SUPREME COURT OF NOVA SCOTIA

Citation: *Nodrick v. Canada (Correctional Service)*, 2014 NSSC 93

Date: 20140204
Docket: Amh No. 422425
Registry: Amherst

Between:

Shawn Dennis Nodrick

Applicant

v.

Correctional Service of Canada
and National Parole Board of Canada

Respondents

DECISION

Judge: The Honourable Justice Joshua M. Arnold

Heard: January 9 and February 4, 2014, in Amherst, Nova Scotia

Written Release: March 13, 2014

Counsel: Shawn Dennis Nodrick, Self-Represented
Susanna Ashley, for the Respondent

By the Court (Orally):

[1] Shawn Dennis Nodrick normally resides in Winnipeg, Manitoba. In early September 2012, he was released from custody in Winnipeg and placed on parole. Mr. Nodrick advises that on September 17, 2012, he was arrested in Winnipeg, accused of violating his parole and sent to the Stoney Mountain Penitentiary, a medium-security institution in Manitoba.

[2] During his time in Winnipeg, Mr. Nodrick advises that he dealt with five employees of Corrections Canada, who are all named in one of his many filings: Leonard Wilkinson; Jeff McNeill; Harjeet Saggar, all of whom are parole officers in Winnipeg; as well as Stephen Fugg and Graham Husack, who are both parole officer supervisors in Winnipeg.

[3] In early 2013, Mr. Nodrick was transferred from Stoney Mountain Penitentiary, Manitoba to Springhill Penitentiary, Nova Scotia. Springhill Penitentiary is also a medium-security prison. Mr. Nodrick's parole officer at Springhill was Jaimie L. Ryan, who, sometime in 2013, provided him with what are described as computer-generated documents related to his parole suspension in Winnipeg.

[4] In December 2013, following a review of those documents, Mr. Nodrick filed for *habeas corpus* in this Court. At the time of filing, Mr. Nodrick was in segregation in Springhill Penitentiary; however, his *habeas corpus* application relates to issues other than his segregation. Several days after filing his *habeas corpus* application, Mr. Nodrick was notified that he would be transferred to Dorchester Penitentiary, New Brunswick, another medium-security institution, in order to get him out of segregation and into general population. As I understand Mr. Nodrick's documents, and from what I have heard today, no objection to the transfer was filed by Mr. Nodrick in December 2013.

[5] When Mr. Nodrick came to court in mid-December 2013, to set dates for the *habeas corpus* application, the Crown advised that Mr. Nodrick would be transferred to Dorchester Penitentiary, New Brunswick on January 2, 2014. The Crown then filed a written brief objecting to the jurisdiction of this Court to hear Mr. Nodrick's *habeas corpus* application on the basis that his complaints appear to revolve around parole-related issues.

[6] The Crown later filed two additional briefs objecting to the territorial jurisdiction of this Court on the basis that Mr. Nodrick is now housed in Dorchester Penitentiary, New Brunswick and is therefore no longer housed within the geographic boundaries of Nova Scotia.

[7] In relation to the actual *habeas corpus* hearing (that is, the hearing of Mr. Nodrick's complaint relating to his parole suspension), Mr. Nodrick advises that he may need to call his parole officer from Dorchester Penitentiary, his parole officer from Springhill Penitentiary, as well as the five Corrections Canada personnel from Winnipeg that were previously mentioned. Mr. Nodrick further advises that he believes the information he received from his parole officer in Springhill Penitentiary relating to the Winnipeg parole suspension is all electronically stored and available on Corrections Canada computers nationally.

[8] In response to the Crown's territorial jurisdiction argument, Mr. Nodrick now raises a new argument alleging that his transfer to New Brunswick was improper. The facts relating to Mr. Nodrick's housing must be kept in mind: he was in a medium-security institution in Manitoba; he was then transferred to a medium-security institution in Nova Scotia but was held in segregation; he was then transferred to a medium-security institution in New Brunswick, and, upon arrival in New Brunswick, he was released from segregation and placed in general population.

[9] Mr. Nodrick advises that he actually tried to file for *habeas corpus* in New Brunswick in relation to his recent transfer to Dorchester Penitentiary but his *habeas corpus* application was not accepted at the court office in Moncton, New

Brunswick for two reasons: first, there is a $35 filing fee that Mr. Nodrick advises he does not have due to his incarceration, and second, his documents were reportedly rejected by the court office in New Brunswick due to their form.

ISSUES

- Is this a civil or criminal *habeas corpus* proceeding?
- Can I deal with the transfer issue to New Brunswick or does that require a new application?
- Is the Crown's objection regarding territorial jurisdiction determinative in relation to Mr. Nodrick's application?
- Is Mr. Nodrick entitled to a remedy from this court?

CRIMINAL OR CIVIL PROCEEDING

[10] On the first issue, for the reasons that follow, I am satisfied that this is a civil proceeding.

