NOVA SCOTIA COURT OF APPEAL

Citation: *Pratt v. Nova Scotia (Attorney General)*, 2020 NSCA 39

Date: 20200505
Docket: CA 484665
Registry: Halifax

Between:

Maurice Pratt

Appellant

v.

Nova Scotia (Attorney General) and
Central Nova Scotia Correctional Facility

Respondents

Judge: The Honourable Justice Van den Eynden

Appeal Heard: November 18, 2019, in Halifax, Nova Scotia

Subject: *Habeas corpus*; close/solitary confinement; procedural fairness; exercise of jurisdiction

Summary: The appellant filed a *habeas corpus* application seeking his release from close (solitary) confinement on the basis it was unlawful. The judge convened a teleconference with the appellant (self-represented) and counsel for the respondents. The appellant sought to have his application set down for a hearing on the merits. The respondents objected. At the conclusion of the call, the judge rendered an oral decision, declining his jurisdiction to hear the application. He said the appellant's *habeas* application was moot and summarily dismissed it. However, after rendering his oral decision, the judge requested additional information from the respondents' counsel. Numerous communications took place between respondents' counsel and the judge's office. Notice was not given to the appellant, nor was he invited to respond. The judge later released a written decision addressing the application on its merits; relying on the materials not disclosed to the applicant.

Issues:

1. Was Mr. Pratt afforded procedural fairness?
2. Did the judge err in the exercise of his *habeas corpus* jurisdiction?

Result

The appeal is allowed. The decisions below and resulting order are set aside. The appellant was not afforded procedural fairness. The judge improperly exercised his *habeas* jurisdiction. The judge also erroneously determined the application of *habeas corpus* principles should be more relaxed in a provincially-run prison by imposing a presumption of fair treatment and process. There is no such presumption. The principles of *habeas corpus* apply consistently between federal and provincial correctional facilities. The application judge erred in law to conclude otherwise.

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Central Nova Scotia Correctional Facility

Respondents

Judges:	Wood, C.J.N.S.; Saunders and Van den Eynden, JJ.A.
Appeal Heard:	November 18, 2019, in Halifax, Nova Scotia
Held:	Appeal allowed with costs, per reasons for judgment of Van den Eynden, J.A.; Wood, C.J.N.S. and Saunders, J.A. concurring
Counsel:	Claire McNeil with Alexa Jarvis (student), for the appellant Duane Eddy, for the respondents

Reasons for judgment:

Overview

[1] Mr. Pratt filed a *habeas corpus* application seeking his release from close (solitary) confinement. He claimed his detention was unlawful.

[2] The Honourable Justice Peter P. Rosinski convened a teleconference with Mr. Pratt (self-represented) and counsel for the respondents. Mr. Pratt wanted to have his application heard on the merits. The respondents asked the judge not to set the matter down for a hearing. At the conclusion of the call, the judge rendered an oral decision. The judge declined his jurisdiction to hear the application. He said Mr. Pratt's *habeas* application was moot and summarily dismissed it.

[3] However, after rendering his oral decision, the judge requested additional information and submissions from the respondents' counsel. There were numerous communications between the judge's office and counsel. The communications revealed that the judge intended to release a written decision, but before doing so he wanted additional materials. Mr. Pratt was not copied, at any time, on the communications between the judge's office and counsel. Mr. Pratt was not invited to respond to the additional materials requested by the judge.

[4] Although the judge initially declined jurisdiction to hear the matter, in a written decision (2019 NSSC 6) rendered some months later, the judge went on to deal with substantive aspects of the application and materially expanded his reasons for concluding Mr. Pratt's application was moot. In doing so, the judge relied on the information not disclosed to Mr. Pratt.

[5] Mr. Pratt argues the judge made serious errors that warrant appellate intervention. He claims the judge erred in declining to exercise his jurisdiction in the first instance, and further compounded this error by proceeding to gather additional information without any notice to Mr. Pratt or providing him with an opportunity to make submissions. Mr. Pratt says the manner in which his *habeas* application was disposed of was fundamentally unfair.

[6] Furthermore, Mr. Pratt challenges the judge's establishment of new legal principles for dispensing with *habeas* applications. Mr. Pratt was being held in a provincially-operated prison. In his written decision, the judge determined, without providing any authority, that the binding legal framework for determining a *habeas*

application should differ if the applicant prisoner is held within a provincially-operated correctional facility as opposed to a federal correctional facility. The judge made this and other determinations respecting the applicable principles absent these issues being raised by the parties and absent any submissions from the parties.

[7] Mr. Pratt acknowledges his appeal before this Court is moot in the sense that he has been released from close confinement and no longer seeks the remedy of release. However, he argues this appeal raises issues about the proper procedures and legal principles to be employed by reviewing courts with respect to *habeas* applications.

[8] The issues raised are important. They are subject to repetition yet evasive of review because individual circumstances in prisons can quickly change before appellate review of the challenged decision. These issues have a broader application. Furthermore, the respondents raised no objection to this Court hearing Mr. Pratt's appeal. Having reviewed the principles in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, I am satisfied this Court should hear Mr. Pratt's appeal regardless of the mootness of his original release remedy.

[9] How Mr. Pratt's application was dispensed with by the lower court was not procedurally fair. With respect, it is clear on the record that the judge made several errors. Appellate intervention is warranted. For the following reasons, I would allow the appeal.

Issues

[10] The grounds of appeal as contained in Mr. Pratt's Amended Notice of Appeal are as follows:

> 1. In failing to send the application to an evidentiary hearing, the learned trial judge erred in his interpretation and application of the law.
> 2. The learned trial judge erred in his interpretation and application of the law in placing the burden of proving an 'arguable case' on the Applicant.
> 3. The learned trial judge denied procedural fairness to the Applicant in deciding to dismiss the application without proper disclosure, and without an evidentiary hearing of the application.
> 4. The learned trial judge erred in his interpretation and application of the law, in particular in creating and applying a presumption of procedural

fairness and reasonableness in favour of decisions made by provincial prison officials.

5. Such further grounds as I may advise and this Honourable Court may permit.
6. The learned judge erred in law in considering documents and submissions provided by the Respondent following the teleconference without giving the Appellant notice or an opportunity to be heard with respect to those documents and submissions.

[11] There is no dispute the grounds raise two core issues: procedural fairness and the exercise of jurisdiction. They can be examined under a simpler framework, as follows:

1. Was Mr. Pratt afforded procedural fairness?
2. Did the judge err in the exercise of his *habeas corpus* jurisdiction?

Standard of review

[12] Issues that involve a lower court's exercise of its *habeas corpus* jurisdiction attract a correctness standard of review. It is well-established that if a provincial superior court improperly exercises or improperly declines to exercise jurisdiction this equates to an error of law and the correctness standard of review applies (*May v. Ferndale Institution*, 2005 SCC 82).

