modern incarnation. Under the historical paradigm, *habeas corpus* was used to "…ensure the physical presence of a person in court on a certain day." In this situation, it would make practical sense to issue the command to the particular jailor who had sole control and custody of the inmate, and who could, on his or her own authority, physically transport the person in court on a particular day so that the judge could immediately decide to either discharge or keep the inmate in custody.
>
> 49. However, in the modern reality, correctional law is part of a large bureaucratic institutional framework that does not possess a single decision-maker; the warden or the institutional head is only one piece of the puzzle. Accordingly, in the modern era, it is no longer necessary for a jailer to bring a body forward for the determination of release or incarceration. Many, if not most, *habeas corpus* incarcerations relate to an inmate's residual liberty, in which a discharge from the care and control of the jailer is not the ultimate result. In fact, the modern reality of correctional services is characterized by many administrative decision makers following policy directives and statutory dictates, and most challenges to these decisions have little or nothing to do with the immediate release of an applicant.

[80] The force of this description is borne out by these proceedings. Before Justice Van den Eynden, the Attorney General did not call as a witness, or tender an affidavit from the 'Warden' or "institutional head". Rather the justification for the reclassification of the respondent came from the CSC officials who actually made the decision that deprived the respondent of his residual liberty.

[81] The Attorney General says that the application judge was wrong to rely on the *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2nd Sess.), c. 2 (*CJPTA*) as authority for the Nova Scotia Court to retain jurisdiction. This submission is based on two propositions.

[82] The first is that a plain reading of the *CJPTA* leads to an inference that the statute relates to cases where there is a monetary remedy (i.e. damages) being litigated. The second is the *CJPTA* is not applicable or compatible with an application for *habeas corpus* given the nature of the remedy available.

[83] With respect, I am unable to agree. The appellant cites no authority for its contended for interpretation of the *CJPTA*. There is nothing in the legislative history or language of the *CJPTA* that supports the legislative intent of the statute is only to address matters involving damages.

[84] The *CJPTA* is the product of the work of the Uniform Law Conference of Canada. Vaughan Black, Stephen Pitel, and Michael Sobkin in their text, *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (Toronto: Carswell, 2012) refer to the resolution passed at the 1990 Conference setting out the four legislative objectives of the *CJPTA*:

> - allow a judgment from one part of Canada to be accorded full faith and credit in another part of Canada,
>
> - establish rules for the service of court processes outside the territorial boundaries of the court,
>
> - establish rules for dealing with issues or matters that affect more than one Canadian province or territory, as to when a court should accept, and when it should decline, jurisdiction to hear a matter, [and]
>
> - establish (i) a procedure for transferring jurisdiction to the courts of a province or territory to deal with a proceeding commenced in another province or territory (ii) rules for determining when such a procedure should be invoked, and (iii) rules for determining the appropriate law to apply for the resolution of the transferred proceedings.
>
> p.6

[85] The language of the *CJPTA* reflects only the broadest of application. It directs that the territorial competence of the Nova Scotia Supreme Court is to be determined by Part I. Section 4 of Part I provides:

> 4 A court has territorial competence in a proceeding that is brought against a person only if

> (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counter-claim;
>
> (b) during the course of the proceeding that person submits to the court's jurisdiction;
>
> (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding;
>
> (d) that person is ordinarily resident in the Province at the time of the commencement of the proceeding; or
>
> (e) there is a real and substantial connection between the Province and the facts on which the proceeding against that person is based.

[86] Section 2(c) defines "proceeding" to mean, "an action, suit, cause, matter or originating application and includes a procedure and a preliminary motion". An application for *habeas corpus* is, in these circumstances, a civil proceeding.[2]

[87] No one suggests that the Attorney General of Canada is not a "person" within the meaning of the *CJPTA*. By operation of law, the Attorney General must be named in all proceedings against the Crown (see s. 23(1) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50; Rule 7.12 (3) of the *Nova Scotia Civil Procedure Rules*).

[88] The appellants complain of no error by Van den Eynden J. in her articulation and application of the real and substantial connection test mandated by s. 4(e) of the *CJPTA*. I see none. Justice Van den Eynden, relying on the leading authority of *Muscutt v. Courcelles*[3], set out the eight factors that inform the real and substantial connection test:

> The connection between the forum and the plaintiff's (applicant's) claim.
>
> The connection between the forum and the defendant (respondents).
>
> The unfairness to the defendant (respondents) in assuming jurisdiction.
>
> Unfairness to the plaintiff (applicant) if not assuming jurisdiction.

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[2] See the comprehensive discussion by Saunders J.A. *in Wilson v. Correctional Service Canada*, 2011 NSCA 116; *Ross v. Riverbend Institution (Warden*), 2008 SKCA 19, and more recently, *Nodrick v. Canada (Correctional Service*), 2014 NSSC 93.

[3] Adopted this Court by *Bouch v. Penny (Litigation Guardian of)*, 2009 NSCA 80; leave to appeal refused [2009] S.C.C.A. 379

> Involvement of other parties to the suit.
>
> The Court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional issues.
>
> Whether the case is inter-provincial or inter-national; and
>
> Comity and the standards of jurisdiction, recognition and the standards of recognition prevailing elsewhere?
>
> (2014 NSSC 120 at para. 48)

[89] In the course of her consideration of the eight factors, the application judge made a number of key findings, none of which are challenged by the appellant.

[90] Some bear reference. Justice Van den Eynden noted that the incident the respondent was allegedly involved in occurred at Springhill, and was investigated by the staff there. The key witnesses and personnel involved in making the decision to change the respondent's security classification, and consequent involuntary transfer, were employed at the Springhill Institution.

[91] The appellant suggested that transportation costs, access to documents, and concerns over transporting a maximum security offender would work an unfairness if the court assumed jurisdiction. Justice Van den Eynden found that these were not "material barriers". She wrote:

> …Springhill is much closer for any Respondent witnesses. The transportation issues would not be a significant issue for the Respondents to contend with. Prisoners are transported fairly routinely from Atlantic Institute to this Province. Many of the documents that would comprise the Record are available to the Respondents on the electronic Offender Management System. Any documentation that was not, surely the two Institutions (Springhill and Atlantic) could coordinate the return of any hard copies that might have been transferred with Mr. Richards. The unfairness issues raised by the Respondents can be appropriately managed without any serious impact upon the Respondents
>
> 2014 NSSC 120 at para. 48

[92] On the other hand, Justice Van den Eynden accepted that a decline of jurisdiction could prejudice the respondent. She reasoned:

> …There will be additional potential delay if he has to start afresh and seek relief elsewhere. He may be impaired in his ability to present his case by access to relevant witnesses in Nova Scotia. If a deprivation of residual liberty is established; the onus reverts to the Respondents to establish it was unlawful. That

> said, with *habeas corpus* applications, particularly a challenge to a security reclassification; inmates often seek to cross examine core decision makers. This includes witnesses that may not be presented by the Respondents originally. This Court has the authority under Civil Procedure Rule 7.14 to order the attendance of a witness for direct and cross examination. Mr. Richards is concerned he may be impaired in the presentation of his application by not having access to key witnesses. This concern is exacerbated should he be transferred from New Brunswick further west.
>
> para. 48

[93] After considering these factors, Justice Van de Eynden found there was a real and substantial connection to the Province of Nova Scotia—indeed a much stronger connection than to New Brunswick. I earlier quoted her conclusion. For ease of reference, I will repeat it. She said:

> [49] I am satisfied and I find on the evidence, there exists a clear [*sic*] and substantial connection to the Province of Nova Scotia. This is not a case of a weak territorial nexus.
>
> [50] I find, in the circumstances of this case, the nexus to be much stronger to Nova Scotia than to New Brunswick. The main nexus to New Brunswick is that Mr. Richards was involuntarily transferred there shortly after he sought relief from this Court.
>
> (2014 NSSC 120)

[94] Justice Van den Eynden then turned to the issue of whether she should decline jurisdiction in favour of New Brunswick. That issue is guided by s. 12 of the *CJPTA*, which provides:

> 12 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
>
> (2) A court, in deciding the question of whether it or a court outside the Province is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
>
> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
>
> (b) the law to be applied to issues in the proceeding;
>
> (c) the desirability of avoiding multiplicity of legal proceedings;

(d) the desirability of avoiding conflicting decisions in different courts;

(e) the enforcement of an eventual judgment; and

(f) the fair and efficient working of the Canadian legal system as a whole.

[95] After noting the similarity or overlap of concerns or circumstances between the issue of territorial competence and *forum conveniens*, Justice Van den Eynden set out her analysis:

> [56] I considered the factors in Section 12; and I refer to my earlier reasons for finding territorial competence. They include the connection to Nova Scotia, the availability of witnesses in Nova Scotia; and the difficulties Mr. Richards might experience in having those witnesses brought to another jurisdiction. I have indicated any transportation concerns or document concerns are not material barriers to the Respondent. Those issues can be managed.
>
> [57] Respecting the law to be applied, again CCRA is a Federal Act and the ultimate remedy, should Mr. Richards succeed, will follow him. The common law principles are the same. Respecting the desirability of avoiding multiple or legal proceedings, this Court can determine the application. Once determined there will be no duplication of a proceeding. There is no proceeding pending in New Brunswick.
>
> [58] The desirability of avoiding conflicting decisions in different courts and enforcement concerns is not an issue. The fair and efficient working of the Canadian legal system as a whole is an important factor, particularly given the fact we are dealing with a *habeas corpus* application. Such applications require timely access to justice; not an inflexible approach by the Courts. Courts are not to stand in the way of the enforcement of such an important remedy, neither should the Respondents. Courts are mandated to ensure timely access to justice in these matters.
>
> [59] I have taken the relevant factors into consideration when determining whether I will continue to accept jurisdiction and whether Nova Scotia is the most convenient forum.
>
> [60] I find the most convenient and appropriate forum is that of Nova Scotia. I retain jurisdiction to hear Mr. Richards' *habeas corpus* application without any further delay. His timely access to any potential remedy is a paramount factor. A decline of jurisdiction in the circumstances of this case would be offensive to the fair and efficient working of our Canadian legal system.
>
> (2014 NSSC 120)

[96] I respectfully agree with her analysis and conclusion.

