SUPREME COURT OF NOVA SCOTIA
Citation: *Brewer v. Her Majesty the Queen*, 2020 NSSC 308

Date: 20201029
Docket: SAM 499646
Registry: Amherst

Between:

Richard Brewer

Applicant

v.

Her Majesty the Queen and
Superintendent of the Springhill Institution

Respondent

DECISION

RE: *HABEAS CORPUS* APPLICATION

Judge: The Honourable Justice Jamie Campbell

Heard: October 21, 2020, in Amherst, Nova Scotia

Counsel: Hanna Garson, for the Applicant
Sahand Farahanchi and Ami Assignon, for the Respondent

[1] Richard Brewer's case is about how broadly *habeas corpus* can or should be interpreted. It is about whether the ancient and ever evolving writ has evolved to a point at which the court should inquire into the policies that govern the form of medical or dental treatment that a prisoner receives. *Habeas corpus* has been referred to as the "palladium of liberty". But what is liberty in this context? Does it include the right to receive dental treatment during a pandemic?

Summary

[2] Mr. Brewer says that because he could not access dental services when the provision of non-emergency dental services was suspended for inmates within federal penitentiaries and similar services were available for members of the community, he was denied the right to equal access to those services. He says that the denial amounted to a deprivation of his residual liberty within the institution. He says that had he been able to see a dentist when he wanted, his dental concerns could have been addressed by having his teeth filled. Now he must either lose the teeth or have root canals. He can access either procedure. An extraction is paid for by the Correctional Service of Canada. A root canal may not be. He wants to have the root canals paid for as a remedy under *habeas corpus*.

[3] There was no deprivation of liberty of the kind addressed by the writ of *habeas corpus*. *Habeas corpus* is not static. It evolves. But that evolution must be based on principle within the scope of its purpose. *Habeas corpus* has protected against the unlawful restriction of an incarcerated person's residual liberty. That is its purpose. Being confined against one's will is a substantial restriction of liberty. Further confinement or physical restraint within that context must be justified by law and is subject to review through *habeas corpus.* It would be an arbitrary and unprincipled transformation of the writ to allow it to become an expedited administrative review of policies and decisions relating to the general management of penitentiaries and correctional facilities. *Habeas corpus* has an exalted status in law because it deals with the physical liberty of vulnerable people. It will not retain that status if it evolves into a complaint procedure.

Evidence

[4] Richard Brewer is 52 years old. He is incarcerated at the Springhill Institution. In March 2020 and again in June 2020 he started to have pain in his lower left molar. The filling had fallen out. The pain spread to his upper left molar. The pain was constant and enough to impair his ability to eat, sleep and function

during the day. On June 2, 2020 he made an inmate request to see a dentist about these concerns. That request was received by Registered Nurse Catherine Kearley. She met with Mr. Brewer for an assessment on that date. She noted that the filling had fallen out and that Mr. Brewer expressed sensitivity to hot and cold, as well as having pain that interfered with eating. The symptoms described by Mr. Brewer did not reach the level of an emergency, so Mr. Brewer's case was added to the waiting list as "urgent".

[5] The assessment of whether Mr. Brewer's case was an emergency was based on a memorandum issued by the Director General, Clinical Services and Public Health. That memorandum, was issued to deal with the Covid-19 pandemic. It ordered that routine/elective and non-essential dental care, including urgent matters, for incarcerated individuals would be suspended on March 27, 2020. Emergency treatment would continue, on a case-by-case basis. An emergency was defined in the memorandum as oral/facial trauma, significant infection and pain that could not be controlled pharmacologically, and uncontrolled bleeding. If the inmate's request was considered an emergency an appointment with a dentist would be booked immediately. That protocol is like those put in place by the Provincial Dental Board of Nova Scotia.

[6] On March 15, 2020, the Provincial Dental Board of Nova Scotia strongly recommended that non-essential and elective dental services be suspended but that emergency treatment should continue. On March 23, 2020, the Dental Board issued an advisory suspending dental services unless it was deemed necessary to perform an emergency procedure. On March 31, 2020, Covid-19 began to show community transmission in Nova Scotia, the protocol was amended to require that emergency treatment could only be provided at designated Emergency Dental Clinics across the province.