[13] When issues of procedural fairness or a denial of natural justice are raised, there is no deference afforded to the judge's decision. The role of this Court is to determine whether there was a breach (*McPherson v. Campbell*, 2019 NSCA 23, at ¶20).

[14] I will apply these standards of review in my analysis. Before examining the issues, some background is needed.

Background

[15] Mr. Pratt was incarcerated at the Central Nova Scotia Correctional Facility, a provincial prison. He was being held in the close (solitary) confinement unit when he filed a *habeas corpus* application. His application disclosed the following claims:

- he was being detained in close confinement without reasons being given;

- he was not given a date for discharge;
- his detention was illegal because he was being held past the ten day maximum and this was contrary to the legislation and goes against the *Mandela Rules*[1].

[16] After receiving Mr. Pratt's application, the Supreme Court Prothonotary wrote a memo to Justice Timothy Gabriel, the judge assigned to chambers. The Prothonotary wrote:

> … I am referring this to you as the Criminal / Crownside judge. …
>
> Should you direct that we decline to accept … for filing ... provide your directions in writing pursuant to CPR 7.12(7).
>
> Should you decide to approve the filing … kindly indicate when you would like the [motion] for directions to be set down as per CPR 7.13(2)(a).
>
> I note that recently there has been a trend towards holding a teleconference between the parties prior to any physical court appearances. If you prefer to proceed by telephone, kindly advise when you would like the call to take place and I will pass information onto the criminal scheduler. …

[17] The above *Civil Procedure Rules* provide:

> 7.12(7) A prothonotary must not refuse to file or act on a document purporting to seek review by way of *habeas corpus* unless a judge concurs in writing ...
>
> 7.13(2) When a notice for *habeas corpus* is filed, a judge must immediately do all of the following:
>
> > (a) appoint the earliest practical time and date and a place for a judge to give directions on the course of the proceeding;
> >
> > (b) order any person detaining the applicant to bring the applicant before the judge at the set time and date;
> >
> > (c) order a respondent to produce all documents relating to the detention immediately to the court;
> >
> > (d) cause the parties to be notified of the time, date, and place of the hearing for directions.

1 The United Nations Standard Minimum Rules for the Treatment of Prisoners, (the *Nelson Mandela Rules*), UNGAOR, 70th Sess., UN Doc. A/Res/70/175 (2015).

[18] The record before this Court does not contain Justice Gabriel's reply to the Prothonotary. However, it is obvious from the record Mr. Pratt's application was accepted for filing, and a teleconference was scheduled so a judge could provide directions on the course of the proceeding.

[19] *Rule* 7.14 authorizes a judge to provide directions for a quick and fair determination of the legality of an applicant's detention. This *Rule*, which is not exhaustive, allows the judge to give these directions:

> 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; …

[20] Mr. Pratt's *habeas* application was filed on October 25, 2018. The motion for directions was originally scheduled for October 30, 2018 before Justice Timothy Gabriel. However, Justice Gabriel set the matter over to November 6, 2018 because Mr. Pratt was not provided with a copy of correspondence counsel for the respondents filed with the court.

[21] Justice Rosinski was the presiding chambers judge on November 6, 2018. At that time he had limited information respecting Mr. Pratt's detention. He had Mr. Pratt's application plus correspondence from the respondents' counsel, Duane A. Eddy (also counsel on appeal).

[22] It is clear from the record that the proceeding on November 6, 2018 was not a hearing on the merits. Rather, it was a motion for directions. There was no dispute that Mr. Pratt had and continued to experience a deprivation of liberty through his placement in close (solitary) confinement. The ultimate issue for determination—on another day—would be whether the deprivation was lawful. However, the parties never got to that point. The judge declined to hear the application, declaring it moot.

[23] In effect, the judge drew a line in the sand, refusing to examine the lawfulness of Mr. Pratt's continuous deprivation beyond the filing date of his application. Over the objections of Mr. Pratt, the judge said he would have to file a new application if he wanted the court to examine that.

[24] To understand what the judge did on November 6, 2018, it is necessary to review in some detail what was before him, as well as the respective positions of the parties.

[25] No sworn documents were filed by the respondents in advance of the November 6, 2018 teleconference. None of the parties were under oath, and there were no witnesses called or exhibits submitted. Counsel for the respondents did provide the judge with a brief one-page letter which advised that Mr. Pratt was being housed in close confinement because of disciplinary sanctions. The respondents took this position:

> The Respondent's position in regards to Mr. Pratt's *habeas corpus* application is that because Mr. Pratt is in segregation for disciplinary reasons and because Mr. Pratt has failed to plead grounds pertaining to procedural unfairness the court should decline to set this matter down for hearing. …
>
> Furthermore, grounds pertaining to alleged restrictions in privileges and allegations which impugn the general administration of the facility, are not matters that fall within the court's *habeas corpus* jurisdiction. …

[26] The information before the judge explaining Mr. Pratt's placement was far from complete. Furthermore, contrary to what the respondents asserted, Mr. Pratt clearly raised issues of procedural fairness. In addition to the concerns identified on the face of his application, during the telephone conference Mr. Pratt informed the judge several times what his specific complaints were. They included a failure to disclose discipline records to him—records upon which the respondents were relying—and a lack of due process. Mr. Pratt's complaints will be discussed later, but next I will explain the circumstances respecting Mr. Pratt's deprivation of liberty.

[27] Mr. Pratt was held in continuous close confinement beginning October 12, 2018 and remained so at the time of the teleconference on November 6, 2018. He would continue to be for a period of time. The respondents' counsel acknowledged that he did not know all the details respecting why and for how long Mr. Pratt would be held in close confinement. Mr. Pratt pleaded with the judge to set the matter down for a hearing.

[28] Based on the material that was available to the judge on November 6, 2018, it was known that Mr. Pratt received a disciplinary penalty of close confinement for three infractions. Mr. Pratt was placed in the close confinement unit on October 12 for sending a birthday card with inappropriate content to a correctional officer. For this, he was given five days in close confinement. Next, he received an additional five consecutive days for covering a security camera. The final incident also involved the covering of a security camera. Mr. Pratt said he covered the camera on this occasion to use the washroom. For the third infraction, Mr. Pratt received a penalty of five days concurrent along with a loss of canteen privileges. His solitary confinement for these three infractions was to expire October 22, 2018. It did not, and he filed his application on October 25, 2018.

[29] These three disciplinary matters were not the subject of Mr. Pratt's application. His primary complaint was "I am down here past the described 10 day limit and have not been given a discharge date". He made clear in his application that his detention had not ended when it should have.

[30] Counsel provided the judge with a news article (that did not name Mr. Pratt), a brief email between counsel and an employee of the correctional facility, and some discipline records relating to Mr. Pratt. The judge had no discipline records or other internal prison documents to examine which would enable him to ascertain the lawfulness of Mr. Pratt's detention after October 22, 2018.

