IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. V.-F. , 2005 NSSC 71

Date: 2005/04/07
Docket: CR. No. 226996
Registry: Halifax

Between:

C. A. V.-F. and
L. R. F.

Applicants

- and -

Her Majesty The Queen, Nova Scotia Crown Attorney
Nova Scotia Sheriff's Department, East Coast Forensic
Psychiatric Hospital (Capital District Health Authority),
and Central Nova Scotia Correctional Facility

Respondents

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Justice A. David MacAdam

Heard: December 6, 10, 30, 2004; January 11, 14, 26, 27, 28, 31, February 3, and 8, 2005, in Halifax, Nova Scotia

Counsel: C. A. V.-F., self-represented - Applicant
L. R. F. - self-represented - Applicant
Leonard J. MacKay/Eric R. Woodburn - Crown
Kenda L. Murphy - Nova Scotia Sheriff's Department and Central Nova Scotia Correctional Facility
Roderick H. Rogers - East Coast Forensic Psychiatric Hospital (Capital District Health Authority

By the Court:

[1] The Applicants are C. A. V.-F. , (herein "V."), and L. R. F., (herein "F."), (herein collectively the "Applicants"). The Respondents are Her Majesty The Queen, Nova Scotia Crown Attorney, (herein the "Crown"), Nova Scotia Sheriff's Department, (herein the "Sheriff Department"), East Coast Forensic Psychiatric Hospital, (herein the "Forensic Hospital"), Central Nova Scotia Correctional Facility (herein the "Facility"), Nova Scotia Minister of Community and Social Services and the Children's Aid Society of Halifax, (herein "Children's Aid Society").

[2] F. has been in custody since May 22, 2004 as a result of criminal charges arising from a stand off with police at his place of residence at Civic [...], Halifax, Nova Scotia. In the amended notice filed on this application, the Applicants seek relief on behalf of F. by way of *habeas corpus,* with *certiorari in aid* citing also the *Liberty of the Subject Act,* R.S.N.S., c. 253.

[3] The Applicants say his custody is unlawful having regard to the "specific type and manner of confinement in question". The Applicants say that F.'s detention:

> ... abridges federally protected interests - by placing petitioner in the wrong prison, denying him treatment, imposing cruel and unusual punishment, impeding his access to the courts, and so on - it is an unlawful detention and habeas corpus lies to release the petitioner therefrom.

[4] In the submission of the Applicants:

> It is immaterial that the petitioner might then be placed in a different, lawfull *(sic)* custody or that his being sentenced to a term of confinement might itself be lawful. The custody requirement, and the corresponding insistence on discharge from custody do not prevent habeas corpus from being an appropriate remedy for the review of unlawful prison administration.

[5] Further relief sought in the application relates to the Applicant's child and their request for the return of the child to her mother, citing again the *Liberty of the Subject Act*, as well as s.744 of the *Criminal Code of Canada* and *Nova Scotia Civil Procedure Rule 56.*

[6] The Applicants also reference S. 91 and S. 92 of the *British North America Act*, (renamed the *Constitution Act*, 1867 (U.K.) 30 and 31 Vict., c. 3, reprinted R.S.C. 1985, App II, No. 5) neither of which are relevant to this application or to the remedy and relief sought from this Court.

The Child and the Children's Aid Society

[7] By a protection application and Notice of Hearing dated January 13, 2004, the Children's Aid Society, commenced a proceeding in the Supreme Court (Family Division) with respect to the Applicants child, pursuant to the *Children and Family Services Act,* Stats. N.S. 1990, c. 5. The Applicants were named as parties in the proceeding and an interim hearing was commenced January 15th, 2004, at which time the then Honourable Justice Deborah K. Smith made a determination there were reasonable and probable grounds to believe the child was in need of protective services and placed the child in the temporary care and custody of the Children's Aid Society. The interim hearing was subsequently completed on February 12, 2004. The Order stipulated the child remain placed in the temporary care and custody of the Children's Aid Society, with supervised access to the Applicants on terms and conditions. An appeal, in respect to this proceeding, was dismissed by the Honourable Justice Linda Lee Oland of the Nova Scotia Court of Appeal:

> ... due to the Appellant's failure to complete the filing of the Appeal Book and the Appellant's factum as directed by Order of this Honourable Court on March 26, 2004.