[7] After the June 2, 2020 meeting with Catherine Kearley RN, Mr. Brewer says that he went to the nursing station most days over the next two months and tried to alert the nurses to the amount of pain that he was experiencing.

[8] On July 30, 2020 Mr. Brewer's file was added to a nurse practitioner's schedule to be reviewed for his dental concerns. On August 2, 2020 Catherine Kearney RN met with Mr. Brewer and noted that his lower left and upper left molars were black, and one was missing a filling. She also noted that Mr. Brewer was taking more of the pain reliever Motrin than provided for in the prescription.

Mr. Brewer says that he was told that no dentist was coming to the institution because the dental suite had to be upgraded to deal with Covid-19 concerns.

[9] Mr. Brewer met with the nurse practitioner on August 11, 2020. He told the nurse that he had been taking more Motrin that prescribed. The nurse discussed the health risks with him and told him that the pharmacy would not send more than was prescribed. Mr. Brewer says that the Motrin was not managing his pain and no other form of pain management was offered to him. The nurse practitioner told Mr. Brewer that because of the Covid-19 pandemic the institution's non-emergency dental care was suspended until further notice. She checked Mr. Brewer's teeth and arranged to book an appointment for him with a dentist outside the institution. That was for August 19, 2020.

[10] Mr. Brewer went to that appointment at Elm Dental in Amherst. The institution received a dental report. It stated that Mr. Brewer needed "RCT or extraction most likely". An attempt could be made to save the teeth by removing decay and putting in a temporary filling. If that did not work, then an extraction or root canal were other choices.

[11] Mr. Brewer had a dental appointment with Dr. Gary Clarke on August 24, 2020. Dr. Clarke is the dentist contracted to provide services at the Springhill Institution. Dr. Clarke said that Mr. Brewer had acute pulpitis and prescribed antibiotics with Ketorolac for pain management. A filling was no longer an option. Root canals and extractions were required. Dr. Clarke placed Mr. Brewer on the waiting list for extractions.

[12] Mr. Brewer later reported that the swelling in his cheek had gone down since taking the antibiotics. The pain relief medication had turned out to be very effective. He gained back the weight that he lost while he was in pain. He has now run out of the pain medication and the pain has returned.

[13] Mr. Brewer does not want to have the teeth taken out. He does not want to lose the molar teeth and worries about the health implications. He would prefer to have root canals instead. The Correctional Service of Canada will not cover the cost of the root canals. He says that he was deprived of his ability to access and make choices about his treatment. Had he been able to access a dentist when he asked for one, he says that the root canal would not have been required and the situation could have been resolved by filling his teeth.

[14] The issue is not now whether Mr. Brewer can access dental services. He can have the teeth removed or he can have a root canal if he wants one. He would have to pay for it though.

Health Services

[15] The Correctional Service of Canada has a legal obligation to provide every inmate with essential health care and reasonable access to non-essential health care. *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 86. That health care must conform to professionally accepted standards. The Correctional Service of Canada provides those services to inmates according to guidelines set out in the National Essential Health Services Framework. That document sets out the principles that apply to making decisions regarding essential and non-essential services, the procedures for requesting and approving access to services and cost coverage for those services. Some services are provided within institutions and in some cases inmates are sent for treatment in the community. That may be for emergency services or for health care services that cannot be provided within the institution. Inmates in Springhill have access to dental services at the dental suite within the institution and through community dental services depending on their needs.

[16] There is a procedure that applies to the management of wait times for inmate dental service requests. Those requests are triaged by a nurse at the institution according to a "Dental Priority Classification" and the total time already waited. A dentist under contract, in this case Dr. Clarke, provides services within the institution.

[17] As with almost everything else, Covid-19 disrupted how those protocols would be applied. A pandemic was declared by the World Health Organization on March 11, 2020. Dental clinics are particularly vulnerable to Covid-19 transmission. Penitentiaries are facilities where many people are placed in close contact. If the virus gets into the institution the risk of transmission is high. The Correctional Service of Canada suspended institutional dental clinics. The March 27, 2020 memorandum from the Director General, Clinical Services and Public Health put that into effect so that only emergency services would be provided.

