SUPREME COURT OF NOVA SCOTIA

Citation: *Williams, Ryan, Lawrence, Hiles v. East Coast Forensic Hospital*, 2019 NSSC 214

Date: 20190705
Docket: Hfx Nos. 489148, 489001, 489019, 489002
Registry: Halifax

Between:

Jeremy Ross Williams

Applicant

v.

East Coast Forensic Hospital and Central Nova Scotia Correctional Facility

Respondents

Daniel Ryan

Applicant

v.

East Coast Forensic Hospital and Central Nova Scotia Correctional Facility

Respondents

Marcel David Lawrence

Applicant

v.

East Coast Forensic Hospital and Central Nova Scotia Correctional Facility

Respondents

Gregory Hiles

Applicant

v.

East Coast Forensic Hospital and Central Nova Scotia Correctional Facility

Respondents

Judge: The Honourable Justice Ann E. Smith

Heard: June 25, 27 and 28, 2019, in Halifax Nova Scotia

Decision: *{Was released to parties July 5, 2019.}*

Counsel: Jeremy Ross William, Self-represented Applicant
Amanda Whitehead; Kathleen Mitchell, for Respondent Nova Scotia Health Authority
Adam Norton, for Respondent Attorney General of Nova Scotia

By the Court:

Introduction

[1] These four *Habeas Corpus* motions were heard together at the request of each Applicant, with the consent of the Respondents and the approval of the Court.

[2] *Habeas Corpus* roughly translated is Latin for "produce the body." In other words, that a person be physically brought before the Court when he challenges the lawfulness of his detention.

[3] In Canada, if an individual believes that they are unlawfully confined, a writ of *habeas corpus* may be used to challenge the alleged illegal confinement.

[4] Each of Mr. Jeremy Ross Williams, Mr. Gregory Hiles, Mr. Marcel David Lawrence and Mr. Daniel Ryan filed Notices of *Habeas Corpus* with this Court on June 6 (Mr. Williams), June 10 (Mr. Ryan and Mr. Hiles) and June 11 (Mr. Lawrence), 2019. Each Applicant has been found not criminally responsible ("NCR") for criminal offences of which they were accused. Each is a patient at the East Coast Forensic Hospital ("ECFH") pursuant to disposition orders of the Nova Scotia Criminal Code Review Board ("Review Board"). Each Applicant challenges the legality of his recent transfer from the ECFH Rehabilitation Units ("Rehab Units") to the Mentally Ill Offenders Unit ("MIOU").

[5] Each Applicant and counsel for the NSHA and Attorney General agreed that the four motions should be heard together. The motions were heard on June 25, 27 and 28, 2019.

The Evidence before the Court

[6] Each Applicant testified on his own behalf. The NSHA filed the Affidavit of Dr. Aileen Brunet, psychiatrist. Dr. Brunet was cross-examined on her affidavit.

[7] In their Notices of *Habeas Corpus*, the Applicants variously named the Central Nova Scotia Correctional Facility and the Attorney General of Nova Scotia as Respondents. After hearing from counsel and each Applicant, this Court determined that the proper respondents to the motion were the NSHA (ECFH) and the Nova Scotia Correctional Facility (the "Facility").

[8] Counsel for the Attorney General filed the Affidavit of Mr. Todd Henwood, a Captain at the Central Nova Scotia Correctional Facility who provides safety and security services to the ECFH. Mr. Henwood was cross-examined on his affidavit.

[9] The Applicant, Mr. Williams, subpoenaed Ms. Amanda Crabtree and Rachel Boehm as witnesses on the motion. Each gave evidence and was cross-examined.

[10] I have considered all of the evidence before the Court, but will not refer to all of it in this decision.

The Positions of the Parties

[11] Each Applicant says that his residual liberty rights were violated when Dr. Aileen Brunet, psychiatrist, and members of his health care team suspended his passes on the basis of what each says was hearsay evidence from another patient who identified them as a "ring" bringing drugs into the ECFH. Dr. Brunet's June 4, 2019 order moving them to the MIOU was for a minimum 30-day period.