[11] Mr. Nodrick is in custody as a result of an administrative decision of the National Parole Board. In **Wilson v. Correctional Service Canada**, 2011 NSCA 116, Saunders J.A. explained the difference between civil and criminal *habeas corpus* applications. Justice Saunders began his analysis at para. 24:

> [24] To answer that question, I have considered a host of cases on criminal, administrative, and constitutional law regarding the issues this file provokes. They include: **In Re: Storgoff**, [1945] S.C.R. 526; **M.N.R. v. Lafleur**, [1964] S.C.R. 412; **R. v. Lapierre** (1976), 15 N.S.R. (2d) 361 (S.C., App. Div.); **Bell v. Director of the Springhill Medium Security Institution** (1977), 19 N.S.R. (2d) 216 (S.C., App. Div.); **R. v. Martin** (1977), 20 O.R. (2d) 455 at 482, 41 C.C.C. (2d) 308 at 336 (C.A.), aff'd [1978] 2 S.C.R. 511; ; **R. v. Robar** (1978), 27 N.S.R. (2d) 459 (S.C., App. Div.); **R. v. Meltzer**, [1989] 1 S.C.R. 1764; **Kourtessis v. M.N.R.**, [1993] 2 S.C.R. 53; **Mooring v. Canada (National Parole Board)**, [1996] 1 S.C.R. 75; **Vukelich v. Mission Institution**, 2005 BCCA 75; **May v. Ferndale Institution**, 2005 SCC 82; **Canadian Broadcasting Corp. v. Newfoundland and Labrador**, 2006 NLCA 21; **Ross v. Riverbend Institution (Warden)**, 2008 SKCA 19; **Finck v. Canada (National Parole Board)**, 2008 NSCA 56; and **R. v. Latham**, 2009 SKCA 26.
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> [25] I am mindful of the special circumstances that inform *habeas corpus* procedures in at least Nova Scotia and Ontario by virtue of their pre-Confederation status and the *habeas corpus* practices and statutes which applied within their borders. See, for example, **Lapierre**; **Bell**; **Robar**; and **Martin**, **supra**. Reiterating the *caveat* I expressed earlier regarding the lack of argument on the issues confronting the Registrar, I am inclined to the view that the application brought by Mr. Wilson in this case is a civil *habeas corpus*, and therefore a civil appeal. I say that for several reasons.

[12] Justice Saunders went on to say at para. 29:

> [29] The appellant's complaint and claim for relief arises in an administrative context. Mr. Wilson took issue with the fact that he was denied a conditional release. That was an administrative decision made by the NPB pursuant to the **CCRA**. The distinction between *habeas corpus* to review the validity of decisions made within penitentiary walls, and criminal appeals from conviction was emphasized repeatedly by the Supreme Court of Canada in **May**, **supra**. ...

[13] In conclusion, Justice Saunders stated, at para. 41:

> [41] Whether an application for *habeas corpus* is characterized as criminal or civil in nature "will depend on the nature of the underlying proceedings giving rise to the detention which is being challenged". … Here, Mr. Wilson's complaint and the relief he seeks relates to an administrative decision made within the prison walls by the NPB which denied his request for a conditional release. …

[14] In **Ross v. Riverbend Institution (Warden),** 2008 SKCA 19, the Saskatchewan Court of Appeal stated at para. 24:

> 24 In particular, the applications for *habeas corpus* are grounded in civil matters. Martin J.A. in *R. v. McAdam* stated:
>
> > It must clearly appear, I apprehend, from all these high authorities that the constitutional right *ex debito justitiae* to the "swift and imperative remedy" (*per* Lord Birkenhead, at p. 609) afforded by this "very high prerogative" and "transcendent" writ in English law, is a civil right, the assertion of which in all cases is by its own peculiar and summary procedure which does not vary in essentials whether the custody be under criminal process, or civil, or military, or naval, or private, or governmental executive Act, or otherwise: its whole procedure with its "peculiarities" is extraordinary and entirely apart and distinctive from the ordinary proceedings that it reviews, and brings the person detained thereunder before the Court or Judge so that the appropriate remedy may be applied. …

[15] At para. 26-28, the Court stated:

> 26 The availability of a writ of *habeas corpus* was canvassed in *R. v. Storgoff*. The court concluded the nature of the prerogative writ of *habeas corpus* is a procedural writ which may apply in a criminal or civil matter. However, it is the proceeding under which the applicant is placed in custody which determines whether the character of the *habeas corpus* proceeding is criminal or civil.
>
> …
>
> 28 … It was confirmed that prison disciplinary proceedings are civil proceedings and are non-criminal in nature, *i.e.* are not criminal proceedings.

TRANSFER ISSUE - SPRINGHILL TO DORCHESTER

[16] Mr. Nodrick recognized that the recent issue relating to his transfer from Nova Scotia to New Brunswick should likely be dealt with in New Brunswick. He

attempted to file his *habeas corpus* application in New Brunswick and was frustrated in his efforts for monetary and procedural reasons. He therefore has asked this Court to deal with the issue. I find that his new *habeas corpus* complaint regarding the transfer from Springhill Penitentiary, a medium-security institution where he was in segregation, to Dorchester Penitentiary, also a medium-security institution where he was released from segregation, should be heard in New Brunswick.