[31] However, during the teleconference, counsel verbally relayed to the judge information he had just received from the correctional facility. Counsel advised he had received documentation dated October 23, 2018 indicating Mr. Pratt had been found guilty of breaching another correctional facility rule. This discipline hearing was conducted in the absence of Mr. Pratt, purportedly due to concerns for staff safety. Mr. Pratt was found guilty based only on the filed compliant. He was neither provided the complaint, nor given the opportunity to respond. Counsel also advised that a request was made to extend Mr. Pratt's detention in close confinement on October 24, 2018, which was approved on October 31, 2018 by the correctional authorities.

[32] Counsel said the documentation set out serious complaints respecting Mr. Pratt's behaviour. They included the claims that Mr. Pratt:

- assaulted two sheriff officers in court on October 23, 2018;
- had behaviours that had become very erratic;

- had been calling and harassing lawyers;
- called the Ombudsman making a statement that he was going to murder someone in the facility.

[33] As noted, the above documents referred to by counsel during the teleconference were not filed with the court. They were not provided to Mr. Pratt, nor did he have an opportunity to make submissions prior to these matters being determined by prison authorities. Although the governing legislative provisions (*Correctional Services Act*, S.N.S. 2005, c. 37 and supporting Regulations) permit hearings in the absence of the prisoner in certain circumstances, the prisoner must be notified both (1) of the decision and the penalty imposed; and (2) the prisoner's new release date. Neither of which happened here. The record contains no documents that would contradict Mr. Pratt's claim he had not received notification of any disciplinary matters after October 22, 2018.

[34] Furthermore, Mr. Pratt disputed the factual circumstances relayed to the judge through counsel. In expressing his concerns respecting the failure to disclose these documents, Mr. Pratt told the judge on November 6, 2018:

> So Mr. Eddy said that today he received a level. I'm going to say on the record, Your Honour, I was not aware of that level nor was I provided with any like of the material that Mr. Eddy has.
>
> …
>
> So for them to say, as Mr. Eddy stated, in the level that he received this morning, that they were unable to take me to an adjudication because there was a safety concern, that's not factual. That's not factual.
>
> …
>
> Your Honour, I have not received a disciplinary report from that. Other than what Mr. Eddy said, I was unaware of it. Nor have I been charged for any staff assault on sheriffs. So I believe that is not in fairness to due process. I'm going to say that I have the right to make full answer and defence. I have the right to know the case that I have to meet.
>
> …
>
> So I'm alleging procedural fairness. I don't believe due process has been followed. I don't believe you should take into account the newest levels that Mr. Eddy has in front of him or ... I don't even think he's provided to you. Definitely, he hasn't provided to myself. I'm requesting a date in court so that you can hear. This ... Your Honour, this should be concerning, that these kind of oversights are not going ... are not being provided.

> This speaks, I think, specifically to the culture of CNSCF at Burnside. Right? I'm not being told when I'm getting out. I'm not being told when I'm on a level, when I have court like today and I'm talking to you. I'm not being provided with any of the pertinent knowledge to defend myself in a fair or just manner. I believe that is an abuse of process. I believe it is an abuse of power. I also believe that it is detrimental to my rights to make full answer of ... my right to make full answer and defence and to know the case that I have to meet.
>
> And, Your Honour, I'm requesting a hearing so that we can ... I can provide further testimony as to what's really going on behind the wall. Because like I think that you would be astonished to find ... or to hear my testimony.

[35] Mr. Pratt raised a breach of his *Charter* rights and further told the judge:

> These matters of *habeas corpus* should be expedient because they deal with my liberty and abuse of the power. So I'm going to request to you to make an order for me to come to the Superior Court and lay out my case and you hear what I have to say and then you make another ruling. Because this is just going on week to week and I have not picked up any level. I made sure that I was on compliance of all regulations in front of me ... expected of me.
>
> I seen the Deputy Super, Ms. Dominix, yesterday. Nobody told me nothing about these new levels. Nobody told me I was adjudicated. That's concerning for me. It prejudices me, Your Honour, and I want my court date for that. I can show you exactly what's going on. And Mr. Eddy can present his case for the Department of Justice.

[36] Although counsel for the respondents acknowledged the lack of disclosure to Mr. Pratt, counsel suggested to the judge that Mr. Pratt should file a new *habeas* application to address his concerns with continuous close confinement. Counsel submitted that Mr. Pratt's status was evolving because of ongoing infractions and the respondents should not be subject to "rolling grounds of *habeas corpus*". In the alternative, counsel suggested the application be adjourned to another teleconference to allow for further disclosure.

[37] Mr. Pratt objected to the respondents' request that in order to have the lawfulness of his deprivation reviewed by the lower court he would have to file yet another *habeas* application. The following excerpt from the November 6, 2018 transcript illuminates the competing positions:

> **THE COURT:** … Well, here's the thing. Mr. Eddy says, Look, you filed October 25th the *habeas corpus* ...
>
> **MR. PRATT:** Correct.

THE COURT: … application. It was in relation to these levels which are no longer going on.

MR. PRATT: Correct.

THE COURT: So his point is, Look, there should be a new *habeas corpus* application filed because the old one, there's nothing left for the Court to fix. Typically, the Court is asked to, you know, change the conditions of your confinement and so on. But, of course, if what you filed is no longer going on, the complaint is no longer really going on, then ...

MR. PRATT: Can I interject, Your Honour?

THE COURT: Yeah.

MR. PRATT: So why am I still in segregation then, Your Honour?

THE COURT: Well, that's another matter, you see. It's ...

MR. PRATT: No. No, no. It's regard ... I came down on the 12th for this incident. I have not left. It's not like I left and I came back. Now, I'm on an administrative segregation hold.

THE COURT: Yeah.

MR. PRATT: So it's in regard to the same initial levels.

THE COURT: Now, legally, it's not.

MR. PRATT: Your Honour, how ... so why am I still down ... like why am I still ... if I came on one level ... if I'm in jail for one charge, right, and that charge ends ...

THE COURT: Yeah.

MR. PRATT: ... and it's ... Your Honour gives me time served, right ...

THE COURT: Uh-huh.

MR. PRATT: ... I'm to be released then. If there's no more ... if there's no new information, if there's no specific offence, if there's no new charge, then I'm supposed to be released. How am I not released then if there's no concerns with my conduct or with my ... do you understand what I'm saying?

Like it's going on. It's going ... like I came down for one incident. I did my time. The guy said, Time served. They did not release me. The administrators here, they still keep me. So it's the same thing that I'm ... like why would I be required to file a *habeas corpus* every single new level, which I'm not even being told of? It's from the same incident. I filed them from those incidents, right, because my time exceeded. My time had exceeded, because the adjudicator, the judge in this matter, said, Your time is done. But they chose not to release me. So it's the same thing going on, Your Honour. And I'm asking to get a court date so that we can all understand why it's still going on.