[18] Gradual reopening started. In the community, dental clinics were authorized to provide emergency and urgent dental services as of May 27, 2020. Beginning on June 19, 2020 elective and non-urgent dental care could be provided. People in the

community could then access a full range of dental services by mid-June. The response to the pandemic was different in the institutional setting of penitentiaries.

[19] On July 28, 2020, Correctional Service of Canada sent a letter to Calian Ltd., which is the private company that subcontracts dentists for institutions run by the Correctional Service of Canada. That letter required the resumption of work by dentists in those institutions. The Correctional Service of Canada's Technical Service completed an air-flow study of the dental suite at the Springhill Institution. It was informed on August 10, 2020 that the dental suite met the requirements to proceed with aerosolizing and non-aerosolizing procedures. Dental services resumed at the institution on August 25, 2020 based on the availability of Dr. Clarke, the contracted dentist who provides dental care at the institution.

[20] The dispute in this case is about the dental care that Mr. Brewer received during the time when the Correctional Service of Canada was responding to the crisis created by the Covid-19 pandemic. It is not about the general level of health or dental care provided to an inmate in the normal course of things. Mr. Brewer argues that he has suffered unnecessarily because of the way that the institutional response to Covid-19 has been managed. While people in the community could access dental care for urgent matters as of May 27, he could not see a dentist until August 24. He argues that he was denied access to dental care that was equal to that offered in the community and that the denial is an unlawful deprivation of his liberty.

Residual Liberty

[21] *Habeas corpus* was made by English judges. They transformed a common device for moving people about in aid of judicial process into an instrument by which they supervised imprisonment orders made anywhere, by anyone and for any reason. The driving force behind the writ was the prerogative, which was the power possessed only by the monarch. As a prerogative writ *habeas corpus* expressed the king's concern to know the circumstances whenever one of his subjects was imprisoned. While it may have had roots in the Middle Ages, it was made a powerful instrument by judges who were responding to a mix of social, religious, and political controversies in the decades around 1600. *Habeas Corpus: From England to Empire*, Halliday, Paul D., The Belknap Press of Harvard University, 2010. It was at that time that the writ took its modern form in which the applicant could demand justification for their detention. *Canada (Public Safety and Emergency Preparedness) v. Chhina* 2019 SCC 29, at para. 19, citing Farbey,

Judith and Robert J. Sharpe and Simon Atrill, *The Law of Habeas Corpus*, 3rd ed. New York; Oxford University press, 2011.

[22] *Habeas corpus* was created in a time of change and one of its features is its ability to respond to changing environments. One of the points of the prerogative writ was its ability to create the means to have justice done even when the law had not previously provided those means. It was a creature of common law courts that was equitable in all but name. It was and is an instrument for the protection of vulnerable people. And while it was never narrow and formalistic it had, as "its grand purpose - the protection of individuals against the erosion of their rights to be free from wrongful constraints upon their liberty". *Jones v. Cunningham*, 371 U.S. 236 (1962), at p. 243.

[23] In *Mission Institution v. Khela* 2014 SCC 24, the Supreme Court noted the necessity for the writ of *habeas corpus* to expand over time. But that expansion should be within the scope of its purpose. That purpose has been to protect "liberty". Liberty can be defined broadly as having the power and authority to fulfill one's potential and to be free of coercion and external constraint. It is with that second sense of liberty that *habeas corpus* is concerned. But it does not address every circumstance in which a person is subject to some external constraint on their freedom to act as they wish. The Latin phrase is loosely translated as "produce the body", *Chhina* at para. 19. It is concerned with the deprivation of liberty that arises from a form of physical or bodily detention. A deprivation of liberty may arise in different ways. It may relate to the initial decision requiring the detention. Or it may relate to a further deprivation of liberty based on a change in the conditions of detention or the continuation of detention. The further deprivation of liberty can arise, for example, when a prisoner is transferred from a lower to a higher security institution. It can arise with an extended detention or a detention of uncertain duration. *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459.