[12] Each Applicant objects to being transferred to the MIOU and losing his previous levels of community access. They each say there was only hearsay evidence which led to their transfers. They each request to be transferred back to the Rehab Units and have their community access passes reinstated.

[13] The Respondent Nova Scotia Health Authority ("NSHA") responded to each notice, in part, on the basis that the Review Board scheme set forth in Part XX.1 of the *Criminal Code* constitutes a statutory review mechanism which "provides for a review at least as broad as that available by way of *habeas corpus* and no less advantageous", an exception to the availability of *habeas corpus* confirmed by the Supreme Court of Canada in *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29 ("*Chhina*").

[14] The Attorney General's position on behalf of the Facility is that while *Civil Procedure Rule* 7.12(3) requires that the Attorney General be a respondent if the detention has any connection to the Government of Nova Scotia, that none of the Applicants is an offender as defined in the *Correctional Services Act*, SNS 2005, c. 37 and therefore has not been ordered into the care and custody of the Correctional Services Division pursuant to a Court or prescribed order (*Correctional Services Act*, SNS 2015, s. 2(t)).

[15] Further, the Attorney General says that the NSHA is a separate entity from Her Majesty the Queen in Right of the Province (*Health Authorities Act*, SNS 2015 c. 1, sections 13 and 18). The Attorney General says that the Central Nova Scotia Correctional Facility is not the appropriate party to respond to the *habeas corpus* claims, as it is not a decision maker, and would not, if an order was made by this Court to discharge any of the Applicants from their current conditions, (without direction from the NSHA) because the NSHA and the Nova Scotia Criminal Review Board are the only entities which exercise care and control over the Applicants.

Law and Analysis

[16] In *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29 Justice Karakatsansis described the writ of *habeas corpus* as an ancient legal remedy that is fundamental to individual liberty and the rule of law:

> The writ of *habeas corpus* is an ancient legal remedy that remains fundamental to liberty and the rule of law today. Dating back to the 13th century, this writ guarantees the individual's protection from unlawful deprivations of liberty. Entrenched in s. 10(c) of the *Canadian Charter of Rights and Freedoms*, the right to *habeas* corpus permits those in detention to go before a provincial superior court and demand to know whether the detention is justified in law. If the relevant authority cannot provide sufficient justification, the person must be released. (para. 1)

[17] Justice Karakatsansis then reviewed two exceptions to the availability of *habeas corpus*:

> Despite the importance of *habeas corpus*, this Court has carved out two limited exceptions to its availability. First, a provincial superior court should decline jurisdiction to entertain an application for *habeas corpus* where a prisoner is using the application to attack the legality of their conviction or sentence, as this is properly accomplished through the ordinary appeal mechanisms set out in the *Criminal Code*, R.S.C. 1985, c. C-46 (see *R. v. Gamble*, [1988] 2 S.C.R. 595, at pp. 636-37). Second, a provincial superior court should also decline jurisdiction where the legislator has put in place "a complete, comprehensive and expert statutory scheme which provides for a review at least as broad as that available by way of *habeas corpus* and no less advantageous" (*May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 40). This second exception has come to be known as the *Peiroo* exception (see *Peiroo v. Canada Minister of Employment and Immigration*) (1989), 69 O.R. (2d) 253 (C.A.)).
>
> [emphasis of the Court] (para. 2)

[18] The Applicants do not challenge the legality of their NCR status, so the first exception is not applicable.

[19] In terms of the second exception, this Court must ask:

> First, it is necessary to ask upon what basis the legality of the detention is being challenged. In other words, what are the grounds in the applicant's *habeas corpus* application? […]
>
> Second, it is necessary to ask whether there is a complete, comprehensive and expert scheme that is as broad and advantageous as *habeas corpus* in relation to the specific grounds in the *habeas corpus* application.
>
> (*Chhina*, at paras. 42-43)

[20] Subsection 672.56(1) of the *Criminal Code* provides that the Review Board "may delegate to the person in charge of the hospital authority to direct that the restrictions on the liberty of the accused be increased or decreased within any limits and subject to any conditions set out in" the Board's disposition.