[97] Of course, the mere fact that an inmate commences a *habeas corpus* application in Nova Scotia, but is then subsequently transferred to another province will not mean that the Nova Scotia Court must maintain jurisdiction. The underlying circumstances of the applicant and of the application will guide a determination if jurisdiction will be exercised.

[98] For example, in *Nodrick, supra*. the applicant was released on parole from a penitentiary in Manitoba. He was arrested and his parole suspended. CSC transferred Mr. Nodrick to Springhill Penitentiary. After reviewing documents relevant to his parole suspension, he commenced a *habeas corpus* application in the Supreme Court of Nova Scotia.

[99] Days later, Mr. Nodrick was notified that he would be transferred from the medium security penitentiary in Springhill to the medium security penitentiary in Dorchester, New Brunswick. Mr. Nodrick did not object to the proposed transfer. It happened. The Attorney General then objected to the Supreme Court hearing the application because it was related to parole, and Nova Scotia no longer had jurisdiction.

[100] Arnold J. did not agree that the Supreme Court of Nova Scotia could never retain jurisdiction to deal with *habeas corpus* applications for inmates who have been transferred out of the province. However, Justice Arnold applying the relevant criteria, found that the real and substantial connection test was not met. Mr. Nodrick's only connection to Nova Scotia was that he happened to be housed here when he reviewed the parole documentation generated in Manitoba.

[101] The appellant relies on cases, principally from British Columbia, to say once an inmate is out of the province, the inquiry is over—the provincial superior court is without jurisdiction. These are: *R. v. Bonamy*, 1999 BCCA 487; *Toodlican v. Kemball and A.G. of Canada* (Unreported decision of Gropper J., B.C.S.C., February 17, 2012). *R. v. Gamble*, [1988] 2 S.C.R. 595 is also cited.

[102] I do not find these authorities persuasive or governing.

[103] In *Bonamy*, the facts are scarce. Mr. Bonamy appealed the dismissal of his *habeas corpus* application because he had not been allowed to argue his application in person before the justice of the British Columbia Supreme Court. His appeal to the Court of Appeal was unsuccessful. Oral reasons were delivered by Huddart J.A.

[104] There were two reasons that the application had been dismissed by the British Columbia Supreme Court. The appellant/applicant was in custody in Grande Cache Institution in Alberta, and the British Columbia Court had no jurisdiction to order the keeper to appear in British Columbia. Second, there was no evidence of any unlawful detention in British Columbia. There were no details about the nature of the relief being sought or of any connection to the province of British Columbia.

[105] In *Toodlican*, the applicant was put in administrative segregation at some point in time while serving a sentence at the Kent Institution in British Columbia. On October 25, 2011, he filed his petition for *habeas corpus*. However, on October 27, 2011 he was involuntarily transferred to a penitentiary in Saskatchewan. The applicant complained that the transfer was done in order to defeat his petition.

[106] Documents demonstrated that in the summer of 2011, CSC had recommended, and then approved, his transfer to a penitentiary in Saskatchewan.

[107] Gropper J. delivered oral reasons. She referred to two bases to dismiss the petition (para. 11). It was moot since Mr. Toodlican was no longer in segregation at Kent, nor in any segregation unit (para. 10). In addition, Justice Gropper reasoned that although it was likely at one time she had jurisdiction to hear the petition when filed, she did not after October 27, 2011 when the petitioner was involuntarily transferred to Saskatchewan. For this, she relied on an excerpt from *The Law on Habeas Corpus* 3rd ed, which she quoted :

> In Canada, it has been held that one province has no power to send a writ of *habeas corpus* beyond its own territorial limits even where the prisoner is detained by order of the court of that province in a federal prison in another province. In such a case, the courts of the province in which the prisoner is detained have *habeas corpus* jurisdiction.
>
> p. 214

[108] I do not doubt the correctness of these decisions or of the general proposition quoted above. But, as earlier demonstrated, that one reference does not tell the whole story of the scope of a court's power to permit access to the remedy of *habeas corpus*. The learned authors at p. 216 more fully explain, and conclude:

> The test is whether the intended respondent exercises de facto control over the prisoner and whether he or she has the power to bring the detention to an end.

[109] To similar effect as to the actual ambit of the writ of *habeas corpus*, Gilles Letourneau, in his work, *The Prerogative Writs in Canadian Criminal Law and Procedure* (1976) writes:

> The granting of the prerogative writ of *habeas corpus* remains essentially within the power of the provincial superior courts which have inherited the common law jurisdiction and power of control and supervision over the acts of inferior courts, tribunals or bodies. This competence presents two characteristics. First, it is limited in its geographical ambit. **The place of confinement must, according to some decisions, be within the province where the writ is applied for. This, however, it is submitted, amounts to a mistaken statement of the law. Sovereignty, effectiveness and enforceability appear to be the three leading considerations behind the limit.** Sellers L.J. stated, "The writ is concerned with personal freedom and the emphasis in principle…is not on where the wrongful detention is occurring but, assuming the court is satisfied that the detention is without justification whether it can, having regard to the proper interests, rights and powers of those governing the place of detention, make an order which can be enforced. The writ is a process directed at a party guilty of an illegal act of detention. It must be served on that party. If the jurisdiction of a court is limited in its territorial ambit, the fundamental questions are: is the respondent, not the prisoner or petitioner, within the reach of the process of *habeas corpus*, and, as Sellers L.J. said, can it be enforced? (p. 310)
>
> [Emphasis added]

[110] The appellants also seek to rely on comments in *R. v. Gamble*, by Wilson J., who wrote that "the remedy of *habeas corpus ad subjiciendum* has traditionally run from the courts of the jurisdiction in which the person seeking review of the legality of his or her detention is confined".

[111] But *Gamble* was not about *which* superior court, with conflicting claims over jurisdiction, should or should not assume jurisdiction to deal with a claim that an applicant was being subject to unlawful detention. It was about the ability of a superior court to decline jurisdiction.

[112] In *Gamble*, the applicant had been convicted of murder and sentenced to life imprisonment without parole eligibility for 25 years by an Alberta court. Her initial attempts to appeal were unsuccessful. After serving ten years in an Ontario

prison, she brought an application for relief under s. 24(1) of the *Charter* and an application for the writ of *habeas corpus*, claiming that due to the advent of the *Charter*, her detention by way of continued parole ineligibility was unlawful. The Ontario Superior Court declined jurisdiction on the basis that the applicant should pursue relief by way of a sentence appeal in the Alberta courts. The Ontario Court of Appeal agreed.

[113] The Supreme Court of Canada, in a majority judgment by Wilson J., turned aside all of the technical arguments why the Ontario Superior Court did not have jurisdiction by way of the writ of *habeas corpus* to consider the legality of her continued detention in Ontario. Chief among the perceived impediments was that the applicant had been convicted and sentenced in Alberta. If she had a complaint, it should be pursued by way of a sentence appeal in that province.

[114] Justice Wilson emphasized the need of superior courts to be flexible, even creative, to ensure the writ of *habeas corpus* fulfilled its new role. She wrote:

> 66 A purposive approach should, in my view, be applied to the administration of *Charter* remedies as well as to the interpretation of *Charter* rights and, in particular, should be adopted when *habeas corpus* is the requested remedy since that remedy has traditionally been used and is admirably suited to the protection of the citizen's fundamental right to liberty and the right not to be deprived of it except in accordance with the principles of fundamental justice. The superior courts in Canada have, I believe, with the advent of the *Charter* and in accordance with the sentiments expressed in the *habeas corpus* trilogy of *Miller*, *Cardinal* and *Morin*, displayed both creativity and flexibility in adapting the traditional remedy of *habeas corpus* to its new role. I find instructive the following innovative uses of *habeas corpus* as a *Charter* remedy: see *Re Cadeddu and The Queen* (1982), 4 C.C.C. (3d) 97 (Ont. H.C.); *Swan v. Attorney General of British Columbia* (1983), 35 C.R. (3d) 135 (B.C.S.C.); *Lussa v. Health Science Centre* (1983), 9 C.R.R. 350 (Man. Q.B.); *MacAllister v. Director of Centre de Reception* (1984), 40 C.R. (3d) 121 (Que. S.C.); *Re Marshall and The Queen* (1984), 13 C.C.C. (3d) 73 (Ont. H.C.); *Re Jenkins* (1984), 8 C.R.R. 142 (P.E.I.S.C. in banco); *Jollimore v. Attorney-General of Nova Scotia* (1986), 24 C.R.R. 28 (N.S.S.C.); *Balian v. Regional Transfer Board* (1988), 62 C.R. (3d) 258 (Ont. H.C.). I agree with the general proposition reflected in these cases that *Charter* relief should not be denied or "displaced by overly rigid rules": see Swan, at p. 148.