[17] Although it does not relate to the application that I must now consider, I would refer Mr. Nodrick to para. 74 and 76 of **May v. Ferndale Institution**, [2005] 3 S.C.R. 809:

> 74 A successful application for *habeas corpus* requires two elements: (1) a deprivation of liberty and (2) that the deprivation be unlawful. The onus of making out a deprivation of liberty rests on the applicant. The onus of establishing the lawfulness of that deprivation rests on the detaining authority.
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> …
>
> (1) Deprivation of Liberty
>
> 76 The decision to transfer an inmate to a more restrictive institutional setting constitutes a deprivation of his or her residual liberty: *Miller*, at p. 637; *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459, at p. 464. As a result, there is no question that the appellants have discharged their burden of making out a deprivation of liberty. We must therefore go on to consider whether that deprivation was lawful.

[18] There are certainly many avenues for *habeas corpus*. As noted in **May v. Ferndale**, *supra*, movement of an inmate to a more restrictive institutional setting constitutes a deprivation of liberty. The onus is then placed on the detaining authority to prove that the deprivation was lawful. Mr. Nodrick was moved from segregation in a medium-security institution in Nova Scotia (where he had no previous ties) to general population in a medium-security institution in New Brunswick. His transfer thereby resulted in his being placed in a less restrictive setting.

TERRITORIAL JURISDICTION

[19] I must now deal with the territorial jurisdiction issue. Mr. Nodrick argued skillfully and vigorously in relation to this matter. The Crown filed several briefs with many authorities.

[20] The first case that the Crown referred to was **Toodlican v. Kemball and A.G. (Canada),** BC Supreme Court, Docket No. 25934. At para. 7-8 of that decision, the British Columbia Supreme Court stated:

> [7] The Crown argues that I have no jurisdiction to issue a writ of *habeas corpus* as Mr. Toodlican is in Saskatchewan and my jurisdiction is limited to British Columbia. Mr. Toodlican says that he is only in Saskatchewan because he was involuntarily transferred there. His involuntary transfer should not defeat his ability to assert his rights before the B.C. Courts.

> [8] With respect, whether involuntary or not, that does not give me jurisdiction where I do not have any. The Warden of the Saskatchewan Penitentiary is subject to the orders of the Saskatchewan Superior Court, but not to the orders of the British Columbia Supreme Court. The respondent has provided several authorities which make reference to that, particularly *The Law of Habeas Corpus* by Zellick and Sharpe, Oxford University Press, third edition, at page 214:
>
> > In Canada, it has been held that one province has no power to send a writ of *habeas corpus* beyond its territorial limits even where the prisoner is detained by an order of that province and the federal provision in another province. In such a case, the courts of the province in which the prisoner is detained have *habeas corpus* jurisdiction.
>
> The Crown has also cited several cases that support the statements made in the treaties on *habeas corpus*.

[21] Finally, at para. 9 of **Toodlican**:

> [9] It is likely that I had jurisdiction to hear this petition when it was filed, but not after October 27, 2011, when Mr. Toodlican was involuntarily transferred to Saskatchewan. The lack of jurisdiction in this court prevents me from issuing any remedy sought by Mr. Toodlican.

[22] The Crown argues that Mr. Nodrick is in the same position as Mr. Toodlican.

[23] I have also been provided with **McKenna v. Correctional Services Canada**, Amh No. 407091, a decision of Scanlan J. (as he then was) in October 2012. In that case, Mr. McKenna had filed for *habeas corpus* in Nova Scotia. He was then transferred to New Brunswick and subsequently withdrew his application for *habeas corpus*. At p. 2, Justice Scanlan states:

> The Crown, Correction Services Canada, has now raised the issue of jurisdiction. Had Mr. McKenna not withdrawn his application, the court would have been

> forced to decide the issue, and the court would have had to reference the *Toodlican* decision from the British Columbia Court of Appeal. I don't know if it's been reported, but it should be cited as February the 17th, 2012 British Columbia Supreme Court. In *Toodlican***,** the inmate was transferred to Saskatchewan from British Columbia, and Mr. Toodlican was asking the British Columbia court to deal with his *habeas corpus* application. Madame Justice Gropper ruled that the matter should properly be dealt with by the court in Saskatchewan.