> **THE COURT:** Okay. And, Mr. Eddy, any last comment?
>
> **MR. EDDY:** The Crown reiterates that circumstances have changed once again, My Lord, due to Mr. Pratt's own actions. And I understand how it may be inconvenient to pursue another *habeas corpus* in relation to these new circumstances, but the ultimate onus is on the Crown to be able to respond to what the current confinement ... the conditions are.
>
> Now to continue on with historical levels and move forward, it's simply procedurally unfair to the Crown if the Court ...
>
> **THE COURT:** Okay.
>
> **MR. EDDY:** ... were to agree with what Mr. Pratt proposes in relation to these most recent levels of incidents. The proper approach, the Crown would submit, in this circumstance is for Mr. Pratt to articulate in a new notice for *habeas corpus*, in a new application, why he feels his current conditions of confinement are illegal or unlawful. And then the Crown can then gather the documents and provide them to the Court. And we can convene another conference call ... and to Mr. Pratt. He'll be provided with those documents. We can convene another conference call to yet again determine whether or not these levels or his current condition of confinement warrants a hearing.

[38] At the end of the motion for directions the judge rendered this brief oral decision:

> Well, yes, thank you very much then, gentlemen. In review of all these materials here, gentlemen, it is my view that it is appropriate for the Court to decline its jurisdiction in this particular case as the documentation relates to matters on or before October 25th, 2018. By that, I mean I do not include within that the matters which were not adjudicated on from October 23rd until October 29th.
>
> So the opportunity is there if there's proper grounds for Mr. Pratt to revisit those by way of a new *habeas corpus* application. But, at this point, I am dismissing the existing October 25th, 2018 application as being basically moot. That means that the matters have been resolved. But although some of them start within the time frame, October 23rd, those are not part of that decision. They, obviously, adjudicated October 29th, could be, if necessary, the subject of a new application. And that's my decision in relation to the matter.

[39] Immediately after the judge rendered his decision, Mr. Pratt reiterated concerns about procedural fairness. The transcript concludes with this exchange between the judge and Mr. Pratt:

> **MR. PRATT:** Your Honour, this is Mr. Pratt. Can I ask about my procedural fairness and my right to make full answer and defence? I wasn't even given that, Your Honour ...

> **THE COURT:** The decision ...
>
> **MR. PRATT:** ... nor were you provided with that, it sounds like ...
>
> **THE COURT:** Mr. ...
>
> **MR. PRATT:** You weren't provided with those new levels.
>
> **THE COURT:** Mr. Pratt, I've made that decision and that's what's going to conclude the matter today. So thank you for your attendance and your submissions. As well, Mr. Eddy ...
>
> **MR. EDDY:** Thank you, My Lord.
>
> **THE COURT:** ... thank you.

[40] It is difficult to understand how the judge could have concluded "the matters have been resolved". Mr. Pratt was and remained in close confinement at the time of the teleconference. The records in the three disciplinary matters produced by the respondents were not the subject of Mr. Pratt's complaint. These records did not address his deprivation of liberty that continued after the disciplinary sanctions had expired on October 22, 2018. Mr. Pratt's detention had not ended, nor "been resolved". Mr. Pratt clearly complained of a lack of disclosure of documents and concerns with due process.

[41] Notwithstanding the fact that the judge disposed of the application on November 6, 2018, on November 13, he asked the respondents for further information. In an email, the judge's judicial assistant wrote to counsel for the respondents asking:

> Justice Rosinski has requested the following information with respect to this matter:
>
> 1. Where in the legislation/policies is there reference to (and what is/when in use?) Sentence Management Plan?
> 2. Why does T. Dominix say in her Oct 30th email "Mr. Pratt has been on levels and SMP requiring him to be housed in CCU"? and
> 3. Regarding Section 75 *Correctional Services Act* are there Regs. Regarding (b) "Shall in accordance with the Regs, conduct a review of the close confinement."

[42] Counsel responded in an email of the same date, providing the judge with documents and submissions respecting questions 1 and 3. As for the judge's second question, counsel provided a response, but for the wrong prisoner. This error was brought to counsel's attention by the judge's assistant on November 16,

2018. On November 17, 2018, counsel acknowledged his error in an email and on November 19, 2018 responded to the judge's inquiries as follows:

> With respect to the courts second question regarding Ms. Dominix's October 30/18 email I've requested copies of all of Pratt's disciplinary reports/levels and SMP's for his current custody term up to November 19, 2018. My understanding is that it is Pratt's extensive history of not following facility rules, specifically his assaultive/violent behaviour towards staff and other inmates, that continually causes him to be placed in CCU [close solitary confinement].
>
> … Once I have the documents and SMP's for Pratt I'll forward them to the court.

[43] On December 11, 2018, the judge's assistant wrote to the respondents' counsel asking:

> Is there something else coming along to the Court with respect to the above-noted matter [Pratt]? … Justice Rosinski is wanting to release a written decision and is awaiting any material that you may have.

[44] Counsel responded on December 11, 2018, advising the judge's assistant that he would be sending materials to the judge. Counsel then wrote a letter directly to Justice Rosinski dated December 11, 2018 advising:

> In response to Ms. McCarthy's [the judge's judicial assistant] email, dated November 13, 2018 and enclosed herein for ease of reference, please find enclosed disciplinary records and Security and Sentence Management Plans for Maurice Pratt from February 2018 to November 2018; Correctional Services Policy and Procedures No 43.00.00 subsection 11 (Additional Measures - Security Management Plan); and section 80 of the Correctional Services Act Regulations - "Review of Close Confinement".
>
> Deputy Superintendent Tracy Dominix, in her email, dated October 30, 2018, was referring to Mr. Pratt's disciplinary incidents and reports.

[45] This communication from counsel to the judge provided factual information respecting the email referenced in ¶30 above and included the three discipline reports previously provided to the judge before the November 6, 2018 motion for directions. Importantly, it also enclosed several additional disciplinary reports plus specific Sentence Management Plans pertaining to Mr. Pratt.

[46] The record contains one further communication between the respondents' counsel and the judge's judicial assistant. Counsel followed up to ensure the materials he sent were received, and he added some additional information

respecting the implementation of policies and procedures for the secure operation, management and administration of a correctional facility.

[47] None of the multiple communications exchanged between the judge/judge's office and counsel for the respondents after the judge rendered his decision on November 6, 2018, nor the additional records provided as a result of these communications, were disclosed to Mr. Pratt. Accordingly, Mr. Pratt was afforded no opportunity to respond.

[48] For reasons which will become apparent in my analysis, it is unnecessary to delve into the details of the supplemental records provided to and relied upon by the judge in his written decision. It is enough to say that the additional documentation leaves material unanswered questions respecting the reasons for Mr. Pratt's continued detention in close confinement and raises questions about whether Mr. Pratt was afforded due process throughout the disciplinary process undertaken by the respondent correctional facility.