[115] There is no doubt that the superior court of New Brunswick, once Mr. Richards was transferred to New Brunswick, also had jurisdiction to entertain an

application for *habeas corpus*, if one was filed in that court, to challenge the legality of his detention. Where there exists concurrent jurisdiction, the *CJPTA* guides courts on whether they should exercise it.

[116] Mr. Richards did not seek to challenge the legality of his conditions of imprisonment in Atlantic Institution in New Brunswick. It was not about being kept in solitary confinement or any other decision by anyone in that institution, or how CSC was administering his sentence there. It was about CSC's decision to increase his security classification from medium to maximum. That decision was made by CSC in Springhill, based on events that happened in Nova Scotia.

[117] The appellant complains that if such applications are successful, the remedy available to the Nova Scotia court is unenforceable because the keeper of the institution where the applicant is housed is not in Nova Scotia. I do not fully understand this submission.

[118] The Attorney General of Canada, the chief law enforcement officer in Canada, represented the named respondents to the application, including the agency that by statute is charged with the care and custody of all inmates, and the key issue in this case, the applicant's security classification. It is puzzling to say the least for the Attorney General of Canada to suggest that a lawful order of the Nova Scotia Supreme Court about the legality of the applicant's security classification may be ignored by CSC employees who work in New Brunswick, or in any other province.

[119] As pointed out by the application judge:

> [25] At this point, I note the *Correctional and Conditional Release Act* (CCRA) is a Federal Act. In my view, if Mr. Richards's security reclassification is found to be unlawful he will remain classified as medium; that classification will follow him through any Federal penal institution in Canada. There is no need to enforce against any particular Warden in another jurisdiction. In short, the classification follows the inmate.

[120] Even if it could be said that a decision by a Nova Scotia court might not be directly enforceable against a person located in another jurisdiction, there is still the utility of the Nova Scotia Court issuing declaratory relief. The availability, and utility of such relief in the context of an application for *habeas corpus* was made clear by Wilson J. in *R. v. Gamble*:

> 81 One issue remains, namely the jurisdiction of the court to issue a declaration of parole eligibility in aid of its *habeas corpus* jurisdiction. Declaratory relief has been recognized by this Court as an effective and flexible remedy for the settlement of real disputes: see *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at pp. 830-33. Moreover, this Court, having assumed jurisdiction over the subject matter and the person on this appeal from a denial of *habeas corpus*, can exercise its broad discretion under s. 24(1) of the *Charter* to order any remedy within its jurisdiction which it considers appropriate and just in the circumstances. Given the prejudice already suffered by the appellant it seems appropriate and just that she be declared eligible for parole forthwith. The Parole Board is, however, the final arbiter of whether and when she should be released on parole and this Court has nothing to say on that subject.

[121] What happened in this case is exactly what one would expect. On being informed of the judgment of Justice Van den Eynden that CSC's decisions to reclassify Mr. Richards as a maximum security prisoner, and his consequent involuntary transfer were unlawful, Mr. Richards' security classification reverted to medium, and he was transferred to Dorchester Institution, a medium security facility.

[122] In my view, the Supreme Court of Nova Scotia had jurisdiction to hear Mr. Richards' application when it was filed, and did not necessarily lose it by CSC transferring him out of Nova Scotia. Whether Nova Scotia can or should retain jurisdiction depends on the circumstances. In Mr. Richards' circumstances, the application judge made no error in her ruling to retain jurisdiction.

JURISDICTION TO ISSUE THE INTERIM ORDER – THE PETERS APPEAL

[123] The appellants' factum refined its complaint of error into one, the application judge did not have jurisdiction to make the interlocutory order directing that Mr. Peters not be removed from the Springhill Institution prior to March 6, 2014 without advance notice to, and approval by the Court.

[124] They advance three arguments why the order exceeded the Court's jurisdiction. They say the relief in the order: i) is beyond what a provincial superior court can order on an application for *habeas corpus*; ii) only the Federal Court has jurisdiction to make an order in the nature of an interlocutory injunction; iii) the interim order prevented CSC from fulfilling its statutory obligations.

Availability of the Relief

[125] The Attorney General cites the leading authorities that describe the importance of *habeas corpus*, but says that because release is the only remedy available, an order that has the effect of an interlocutory injunction is not available. This submission is summarized as follows:

> 32. **In Canada, our highest court has conclusively confirmed that provincial superior courts retain inherent jurisdiction over *habeas corpus*. However, the remedy that can issue from superior courts on these applications is extremely narrow by virtue of the fact that Parliament has vested the Federal Court with general supervisory and review power over federal decision makers pursuant to the Federal Courts Act**. This issue will be discussed in greater detail below; at this stage, the central point is that because *habeas corpus* solely concerns the lawfulness of deprivations of liberty, the sole remedy available on an application for *habeas corpus* is release or "discharge" from unlawful forms of detention. If successful, an applicant challenging the cause of his or her detention is entitled to release, while an applicant challenging conditions of detention resulting in a deprivation of residual liberty is entitled to be 'released' to his or her previous circumstances of incarceration.
>
> …
>
> 35. **Injunctive relief of this sort lies beyond the scope of relief available on application for *habeas corpus*, where the sole remedy available is 'release'**. In particular, where an inmate has filed an application for *habeas corpus* in order to challenge his segregation status, as in Mr. Peters' case, granting an injunction in order to prevent his release from segregation amounts to precisely the opposite of 'release', undermining the historical purpose and effect of the writ.
>
> [Emphasis added]

[126] With respect, I am unable to agree. The Nova Scotia Supreme Court does not invoke its "inherent jurisdiction" to entertain an application for *habeas corpus*. Jurisdiction is explicitly bestowed by the pre-confederation statute, the *Liberty of the Subject Act*, R.S.N.S. 1989, c. 253, and the common law. I see no comment by the Supreme Court of Canada that suggests otherwise.

[127] That Court did recognize that provincial superior courts had the sole jurisdiction to entertain an application for *habeas corpus*, and that such jurisdiction should not be lightly be declined. In *May v. Ferndale Institution*, LeBel and Fish JJ. wrote:

> [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*). 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* and *Peiroo*).

[128] There is little purpose in tracing all of the history of the writ of *habeas corpus* and the various Acts of Parliament that were passed to strengthen the availability of the writ. It is sufficient to observe that the *Habeas Corpus Acts* in England wanted to address two perceived abuses, delay and the movement of prisoners beyond the jurisdiction of the court. LeBel J., for the Court in *Khela*, referred to the history of the writ and of these *Acts*:

> [27] W. Blackstone, in his *Commentaries on the Laws of England* (1768), vol. III, c. 8, at p. 131, asserted that *habeas corpus* is "the great and efficacious writ in all manner of illegal confinement" (cited by D. Parkes, "The 'Great Writ' Reinvigorated? Habeas Corpus in Contemporary Canada" (2012), 36 Man. L.J. 351, at p. 352); May at para. 19; W. F. Duker, *A Constitutional History of Habeas Corpus* (1980), at p. 3). In an earlier incarnation, *habeas corpus* was a means to ensure that the defendant in an action was brought physically before the Court. (Duker, at p. 4; J. Farbey, R. J. Sharpe and S. Atrill, *The Law of Habeas Corpus* (3rd ed. 2011), at p. 16; P. D. Halliday, *Habeas Corpus: From England to Empire* (2010), at p. 2). Over time, however, the writ was transformed into a vehicle for reviewing the justification for a person's imprisonment (Duker, at p. 4). Indeed, by the late 17th century, Vaughan C.J. of the Court of Common Pleas stated that "[t]he Writ of *habeas corpus* is now the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it" (Duker, at p. 54, citing Bushell's Case (1670), Vaughan 135, 124 E.R. 1006, at p. 1007).
>
> [28] The first legislation respecting *habeas corpus* was enacted in 1641. The remedy was subsequently codified a second time in the *Habeas Corpus Act* of 1679 (Engl.), 31 Cha. 2, c. 2 (T. Cromwell, "Habeas Corpus and Correctional Law -- An Introduction" (1997), 3 Queen's L.J. 295, at p. 298), **the many**

> **purposes of which included addressing problematic delays in obtaining the writ, ensuring that prisoners were provided with copies of their warrants so that they would know the grounds for their detention, and ensuring that prisoners "would not be taken to places beyond the reach of the writ**" (Farbey, Sharpe and Atrill, at p. 16; Halliday, at pp. 239-40).
>
> [29] Through both the *Charter* and the common law, Canada has attempted to maintain and uphold many of the goals of the *Habeas Corpus Act*, which embodied the evolving purposes and principles of the writ. *Habeas corpus* has become an essential remedy in Canadian law. In May, this Court emphasized the importance of *habeas corpus* in the protection of two of our fundamental rights:
>
> > (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*). [para. 22]
>
> These rights belong to everyone in Canada, including those serving prison sentences (May, at paras. 23-25). *Habeas corpus* is in fact the strongest tool a prisoner has to ensure that the deprivation of his or her liberty is not unlawful. In articulating the scope of the writ both in the Miller trilogy and in May, the Court has ensured that the rule of law continues to run within penitentiary walls (*Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, at p. 622) and that any deprivation of a prisoner's liberty is justified.
>
> [Emphasis added]

[129] These statutes are part of the law in Nova Scotia. The *Liberty of the Subject Act* adopted the Imperial statutes that sought to address abuses in the availability of *habeas corpus*, and continued the common law jurisdiction of the Supreme Court:

> 2 (1) The Act of the Imperial Parliament, passed in the thirty-first year of the reign of King Charles the Second, entitled An Act for the Better Securing the Liberty of the Subject, and for the Prevention of Imprisonment Beyond the Seas and the Act of the Imperial Parliament, passed in the fifty-sixth year of the reign of King George the Third, entitled An Act for More Effectually Securing the Liberty of the Subject and all Acts of the Imperial Parliament passed in addition to, or amendment of, or on the same subject as the said recited Acts, or either of them, shall have full force and effect in the Province, so far as the same are applicable therein.
>
> (2) The Supreme Court, and the judges thereof, have the same authority and power over cases within the purview of such Acts in the Province as the courts mentioned in such Acts, and the judges thereof, have in England.