[24] Justice Scanlan goes on to say at pg. 3, line 6, of **McKenna**, *supra*:

> More important, however, is the fact that this court in Nova Scotia lacks jurisdiction. In other words, even were I inclined to try to and deal with this matter in this court, Mr. McKenna, I would not have the jurisdiction. I would have referred to the *Toodlican* case, paragraph 8 of the decision, where Madame Justice Gropper said:
>
> > With respect, whether involuntary or not…(she was referencing the transfer)…that does not give me jurisdiction where I do not have any. The Warden of the Saskatchewan Penitentiary is subject to the orders of the Saskatchewan Superior Court, but not to the orders of the British Columbia Supreme Court.
>
> Even had this matter proceeded before this court, Mr. McKenna, I would have no authority whatsoever to order the warden to transfer you back to Nova Scotia. He is not subject to the authority of this court, when it relates to *habeas corpus* applications. *Habeas corpus* applications are very unique in terms of law. It's difficult sometimes for people who do not deal with the law or legal issues on a daily basis to understand the uniqueness of *habeas corpus*. When it comes to Superior Courts within Canada, the right place to have *habeas corpus* dealt with is the province in which you are asking the court to make orders.

[25] The Crown also referred to **R. v. Gamble,** [1988] 2 S.C.R. 595. Wilson J., for the majority of the Supreme Court of Canada, stated at para. 48-50:

> 48 The remedy of *habeas corpus ad subjiciendum* has traditionally run from the courts of the jurisdiction in which the person seeking review of the legality of his or her detention is confined: **R. v. Riel** (1885), 2 Man. L.R. 302 (Man. Q.B.); **Ex**

parte Stather (1886), 25 N.B.R. 374 (N.B.S.C.); **R. v. Holmes**, [1932] 3 W.W.R. 76 (Man. K.B.); [page632] **Laflamme v. Renaud** (1945), 84 C.C.C. 153 (Que. S.C.) In **Ex parte Stather** the New Brunswick Court of Appeal rejected the submission that an accused convicted and sentenced by the courts of Nova Scotia could not have the legality of his detention in Dorchester Penitentiary, New Brunswick, reviewed by way of *habeas corpus* in the courts of New Brunswick. As Palmer J. noted at p. 378:

> It would appear to be absurd that a person could be deprived of his personal liberty illegally, merely because he was placed in the Dominion Penitentiary and be without remedy. It is clear he could not apply to the Court of Nova Scotia, for it has no officers here, and its process would have no force in this Province and could not be executed here.

The commentators seem to agree that *habeas corpus* proceedings can be pursued in the courts of the province of the alleged illegal detention: see G. Letourneau, The Prerogative Writs in Canadian Criminal Law and Procedure (1976), at pp. 310-12; D. A. Cameron Harvey, The Law of *Habeas corpus* in Canada (1974), at pp. 66 ff.; R. J. Sharpe, The Law of *Habeas corpus* (1976), at p. 191, note 5.

49 Moreover, allowing the courts of the jurisdiction in which the prisoner is confined to entertain an application for the writ makes good practical sense because the writ will be served on those responsible for the confinement of the prisoner so that he or she can be brought before the court: see **R. v. Holmes**, *supra*. In the present case, for example, the writ was intended to issue to the Warden of the Prison for Women in Kingston. Although we did not reach the jurisdictional issue in **Milne**, the case demonstrates the virtue of *habeas corpus* being available in the province of detention. **Milne**, who was in custody in Ontario, launched his Charter challenge against the lawfulness of his continuing detention by way of an application for *habeas corpus* in the Ontario courts although he was originally convicted and sentenced in British Columbia.

50 The traditional concerns regarding the ready availability of *habeas corpus* to prisoners in the jurisdiction in which they are confined are accentuated by the crucial role that superior courts play under s. 24(1) of the Charter as courts with "constant, complete and concurrent jurisdiction for s. 24(1) applications": see **R. v. Rahey**, [1987] 1 S.C.R. 588, at pp. 603-4. As my colleague, Lamer J., pointed out in **Mills** at p. 899:

> The superior courts of our country have always demonstrated the greatest of flexibility as regards procedure, acknowledging that it is there to guarantee rights and not to hinder them.

> Superior courts would needlessly hinder the enforcement of rights if they refused to hear *habeas corpus* applications from prisoners detained within their jurisdiction.

[26] **Gamble,** *supra,* emphasizes the court's need to be flexible when dealing with *habeas corpus* matters, that is, to guarantee rights and not to unnecessarily hinder rights.

[27] The decision in **McGuire v. McGuire and Desordi**, [1953] O.J. No. 731 has also been placed before me. The facts in **McGuire,** *supra,* are found at para. 17:

> In an action for divorce the defendant spouse made an application in chambers for an order that a writ of *habeas corpus ad testificandum* should issue for the purpose of bringing her co-defendant who was then in prison outside of Ontario, before the judge presiding at the trial of the action at the sittings of the court in Ottawa, to give evidence on her behalf.

[28] The Court went on to say at para. 21:

> … He argues that the Supreme Court of Ontario has no jurisdiction to order a writ of *habeas corpus ad testificandum* to issue to a person outside of Ontario to bring a person who is in custody outside Ontario before a Court in Ontario. The *British North America Act* gives to the Provinces legislative power in respect of the classes of subjects enumerated in s. 92 among which are "Property and Civil Rights in the Province" and "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts. But no provincial Legislature has any power to pass laws having any operation outside its own territory and no tribunal established by

> provincial legislation can extend its process beyond its own territory so as to subject other persons or property to its decisions.