[49] The decision rendered on November 6, 2018 dismissing Mr. Pratt's application was two short paragraphs. The judge's written decision released January 10, 2019 was 21 pages plus 14 appended pages. The decision goes well beyond matters decided on November 6, 2018. In addition to relying on new materials, the judge boldly stated, without authority, that the legal principles that govern a *habeas* application should be more relaxed in a provincially-operated correction facility. Mr. Pratt says the judge failed to follow the law as he was required, and his revised legal principles cannot stand as they erode the constitutionally protected remedy of *habeas corpus*. I will elaborate on the judge's written decision in my analysis.

[50] On May 22, 2019 an order was issued providing:

> WHEREAS an application for a writ of *Habeas Corpus* was filed by Maurice Pratt on October 25, 2018;
>
> AND WHEREAS a hearing was held in respect of that application on November 6, 2018, with Maurice Pratt representing himself, and Duane Eddy representing the Respondents;
>
> AND UPON hearing Maurice Pratt and Duane Eddy, and upon reviewing the documents and materials filed herein;
>
> IT IS ORDERED THAT:
>
> 1. The application is hereby dismissed without costs to any party.

[51] Although the recitals indicate a "hearing was held in respect of that application on November 6, 2018…" the record does not support a conclusion that there was a hearing respecting the merits of Mr. Pratt's application. I will return to this point later.

[52] Mr. Pratt filed a Notice of Appeal on January 29, 2019. By order of this Court, granted on August 15, 2019, Mr. Pratt was permitted to amend his Notice of Appeal by adding a sixth ground of appeal as noted in ¶10 herein.

Analysis

[53] Before undertaking a review of the specific issues, a brief overview of the applicable legal principles is in order to contextualize the grounds of appeal.

[54] *Habeas corpus* is a fundamental remedy with historical and constitutional significance in our legal system. The oversight obligation of reviewing provincial superior courts is a very important function. This obligation cannot be given short shrift even if it may be, by times, challenging, cumbersome and inconvenient. The *Rules* expressly acknowledge that *habeas corpus* takes priority over all other business of the court (see *Rule* 7.13 (1)).

[55] The principles that govern are well-known and not controversial. By way of a cursory overview they include:

- *Habeas corpus* is a "non-discretionary" remedy. It must be issued as of right by the provincial superior courts where the requirements are met.
- If the applicant proves a deprivation of liberty and raises a legitimate ground to question the legality of the deprivation the matter must proceed to a hearing.
- If the applicant has raised such a ground, the onus shifts to the respondent authorities to show the deprivation of liberty was lawful.
- The requirement for a legitimate ground has been characterised as "a legitimate doubt" or "some basis" to question the lawfulness of the detention. This requirement is different than actual proof that the detention is unlawful. The legal burden to prove lawfulness rests upon the respondent decision maker.

- An interpretation of the test for "legitimate ground" that increases the standard of proof, or imposes technical legal requirements, runs the risk of unduly narrowing the scope of this constitutionally protected remedy.
- Thus, when interpreting the legitimate ground requirement attention must be paid to avoid shifting the burden improperly. This is especially so in situations where the applicant claims lack of access to information or reasons concerning their detention.
- This interpretation of the content of the applicant's obligation to show "grounds" to question the lawfulness of a decision is consistent with the purpose of the remedy to hold authorities to account for incursions on personal liberty.
- A challenge to the fairness of the process may be based on procedural violations of either or both the common law or statute. In determining the fairness of the process, apart from transient or trifling complaints, respondent decision makers are not entitled to deference by the reviewing court.
- In short, the rules that govern can be said to favour the prisoner, requiring the respondent decision maker to introduce evidence to justify the deprivation where the prisoner has discharged their evidential burden by establishing a factual context that "bears upon" the legality of the imprisonment. A claim based on no disclosure or reasons for decision can meet that requirement.

See *May v. Ferndale Institution*, *supra*; *Mission Institution v. Khela*, 2014 SCC 24; *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 839; J. Farbey, R. J. Sharpe and S. Atrill, *The Law of Habeas Corpus*, 3rd ed (Oxford: Oxford University Press, 2011).

[56] It is also important to recognize the additional challenges self-represented prisoners face in advancing their *habeas* claims. It cannot be seriously disputed that, as a general statement, prisoners face challenges in advancing litigation. These challenges are particularly pronounced for prisoners in restricted detention, such as solitary confinement. There are added challenges if the prisoner has underlying literacy and/or mental health issues.

[57] Given the many prisoner appeals and chambers matters before this Court, I can take judicial notice of the challenges self-represented prisoners face in getting legal documentation prepared and filed, gaining access to legal research, and even receiving or sending mail pertaining to active matters.

[58] There is a role for lower court judges to manage *habeas corpus* applications with particular regard to facilitating access to justice for self-represented applicants. Bourgeois, J. (as she then was) noted in *Blais v. Correction Service Canada*, 2011 NSSC 508:

> [9] ... [P]rovincial superior courts do have a role, in fact an obligation to diligently guard against the erosion of the *habeas corpus* remedy and in particular its continuing application in the prison context.

[59] Aside from these observations, this record demonstrates a case on point. Although the correctional facility had control over Mr. Pratt, they failed to ensure he received important and relevant documents. Mr. Pratt filed his application on October 25, 2018. His motion for directions, originally scheduled in a timelier manner for October 30, 2018, had to be adjourned to November 6, 2018 because of the respondents' failure to provide Mr. Pratt with their materials. All the while, Mr. Pratt remained in close (solitary) confinement.

[60] Placement in solitary confinement is not a minor curtailment of a prisoner's residual liberty interests. No longer is there any dispute that this type of confinement is a very serious form of incarceration—one that can have profound lasting negative effects on prisoners (see *Wilcox v. Alberta*, 2020 ABCA 104; *Brazeau v. Canada (Attorney General)*, 2020 ONCA 184). These authorities emphasize that it is particularly so for those suffering from mental health issues; Mr. Pratt informed the judge of his own mental health issues on November 6, 2018.

Was Mr. Pratt afforded procedural fairness?

[61] The record raises some serious behavioural concerns presented by Mr. Pratt. Even if true, that does not deprive him of his constitutionally protected rights and remedies.

[62] The question of whether Mr. Pratt was afforded procedural fairness arises in several contexts. He has a long list of complaints. For the purposes of this appeal, I need only address his primary complaints of a lack of procedural fairness

respecting: (1) the November 6, 2018 teleconference; and (2) the way the judge gathered and used information after rendering his decision on November 6, 2018.