[8] Associate Chief Justice Smith, by a Protection Order dated April 3rd, 2004, determined the child was in need of protective services pursuant to the *Children and Family Services Act*, S. 22 (2), para. g. In accordance with the *Children and Family Services Act*, a disposition hearing was held on June 7th, 2004 and by a decision rendered June 9th, 2004, Associate Chief Justice Smith ordered the child continue to remain placed in the temporary care and custody of the Children's Aid Society, and that the order for temporary care and custody would be reviewed by the Court at a further hearing to be held on the 7th, 8th, and 9th days of September, 2004, or sooner "... upon the application of any party to this proceeding upon notice to other party."

[9] Following a number of hearing dates in September, October and November, 2004, Associate Chief Justice Smith, in reasons dated November 26, 2004 released her decision on the Review Hearing held pursuant to s. 46 of the *Children and Family Services Act*.

[10] On a number of occasions F. sought to address the issue of the child and the Applicants request for this Court to assume jurisdiction in respect to the child.

[11] The Children's Aid Society at a hearing on August 19th, 2004 applied to have the application in respect to the Children's Aid Society quashed on the grounds the material filed by the applicants in support did not disclose any evidence the child was being unlawfully detained, that the application should be stayed or dismissed on the grounds the application represented a collateral attack on the ongoing child welfare proceedings in the Supreme Court (Family Division), and in the alternative, this court exercise its discretion and decline to hear the matter while it is being heard by a Court with concurrent jurisdiction. Having heard the Applicants and counsel on behalf of the Children's Aid Society, the application in respect to the child was dismissed on the basis the issues in respect to the child were then before the Supreme Court (Family Division) and at the time of this motion a continuation hearing had been set for early September to further review issues relating to the temporary care and custody of the child. In the alternative, having regard to all of the circumstances and having regard to the existing proceeding in the Supreme Court (Family Division), and the right to ongoing review of any Orders involving the child, this Court declined to exercise any concurrent jurisdiction in respect to the infant child. An Order to this effect was granted on October 14th, 2004. The Applicants appeal of this Order was dismissed by the Nova Scotia Court of Appeal on February 22, 2005.

The Forensic Hospital

[12] On application by the Forensic Hospital to amend the name of this Respondent to "Capital District Health Authority" and to dismiss the Application against the Authority, and upon hearing counsel and the Applicants, an Order was issued dated September 24, 2004 providing that the claim and proceeding by the Applicants against the Forensic Hospital and/or Capital Health District Authority, "be and is hereby dismissed". On the Application the Applicants acknowledged the primary purpose in naming the Authority was to ensure that documents and other materials in its possession would be produced on this *habeas corpus* application. The production having been completed or undertakings to that effect having

been made by counsel, the action against the Authority was dismissed without objection.

The Background and the Bail Hearing

[13] Following F.'s arrest, and while on remand, Judge R.E. Kimball of the Nova Scotia Provincial Court ordered an assessment of F. as to whether he was unfit to stand trial and whether, at the time of the act or omission charged, he suffered from a mental disorder so as to exempt him from criminal responsibility, by virtue of subsection 16(1) of the *Criminal Code*. The Order of Judge Kimball provided it was to be in force until July 6, 2004, at 9:30 a.m. and that a written assessment report be filed with the Court Clerk at Halifax Provincial Court, no later than July 5, 2004. The Assessment Report, dated June 25, 2004 included in the Summary And Recommendations, the opinion that F. was ”... fit to stand trial and does not meet the criteria for exemption from criminal responsibility as laid out in s. 16(1) C.C. " One of the issues raised by the applicants is the adequacy of the reasons given by Judge Kimball in ordering the assessment.

[14] Although there were a number of earlier appearances in Provincial Court by the Applicants, it appears on July 8th the application by V. for judicial interim release was heard before Judge James Burrill, also of the Nova Scotia Provincial Court at Halifax, Nova Scotia. Following submission by counsel for the Crown and counsel for V., Judge Burrill granted V. a release on condition of her entering into a recognizance with one surety to justify in the total amount of $5,000.00, without requiring a cash deposit, and which surety was subject to approval by the Court.