> (3) The rights and remedies, and the obligations, punishments, and penalties conferred and imposed by the said statutes, or either of them, are conferred and imposed upon and made applicable to persons within the Province, as fully as if such Acts were re-enacted, and specially extended to the courts, judges, officers and persons within the Province.
>
> (4) This Section shall not be construed to abrogate or abridge the remedy of an order in the nature of *habeas corpus* at common law, but the same exists in full force and is the undoubted right of the people of the Province.

[130] The *Act* clearly contemplates a justice of the Supreme Court being able to issue interim relief. For example, it provides that it can "make such order, require such verification and direct such notices or further returns in respect thereto as are deemed necessary or proper for the purposes of justice" (s. 6).

[131] In addition, the court is empowered to order bail, clearly interim relief. Furthermore, any keeper on receipt of any order of a judge of the Supreme Court shall obey it. The relevant provisions are:

> 6 (1) Upon return to such order, the Court or judge may proceed to examine into and decide upon the legality of the imprisonment and make such order, require such verification and direct such notices or further returns in respect thereto as are deemed necessary or proper for the purposes of justice.
>
> (2) The Court by order, or the judge by order in writing signed as aforesaid, may require the immediate discharge of the prisoner or may direct his bailment in such manner, and for such purpose, and with the like effect and proceeding, as is allowed upon *habeas corpus*.
>
> (3) Such bail, when ordered, may be entered into before any justice of the peace specially named in such order, or any justice of the county or place if no such justice is named.
>
> 7 Such keeper shall, immediately upon the receipt of any order of the Court or a judge in relation to a prisoner in custody, communicate the same to such prisoner, and give him a true copy thereof if demanded and obey the requirements of the same. R.S., c. 253, s. 7.

[132] Acting pursuant to the *Judicature Act*, R.S.N.S. 1989, c. 240, as amended, the judges of the Supreme Court promulgated the *Nova Scotia Civil Procedure Rules*. Rule 7.14, amongst other things, authorizes a judge to "make any order necessary to obtain the presence of an applicant". The complete text of the *Rule* is:

> 7.14 Directions to determine legality of detention

> 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.

[133] The appellants have not suggested that any of these provisions are unconstitutional. Both the *Liberty of the Subject Act* and the *Nova Scotia Civil Procedure Rules* bestow the requisite jurisdiction on Justice Van den Eynden to make the order she did on February 27, 2014.

[134] Even if it could be said that these provisions could not be relied upon to source jurisdiction, the *amicus* makes an attractive submission that the inherent jurisdiction of the Nova Scotia Supreme Court would be a well into which one would not have to dip deeply to find the necessary authority to make orders that ensure timely and effective access to the *Charter* protected right to have the validity of detention determined by way of *habeas corpus*.

[135] It was concern over delay, and potential frustration of the application for *habeas corpus* that led Justice Van den Eynden to make the interim order in the Peters proceedings; the very things that statutory amendments in the 1600's and later, were enacted to avoid.

[136] Ironically, it was the position of the appellant that transfer of an inmate such as Mr. Peters irrevocably deprived the Nova Scotia Court of jurisdiction to adjudicate the *habeas corpus* application that created the need to make the interim order. In light of the potential for a judge of the Nova Scotia Supreme Court to conclude that he or she may retain jurisdiction to adjudicate the *habeas corpus* application, it may not be necessary to make such an interim order in the future, but the power or jurisdiction to make such an order in an appropriate case exists.

[137] The appellants are correct that the effect of the order was to keep Mr. Peters in administrative segregation, one of the forms of deprivation of residual liberty he complained of. However, Mr. Peters also challenged the heightened security classification which put him on the list for involuntary transfer to the maximum security Atlantic Institution.

[138] Mr. Peters commenced his application for *habeas corpus* on February 18, 2014. It was scheduled to be heard on March 6, 2014. The appellants could not say when Mr. Peters may be transferred. The application judge carefully explained to Mr. Peters his options. If she did not make the order, he could be moved to Atlantic Institution and presumably be out of segregation. It was the applicant's choice to remain in segregation at Springhill and have his *habeas corpus* application heard expeditiously in Nova Scotia. The application judge was well aware of CSC's obligation to move Mr. Peters out of segregation as soon as possible. Nonetheless, as Justice Van den Eynden later explained on March 6, 2014:

> To avoid any frustration or delay in Mr. Peters' application being heard by the Court, I made an order in these circumstances and I found that to be appropriate. Given that the hearing date was going to occur on today's date, I didn't want Mr. Peters' application to be frustrated and for him to start all over in New Brunswick. I did not and do not intend to interfere in anyway with the administration of the Correctional Services Canada or the Warden or any of the functions which they need to carry out under the applicable legislation and the regulations. When a *habeas corpus* application is in the face of the Court, as Mr. Peters' application was, the Court has a responsibility to protect against any frustration of that application. Such orders as I made in this case, Mr. Peters, to direct that you be maintained within the jurisdiction of Nova Scotia should only be made in appropriate circumstances.

[139] The appellants make no complaint about the manner that Justice Van den Eynden exercised her discretion to make such an order—only that she had no jurisdiction to do so.

Exclusive Federal Court Jurisdiction

[140] The fact that interlocutory injunctive relief may be available in the Federal Court as part of its supervisory power over federal decision makers does not detract from the power of the Nova Scotia Court to make an order that ensures that the pending application for *habeas corpus* is heard without delay (see *Canada (Human Rights Commission) v. Canada Liberty Net*, [1998] 1 S.C.R. 626).

[141] Nor does the fact that the ultimate remedy available on an application for *habeas corpus* is release from liberty detract from the jurisdiction of a provincial superior court to maintain the status quo pending the hearing. Yet the appellants say that the only court that can issue such an order is the Federal Court, by virtue of its jurisdiction to supervise federal decision makers.

[142] The same argument was considered by the Supreme Court of *Canada in Canada (Attorney General) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307. Estey J., writing for the Court, firmly rejected such a narrow approach to the jurisdiction of a provincial superior court (at pp.329-331):

> The respondents also claimed, as already indicated, an injunction restraining the appellants, the Restrictive Trade Practices Commission and the individual appellants from conducting the inquiry under the *CIA* so far as it related to the conduct of the Law Society. Again the word "injunction" is included in the definition of "relief" in s. 2(m) of the *Federal Court Act*. In this instance the remedy sought would run against a federal board as defined by s. 2(g) of that *Act* and therefore is expressly included in s. 18 as being within the exclusive jurisdiction of the Trial Division of the Federal Court of Canada. Both courts below determined in essence that the injunction was sought out of an abundance of caution and as a matter of convenience was combined in the declaratory action now rather than risk possible recourse to later supplementary litigation should circumstances then require it.
>
> **Courts having a competence to make an order in the first instance have long been found competent to make such additional orders or to impose terms or conditions in order to make the primary order effective. Similarly courts with jurisdiction to undertake a particular *lis* have had the authority to maintain the status quo in the interim pending disposition of all claims**

> **arising even though the preservation order, viewed independently, may be beyond the jurisdiction of the court.** An example of the latter type of judicial action is found in *British Columbia Power Corporation, Limited v. British Columbia Electric Company, et al.*, [1962] S.C.R. 642. Kerwin C.J., speaking for the majority of the Court, said at pp. 644-45:
>
> > In a federal system, where legislative authority is divided, as are also the prerogatives of the Crown, as between the Dominion and the Provinces, it is my view that it is not open to the Crown, either in right of Canada or of a Province, to claim a Crown immunity based upon an interest in certain property, where its very interest in that property depends completely and solely on the validity of the legislation which it has itself passed, if there is a reasonable doubt as to whether such legislation is constitutionally valid. To permit it to do so would be to enable it, by the assertion of rights claimed under legislation which is beyond its powers, to achieve the same results as if the legislation were valid. In a federal system it appears to me that, in such circumstances, the Court has the same jurisdiction to preserve assets whose title is dependent on the validity of the legislation as it has to determine the validity of the legislation itself.
>
> In this case it is no doubt academic that the appellants or any officer of the Crown would conduct an inquiry under the *CIA* in the face of a judicial determination in favour of the respondents. **I answer the technical point as to the jurisdiction of the British Columbia courts to entertain a plea for injunction on these proceedings on the technical basis that such a remedy could be granted as ancillary to the court's principal determination and in support thereof as a matter of inherent jurisdiction of a superior court of general jurisdiction to ensure the effectiveness of its dispositions.**
>
> [Emphasis added]

[143] The Nova Scotia Supreme Court had jurisdiction to adjudicate the application for an order in the nature of *habeas corpus*. The concurrent jurisdiction of the Federal Court does not oust that of the provincial superior court to issue interim relief.