[29] And at para. 26:

> … But at common law no Court had any jurisdiction or powers over persons outside the territorial jurisdiction of the Court. A writ of *habeas corpus* could not be issued to such a person…

[30] The Crown has also referred to various statutes including the **Interprovincial Subpoena Act**, S.N.S. 1996, c. 1; **Reciprocal Enforcement of Judgments Act,** R.S.N.S., c. 388; and the **Court Jurisdiction and Proceedings Transfer Act**, S.N.S. 2003 (2nd Sess.), c. 2. According to s. 2(h) of the **Court Jurisdiction and Proceedings Transfer Act**, territorial competence is defined as:

> (h) "territorial competence" means the aspects of a court's jurisdiction that depend on a connection between
>
> (i) the territory or legal system of the state in which the court is established, and
>
> (ii) a party to a proceeding in the court or the facts on which the proceeding is based.

[31] Section 4 of the **Court Jurisdiction and Proceedings Transfer Act** states:

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

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

[32] Subsections 4(a) and (b) of the **Court Jurisdiction and Proceedings Transfer Act** seem unlikely to apply in the *habeas corpus* context. Subsection 4(e), however, refers to the need for courts to assess the real and substantial connection between the Province and the facts on which the proceeding is based.

[33] The Crown also refers to the "real and substantial connection test", referenced with the Supreme Court of Canada decision of **Club Resorts Ltd. v. Van Breda**, 2012 SCC 17. However, **Club Resorts Ltd.**, *supra*, was decided in the context of a traditional civil claim. I have not been provided with or located any law that applies the real and substantial connection test to *habeas corpus* matters.

[34] I have already determined that the *habeas corpus* application in this case is a civil proceeding. The Crown has brought to my attention the **Court Jurisdiction**

and Proceedings Transfer Act; the real and substantial connection is applied in civil matters; and the real and substantial connection test is referred to in the **Court Jurisdiction and Proceedings Transfer Act.** It is therefore certainly possible that the real and substantial connection test could be utilized by courts in *habeas corpus* matters to determine whether or not a provincial superior court has territorial jurisdiction.

[35] Section 11 of the **Court Jurisdiction and Proceedings Transfer Act** deals with the presumption of real and substantial connection. The majority of s. 11 appears to have little, if any, significance in relation to this *habeas corpus* application.

[36] However, it is my opinion that where a presumption is not shown the court may still take jurisdiction based on the factors set out in **Muscutt v. Courcelles**, [2012] O.J. No. 2128 (C.A.); see also **Penny (litigation guardian of) v. Bouch**, 2009 NSCA 80. In an article by Vaughn Black, Stephen Pitel and Michael Sobkin, *Statutory Jurisdiction: An Analysis of the Court Jurisdiction in Proceedings Transfer Act* (Toronto: Carswell, 2012), the authors suggest at p. 136, that a summary of the factors needed to determine whether a real and substantial connection exist would include:

1) Connection between the forum and plaintiff's claim.

2) Connection between the forum and the defendant.
3) Unfairness to the defendant in taking jurisdiction.
4) Unfairness to the plaintiff in not taking jurisdiction.
5) The involvement of other parties.
6) The court's willingness to enforce a foreign judgment rendered on the same jurisdictional basis.
7) Whether the dispute is international or interprovincial.
8) Comity and the standards of jurisdiction used by other courts.

[37] That eight-point real and substantial connection test, and/or the factors detailed in the **Court Jurisdiction and Transfer of Proceedings Act**, do not appear to have ever been applied in a *habeas corpus* application. The lack of prior reliance on the real and substantial connection test in *habeas corpus* applications does not preclude the use of this test in *habeas corpus* proceedings, if access to justice is to be a primary consideration in these matters and if the law is to be applied meaningfully and flexibly.

[38] Going back to the eight-point test that I just outlined, even if the Court determines that it could exercise jurisdiction, the Court may still decline jurisdiction on the grounds of *forum non conveniens*. The factors for that analysis are set out at s. 12 of the **Court Jurisdiction and Transfer of Proceedings Act**.

[39] Reference was made by the Crown to the case of **Ex parte Stather**, (1886) 25 N.B.R. 374 (N.B.S.C.). In that case, an inmate at Dorchester Penitentiary, New Brunswick made an application for *habeas corpus* to the New Brunswick Supreme

Court, as it was then. The inmate had been convicted in the Nova Scotia Supreme Court in Halifax but was housed in New Brunswick. Before determining the merits of the application, the Court considered the preliminary matter of jurisdiction. The New Brunswick Supreme Court held that since the Nova Scotia Supreme Court did not have jurisdiction over the matter the proper forum for hearing the application was the New Brunswick Supreme Court.