[15] On the afternoon of July 8th, Judge Burrill began the application by F. for his release. Before commencing the hearing, a discussion ensured between F. and the Court which included, in respect to the assessment, the following:

> Mr. F.: .... But I',m trying to consider a couple of questions I'd like answered is, one, where does this assessment go now?
> THE COURT: Okay. I can tell you - - I can answer that question very quickly. The assessment was done to determine whether or not you were fit to stand trial, deal with the issues of bail and all the other materials that will arise at trial. The opinion of the doctor was that you were fit to stand trial. I've read that you were fit to stand trial and, in their opinion, that you were - - that the issue of non-criminal

> responsibility, or having said it in another way around, is whether or not you were not criminally responsible by reason of a mental disorder does not arise in this case.
>
> So that's the end of the matter as far as I'm concerned. That it plays no role in this bail hearing. It was to determine whether or not you were fit (sic) "to"stand trial whether or not you were criminally responsible for your actions. And in both - - in answer to both these issues, the Court received the opinion of the hospital that you were fit to stand trial and that you were criminally responsible for any actions.

[16] The hearing commenced on the afternoon of July 8th and continued on July 12th. The Crown, rather than calling witnesses to testify, made oral submissions including reading from the statements provided by the officers involved.

[17] On July 13th, Judge Burrill rendered his decision. He stated F. was "... charged with nine offences arising out of what has been described as a 67-hour armed stand-off at [...], between the 18th day of May and the 26th day of May, 2004." He noted the charges included unlawful confinement of a child, the detention and concealment of her in contravention of a custody Order, assault of peace officers with a 12-gage shotgun, the discharge of that shotgun with intent to endanger the life or lives of officers, and the possession of a weapon for a purpose dangerous to the public peace, and obstruction of a peace officer. He commented there were other firearm related charges that dealt with the unlawful use and possession of a 12-gage shotgun. He referred to s.12(e) of the *Canadian Charter of Rights and Freedoms*, (herein also referred to as the "Charter") to the effect that anyone charged with an offence has the right not to be denied reasonable bail without just cause. He recognized the burden was on the Crown to show cause why bail should be denied, adding the Court must be persuaded on a balance of probabilities that F.'s detention was required to ensure his attendance in court, public safety, or to maintain confidence in the administration of justice.

[18] Judge Burrill summed up the position of the parties by noting the Crown alleged the events occurred because of F.'s lack of respect for court orders while F. alleged it was the result of various authorities that continually harass him and his family and that the harassment had begun in Ontario and what was happening in Nova Scotia was really an extension of and a continuation of the harassment. Judge Burrill reviewed a number of

convictions he believed were significant to be considered on the bail hearing. Also considered by Judge Burrill was the existence of a bench warrant in Ontario, although he accepted from F. that the authorities were apparently not prepared to execute it outside of that Province, that is, they were not prepared to make application in Nova Scotia to have him returned to be tried on the charges. As well, the Court considered an outstanding breach of probation for his failure to take counselling that had been ordered. He commented that the Probation Order, which was still in effect, contained a clause stating he was not to possess firearms and was required to keep the peace and be of good behaviour. Although, F. disputed the merits of the charges, he apparently did not, in the view of Judge Burrill, categorically deny the events as recited by the Crown.

[19] Judge Burrill said a bail hearing is about the assessment and management of risk. After reviewing the Crown's position in respect to the question of risk and the submission of F., together with material presented by F. by way of exhibits, Judge Burrill determined the Crown had shown cause on both the primary and secondary grounds and F. was indeed a flight risk if he was able to obtain possession of the child, "legally or otherwise". He also indicated he was satisfied the Crown had demonstrated that despite any court Order that may be made, or any bail condition that the Court would impose, F. would feel it to be illegal and therefore would feel free to ignore it. Judge Burrill ordered F. to be remanded in custody until the matter was dealt with according to law.