Interference with CSC's statutory obligations

[144] The submissions of the appellants that the interim order was flawed because it interfered with CSC fulfilling its statutory obligations is difficult to comprehend. Many officials have statutory duties. Court orders routinely have an impact on how, and when officials discharge their duties. The defined duties in the *CCRA* do

not have some kind of super status that trumps the jurisdiction of courts to ensure that the constitutional right of an inmate to have the legality of his or her detention is determined expeditiously.

CORRECTIONAL SERVICE OF CANADA AS A NAMED PARTY

[145] There are two aspects to the appellants' assertion of error. The first is that, "As "Correctional Service of Canada" is not the "keeper," it is not a proper respondent on an application for *habeas corpus*, and the application judge erred in law by adding this party." The second is that although CSC makes administrative decisions about segregation and classification, it is not a suable entity, merely being a Federal Government department.

[146] Largely for the reasons set out earlier (¶74-80), I see no error in naming CSC as the respondent in an application for an order in the nature of *habeas corpus*.

[147] It was the un-rebutted evidence of Mr. Richards that the form he used to commence his application for an order in the nature of *habeas corpus* was one provided by CSC staff at Springhill. That document named Correctional Service Canada (Springhill Institution) as the respondent. It was the Attorney General of Canada that suggested to the judge presiding in chambers in Amherst on December 5, 2013, that the style of cause should be amended to simply refer to the Warden (Springhill Institution). Mr. Richards, acting *pro se*, did not object.

[148] Justice Van den Eynden, on March 7, 2014, on her own initiative, after reviewing the written brief filed by the appellant reinstated CSC as a party. The application judge did the same thing when she heard Mr. Peters' application.

[149] Not only do I see no error in these decisions, it makes sense to me to have CSC as the named party. By the express terms of the *CCRA*, CSC is responsible for the custody of all inmates. As such, it makes decisions about security classifications, segregation and where an inmate is housed. It also implements those decisions.

[150] A judge of the Nova Scotia Supreme Court has broad powers to ensure that the proper parties are named in proceedings undertaken in that court. For example, Civil Procedure Rule 35.04 provides:

> 35.04 (1) A party who starts a proceeding for judicial review or an appeal must, unless a judge orders otherwise, name as respondents the decision-making authority, each person who is a party to the process under review or appeal or the process that led to the decision under review or appeal, and any other person required by legislation to be a respondent.

[151] Many times, the exact name of a person who has made a decision impacting the residual liberty of an inmate may not be known. What is obvious to all is that such decisions are the responsibility of the CSC, and are made in its name. It is the decision-making authority, and is a proper party.

[152] The *amicus* points out that since 1990 there have been no fewer than 83 cases where CSC was named as a party. In twelve of those, rulings were issued against CSC. Of course, past practice does not equate to sound legal authority.

[153] The appellants cite the *Financial Administration Act*, R.S.C. 1985, c. F-11 in support of its position that the CSC is a government department; it is therefore, so the argument goes, not a separate agency, capable of being sued or suing in its own name as a legal entity. All of the cases cited by the appellants in support involve civil actions for damages.

[154] However, there is also ample authority for the proposition that a government agency or department is a legal entity for the purposes of asking courts for relief by way of prerogative writs. Holden J., as he then was, in *Westlake et al v. The Queen in Right of the Province of Ontario*[4], found the Ontario Securities Commission not to be a statutory body capable of being sued in a tort action, but noted that it enjoyed legal existence enabling it to appear and be represented when its actions were before the court for judicial review. He described such entities:

> It will be obvious from what has been said that there is a sixth category of statutory bodies and it is in this category that, in my opinion, the Ontario Securities Commission belongs. These are non-corporate bodies which are not by the terms of the statute incorporating them or by necessary implication liable to be sued in an action for damages, but who are legal entities in that their actions may

[4] [1971] 3 O.R. 533, [1971] O.J. No. 1925 (H.C.), aff'd [1972] 2 O.R. 605 (C.A.); leave denied, 33 D.L.R. (3d) 256 (S.C.C.). See also: *Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board*, [1952] O.R. 366, where the Ontario Court of Appeal determined that the Ontario Labour Relations Board was not an entity subject to suit in the courts, otherwise than by judicial review by *certiorari* or like statutory procedure.

> be reviewed in proceedings brought against them by way of the extraordinary remedies of *certiorari*, mandamus and prohibition.
>
> para. 14

[155] The appellants acknowledge that in an application for *habeas corpus*, neither the Crown nor CSC are being sued *per se*. And as LeBel J. in *Khela* observed, the purpose of *habeas corpus* "distilled to its essence" is judicial review to "ensure that executive power is exercised in a manner consistent with the rule of law" (para. 37).

[156] The appellants appear to concede that the Attorney General is an appropriate respondent, or as they put it, the Attorney General "may not be an inappropriate respondent". Not only is an application for *habeas corpus* a "proceeding" within the meaning of s. 23 of *the Crown Liability and Proceedings Act*, Rule 7.12(3) of the *Nova Scotia Civil Procedure Rules* mandates that the Attorney General be named as a party if the detention has any connection with the government of Canada:

> (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.

[157] Whoever is named by the applicant, the 'Warden' of Springhill or CSC, the Attorney General responds as the person in charge of litigation in which the actions of the government of Canada is being challenged.

[158] Not only is CSC a proper respondent as the statutory authority responsible for the care and custody of inmates and for assigning a security classification for each inmate, there is much to be said for the practice of simply naming CSC and the Attorney General of Canada as respondents—or the Attorney General of Canada, representing the Correctional Service of Canada.

[159] For virtually all challenges to the actions of CSC, the applicant is self-represented. Simplicity in procedure is to be encouraged. A direction that it is sufficient to simply name the CSC as the responsible entity in an application for *habeas corpus* would help to eliminate what seems to be a common phenomenon—the naming of a plethora of different individuals, institutions and offices. For example, in *May v. Ferndale*, each of the applicants named not only the Correctional Service of Canada, but numerous individuals and 'offices':

Terry Lee May, appellant; v. Warden of Ferndale Institution, Warden of Mission Institution, Deputy Commissioner, Pacific Region, Correctional Service of Canada and Attorney General of Canada, respondents And David Edward Owen, appellant; v. Warden of Ferndale Institution, Warden of Matsqui institution, Deputy Commissioner, Pacific Region, Correctional Service of Canada and Attorney General of Canada, respondents And Maurice Yvon Roy, Gareth Wayne Robinson and Segen Uther Speer-Senner, appellants; v. Warden of Ferndale Institution, Warden of Mission Institution, Deputy Commissioner, Pacific Region, Correctional Service of Canada and Attorney General of Canada, respondents, and Canadian Association of Elizabeth Fry Societies, John Howard Society of Canada and British Columbia Civil Liberties Association, interveners.

[160] I see no error by the application judge reinstating CSC as a respondent to the proceedings.

JURISDICTION OF THIS COURT TO HEAR THESE APPEALS

[161] Although not free from difficulty, I am satisfied that at least with respect to both interlocutory appeals, this court has jurisdiction to grant leave to appeal and to hear those appeals, but does not with respect to the final order of the application judge declaring Mr. Richards' detention to be unlawful. My reasons follow.

[162] It is well settled that there is no common law right to appeal any judgment. Appeals are strictly creatures of statute (see *R. v. Meltzer*, [1989] 1 S.C.R. 1764). As I will discuss below, this legal reality is not only equally applicable, but is accentuated with regard to the historic writ of *habeas corpus*.

[163] Notices of Appeal in Nova Scotia are required to identify the statutory authority for the appeal (*Rule* 90.06(1)(c)). An Application for Leave to Appeal, and Notice of Appeal (Interlocutory) with respect to interlocutory decisions must include everything required for a general Notice of Appeal in addition to other requirements (*Rule* 90.09). In this case, the Applications for Leave to Appeal and the Notice of Appeal omit any reference to the statutory authority relied on for the appeal proceedings.

[164] The Attorney General argues that the general appeal provision (s. 38) found in the *Judicature Act*, R.S.N.S. 1989, c. 240, as amended, provides ample scope for an appeal to the Nova Scotia Court of Appeal from any decision or order of a judge of the Supreme Court. There is no doubt that the language of s. 38 is broad, and

unrestrained by legal history and high authority, could easily be viewed as providing legislative sanction for an appeal in matters of *habeas corpus* to this Court. That section provides:

> 38 (1) Except where it is otherwise provided by any enactment, an appeal lies to the Court of Appeal from any decision, verdict, judgment or order of the Supreme Court or a judge thereof, whether in court or in chambers.

[165] I also have little doubt that there may be merit in the Attorney General's suggestion that it would be convenient, even appropriate, in today's legal landscape for there to be a right of appeal by the Attorney General. The problem is there are at least two decisions by the House of Lords, and a number by this Court, saying there is not. I turn to these authorities.