[40] Additionally, in E.G. Ewaschuk, **Criminal Pleadings and Practice in Canada**, 2nd edn. (Thomson Reuters, looseleaf) at Section 26:1055, the authors cite **R v. Riel (No. 2)** 1885 2 Man. L.R. 302 (Q.B.) as well as **Stather,** *supra,* and **McGuire,** *supra,* for the proposition that the jurisdiction of a provincial superior court over *habeas corpus* matters is limited to inmates housed within the province:

> A Provincial Superior Court has "limited territorial jurisdiction" in respect of the issue of a writ of *habeas corpus*. In particular, the court has jurisdiction *only* in respect of a person detained in its province. In other words the court may *not* order a person to produce the body of a person detained "in another province" even if the warrant of committal was issued in the court's own province.

[41] In **The Law of *Habeas Corpus***, 3rd edn. (Oxford University Press, 2011), the authors, Judith Farbey, Robert Sharpe, and Simon Atrill, under the heading "Federal Jurisdictions", state at pp. 214-215:

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

> detained have *habeas corpus* jurisdiction. It has also been held in child custody cases that the writ cannot issue where the child is in another province, although it may be possible to continue proceedings if the child is removed after the application is made.

[42] The majority of the authorities referred to in this hearing appear to weigh against this Court having jurisdiction over Mr. Nodrick now that he has been transferred to New Brunswick. However, in that same publication, **The Law of *Habeas Corpus***, the authors also state, at pp. 206-207:

> *Habeas corpus* is one of the prerogative writs, and rather than raise an issue between two parties which is to be decided by a court having jurisdiction over them both, it is supposed to issue on the part of the Queen so that she might have an account of any of her subjects who are imprisoned. At common law, all the prerogative writs had this broader ambit and were said to run to all parts of the Queen's dominions. In theory, *habeas corpus* depends not upon the ordinary jurisdiction of the court for its effectiveness, but upon the authority of the sovereign over all her subjects. While this does not make it possible to issue the writ where the respondent is in a foreign country, even where the respondent is a subject of the Crown, it does give the writ an extra ordinary territorial ambit.
>
> This feature of *habeas corpus* continues to be important in relation to offshore detentions by executive order. As it will be shown, it has been consistently held that the executive cannot immunize detention orders from review on *habeas corpus* by holding the detainee beyond the courts' usual territorial reach.

[43] This is likely the most significant issue that Mr. Nodrick has indicated his frustration with: he commenced his *habeas corpus* application in Nova Scotia; he was at that time housed in Springhill Penitentiary, Nova Scotia; Corrections Canada moved him to Dorchester Penitentiary, New Brunswick; and Corrections Canada now wants to immunize itself from Mr. Nodrick's *habeas corpus*

application in Nova Scotia as a result of their moving him beyond the Court's usual territorial reach.

[44] In **May v. Ferndale**, *supra,* the Supreme Court of Canada reviewed the law in relation to *habeas corpus* and provided considerable guidance on *habeas corpus*-related issues. At para. 19-21, the majority stated:

> 19 The writ of *habeas corpus* is also known as the "Great Writ of Liberty". As early as 1215, the *Magna Carta* entrenched the principle that "[n]o free man shall be seized or imprisoned except by the lawful judgement of his equals or by the law of the land". In the 14th century, the writ of *habeas corpus* was used to compel the production of a prisoner and the cause of his or her detention: W. F. Duker, *A Constitutional History of Habeas Corpus* (1980), at p. 25.
>
> 20 From the 17th to the 20th century, the writ was codified in various *habeas corpus* acts in order to bring clarity and uniformity to its principles and application. The first codification is found in the *Habeas Corpus Act*, 1679 (Engl.), 31 Cha. 2, c. 2. Essentially, the Act ensured that prisoners entitled to relief "would not be thwarted by procedural inadequacy": R. J. Sharpe, *The Law of Habeas Corpus* (2nd ed. 1989), at p. 19.
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> 21 According to Black J. of the United States Supreme Court, *habeas corpus* is "not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose -- the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty": *Jones v. Cunningham*, 371 U.S. 236 (1962), at p. 243. …

[45] The majority continued at para. 22-23 and 25:

> 22 *Habeas corpus* is a crucial remedy in the pursuit of two fundamental rights protected by the *Canadian Charter of Rights and Freedoms*: (1) the right to liberty of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (s. 7 of the *Charter*); and (2) the right not to be arbitrarily detained or imprisoned (s. 9 of the *Charter*). …
>
> 23 However, the right to seek relief in the nature of *habeas corpus* has not always been given to prisoners challenging internal disciplinary decisions. At