[24] There are two instances in which a provincial superior court can decline to hear a *habeas corpus* application. The first is where a prisoner seeks to attack the legality of their conviction or sentence. There is an appeal process for that. The second is where there is a comprehensive scheme regulating the determination and review of the matter that is as broad or broader than the traditional scope of *habeas corpus* review. Those two exceptions presume however that the application, which is framed as a *habeas corpus* application is in fact a *habeas corpus* application. Framing an application as *habeas corpus* does not guarantee that it will be accepted as such.

[25] Canadian courts treat *habeas corpus* applications as a priority. It is after all a time sensitive remedy. It provides a summary procedure by which a person can test the validity of their detention. In *Nova Scotia Civil Procedure Rule* 7.13(1) says that "*Habeas corpus* takes priority over all other business of the court." The Notice for *habeas corpus* must include, among other things, the name and place of detention, the reasons given to the applicant for the detention, and "information about what prevents the applicant from leaving the place of detention." When an application has been filed a judge must "immediately" appoint the earliest practical time to give directions on the course of the proceeding, order the person detaining the applicant to bring them before the judge, order the production of documents relating to the detention, and cause the parties to be notified of the time, date and place of the hearing for directions. These are urgent matters, dealt with summarily, because they engage the liberty interest of the applicant to be free from unlawful detention. *Habeas corpus* is the tool by which the court supervises the power of state authorities to limit a person's liberty by confining or detaining them.

[26] Inmates in prisons, by definition have had restrictions placed on their liberty. Obviously, they are not free to come and go as they please. But when the decision of prison administrators has the effect of reducing the residual liberty of an inmate the inmate is entitled to seek review of the decision through *habeas corpus*. *Habeas corpus* is available to challenge confinement in a Special Handling Unit, or administrative segregation, because it is a form of detention that is distinct and separate from that imposed on the general inmate population. It involves a significant reduction in the residual liberty of the inmate. It is a new detention that purports to rest on its own foundation of legal authority. But *habeas corpus* does not lie to challenge "any and all conditions of confinement" including "the loss of any privilege enjoyed by the general inmate population". It lies 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 privileges, is more restrictive or severe than the normal one in an institution." *R. v. Miller*, [1985] 2 S.C.R. 613, at para. 35.

[27] *Habeas corpus* by its nature must adapt and evolve but the adaptation and evolution of the remedy must respect the goals and purpose of the writ. The expansion of its scope to include the protection of the rights of incarcerated persons is an example of that. The right to seek that relief was not always available to prisoners challenging internal disciplinary decisions. At common law a person convicted of a felony and sentenced to prison was considered to be without rights. That was why Canadian courts refused to review the decisions of prison officials.

That changed in 1980 with the decision in *Martineau v. Matsqui Institution*, [1980] 1 S.C.R. 602 in which Justice Dickson, as he then was, said that elementary protection was required when a person was deprived of his liberty by being placed in a "prison within a prison".

[28] The scope of *habeas corpus* expanded even more with *Khela*. That decision confirmed that a decision to transferring an inmate from a medium security institution to a maximum security institution could engage a liberty issue and was reviewable under a *habeas corpus* application. The inmate's residual liberty was limited by being placed in an institutional environment that would be, by its nature, more restrictive. *Habeas corpus* can and does evolve, as it has evolved to apply to inmates and to transfers between institutions. It was and remains a guarantor of liberty in the sense of being free from physical restraint or confinement. It has not been transformed into an expedited administrative review process.

[29] In *R. v. Latham* 2018 ABCA 308, the Alberta Court of Appeal cautioned against allowing *habeas corpus* to become "a legal Swiss Army knife" to engage any grievance that the inmate may have. It is a limited remedy designed to address wrongful detentions and loss of liberty only and is not available as for right to deal with any kind of dispute that a person chooses to raise, just because they are detained.