[166] The rule that there is no right of appeal from a successful application for *habeas corpus*, absent express statutory language, was clearly established in *Cox v. Hakes*, (1890) 15 App. Cas. 506. Reverend Cox was sued by James Hakes for offences against the ritual of the Church of England. The Chancery Court found him guilty of contempt and contumacy and ordered him imprisoned until he satisfied the contempt. Cox was successful in his application for the writ of *habeas corpus*. The Queen's Bench Division ultimately ordered his discharge. Hakes appealed to the Court of Appeal, which reversed.

[167] The sole issue considered by the House of Lords was whether the Court of Appeal had jurisdiction to entertain the appeal by Hakes. At that time, s. 19 of the *Supreme Court of Judicature Act, 1873*, 36 & 37 Vict. (U.K.) provided for a right of appeal in very broad terms: "The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice."

[168] There can be little doubt that an order for discharge was an order of a High Court Justice. Further, the order did not come within any of the exceptions mentioned in s. 19. Yet the majority of the House (5-2) concluded that in light of the history of the writ of *habeas corpus*, the general language set out in s. 19 was insufficient to fund jurisdiction to appeal an order for discharge.

[169] Lord Halsbury L.C. remarked "probably no more important or serious question" had ever come before the House of Lords. He noted the history of the

writ, which permitted an unsuccessful detainee to make repeated applications, but if successful, no writ of error or demurrer was allowed. Given this history, the majority held that Parliament had not intended to alter this procedure without express language. The Lord Chancellor concluded (p.522):

> It is the right of personal freedom in this country which is in debate; and I for one should be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed, and that the right of personal freedom is no longer to be determined summarily and finally, but is to be the subject to the delay and uncertainty of ordinary litigation, so that the final determination upon that question may only be arrived at by the last Court of Appeal.
>
> For these reasons I am of opinion that the judgment of the Court of Appeal was wrong, and I move your Lordships that that judgment be reversed.

[170] The House of Lords reaffirmed this position over thirty years later in *Secretary of State for Home Affairs v. O'Brien*, [1923] A.C. 603. I have earlier referred to some of the details of that case when I set out the substance of decision by the English Court of Appeal (¶ 70). For convenience, I will repeat some, and then add to, those details.

[171] On March 11, 1923, the Home Secretary caused Mr. O'Brien to be arrested in London and then deported to Dublin where he was imprisoned in the Irish Free State. The prisoner applied to the Divisional Court for a writ of *habeas corpus*, which was refused. He appealed to the English Court of Appeal, which granted the order *nisi* on April 13, 1923. On May 9, 1923, the Court made the order absolute. The Home Secretary had until May 16, 1923 to make his return to the writ.

[172] The Home Secretary launched an appeal to the House of Lords. For authority to do so, he relied on the broad language of s. 3 of the *Appellate Jurisdiction Act, 1876*, 39 & 40 Vict. (U.K.). That section provided, subject to certain exceptions, "an appeal lies to the House of Lords from any order of the Court of Appeal in England". The appeal to the House of Lords was heard on May 14, 1923. The prisoner had not yet been discharged.

[173] At the hearing, the Law Lords questioned whether it had jurisdiction to entertain the appeal. At the end of argument, the majority (4-1) decided it did not. Reasons were later released. I will refer to two of the opinions.

[174] The Earl of Birkenhead wrote of the history of the writ, and its legal importance. He acknowledged the breadth of the language found in the *Appellate Jurisdiction Act, 1876*. Nonetheless, even without the authority of *Cox v. Hakes*, he was of the view that there was no right to appeal by the Home Secretary. He wrote (p. 609-10):

> Today the substitution of more modern remedies has left the writ ad subjiciendum, more shortly known as the writ of habeas corpus, in almost exclusive possession of the field. It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by Courts of Law as a check upon the illegal usurpation of power by the Executive at the cost of the liege.
>
> In the course of time certain rules and principles have been evolved; and many of these have been declared so frequently and by such high authority as to become elementary. Perhaps the most important for our present purpose is that which lays it down that if the writ is once directed to issue and discharge is ordered by a competent Court, no appeal lies to any superior Court. Correlative with this rule, and markedly indicative in itself of the spirit of our law, is that other which establishes that he who applies unsuccessfully for the issue of the writ may appeal from Court to Court until he reaches the highest tribunal in the land. If I am right in treating these rules as familiar and well settled, some curiosity may be felt as to the grounds which led the present appellant, advised as he has been by the law officers of the Crown, to assume that an appeal lay to this House in the circumstances of the present case. The argument is, of course, founded upon the very wide language of s. 3 of the Appellate Jurisdiction Act, 1876, which is undoubtedly general enough to cover this or almost any other case. It is certainly true that in terms the words are wide enough to give an appeal in such a matter as the present. But I should myself, if I approached the matter without the assistance of the authority at all, decline utterly to believe that a section couched in terms so general availed to deprive the subject of an ancient and universally recognized constitutional right.

[175] The Earl of Birkenhead went on to express his content at also being able to rely on their earlier decision in *Cox v. Hakes*. He referred to the opinion of Lord Halsbury L.C., and concluded (p. 611):

> All the judgments in the case [*Cox v. Hakes*] will repay study; but while they illustrate and elaborate the conclusion so lucidly declared by Lord Halsbury, they do not perhaps add anything which is material to our present purpose. It follows, therefore, from *Cox's Case* (1) that no appeal lies to the Court of Appeal where

> discharge has been ordered: and the language of the relevant statutes being for the present purpose indistinguishable, it equally follows by parity of reasoning that no appeal lies in the present matter to the House of Lords, unless upon some ground of principle the present case can be distinguished from *Cox's Case*.(1)

[176] He could find nothing to distinguish *Cox's Case*; nor could the other three Law Lords who concurred that there was no right of appeal. One attempt to distinguish *Cox's Case* was on the basis that there had not yet actually been a discharge of the prisoner O'Brien, but in *Cox's Case*, discharge had been made. This was rejected.

[177] The best description why is found in the opinion of Viscount Finlay who clearly explained that not only was there no right of appeal from an order of discharge, there was also no right of appeal from the issuance of the writ. Viscount Findlay reasoned (at p. 617-8):

> Lord Herschell, in *Cox's Case* (2), said: "It is unnecessary to determine whether an appeal would lie from an order for a writ of habeas corpus if it were brought to the Court of Appeal before there had been a discharge under it. No such point arises here." The point now arises and it must be determined. **In my opinion when the substance of the thing is looked at it is plain that there is no real difference between the two cases, [O'Brien and Cox v. Hakes] and that the order of the Court of Appeal that a writ of habeas corpus do issue directed to the Secretary of State commanding him to have the body of Art O'Brien before the Court of Appeal is no more appealable than the order of discharge itself if it had been made upon the return.**
>
> The Court of Appeal had decided that the detention was illegal, and it was on this ground, and on this ground only, that the order for the issue of the writ was made.
>
> [Emphasis added]

[178] In 1960, s. 15 of the *Administration of Justice Act* (U.K.) came into effect, providing for a right of appeal in civil or criminal *habeas corpus* proceedings, whether the applicant secures his release or not. What is the situation in Canada, and in particular, Nova Scotia?

[179] A good starting point to answer this question is the decision of the Supreme Court of Canada in *Re Storgoff*, [1945] S.C.R. 526. In *Storgoff*, the applicant was convicted of being nude in a public place under the *Criminal Code*. He successfully applied before a judge for discharge on the return of a writ for *habeas*

corpus. The Crown appealed, relying on provisions in the *Court of Appeal Act*, R.S.B.C. 1936 c. 57, which gave a right of appeal to the Attorney General. The relevant parts of that statute, first enacted in 1920 (S.B.C. 1920, c. 21, s.2) were:

> 6 ... an appeal shall lie to the Court of Appeal:
>
> …
>
> (d) From every decision of the Supreme Court or a Judge thereof, or of any County Court or County Court Judge, in any of the following matters, or in any proceeding in connection with them, or any of them:
>
> …
>
> (vii) *Habeas Corpus*:
>
> …
>
> and in cases of *habeas corpus* in which Crown is the successful appellant the Court of Appeal may make such order as it may see fit concerning the re-arrest of the accused person

[180] The Court of Appeal reversed the judgment and ordered Mr. Storgoff's re-arrest. The Supreme Court of Canada had to determine whether the proceeding was criminal or civil. If civil, the British Columbia Act would apply and the Attorney General had a right of appeal. If criminal, s. 6 of the *Act* would be inoperative as the Provincial Legislature has no jurisdiction to legislate in relation to criminal law and procedure.

[181] The Supreme Court held, in a 6-1 majority decision, that the application for *habeas corpus* had been a step in a criminal proceeding. Since the *Criminal Code* at that time provided no right of appeal in criminal *habeas corpus* matters, Mr. Storgoff was ordered released.[5]

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[5] Parliament did not introduce a right of appeal for the applicant and the Attorney General in criminal *habeas corpus* proceedings until 1964. The provisions are presently found in s. 784 of the *Criminal Code*. The procedure in Nova Scotia and Ontario for such proceedings may be different due to the existence of pre-confederation legislation (see *R. v. LaPierre* (1976), 15 N.S.R. (2d) 361 (A.D.))

[182] The significance of *Storgoff* is the clear recognition, and adoption of the law from the United Kingdom, that the proceedings regarding the issuance of the writ of *habeas corpus* are neither inherently civil nor criminal. They can be either.