[63] As noted, this Court's assessment of whether Mr. Pratt was afforded procedural fairness by the judge attracts no deference. These complaints tend to overlap with the assessment of whether the judge erred in the exercise of his *habeas corpus* jurisdiction because of their influence on his jurisdictional decisions. That said, I address procedural fairness as a standalone issue. It was argued that way by the parties and the overlap will be addressed in my analysis of the jurisdiction issue.

[64] Turning to the November 6, 2018 teleconference, the respondents attempted to persuade the judge not to hear Mr. Pratt's application by asserting he did not allege any procedural unfairness on the part of correctional officials. That assertion flies in the face of the record. Mr. Pratt clearly raised issues of procedural fairness.

[65] Mr. Pratt's complaints of procedural fairness were raised to meet his threshold burden of establishing a legitimate doubt as to the reasonableness of his continued detention. Recall that at the time of the teleconference, Mr. Pratt was not provided with any material pertaining to his detention in close confinement beyond his known release date of October 22. Counsel for the respondents was in possession of relevant documents that neither Mr. Pratt nor the judge had.

[66] These documents referenced details and decisions made by the correctional facility respecting Mr. Pratt's alleged misconduct. Not only did Mr. Pratt not have the documents the respondents were relying upon, they revealed that decisions which resulted in continued deprivation of his liberty were made in his absence with no afforded opportunity for his input. Mr. Pratt stated this was unfair and impeded his ability to understand and respond to the case against him.

[67] Mr. Pratt says the judge unfairly disposed of his application on November 6, 2018. The judge's oral decision is not a model of clarity. It is difficult to ascertain whether he overlooked Mr. Pratt's procedural fairness complaints, dismissed them out-of-hand, or avoided dealing with them by telling Mr. Pratt that he could file a new *habeas* application. In any of these scenarios, Mr. Pratt says the judge erred.

[68] Mr. Pratt says the judge should have set his application down for a hearing on its merits and provided the necessary directions pursuant to *Rule* 7.13 and 7.14 (see ¶17 and 19). The judge did neither.

[69] Rather, he declined to hear the application on its merits by summarily concluding Mr. Pratt's application was moot. He did so notwithstanding: (1) an apparent deprivation of Mr. Pratt's residual liberty, unchallenged by the respondents (November 6, 2018 marked Mr. Pratt's 25th day in close (solitary) confinement—15 days beyond his stated discharge date); (2) relevant documentation was not disclosed to Mr. Pratt nor did he have an opportunity for input in decisions respecting the ongoing deprivation of his liberty, whether for disciplinary and/or administrative reasons. The oral submissions from counsel left unexplained gaps as to why Mr. Pratt was still being detained in close confinement. There remained a live controversy. Legitimate fairness issues were raised. In my view, these issues warranted a hearing. At the very least, Mr. Pratt says the judge should have afforded him the opportunity to amend his application as opposed to sending him back to square one. I agree.

[70] Turning to the way the judge gathered and used information after rendering his decision on November 6, 2018, Mr. Pratt's complaints come as no surprise. Mr. Pratt says the judge's request for documentation and submissions post decision and his use of those materials to bolster prior reasons—without providing notice or the opportunity for Mr. Pratt to respond—is an obvious violation of due process/natural justice and was prejudicial to Mr. Pratt. Those complaints are warranted.

[71] The written decision bears little resemblance to the judge's oral decision. The judge proceeded to decide substantive factual and legal issues without any evidence or submissions from Mr. Pratt. For example, the judge concludes Mr. Pratt's detention after October 29, 2018 was for non-disciplinary reasons. This is a sharp change from the circumstances known during the teleconference on November 6 and appears to be based on records produced without notice to Mr. Pratt by the respondent correctional facility after the application was dismissed. As acknowledged by the respondents, the judge also went on to find the respondents had discharged their burden of proving that the deprivation was lawful. But this issue was not placed before the judge because the application was summarily dismissed without a hearing on the merits. The parties never got to this stage.

[72] At the end of his January 10, 2019 written decision the judge concluded:

> [53] In these circumstances, I was satisfied that the disciplinary matters that arose on or before October 25 were fully moot on November 6, 2018, and that regarding his continued administrative close confinement detention between

> October 30 and November 6, 2018, the Respondents have discharged their onus to establish that there is no realistic ground which if established, would be of sufficient substance to convince the court that it should grant the remedy of habeas corpus.
>
> [54] Therefore, the application for *habeas corpus* is dismissed at stage one.

[73] Although he arrives at the conclusion Mr. Pratt's application was "fully moot" and is "dismissed at stage one", it is important to note this was after he analyzed whether there was a deprivation of liberty, whether Mr. Pratt raised a legitimate complaint and the lawfulness (reasonableness) of Mr. Pratt's detention. For reasons never explained to the parties, and despite having unequivocally dismissed the application summarily on November 6, 2018, the judge conducted an analysis on the merits without holding a hearing. If a hearing is to be held, *Rule* 7 sets out the usual subjects addressed during the required motion for directions such as: setting a hearing date and dates for filing affidavits and briefs; ordering the detainer to bring the applicant to court for the hearing; the production of documents not already produced; the attendance of witnesses as required; and determining the documents which will constitute the record. None of this was done by the judge. Not only was it procedurally unfair for the judge do what he did, his decision discloses errors in principle.

[74] For now I note that the judge went on to establish new legal principles for the adjudication of *habeas* applications in the context of provincially-operated prisons—again, a matter he was not asked, nor required, to adjudicate. The judge provided no indication to the parties that he intended to do so. As previously noted, he invited no submissions. There is nothing procedurally fair about this.

[75] In the respondents' written submissions to this Court, they adopted a different approach to these complaints of an unfair process. They said the judge has broad discretion to set his own process, had the authority to request additional information, and there was nothing wrong with what he did. They put it this way:

> [73] The case at bar demonstrates that an in-court hearing is not necessary to determine whether an individual's detention is lawful. There was sufficient evidence, documentation, and representation made by the parties to enable the Learned Chambers Judge to conclude that the Respondents' actions were reasonable in the circumstances and the Appellant's detention in close confinement was lawful and not contrary to the legislation. Nothing regarding the November 6, 2018 telephone conference or supplementary returns provided by the Respondents, pursuant to s. 6 of the *Liberty of the Subject Act* was procedurally unfair to the Appellant or infringed the Appellant's s. 10 (c) *Charter* right.

[76] However, when the panel posed questions to counsel during oral submissions respecting the judge's subsequent gathering of information without notice to Mr. Pratt, the respondents' counsel acknowledged that the unilateral communications were not appropriate and the judge should have stopped after having rendered his decision on November 6, 2018. Late, but nevertheless an appropriate concession.

[77] I recognize the importance of judicial discretion. However, the process must still be procedurally fair and the parties should know what it is and how they are to participate. There was nothing procedurally fair in the events that unfolded after November 6, 2018 leading up to and including the written decision. I would allow this ground of appeal, and as a result set aside the judge's oral and written decisions and resulting order.