[30] In *R. v. Hawco* 2017 NSSC 346, Justice Murray dealt with a case in which the applicant disagreed with the medication policy that was in place and with the professional judgement of the attending doctor. Justice Murray noted his difficulty with the use of *habeas corpus* to address what appeared to be matter of professional judgement. He concluded that the complaints did not warrant the extraordinary remedy. He cited *Rain v. Canada (Parole Board)* 2015 ABQB 639 where the court stated that access to prison or rehabilitation programming was not a deprivation of liberty that would attract *habeas corpus* scrutiny. Mr. Hawco's application was dismissed.

[31] Justice Murray also cited *R. v. Farrell* 2011 ONSC 2160. The complaint there was about the living conditions inside a remand centre. That complaint included concerns about the quality of food, clothing, lighting, air quality, telephone access, reading material, toiletries, and the availability and quality of programming. The delay in receiving medical treatment was also a complaint. The court found that the issues were not ones that were appropriate for a *habeas corpus*

application. *Habeas corpus* is not available to challenge general conditions of confinement.

[32] The purposive approach advanced by Justice Wilson in *R. v. Gamble* (1988), 66 C.R. (3d) 193 (S.C.C.) justifies the use of judicial creativity and flexibility in adapting *habeas corpus* to modern needs. That does not mean that judges should interpret *habeas corpus* as a writ that reaches into every detail of the running of penal institutions. It is not a multipurpose legal tool made available to every person who is incarcerated. Its purpose is to continue to serve as an efficient and timely process to guarantee the liberty of those who are at risk of losing it. That includes the protection of the residual liberty of people who are incarcerated. But it remains a remedy that has as its focus the restoration of physical liberty and freedom from detention. It is not an administrative remedy to address grievances or the concerns of inmates with the way penal institutions operate.

[33] It is conceivable that issues that do not deal with physical confinement or restraint may be addressed through *habeas corpus*. The denial of the most basic services or the necessities of life, as opposed to the loss of privileges, may rise or descend to become issues of liberty and attract *habeas corpus* scrutiny. Depriving an inmate of food may be a condition or form of confinement that is so egregious that even in the absence of further physical restraint, changes the very nature of the confinement and engages the liberty interest.

[34] Mr. Brewer is challenging the level dental services that were provided to him during the pandemic and way that the institutional response to the pandemic delayed his treatment. A person in the community could have had a dental issue addressed while he could not. Dental clinics in the community opened before dental services were provided within the institution.

[35] Mr. Brewer was not ignored. He was in pain. He identified an issue and was able to see a nurse. His issue was urgent but was not an emergency. He was eventually able to be seen by a dentist. He is not satisfied with the promptness with which the institution responded to his needs. That relates to the policies put in place to deal with the potential for the spread of the Covid-19 virus within penal institutions. It involves the review of the decisions that resulted in a more restrictive return to the provision of services within institutions having regard to the special risks presented by the potential for the introduction of the virus into that environment which houses a vulnerable population. There is no dispute that Mr.

Brewer was treated according to the policy and that the policy was fairly applied to him by the medical staff.

[36] *Habeas corpus* has an exalted status in Canadian law. Its status can be preserved only by reserving its use for issues that address the protection of liberty. In Nova Scotia when a *habeas corpus* application is filed it receives the highest priority. It is the way todays judges preserve the role carved out by our predecessors 400 years ago, to protect against unlawful or unjustified detention. It was established by judicial creativity and judges are still called upon to interpret it in a way that gives meaning to its purpose. It is not place for artificial, technical or "non-purposive" distinctions when the "liberty of the subject" is at stake. But it is not a more expedited form of judicial review of administrative decisions made by those who are responsible for correctional facilities.

[37] What Mr. Brewer has alleged is not a deprivation of liberty. The allegation that a policy failed to provide for the provision a satisfactory level of services during a pandemic is not an allegation of a deprivation of residual liberty.

Remedy

[38] The remedies sought by Mr. Brewer re-enforce the conclusion that a *habeas corpus* application is not the proper way to deal with what in effect is an administrative review.