[183] As explained by Macdonald J.A. in *R. v. LaPierre* (1976) 15 N.S.R. (2d) 361, prior to *Storgoff*, the generally accepted view was that proceedings involving prerogative writs are civil, even when they arise in connection with criminal proceedings (para. 29).

[184] In *Storgoff*, Taschereau J., as he then was, wrote (pp. 574-5):

> In view of this recent decision, and of the unequivocal language used by their Lordships, I believe it is settled law that *Habeas Corpus* is a procedural writ, and that it is not a new suit different from the one which has been dealt with at the trial. It is not as contended, always a civil writ, the purpose of which is to enforce a civil right. In certain cases it is of a criminal nature, being a step in a criminal proceeding, and in other cases, when it is a step in a "civil cause or matter", it will have a civil character.

[185] As explained earlier (¶ 86), the proceedings that have led to these appeals are civil. The Attorney General acknowledges this. It is for that reason, they cite the general appeal provision found in the *Judicature Act*.

[186] Not only do the decisions of the House of Lords[6] (discussed above) stand in the way of interpreting the general words of the *Judicature Act* to bestow a right of appeal on the Attorney General, so do a number of decisions of this Court; not to mention the legislative history and current provisions of the *Liberty of the Subject Act*, R.S.N.S. 1989, c. 253.

[187] Dating back to 1881, this Court has decided in a number of cases that it does not have jurisdiction to entertain an appeal by the Attorney General from an order in the nature of *habeas corpus*. The relevant case law is canvassed in the latest decision from this Court on this issue, *R. v. MacKay*, (1956) 114 C.C.C. 107, 38 M.P.R. 91, 2 D.L.R. (2d) 358, 1956 CarswellNS 7 (N.S.S.C.A.D.).

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[6] See also the more recent decision of the Privy Council in *The Superintendent of Her Majesty's Foxhill Prison and the Government of the United States of America v. Viktor Kozeny*, [2012] UKPC 10

[188] In *MacKay*, a County Court judge discharged the respondent from custody arising from a conviction for an offence under the provincial *Liquor Control Act*. The *County Court Act*, R.S.N.S. 1954, c. 59 gave to judges of that Court the same jurisdiction and power under the *Liberty of the Subject Act* as a judge of the Supreme Court. Further, the *County Court Act* provided that an appeal "shall lie to the Supreme Court *in banco* [the predecessor of this Court] from every judgment, order, or decision of a county court, or a judge thereof…".

[189] Nonetheless, the Court was unanimous that the Attorney General had no right to appeal. MacQuarrie J. wrote the majority reasons for judgment. He began his judgment (at para. 4) by quoting from the judgment of Estey J. in *Re Storgoff, supra*, that "appeals in matters of habeas corpus have been and are statutory."

[190] Justice MacQuarrie cited the previous case law from the Nova Scotia Supreme Court *in banco* which had held that the Attorney General had no right of appeal (*Re A.L. McKenzie* (1881), 14 N.S.R. 481; *Re E.G. Blair* (1891), 23 N.S.R. 225, and *Re Frank Mackey* (1918), 52 N.S.R. 165). He distinguished the case of *Re Hood*, (1927) 59 N.S.R. 387, on the basis that the appeal in that case was not taken against the order discharging the prisoner.

[191] Justice MacQuarrie referred (at para. 11) to s. 14(3) [now s. 15(3)] of the *Liberty of the Subject Act*. This provision was enacted in 1933. It provides that the Attorney General must receive notice of the application for discharge, and on request of the Attorney General, the application shall be referred to the Supreme Court *in banco*.

[192] Justice MacQuarrie concluded (at para. 13):

> The legislative history of s. 33 of the *County Court Act* and the provision in s. 14(3) of the *Liberty of the Subject Act*, as well as the provisions of *the County Court Act*, s. 85, indicate that the legislation recognized throughout and contemplated no change in the principle so deeply established over a long period of time that this court has no jurisdiction to set aside an order for discharge in the nature of habeas corpus. Under the *Liberty of the Subject Act* there is no such power to review such order granted by a judge of the Supreme Court and a judge of the County Court has, within the provisions of s. 33 of the *County Court Act*, concurrent powers with a Judge of the Supreme Court.

[193] Justice MacDonald wrote a concurring opinion, in order to, as he put it, underline a point or two. MacDonald J., also referred to the principle that appeals in matters of *habeas corpus* must be expressly authorized by statute. He then acknowledged and adopted the principles set out by the House of Lords in *Cox's Case* and *O'Brien*:

> [19] Numerous cases have examined the principles which underlie the nature of this writ as one of the great agencies for the preservation of liberty under the British constitutional system, with its twin features of finality of decision where discharge is ordered, and the right to successive applications to different courts where discharge has been refused. They establish that so far at least as concerns an order for discharge of a person detained, the right to appeal therefrom must be conferred in very express words, and that even general terms which (literally read) are wide enough to confer such an appeal will be construed so as to exclude that result. Thus words conferring jurisdiction to hear appeals from "any judgment or order" of specified courts have been held inadequate to justify entertaining appeals from a discharge on habeas corpus (*Cox v. Hakes* (1890), 15 App. Cas. 506*; Home Secretary of State for Home Affairs v. O'Brien*, [1923] A.C. 603; cf. *The King v. Jen Jang How* (1917), 59 S.C.R. at pp. 179-80; 181-2). The principle is that a legislative intention to abridge such a vital right is not to be inferred from anything but the most precise language (Maxwell on Statutes, 9th ed. at 63 and 94; 31 Halsbury 505).

[194] Justice MacDonald concluded:

> [22] Further it is significant that the right of a person detained to make successive applications for *habeas corpus* — which was the other safeguard of liberty provided by the writ — was regulated by the Legislature in great detail by ss. 13 and 14 of the *Liberty of the Subject Act*. These sections not only imply that there is no appeal from an order of discharge; but suggest that had the Legislature intended to confer such an appeal it would have done so in unmistakable terms.

[195] Until now, *MacKay* has not been cited by this, or any court since its release in 1956.

[196] The general right of appeal found in s. 38 of the *Judicature Act* is qualified by the opening words "Except where it is otherwise provided by any enactment". The *Liberty of the Subject Act* has an appeal section. It gives to a prisoner the right of appeal. In exchange for that right, it prohibits a prisoner from pursuing

subsequent applications for *habeas corpus* based on the same grounds. Section 14 provides as follows:

> 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.

[197] This section was first enacted in 1913 (S.N.S. 1913, c. 28, s. 24) as s. 12. It was split into two sections and later re-numbered to appear, as it does now, as s. 14(1). Section 14(2) directs the speedy process in this Court to deal with the appeal by the prisoner, and maintains its jurisdiction to hear an application in the first instance by a prisoner, or by referral from a judge.

[198] As can be seen, no right of appeal is given to the Attorney General in the *Liberty of the Subject Act*. Instead, as described in *MacKay*, under s. 15(3) of the *Act* there appears to be at least the possibility the "Attorney General" may request, in certain situations, the referral of an application for *habeas corpus* to this Court. It seems to me that the intent of the Legislature is clear. A prisoner has a right of appeal, the Attorney General does not.

[199] This conclusion accords with the history of the long standing requirement that an appeal by the detainer must be granted by express statutory authority, first established 125 years ago, and re-affirmed by this Court, and other courts, on numerous occasions since.

[200] Nonetheless, the Attorney General puts forth two general arguments in support of its request for this Court to hear these appeals. He suggests that: the law set out in *Cox*, *O'Brien* and in *MacKay* is not reflective of the current practice in Canada, and the modern operation of *habeas corpus*; and, the appeals are not from the issuance of the writ of *habeas corpus*, or from an order of discharge, hence an

appeal should lie under the general appeal provisions of the *Judicature Act*. I will address each of these in turn.

Current Practice in Canada

[201] The Attorney General contends that in the almost 60 years since *MacKay* was decided, there have been major developments regarding the law of *habeas corpus*. These include the enactment of a right of appeal for the Attorney General in the *Criminal Code*; the writ now includes a review of the residual liberty interests of a prisoner, including a reasonableness standard of review; and there have been many appellate courts that have heard appeals by the "detainer" without objection.

[202] With respect, I see no relevance to the amendment to the *Criminal Code*. If anything, it reinforces the need for specific legislative sanction for an appeal by the "detainer".

[203] I also see little relevance to fact that the reach of *habeas corpus* has been extended to include the duty of superior courts to determine if a prisoner's residual liberty interests have been unlawfully deprived, including whether the prisoner's liberty is unlawful by reason that the detainer's acts are unreasonable.

[204] The Supreme Court of Canada, in what is referred to as the trilogy of cases (see above, ¶ 62) emphasized the importance of an individual's residual liberty interests, and the need to ensure that *habeas corpus* was available to protect against unlawful state action that impinges on those interests. As observed by the Court in *May*, *supra*. the right to liberty, and to have it determined by *habeas corpus*, are guaranteed by the *Charter*:

> [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*:
>
> > 10. Everyone has the right on arrest or detention
> >
> > ...
> >
> > (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

[205] If the state's actions infringing liberty are unreasonable, they are unlawful (see: *Khela, supra*). I fail to see how the writ of *habeas corpus* operates today justifies reading into the *Judicature Act* a right of appeal for the Attorney General from the issuance of the writ, or an order that ends an unlawful deprivation of liberty.