[21] Each of the Applicants' Disposition Orders contain delegation provisions pursuant to subsection 672.56(1). ECFH says that it was exercising this delegated authority when it transferred the Applicants to the MIOU.

[22] Subsection 672.56(2) requires a hospital to notify the Review Board where there have been significant increases in the restrictions on an accused's liberty, which have lasted for longer than seven days. The Review Board must then hold a hearing:

> **Review in case of increase on restrictions on liberty**
>
> **(2.1)** The Review Board shall hold a hearing to review a decision to significantly increase the restrictions on the liberty of the accused, as soon as practicable after receiving the notice referred to in subsection 672.56(2).

[23] ECFH provided the Review Board with the requisite notice under subsection 672.56(2). The Applicant's Review Board hearings are scheduled for July 8-9, 2019, approximately five weeks after their transfer to the MIOU.

Findings – Jurisdictional Issue

[24] I find that the Review Board scheme in Part XX.1 of the *Criminal Code* is a "complete comprehensive and expert statutory scheme which provides for a review

at least as broad as that available by way of *habeas corpus* and no less advantageous" (*Chhina* at para. 59).

[25] I so find because where section 672.56(2) of the *Criminal Code* applies, the hospital has admitted that there has been a significant increase in the restrictions on an accused's liberty, for a period longer than seven days. By way of contrast, an applicant for *habeas corpus* has the burden "to establish a deprivation of liberty and to raise a legitimate ground for questioning the legality of that deprivation" (*Chhina* at para. 17).

[26] Further, review hearings are not intended to be adversarial and the Review Board must search out and consider evidence favouring the discharge or release of the NCR accused. I refer to the decision of the Supreme Court of Canada in *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625 at para. 54:

> The regime's departure from the traditional adversarial model underscores the distinctive role that the provisions of Part XX.1 play within the criminal justice system. The Crown may often not be present at the hearing. The NCR accused, while present and entitled to counsel, is assigned no burden. The system is inquisitorial. It places the burden of reviewing all relevant evidence on both sides of the case on the court or Review Board. The court or Review Board has a duty not only to search out and consider evidence favouring restricting NCR accused, but also to search out and consider evidence favouring his or her absolute discharge or release subject to the minimal necessary restraints, regardless of whether the NCR accused is even present. This is fair, given that the NCR accused may not be in a position to advance his or her own case. The legal and evidentiary burden of establishing that the NCR accused poses a significant threat to public safety and thereby justifying a restrictive disposition always remains with the court or Review Board. If the court or Review Board is uncertain, Part XX.1 provides for resolution by way of default in favour of the liberty of the individual.
>
> [emphasis of the Court]

[27] Given the responsibilities of the Review Board and the fact that an NCR accused has no burden of advancing his position, the process is more advantageous to the NCR accused, than is a *habeas corpus* hearing.

[28] Further, NCR accused have a direct right of appeal to the Court of Appeal from a Review Board disposition order, which is another aspect of the scheme in Part XX.1 of the *Criminal Code*.

[29] Section 672.72 of the *Criminal Code* provides that: "Any party may appeal against a disposition made by…a Review Board" within 15 days after receiving a copy. This includes the NCR accused. The appeal goes to the Nova Scotia Court of Appeal, which under subsection (3) must hear the appeal "as soon as practicable."

[30] Section 672.78 outlines the Court of Appeal's powers on an appeal from a disposition. The Court of Appeal "may make an disposition under section 672.54…that the Review Board could have made" – including an absolute discharge or a conditional discharge; refer the matter back to the Review Board, with directions; or "make any other order that justice requires" (see subsection 672.78(3)).

[31] In *Cooper v. Eastern Health*, 2018 NLSC 79 Butler J. declined to exercise jurisdiction to consider Mr. Cooper's request for a writ of *habeas corpus* relative to a disposition order of the province's *Criminal Code* Review Board. Justice Butler held that the proper procedure was an appeal from the disposition order.