Habeas Corpus

[20] Brian J. Gover and Victor V. Ramraj in The Criminal Lawyers' Guide to Extraordinary Remedies , (Canada Law Book Inc., 2000) review the use of "extraordinary remedies" in Canadian criminal law. At p. 75, they begin their treatment of *habeas corpus* by observing:

> The writ of *habeas corpus*, or, more accurately, *habeas corpus ad subjiciendum*, provides the means for a superior court to determine the legality of an individual's detention. This writ has been described as having 'a great place in the history of [English] constitutional law because it has come to be the most efficient protection ever invented for the liberty of the subject'.

[21] Then, at p.78, they comment on the interaction of *habeas corpus* with s. 10 of the *Charter*:

> An individual who has been detained has the right to have the validity of his or her detention determined by way of *habeas corpus* and, if the detention is found to be unlawful, the right to be released. These rights are now constitutionally entrenched in s. 10(c) of the Charter which provides:
>
> > 10. Everyone has the right on arrest or detention
> >
> > ...
> >
> > (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.
>
> In Canada, the elevation of the 'great writ' to the status of a Charter right has inspired an evolution in the jurisprudence. The process of relaxing the strict requirements of the early common law rules which govern the availability of the writ and which began prior to the coming into force of the Charter has accelerated significantly in the jurisprudence since the advent of the Charter.

[22] The authors reference the use of the "Purposive Approach" advanced by Justice Wilson in *R. v. Gamble* (1988), 66 C.R. (3d) 193 on the availability of the writ. At pp. 79-80, they state:

> In *R. v. Gamble,* in a clear departure from the restrictive common law rules governing the availability of the writ, Wilson, J. affirmed that where *habeas corpus* is sought as a Charter remedy, courts should not be bound 'to limited categories or definitions of jurisdictional review when the liberty of the subject [is] at stake' and, further, that 'distinctions which have been uncertain, technical, artificial and, most importantly, non-purposive should be rejected'. She explained:
>
> > A purposive approach should, in my view, be applied to the administration of Charter remedies as well as to the interpretation of Charter rights, and in particular should be adopted when habeas corpus is the requested remedy, since that remedy has traditionally been used for, and is admirably suited to, the protection of the citizens' fundamental right to liberty and the right not to be deprived of it except in accordance with the principles of fundamental justice. The superior courts in Canada have, I believe, with the advent of the Charter and in accordance with the sentiments expressed in the habeas corpus trilogy of *Miller, Cardinal* and *Morin* ... displayed both

> creativity and flexibility in adapting the traditional remedy of habeas corpus ... as a Charter remedy ... *I agree with the general proposition reflected in these cases that Charter relief should not be denied or 'displaced by overly rigid rules':* see *Swan* at p.148.

This purposive approach was subsequently affirmed by the Supreme Court of Canada in *R. v. Sarson, ...* .

[23] At p. 83 they note the application of *habeas corpus,* by Courts in Canada, has been extended to restraints of liberty not involving "illegal incarceration":

> The prevailing view now is that the restraints on individual liberty which are reviewable by way of *habeas corpus* are no longer limited solely to cases of illegal incarceration. For example, *R. v. Gamble* implies that the writ 'is now available whenever any liberty interest protected by s. 7 of the Charter is infringed'. It is available to challenge secondary forms of detention which limit the applicant's residual liberty, even where deprivation of the applicant's liberty interest is not actual but is threatened. In essence, *habeas corpus* can be used to challenge three different deprivations of liberty: 'the initial deprivation of liberty, a substantial change in conditions amounting to a further deprivation of liberty, and a continuation of the deprivation of liberty'.

[24] In *Bell v. Director of Springhill Medium Security Institution*, et al, [1977] N.S.J. No. 457, MacKeigan, C.J.N.S., for the Court, outlined the procedure relating to a *habeas corpus* application. At paras. 31-33 he stated:

> 31. Procedure on habeas corpus is still governed by the old Nova Scotia statute, the Liberty of the Subject Act, supra, modified slightly, in civil matters, by Civil Procedure Rule 56 and, in criminal matters, by Crown Rule 58 and by Part XXIII of the Criminal Code. Rules 56 and 58 did not specifically repeal the old Crown Rules 121 to 130 as to habeas corpus, but made them largely obsolete.
>
> 32. After an originating notice is filed to begin the proceedings, an order in the nature of habeas corpus may be obtained ex parte, directed to the person having custody of the prisoner, and requiring him to appear before the court and to 'make a true and full return' as to 'whether or not such person is detained in such jail or prison, together with the day and cause of his having been taken and