[206] If modern conditions make it expedient for the detainer to have a right of appeal, it can easily be created by Provincial legislative amendment.

[207] The Attorney General is correct in saying that there have been many appellate cases, including ones that have reached the Supreme Court of Canada. The problem with the Attorney General's submission is that in some of the cases he has cited (and others that I have checked), either the appellant was the prisoner, or the cases originated in provinces where there may well have been legislative authority for the detainer to appeal to the provincial court of appeal[7], or the issue was simply overlooked.

[208] No one has questioned that a prisoner generally has the right to appeal, but at least in non-criminal matters, the issue of the ability of the "detainer" being able to appeal must be resolved by examining the relevant provincial legislation. The need for caution about this was identified by J. Farbey, R. J. Sharpe and S. Atrill, *The Law of Habeas Corpus*, 3rd ed. (p.227):

> Appeals in provincial cases will always be available, either under the general grant of a right of appeal, or under specific provision with respect to habeas corpus. In jurisdictions where it is not expressly provided that an appeal lies from *any* habeas corpus decision, the question of the propriety of appealing an order of release could still arise.
>
> [Emphasis in original]

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[7] For example, *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 arose out of an appeal by the detainer to the British Columbia Court of Appeal. But as noted above (¶ 179), the *Court of Appeal Act* in that province was amended in 1920 to specifically give to the Attorney General a right to appeal. At the time of those appeal proceedings, it still existed, as R.S.B.C. 1979, c. 74, s. 5(d)(vii).

[209] Whatever may be the statutory regime in other jurisdictions, or if cases proceeded without the issue of appellate jurisdiction being raised, they cannot influence our determination of the proper legal landscape in Nova Scotia.

[210] The Attorney General points out that this Court has heard "at least one appeal from an order of discharge" by a "detainer". He is correct. The case was *National Parole Board and Correctional Service of Canada v. L.R.F.*, 2008 NSCA 56.

[211] In that case, the respondent was denied full and day parole. Rather than appeal, he brought an application for *habeas corpus*. A Justice of the Nova Scotia Supreme Court found that the applicant had been denied procedural fairness and directed a re-hearing of the respondent's application for parole. Appeal proceedings were launched by the National Parole Board and Correctional Service Canada as appellants. In the meantime, the new parole hearing apparently proceeded (2006 NSCA 132).

[212] By the time the appeal was heard, the respondent had served his sentence. Nonetheless, this Court heard the appeal, and concluded that the application judge had erred in law in deciding the issue in light of the availability of a complete, comprehensive, and expert statutory appeal regime. The respondent was self-represented. The question of the right to appeal was neither raised, nor discussed.

Scope of these appeal proceedings

[213] The Attorney General claims an appeal as of right in the Richards' appeal from the final order of the application judge, and seeks leave to appeal the interlocutory orders made in both the Richards and Peters proceedings.

[214] To escape the application of the principles found in *Cox, O'Brien* and *MacKay*, the Attorney General argues that he is not appealing either the issuance of the writ of *habeas corpus*, or the order of discharge in the Richards appeal. This, he says, is because there is an undertaking that regardless of the outcome of the appeal, there will be no change in Mr. Richards' security classification and place of confinement—hence no impact on his liberty. The Attorney General only wishes to clarify that the application judge lacked jurisdiction to proceed because Mr. Richards was no longer in Nova Scotia.

[215] With respect, I am unable to agree. If we were to agree with the Attorney General that the application judge did not have the jurisdiction to consider the legality of Mr. Richards' detention because he was no longer in Nova Scotia, we would be required to issue an order allowing the appeal. That order, whether moot in these particular circumstances, would be to reverse an order discharging Mr. Richards from the unlawful deprivation of his residual liberty.

[216] The jurisdiction of the English courts to issue *habeas corpus* was precisely the issue in *O'Brien* (where the prisoner was in custody of the Irish Free State). The House of Lords clearly held that it had no legal authority to interfere with the decision of the Court of Appeal. The same principles apply here.

[217] However, with respect to the interlocutory appeals, I agree that the appeal is not from the issuance of the writ of *habeas corpus*, or from an order of discharge. The appeals engage solely the question of the jurisdiction of the application judge.

[218] Faced with conflicting decisions by judges of the Nova Scotia Supreme Court, the Attorney General brought Applications for Leave to Appeal to ask this Court to exercise its discretion to hear these appeals to ensure that prospective litigants, and the justices of the Supreme Court, understand and universally apply the correct legal principles.

[219] This Court, by virtue of the *Judicature Act*, enjoys a broad power to grant leave to appeal from any interlocutory order by a justice of the Supreme Court, whether made in Court, or in Chambers. Section 40 of the *Act* provides:

> **Appeal from interlocutory order upon leave**
>
> 40 There is no appeal to the Court of Appeal from any interlocutory order whether made in court or chambers, save by leave as provided in the Rules or by leave of the Court of Appeal.

[220] As observed by Iacobucci and Major JJ. in *Housen v. Nikolaisen* "the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application".[8] In my view, properly interpreted, s. 40 of the *Judicature Act* gives to this Court the power to grant leave in these circumstances.

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[8] 2002 SCC 33 at para. 9

The orders in dispute were made by a justice of the Supreme Court. They are interlocutory, and although made in relation to the purported exercise of her jurisdiction under the *Liberty of the Subject Act*, and the common law, they do not pertain to the issuance of the writ or an order dealing with the issue of discharge of a prisoner from an unlawful detention.

SUMMARY AND CONCLUSION

[221] This case is fundamentally about ensuring access to justice.

[222] Correctional Service of Canada employees have an incredibly difficult job. They must house, feed, mentor, educate and keep safe thousands of prisoners, many from diverse backgrounds and character. An elaborate legislative framework directs how decisions are made in carrying out that mandate.

[223] The legislative framework is found in the *CCRA*, Regulations, and Directives. Inmates who feel aggrieved by decisions made by CSC employees can try to challenge those by recourse to the grievance process, which can eventually lead to an application in Federal Court.

[224] In this case, both respondents spurned the grievance process, and invoked their *Charter* protected right to challenge the decisions made by CSC employees by applications for the writ of *habeas corpus*. The application judge made two interlocutory orders in the course of those proceedings.

[225] In the case of Mr. Richards, the application judge determined that she had, and should exercise, jurisdiction to determine the complaint of Mr. Richards that his security classification and consequent transfer to a maximum security institution was unlawful, even after he had been transferred to New Brunswick.

[226] The application for *habeas corpus* was commenced when Mr. Richards was in Nova Scotia. He properly named the CSC as a respondent. Before the application could be heard, CSC transferred Richards to a maximum security institution in New Brunswick. The application judge ruled that the fact Mr. Richards was no longer in Nova Scotia did not automatically deprive the Supreme Court of jurisdiction to hear the application.

[227] In making that ruling, the application judge was guided by the *Court Jurisdiction and Proceedings Transfer Act*. The CSC still had legal and *de facto*

control over the security classification of Mr. Richards. The application judge made no reviewable error in her determination that Mr. Richards had met his burden to establish a real and substantial connection to Nova Scotia; nor that she should not decline jurisdiction in favour of New Brunswick. There was no substantial prejudice to the appellant, and it would ensure timely access to justice for Mr. Richards.

[228] Timely access to the courts to determine if detention was unlawful was a concern voiced hundreds of years ago. It is no less relevant today, particularly when the actions by state officials that deprive individuals housed in institutions may be short lived.

[229] Without timely access, detentions which may otherwise be found to be unlawful may never be subject to judicial scrutiny, leading to a failure of the rule of law in institutions, and a frustration of the enshrined right in the *Charter* to have the validity of a detention determined by way of *habeas corpus*.

[230] In relation to Mr. Peters, the application judge had ample authority pursuant to the *Liberty of the Subject Act* and the *Nova Scotia Civil Procedure Rules* to make the interlocutory order directing CSC not to transport Mr. Peters pending the hearing of his application. The same concerns about timely access to his right to challenge his detention, animated the application judge to make the interlocutory order.

[231] The application judge made no error by adding CSC back as a named party. For purposes of judicial review, it is a proper entity to name, alone or as the Attorney General of Canada, representing the Correctional Service of Canada. Doing so simplifies the procedure for the self-represented litigants who make up the vast majority of individuals seeking to challenge some aspect of their detention in an institution.

[232] Absent express statutory authority, the Attorney General has no right to appeal the issuance of the writ or an order of discharge. The broad language found in s. 38 of the *Judicature Act* is insufficient, in light of the decisions of the House of Lords, and of this Court — particularly in light of the Legislature's decision to grant to the prisoner a right of appeal in the *Liberty of the Subject Act*, and not a detainer.

[233] As a consequence, the appeal from the order discharging Mr. Richards from his unlawful detention is dismissed for want of jurisdiction. Nonetheless, this Court does have jurisdiction to grant leave to appeal from the interlocutory orders of the application judge.

[234] On behalf of the Court, it is appropriate to thank the *amicus curiae* for his helpful and thorough submissions.

[235] I would grant leave to appeal in both interlocutory appeals, but the application judge made no reviewable error, in these circumstances, and I would dismiss both appeals.

Beveridge, J.A.

Concurred in:

Fichaud, J.A.

Bryson, J.A.