[32] In doing so, Justice Butler followed the British Columbia Court of Appeal decision in *Staetter v. British Columbia (Director of Adult Forensic Psychiatric Services*), 2017 BCCA 68 where the Court held that the appeal provisions provided the requisite "comprehensive procedure" to satisfy the second exception to the availability of *habeas corpus* (para. 10).

[33] This Court finds that the second exception to *habeas corpus* applies, and therefore I decline to exercise jurisdiction over each *habeas corpus* claim.

Provisional Findings – *Habeas Corpus*

[34] ECFH argued, in the alternative, that if this Court assumes *habeas corpus* jurisdiction that it should find that the Applicants' detention for 30 days in the MIOU was reasonable in the circumstances, and ECFH's decision to transfer the Applicants to the MIOU is entitled to deference by this Court.

[35] In *Chhina*, Justice Karakatsanis summarized the test for *habeas corpus*:

> An application for *habeas corpus* requires the applicant to establish a deprivation of liberty and to raise a legitimate ground for questioning the legality of that detention. If this is accomplished, the onus then shifts to the authority in question to show that the deprivation of liberty is lawful. In order for detention to be lawful, the decision-maker must have authority to order detention, the decision-

> making process must be fair, and the decision to detain must be both reasonable and compliant with the *Charter* (*May*, at para. 77; *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 72). Changes in conditions or orders leading to further deprivations of liberty may also be challenged in the same manner.

[36] Had I determined that the Court should exercise *habeas* corpus jurisdiction, I would have determined that each Applicant has raised a legitimate ground for questioning the legality of his detention. Therefore, the onus would have shifted to ECFH to show that this deprivation of liberty is lawful.

[37] In *Chhina*, Justice Karakatsanis reviewed three factors in considering whether the scheme set out in the *Immigration and Refugee Protection Act*, S.C. 2001 provided Mr. Chhina, a refugee in detention, with a review at least as broad as that available by way of *habeas corpus*: the authority of the decision maker; the fairness of the process; and the reasonableness/constitutional compliance of the decision.

[38] ECFH has the lawful authority to restrict the liberty of patients, subject to the limits and conditions set by the Review Board. This authority has been delegated to ECFH by the Review Board, in accordance with the *Criminal Code*.

[39] Section 672.56(1) of the *Criminal Code* provides:

> **Delegated authority to vary restrictions on liberty of accused**
>
> **672.56(1)** A Review Board that makes a disposition in respect of an accused under paragraph 672.54(b) or (c) may delegate to the person in charge of the hospital authority to direct that the restrictions on the liberty of the accused be increased or decreased within any limits and subject to any conditions set out in that disposition, and any direction so made is deemed for the purposes of this Act to be a disposition made by the Review Board.

[40] There are no provisions in the Applicants' Disposition Orders that would prevent ECFH from moving them to the MIOU where necessary for clinical reasons and/or reasons of safety and security.

[41] The decisions to transfer the applicants were made at a management-level meeting on June 4, 2019, based primarily on a patient report that identified the Applicants as being a "ring" involved in bringing drugs into the ECFH and the observations of nurses that certain patients were under the influence. Dr. Brunet's affidavit evidence was that she spoke with this patient before making the decision

to transfer the Applicants to the MIOU and found him to be credible. However, her evidence at the hearing was that the patient was "reasonably credible."

[42] Subsection 672.56(2)(b) of the *Criminal* Code provides that a person who significantly increases the restrictions on an accused's liberty must "give notice of the increase as soon as is practicable to the accused… ." The Applicants were given such notice.

[43] The ECFH says that it was reasonable to transfer the Applicants to the MIOU for reasons of safety and security, based on what they say was credible information about their involvement in bringing contraband substances into the facility.