[39] The amended Notice of *Habeas Corpus* seeks a remedy under section 24(1) of the *Charter*. It is for an order to "emancipate Mr. Brewer from the deprivation of residual liberty in the form of denial of equal access to dental care as is available in the community in the form of a root canal, as clinically prescribed by a dentist." The order would also be to require the respondent to provide transportation to and from a dental clinic. The remedy sought uses the words "emancipation" and "liberty" but what it seeks is a root canal, as opposed to a dental extraction. Mr. Brewer says that if he had been seen by a dentist earlier, he would not have needed to have his teeth taken out. Now the only way that they can be saved is by a root canal. He can get a root canal now if he wants one. He just needs to pay for it. He wants to have the root canal paid for to compensate for what he perceives as the unavailability of timely treatment.

[40] Mr. Brewer is not seeking an order to stop the institution from detaining him or even to stop refusing to allow him to access root canal treatment but to stop refusing to pay for his root canal.

[41] That is some steps removed from the *habeas corpus*. While the scope of the writ may not be strictly defined by its remedies its purpose has been to serve as a protection against the unlawful deprivation of liberty. The remedies sought here do not relate to the deprivation of liberty but amount to a claim for compensation.

[42] The remedy is argued to be under section 24(1) of the *Charter*. Section 24(1) relief is not broadly available in *habeas corpus* applications. The Supreme Court of Canada decision in *Gamble* is an exception to the general rule that the remedy on *habeas corpus* is release from detention. In that case the accused was convicted and sentenced under the wrong law. An appeal was no longer available. There was a clear *Charter* breach. The court made a declaration under section 24(1) of the *Charter* that Ms. Gamble was eligible for parole. That does not expand the concept of *habeas corpus* by granting courts broad remedial powers to provide redress for any concerns raised by a person in custody.

[43] The only way in which the court could make such an order would be to apply one of the other traditional administrative law remedies. Those would include an injunction, writs of *certiorari*, prohibition, *mandamus*, and *quo warranto* as well as ordering declaratory relief. But all those remedies are within the exclusive jurisdiction of the Federal Court within the context of a federal institution such as Springhill. *Certiorari* in aid of *habeas corpus* is distinct from *certiorari* applied for on its own. *Certiorari* on its own is available to quash an administrative decision and is only available in the Federal Court. *Certiorari* in aid is a procedural tool to ensure that evidence is available to the reviewing court. It is not used as an ancillary remedy. *Chambers v. Daou* 2015 BCCA 50, at para. 51.

[44] Provincial superior courts have the jurisdiction to deal with *habeas corpus* applications from inmates in federal institutions. Section 18 of the *Federal Court Act* provides that a superior court cannot go beyond the fundamental and principled purpose of the writ of *habeas corpus* to supervise the conduct of correctional officials. In *R. v. Haug* 2011 ABCA 153, the Alberta Court of Appeal stated at para. 6:

> The appellant has overestimated the jurisdiction of the Court of Queen's Bench to monitor the activities of the Correctional Service of Canada. The appellant originally applied for *habeas corpus* as a method of attaining the relief he wanted. *Habeas corpus* is a specialized procedure that allows the court to review the legality of the detention of a prisoner, and to release the prisoner if his detention is unlawful. While it has occasionally been used to review the conditions of detention of serving prisoners, it is not a general remedy to be used to supervise

> the conduct of corrections officials. In the federal system that responsibility primarily falls within the jurisdiction of the Federal Courts, and possibly some administrative tribunals with the appropriate jurisdiction.

[45] The remedy that Mr. Brewer seeks is a form of compensation for what he asserts was an unlawful restriction on his right to access dental services during the time when full dental services were not being provided because of Covid-19 restrictions. He wants to get a root canal. And no one right now is preventing him from getting a root canal. He wants to have it paid for. *Habeas corpus* cannot be interpreted in a principled way to encompass that remedy.

Conclusion

[46] Mr. Brewer has not established that he has been subjected to a deprivation of his residual liberty. What he is seeking is in effect a review of the measures relating to the provision of dental services taken by the Correctional Service of Canada in response to the Covid-19 pandemic. That was not a decision about his liberty. He wants to have his root canal paid for. That is not a remedy that relates to his liberty.

[47] The application for *habeas corpus* is denied.

Campbell, J.