[78] Although the procedural flaws are dispositive of the appeal, I will go on to address how the judge erred in the exercise of his jurisdiction. I will address Mr. Pratt's challenges to certain legal principles set out in the judge's written decision in the next issue.

Did the judge err in the exercise of his habeas corpus jurisdiction?

[79] I refer back to the standard of review—that if a provincial superior court improperly exercises or improperly declines to exercise jurisdiction, this equates to an error of law and the correctness standard of review applies.

[80] Turning to the judge's first decision, rendered orally on November 6, 2018, I will reproduce it here for convenience as it is brief:

> Well, yes, thank you very much then, gentlemen. In review of all these materials here, gentlemen, it is my view that it is appropriate for the Court to decline its jurisdiction in this particular case as the documentation relates to matters on or before October 25th, 2018. By that, I mean I do not include within that the matters which were not adjudicated on from October 23rd until October 29th.
>
> So the opportunity is there if there's proper grounds for Mr. Pratt to revisit those by way of a new *habeas corpus* application. But, at this point, I am dismissing the existing October 25th, 2018 application as being basically moot. That means that the matters have been resolved. But although some of them start within the time frame, October 23rd, those are not part of that decision. They, obviously, adjudicated October 29th, could be, if necessary, the subject of a new application. And that's my decision in relation to the matter.

[81] For the same reasons expressed in the previous ground, I am satisfied Mr. Pratt raised legitimate procedural fairness concerns sufficient to question the lawfulness of his detention. To repeat, there was a clear deprivation of liberty. Mr. Pratt's application was neither moot on the day he filed it with the court (October 25, 2018), nor on November 6, 2018 when the judge declined jurisdiction to hear it. The line the judge drew at October 25, 2018 was artificial. There was a live unresolved issue: a continued deprivation beyond a discharge date for which there was no documentation before the court or provided to Mr. Pratt explaining why. More was required of the judge. Although I understand the respondents' concerns with open-ended applications, that issue does not realistically present itself here.

[82] In these circumstances, Mr. Pratt's application should have been set down for a hearing as of right. In my view, it was improper for the judge to decline jurisdiction to hear the application.

[83] Turning to the judge's written decision of January 10, 2019, I similarly conclude there was reviewable error. This error involves the improper exercise of jurisdiction rather than a decline of jurisdiction. That is because the judge proceeded to gather additional information (which was procedurally unfair) and then dealt with substantive issues on their merits notwithstanding he declined to do so in his first decision.

[84] In addition to these problems, Mr. Pratt says the judge made several legal errors in his interpretation and application of the law. Although not a determinative error, the judge incorrectly identified the time a prisoner can be held in continuous close confinement without further authorization as "in excess of 15 days". However, the governing *Regulation* was amended in 2017 to reduce the length of time permitted in close confinement from 15 to 10 days.

[85] Next I will deal with the most material error—the novel presumption of fairness championed by the judge that favours the respondent decision maker.

[86] As noted earlier, neither party placed this legal principle in issue, nor did they have the opportunity to provide submissions as they were not invited to do so. The judge ventured down this path on his own initiative and cited no legal precedent for his conclusion. The judge constructed what he termed a presumption of fundamentally fair treatment and process. There is no such presumption. This critical error permeated the judge's reasoning.

[87] During oral submissions before this Court, responding counsel acknowledged that even if the respondents had been invited to make submissions to the judge they would not have argued for the favourable presumption. In their written submissions to this Court, the respondents said that while they would not have relied upon such a presumption in any hearing on the merits, the judge did not err in his interpretation and that his declared "adjustment" of legal principles to suit the provincial context had not departed from the law respecting *habeas corpus*. Respectfully, the respondents' position is without merit.

[88] The judge determined that if the deprivation of liberty arises in a provincially-operated prison there is a presumption of fairness in favour of the provincial correctional officials.

[89] He reasoned the development of the presumption this way:

> [22] I bear in mind especially Justice Van den Eynden's reminder in *Gogan:* "It is clear the Supreme Court of Canada has directed the provincial superior courts should guard against unduly narrowing the scope of *habeas corpus* – which is a constitutionally protected right" (para. 27).
>
> [23] Justice Van den Eynden's comments in *Gogan*, are binding on this Court, however I will go on to suggest that they may be adjusted in the case at bar and still respect the spirit of binding precedent.[*12]
>
> *Footnote 12 provides: To be clear, I am speaking only for myself, and not on behalf of any other members of the court.
>
> [24] The most notable cases from the Supreme Court of Canada and the Nova Scotia Court of Appeal all concern *habeas corpus* applications arising in the federal penitentiary context.
>
> [25] The complexity and sophistication of the federal penitentiary scheme is reserved exclusively for "sentenced" inmates. (footnote omitted)
>
> [26] In the federal penitentiary context, the inmates are serving sentences of two or more years, and their applications typically involve profound matters such as the initial classification, or reclassification of an offender's status- whereas in the provincial correctional facility context, we find a mix of offenders serving sentences of up to two years less a day, and a large number of offenders on "provincial remand", whose applications necessarily involve less profound and more short-term matters, such as the imposition of disciplinary and administrative close confinement.
>
> [27] Although the decisions of the Supreme Court of Canada and the Nova Scotia Court of Appeal are binding upon this Court, at least insofar as the *ratio decidendi* of each of their decisions, and they are persuasive beyond the *ratio*

> *decidendi*, in my opinion, because there are significant differences between the factual and legal nature of the *habeas corpus* applications arising in the federal penitentiary context, as contrasted with the provincial correctional facility context, it is appropriate to adjust the principles applicable to the Nova Scotia provincial correctional facility context.
>
> [28] Bearing in mind that at stage two *habeas corpus* applications will examine the lawfulness of a material deprivation of liberty by reference to whether there has been a lack of procedural fairness, errors in the interpretation of the relevant legislation, or lack of the decision-maker's jurisdiction to act (all of which attract a correctness standard of review), and the reasonableness of the decision made (which attracts a reasonableness standard of review), I suggest that it is appropriate in the provincial correctional facility context to adjust the governing principles as follows:
>
> > a. Although provincial correctional services policies do appear have the force and effect of law (per s. 39 *Correctional Services Act*, S.N.S. 2007, c. 35 and *Jivalian v. Nova Scotia*, 2013 NSCA 2, at para. 31) even if they do not have the force of law (as I wrongly suggested at footnote 4 in *Coaker v. Nova Scotia (Attorney General)*, 2018 NSSC 291), generally speaking, if an institution has fundamentally fair policies made applicable to it, as I find are in existence at present, or internal rules to similar effect, and it follows those in any particular case, an inmate will have presumptively received fundamentally fair treatment and process, and not be able to make out an arguable case otherwise;
> >
> > b. If an inmate has received fundamentally fair treatment, absent other valid grounds for review, the court will not examine the merits of any disciplinary findings or sanctions imposed, including disciplinary close confinement permitted by s. 74(c) of the *Correctional Services Act* (*R. v. Van den Elsen-Finck*, 2005 NSSC 71, at paras. 145-197 per MacAdam J.);
> >
> > c. If an inmate is placed in administrative close confinement (i.e. non-disciplinary) per s. 74(b) of the *Correctional Services Act*, and has received fundamentally fair treatment, absent other valid grounds for review, *the court should be reluctant to examine the reasonableness of the decision to impose administrative close confinement.*
>
> [Emphasis added]