> detained', and with 'a copy of the process, warrant or order upon which the prisoner is held ...' (Liberty of the Subject Act, supra, ss. 3 and 4). The judge may require the prisoner to be physically produced in court, but does not usually do so.
> 33. The judge is then 'to examine into and decide upon the legality of the imprisonment' and he may 'require such verification' of the return as he sees fit (s. 5(1)). He may 'require the production of all such proceedings, documents and papers relating to the matter in question ... as ... appear necessary for the elucidation of the truth'. By virtue of these pre-Confederation provisions, Nova Scotia has, as does Ontario, 'the unique power to inquire into the truth of the facts as stated in the return ...' (Harvey, supra, p. 105). Certiorari in aid may also be permitted in some cases (s.8), where it is necessary and possible to quash a voidable warrant or other basis for detention, a matter not relevant here. (See Harvey, supra, pp. 125-132, and Macdonald, J.A., in R. v. LaPierre (1976), 15 N.S.R. (2d) 361 (N.S.C.A.) At pp. 374-380.)

Statutory Bail Provisions

[25] The *Criminal Code* contains three statutory provisions dealing with judicial interim release. The sections are 515, 520, and 525.

[26] In *R. v. T.C.*, [2004] A.J. No. 695 Justice Lee of the Alberta Court of Queen's Bench reviewed the onus or legal burden arising on a s. 515 bail application as well as a bail review under s. 520 and a bail application under s. 525.

[27] Under s. 515, the "judicial interim release" section, the burden is on the prosecution to "show cause". Section 520(1) provides that an "accused may, at any time before the trial of the charge, apply to a judge for a review of the order". By s. 520(7)(d) the accused is required to "show cause". As stated by Justice Lee, "in Alberta, this most frequently translates into the accused showing an error in law or principle by the lower court, or a material change in circumstances. If cause is shown, the reviewing court can substitute its own discretion.

[28] Section 525, states "the person having the custody of the accused shall, forthwith on the expiration of those ninety or thirty days, as the case may be, apply to a judge to fix a date for a hearing to determine whether or not the accused should be released from custody." Justice Lee observes that s.

525 is silent as to which party must "show cause" but adds the section, "directs that 90 days from the time of this accused's detention on the offence, he must be brought by the person having custody of him before the Court to fix a date for a hearing "to determine whether or not the accused should be released from custody." At para 16, Justice Lee notes:

> Following the Section 525 hearing, if the judge is not satisfied that the continued detention of the accused in custody is justified within the meaning of Section 515(10), he shall order the accused released under Section 525(4). It is submitted that this review of the grounds under Section 515(10) must be done bearing in mind the unreasonable delay in securing a trial date.

[29] In respect to the applicant's claim for relief by way of *habeas corpus*, because of the decision of the Provincial Court Judge to receive evidence by submission as opposed to requiring the evidence to be introduced in the testimony of witnesses, the Crown during the hearing raised as an issue whether *habeas corpus* was the appropriate remedy. Crown, referencing the decision of the Supreme Court of Canada in *R. v. Pearson* [1992] 3 S.C.R. 665, said it was not an appropriate remedy since F. had been provided two bail reviews under the s. 520 of the *Criminal Code,* as well as a hearing pursuant to s. 525 of the *Criminal Code*.

[30] Also raised by the applicants was the jurisdiction of the bail hearing Judge to conduct the bail hearing before the ordered assessment had been completed.

[31] At the time, I ruled the issue of the jurisdiction of the Provincial Court to proceed with the bail, when it did, was a matter analogous to the constitutional claim raised in *R. v. Pearson, supra.* An application for *habeas corpus* was appropriate in the event the jurisdictional allegation by F. was substantiated. The issue of jurisdiction goes to the validity of the hearing itself and is therefore, a proper matter for *habeas corpus*. The issue is not the denial of bail, nor whether the Provincial Judge had a sufficient basis or evidence to reach the conclusion he did. The issue is whether the bail hearing was itself held in contravention of statutory provisions contained in the *Criminal Code* and therefore without jurisdiction on the part of the Provincial Judge.