[44] Transfer decisions will be reasonable when they fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Mission Institution v. Khela*, 2014 SCC 24):

> [73] A transfer decision that does not fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" will be unlawful (*Dunsmuir*, at para. 47). Similarly, a decision that lacks "justification, transparency and intelligibility" will be unlawful (*ibid*). For it to be lawful, the reasons for and record of the decision must "in fact or in principle support the conclusion reached" (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 12, quoting with approval D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304).
>
> [74] As things stand, a decision will be unreasonable, and therefore unlawful, if an inmate's liberty interests are sacrificed absent any evidence or on the basis of unreliable or irrelevant evidence, or evidence that cannot support the conclusion, although I do not foreclose the possibility that it may also be unreasonable on other grounds. Deference will be shown to a determination that evidence is reliable, but the authorities will nonetheless have to explain that determination.
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> [75] A review to determine whether a decision was reasonable, and therefore lawful, necessarily requires deference (*Dunsmuir*, at para. 47; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59; *Newfoundland and Labrador Nurses' Union*, at paras. 11-12). An involuntary transfer decision is nonetheless an administrative decision made by a decision maker with expertise in the environment of a particular penitentiary. To apply any standard other than reasonableness in reviewing such a decision could well lead to the micromanagement of prisons by the courts.
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> [emphasis by the Court]

[45] Counsel for ECFH agreed that the Supreme Court's reasoning in this case also applies in the hospital setting. This Court notes that the Supreme Court in *Mission Institute* also stated (para. 88) that "when liberty interests are at stake, procedural fairness also includes measures to verify the evidence being relied upon. If an individual is to suffer a form of deprivation of liberty, 'procedural fairness includes a procedure for verifying the evidence adduced against him or her'", referencing *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38 at para. 56.

[46] The evidence that the Applicants were involved in a "ring" bringing drugs into the Facility was scant. It consisted of the report of a fellow patient who fingered the Applicants in a report to a nurse on the Rehab Unit. There was evidence of patients being under the influence around the same time (June 1st weekend). No drugs were found on the Applicants or in their rooms. No camera video evidence identified the Applicants with drugs or exchanging drugs with a visitor.

[47] Counsel for ECFH argued that the decision to transfer the Applicants to the MIOU was not punitive, but one based on safety and security of staff and patients.

[48] Had this Court determined to exercise *habeas corpus* jurisdiction, I would have concluded that the decision to transfer the Applicants from the Rehab Unit to the MIOU was unreasonable and unlawful because the decision-making process was procedurally unfair, being based almost entirely on the unverified report of a co-patient. The transfer decision clearly was not made for clinical reasons. This Court recognizes that decisions made by a facility such as ECFH must be afforded significant deference. The hospital's decision-makers must manage a vulnerable patient population in circumstances that can be volatile. There are legitimate concerns relating to staff and patient safety and health. However, the decision to transfer the Applicants to the MIOU significantly affected their residual liberty rights. As such, each Applicant was entitled to have some procedure that verified the evidence against him. This is not evidence beyond a reasonable doubt, or even evidence on a balance of probability, but surely it is more than the uncorroborated report of a fellow patient who was described by Dr. Brunet as "reasonably credible."

[49] Finally, I would not have found that the Facility was a decision maker in the same sense as the ECFH and was not an appropriate party to respond to the Applicants' *habeas corpus* claims.

Conclusions

[50] **(1)** The Court declines to exercise its *habeas corpus* jurisdiction on the basis that the Review Board scheme in Part XX.1 of the *Criminal Code* constitutes a statutory review mechanism that "provides for a review at least as broad as that available by way of *habeas corpus* and no less advantageous" within the meaning of *Chhina*.

(2) Had this Court exercised *habeas corpus* jurisdiction it would have found the transfer decisions to be procedurally unfair and therefore, unreasonable and unlawful.

[51] Finally, I note that the Applicants' restriction of liberty hearings are scheduled for July 8 and 9, 2019, approximately five weeks after their transfer to the MIOU. Whether the hearing was scheduled "as soon as practicable" after receiving notice of significant increased restrictions is not an issue before this Court. This Court does note, however, the observation of the Ontario Court of Appeal in *Saikley (Re)*, 2012 ONCA 92 that:

> All institutions responsible for the vulnerable community of detained NCR patients, including the courts, are obliged to ensure that hearings to which patients are entitled are conducted and a decision is rendered as expeditiously as is practicable.
>
> (para. 72)

Smith, J.