> common law, for a long time, a person convicted of a felony and sentenced to prison was regarded as being devoid of rights. Convicts lost all civil and proprietary rights. The law regarded them as dead. On that basis, courts had traditionally refused to review the internal decision-making process of prison officials: M. Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (2002), at pp. 47-50. By the end of the 19th century, although the concept of civil death had largely disappeared, the prisoner continued to be viewed in law as a person without rights: M. Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (1983), at p. 82.
>
> 25 Shortly after certain serious incidents in federal penitentiaries occurred in the 1970s and reviews of their management took place, this Court abandoned the "hands-off" doctrine and extended judicial review to the decision-making process of prison officials by which prisoners were deprived of their residual liberty. In *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, Dickson J. (as he then was) laid the cornerstone for the modern theory and practice of judicial review of correctional decisions:
>
> > In the case at bar, the disciplinary board was not under either an express or implied duty to follow a judicial type of procedure, but the board was obliged to find facts affecting a subject and to exercise a form of discretion in pronouncing judgment and penalty. Moreover, the board's decision had the effect of depriving an individual of his liberty by committing him to a "prison within a prison". In these circumstances, elementary justice requires some procedural protection. The rule of law must run within penitentiary walls. [at p. 622] [Emphasis by Dickson J.]

[46] And at para. 34, the majority stated:

> 34 Thus, as a matter of general principle, *habeas corpus* jurisdiction should not be declined merely because of the existence of an alternative remedy. Whether the other remedy is still available or whether the applicant has foregone the right to use it, its existence should not preclude or affect the right to apply for *habeas corpus* to the Superior Court of the province: Sharpe, at p. 59.

[47] In **May v. Ferndale**, *supra*, the Supreme Court of Canada emphasizes the importance of *habeas corpus* applications and provides clear direction to the courts

to be generous in deciding jurisdiction in this type of hearing so that all individuals have fair access to justice. The majority concluded at para. 44:

> 44 To sum up therefore, the jurisprudence of this Court establishes that prisoners may choose to challenge the legality of a decision affecting their residual liberty either in a provincial superior court by way of *habeas corpus* or in the Federal Court by way of judicial review. As a matter of principle, a provincial superior court should exercise its jurisdiction when it is requested to do so. *Habeas corpus* jurisdiction should not be declined merely because another alternative remedy exists and would appear as or more convenient in the eyes of the court. The option belongs to the applicant. Only in limited circumstances will it be appropriate for a provincial superior court to decline to exercise its *habeas corpus* jurisdiction. For instance, in criminal law, where a statute confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be, *habeas corpus* will not be available (i.e. *Gamble*). Jurisdiction should also be declined where there is in place a complete, comprehensive and expert procedure for review of an administrative decision (i.e. *Pringle and Peiroo*).

[48] The majority of the Supreme Court went on to state at para. 50:

> 50 Given the historical importance of *habeas corpus* in the protection of various liberty interests, jurisprudential developments limiting *habeas corpus* jurisdiction should be carefully evaluated and should not be allowed to expand unchecked. The exceptions to *habeas corpus* jurisdiction and the circumstances under which a superior court may decline jurisdiction should be well defined and limited. …

[49] The majority further considered the issue of jurisdiction at para. 64-65:

> 64 … Parliament has not yet enacted a comprehensive scheme of review and appeal similar to the immigration scheme. …
>
> 65 … In our view, the following five factors militate in favour of concurrent jurisdiction and provide additional support for the position that a provincial superior court should hear *habeas corpus* applications from federal prisoners: (1) the choice of remedies and forum; (2) the expertise of provincial superior courts; (3) the timeliness of the remedy; (4) local access to the remedy; and (5) the nature of the remedy and the burden of proof.

[50] During argument in Mr. Nodrick's case, the Crown took exception to the suggestion that provincial superior courts may offer a more streamlined process than the Federal Court in accessing justice in *habeas corpus* matters. In **May v. Ferndale**, *supra*, the majority spoke to this point at para. 68-69:

> 68 Second, the greater expertise of the Federal Court in correctional matters is not conclusively established. The Federal Court has considerable familiarity in federal administrative law and procedure and deservedly enjoys a strong reputation in these parts of the law as in other federal matters. On the other hand, prison law revolves around the application of *Charter* principles in respect of which provincial superior courts are equally well versed. Moreover, prison law and life in the penal institution remain closely connected with the administration of criminal justice, in which the superior courts play a critical role on a daily basis. In this context, we find no strong grounds for the adoption of a policy of deference in favour of judicial review in the Federal Court.
>
> 69 Third, a hearing on a *habeas corpus* application in the Supreme Court of British Columbia can be obtained more rapidly than a hearing on a judicial review application in the Federal Court. …

[51] The majority of the Supreme Court of Canada went on to discuss why a *habeas corpus* application might be properly heard in a provincial superior court at para. 70-71:

> 70 Fourth, relief in the form of *habeas corpus* is locally accessible to prisoners in provincial superior courts. Access to justice is closely linked to timeliness of relief. Moreover, it would be unfair if federal prisoners did not have the same access to *habeas corpus* as do provincial prisoners. Section 10(c) of the *Charter* does not support such a distinction. …
>
> 71 Finally, a writ of *habeas corpus* is issued as of right where the applicant shows that there is cause to doubt the legality of his detention … Also, on *habeas corpus*, so long as the prisoner has raised a legitimate ground upon which to

> question the legality of the deprivation of liberty, the onus is on the respondent to justify the lawfulness of the detention …

[52] In relation to the issue of territorial jurisdiction in *habeas corpus* matters, there are several issues to consider: many decisions indicate that provincial superior courts do not have jurisdiction outside of their territorial borders; there is direction from the Supreme Court of Canada, in **May v. Ferndale**, *supra*, with regard to avoiding an overly restrictive interpretation regarding jurisdiction when it comes to *habeas corpus* matters; there is the **Court Jurisdiction and Proceedings Transfer Act**; and there is the real and substantial connection test if the court is dealing with a civil matter.