[90] As correctly identified by the appellant, this analysis is flawed. The appellant provided thorough and helpful submissions to explain the error. The following is a summary of those submissions:

- The judge's conclusion there should be different principles for *habeas corpus* in provincial correctional facilities (compared to those detained in

federal facilities) departs from the clear and established binding principles. The presumption could erode the important oversight role provincial superior courts have over unlawful detention claims by prisoners held in provincially-operated correctional facilities.

- There was no evidence before the judge to support his conclusion that provincial applications "necessarily involve less profound and more short-term matters" and in theory a deprivation of liberty in a provincial institution could exceed that imposed in a federal facility in terms of duration.

- In terms of the jurisprudence, the principles applied by courts in *habeas corpus* appear uniform across correctional bodies, as well as other bodies such as immigration authorities. For example, the Supreme Court of Canada in *Khela* reached the opposite conclusion. It determined those detained in federal prisons should have the same rights to *habeas corpus* as those detained in provincial prisons.

- One area in which the judge departed from the established principles was in finding that provincial correctional policies are "fundamentally fair":

> … generally, speaking if an institution has fundamentally fair policies made applicable to it, **as I find are in existence at present**, or internal rules to similar effect, and **it follows those in any particular case, an inmate will have presumptively received fundamentally fair treatment and process, and not be able to make out an arguable case otherwise.** [emphasis added]

- The judge found the provincial policies at issue to be "fundamentally fair" in the absence of any evidence, argument or precedent. The judge failed to identify whether he was referring to all correctional policies, or specific policies. The judge failed to provide any detailed analysis of the policies or provide reasons for his conclusions they are fair. In addition, policies can change. There was no proof these were the same policies in place on November 6.

- At the time of the November 6 teleconference, the respondents had not submitted copies of any correctional policies to the court in support of its position. The correctional policies at issue are not law, but rather matters of fact. In the absence of any evidence concerning the correctional policies and their application, the judge erred in law in making any findings concerning the "fairness" of the correctional policies.

- Alternatively, if the Nova Scotia correctional policies have the status of 'law', the fairness of the application of those policies by the respondent correctional facility involves mixed questions of fact and law requiring evidence. In the absence of such evidence concerning the application of otherwise fair policies, the judge erred in making any findings concerning the fairness of the process afforded Mr. Pratt in this case.

[91] I agree with the appellant's assertion that the correctional policies at issue in this case do not have the force of law. This was made clear by my colleague Justice Fichaud in *Jivalian v. Nova Scotia (Department of Community Service)*, 2013 NSCA 2 where he explained that in order for a policy to have the force of law, the governing legislation must explicitly authorize departmental employees to create policies that have the effect of law. There is no enabling provision in the *Correctional Services Act* or *Regulations* authorizing the Executive Director to create policies that have the force of law. Absent explicit authority, Nova Scotia correctional services policies do not have the force of law. That said, this is not an issue upon which the appeal turns.

[92] To conclude, I would allow this ground of appeal.

Additional considerations

[93] Mr. Pratt invited this Court to offer clarification and guidance. In his factum, Mr. Pratt stated:

> This appeal raises significant questions concerning the procedures to be employed by reviewing courts in response to applications for *habeas corpus*. It provides a rare and significant opportunity to this Court to clarify the steps that courts below should follow to protect the fairness and integrity of *habeas corpus* as [*sic*] fundamental remedy with historical and constitutional significance in our legal system and constitutional democracy.
>
> This appeal also indirectly raises access to justice questions as many *habeas corpus* claimants come before the court without the benefit of legal representation. In this context, it is of heightened importance that courts below employ procedures and practices that enhance access to justice, rather than closing the door in cases that engage significant human rights interests.

[94] There were numerous material shortcomings in the handling of this application. This Court's identification and response to these shortcomings hopefully provides clarity respecting the proper procedures and legal principles to be employed by the reviewing court with respect to *habeas* applications and will

guard against similar future errors and ensure that the remedy remains robust, as it should regardless of whether the applicant is in a provincial or federal prison.

[95] As stated, lower courts must diligently guard against the erosion of the *habeas corpus* remedy in the prison context. Fair and speedy processes are necessary to ensure the urgent objective of hearing *habeas corpus* applications on an expedited basis is realized.

[96] In *Beals c. Anctil*, 2018 QCCA 2000, the Quebec Court of Appeal calls upon judges, courts—both trial and appellate-level—to revise and correct their processes as necessary to ensure the urgent objective of hearing *habeas corpus* applications on an expedited basis is realized (¶39).

[97] To protect the *Charter* right to detention review and to best facilitate access to justice for self-represented *habeas corpus* applicants, lower courts can play a helpful role by simplifying and clarifying their *habeas* process. As Beveridge, J.A. noted in *Springhill Institution v. Richards*, 2015 NSCA 40:

> [159] For virtually all challenges to the actions of CSC, the applicant is self-represented. Simplicity in procedure is to be encouraged. ...

[98] As a starting point, *Rule* 7 provides a fairly comprehensive framework for ensuring *habeas* applications get the priority mandated over the lower court's business. The employment of timely motion for directions via video or teleconference—desirable tools to help sort through many preliminary matters that may arise—provides a venue to work through some of the challenges self-represented prisoners face in marshalling their applications.

[99] Some courts, such as the Court of Queens Bench in Alberta, have developed accelerated review processes to address the high number of self-represented *habeas* applicants (*Latham v. Her Majesty the Queen*, 2018 ABQB 69). My reference is no indication one way or the other of an endorsement, rather I mention *Latham* to illustrate that some courts have developed detailed processes.

[100] These comments are intended as constructive and sensitive to the important and challenging obligations of provincial superior courts in their oversight function. Beyond the foregoing, the actual development of its timely, clear, fair and effective processes is best left to the lower reviewing court.

Disposition

[101] I would allow the appeal and set aside the decisions below and resulting order. The appellant was represented by Dalhousie Legal Aid on appeal and, pursuant to *Rule* 77.03(5), I would award costs payable to Dalhousie Legal Aid by the respondents in the amount of $3,000.00, inclusive of disbursements.

Van den Eynden, J.A.

Concurred in:

Wood, C.J.N.S.

Saunders, J.A.