[53] Mr. Nodrick also points to the decision of **Bradley v. Canada (Correctional Service)**, 2011 NSSC 503, where a Justice of this Court relatively recently maintained jurisdiction of a prisoner who applied for *habeas corpus* while housed in New Brunswick, albeit in very specific factual circumstances. Scanlan J. (as he was then) described in **McKenna**, *supra*, at p. 2, in discussing **Bradley**, *supra*:

> The Crown has explained how the *Bradley* case is, and should be, distinguished from the present case. The Crown has explained that in *Bradley* there was a suggestion that there may have been contempt by Correctional Services Canada, not that they admitted any contempt, but they did not want to have to deal with the issue of possible contempt, and therefore they did not raise the argument of jurisdiction in that case. The matter proceeded before Justice Bourgeois.

[54] I do not agree with the Crown in Mr. Nodrick's case that the Supreme Court of Nova Scotia will never have jurisdiction to deal with *habeas corpus* applications for inmates housed outside of Nova Scotia; I reference **Bradley**, *supra*, on this point.

[55] It is difficult to imagine that an inmate could commence an action for *habeas corpus* in Nova Scotia while the inmate was housed in Nova Scotia; that a real and substantial connection to Nova Scotia could exist factually in that particular case; that Corrections Canada, being the responding party to the proceedings, could then transfer the inmate out of Nova Scotia, thereby frustrating the inmate's action for *habeas corpus*; and that the Supreme Court of Nova Scotia would thereby be unable to assert jurisdiction. Fairness could dictate, depending on the facts, that the Supreme Court of Nova Scotia take or maintain jurisdiction.

[56] Can the executive immunize detention orders from review on *habeas corpus* by holding the detainee beyond the court's usual territorial reach? That question was asked and answered in the negative by Justice Bourgeois in **Bradley**, *supra*, and I am certainly not going to make a ruling that impedes the possibility of this Court doing the same thing in the future.

[57] In Mr. Nodrick's case, the only real connection between Mr. Nodrick and the Supreme Court of Nova Scotia is not substantial. Mr. Nodrick was housed in Nova

Scotia when he happened to file in his *habeas corpus* application. Mr. Nodrick advises that he dealt with one parole officer in Nova Scotia who merely printed off computer-generated information relating to his time in Winnipeg and then provided Mr. Nodrick with that information. That same computer-generated information is also available through his parole officer in Dorchester Penitentiary. The five material witnesses in relation to Mr. Nodrick's intended application are all parole officers and/or parole officer supervisors who work in Winnipeg.

REMEDY/CONCLUSION

[58] I do not believe that this Court should take jurisdiction of Mr. Nodrick's *habeas corpus* application. There is no real and substantial connection to Nova Scotia. If he wishes, Mr. Nodrick can apply for *habeas corpus* in New Brunswick.

[59] Once Mr. Nodrick made his initial application for *habeas corpus* to this Court, the Crown advised Mr. Nodrick and the Court that Mr. Nodrick was likely to be transferred to New Brunswick at some time in the not-too-distant future. No mention was made by the Crown at the time of setting the matter down that there would be an objection to the Court hearing the matter based on territorial jurisdictional limitations. Mr. Nodrick then filed a substantial amount of material

with this Court, in anticipation of a hearing in this Court, prior to the Crown raising their territorial jurisdictional objections.

[60] Today Mr. Nodrick represented to this Court that he is currently unable to pay the further filing costs as required in New Brunswick. The Crown has agreed to inquire into the possibility of a waiver by the court office in Moncton, New Brunswick of any applicable filing fees in Mr. Nodrick's case.

[61] Mr. Nodrick also advises that the documents he had successfully filed with the Prothonotary in Amherst, Nova Scotia were rejected by the court office in Moncton, New Brunswick. The Crown has advised that they also have experienced difficulties with *habeas corpus* applications in Moncton, New Brunswick. The Crown therefore agreed to attempt to facilitate the filing of Mr. Nodrick's *habeas corpus* application in Moncton, New Brunswick since Mr. Nodrick has already drafted many of his materials for the *habeas corpus* application.

[62] The Crown has agreed to report to this Court as to the progress of Mr. Nodrick's application in New Brunswick within one week of this oral decision.

ARNOLD J.