[32] In The Criminal Lawyers' Guide to Extraordinary Remedies, op. cit., at pp. 85-86, the authors comment:

> ... jurisdiction refers to the parameters within which a court can legitimately exercise its power or authority.
>
> ...
>
> Jurisdictional error is readily established 'where an inferior court has stepped outside the limits of its authority by misconstruing a statute or by failing to base its decision on proper considerations'. It has been argued, however, that even when the inferior court is acting within the confines of its jurisdiction, it can still attract judicial review by making a patent error of law. A denial of natural justice or procedural fairness is also subject to review by way of *habeas corpus*.
>
> ...
>
> ... *habeas corpus* can be based on 'any legal standard which supports a conclusion that continued incarceration would be lacking in, or contrary to, legal authority'.

[33] Crown counsel, in closing submission, again suggests the proper avenue for reviewing the hearing before Judge Burrill, including the validity of the hearing itself, is by a bail review under s. 520. Counsel refers to para 26 of *R. v. Pearson,* supra where Chief Justice Lamer cites the caution by Cory, J., in *Steele v. Mountain Institution,* [1990] 2 S.C.R. 1385 , at p. 1418, "against allowing *habeas corpus* to develop as a costly and unwieldy system parallel to an existing system of judicial review."

[34] For the reasons canvassed above, I remain of the view that *habeas corpus*, in the circumstances here present, is an appropriate avenue for examining whether the Provincial Court Judge had jurisdiction to hear the bail application when and how he did. Nothing in Crown's closing submission convinces me that, if a lack of jurisdiction is substantiated, *habeas corpus* cannot lie.

[35] Applying *R. v. Pearson, supra,* I am satisfied the issue of jurisdiction of the original bail hearing is a matter for which *habeas corpus* can be available as a remedy, notwithstanding the judicial interim release and review provisions contained in the *Criminal Code*. Whether, however, in view of the ongoing review proceedings, it is the appropriate avenue for addressing the concerns of F. is another question. F. says he was denied an opportunity to make full answer and defence by Judge Burrill agreeing to receive evidence by submission or recitation by counsel rather than by hearing the testimony of the witnesses. F. says he was therefore denied the opportunity to challenge this evidence by cross-examination. However,

having unsuccessfully raised this issue on at least two of the review hearings, is he also entitled to raise this issue again on this application?

[36] Early in the course of this hearing, F. raised an issue as to the lawfulness of his arrest and detention. He also alleged the Provincial Court lost jurisdiction by virtue of its failure to observe mandatory provisions of the *Criminal Code* during the conduct of the bail hearing.

(A) F.'s Arrest and Detention

[37] In respect to the question of the validity of the detention and arrest, the Ontario Court of Appeal in *R. v. Jarman* (1972), 10 C.C.C. (2nd) 426 held that where an information falls within a trial court's jurisdiction the judge has exclusive jurisdiction to determine its validity and its decision upholding it is not subject to either a motion to squash or to extraordinary remedy proceedings but only to an appeal against the disposition of the case.

[38] In any event and despite a multitude of allegations, there was nothing presented on this application substantiating unlawfulness in his arrest and detention in May 2004. To the extent, there were submissions relating to his arrest, they concerned the merits of the charges rather than the lawfulness of the arrest in the first place. These submissions related to whether the charges could be sustained and, as such, are matters for the trial judge, and, if applicable, a jury, and do not, on the material filed on this application, including the numerous submissions and documents tendered, justify a determination the initial arrest and detention was unlawful.

(B) The Bail Hearing

[39] The issue of the timing of the bail hearing in relation to the finalizing of the assessment ordered by Judge Kimball arises under Section 672.17 of the *Criminal Code*, which provides:

> During the period that an assessment order of an accused charged with an offence is in force, no order for the interim release or detention of the accused may be made by virtue of Part XVI or section 679 in respect of that offence or an included offence. 1991, c.43, s. 4.

[40] As also noted by Crown counsel, the synopsis to s.672.17 contained in the *Martins Criminal Code*, (counsel Edition, 2004 Canada Law Book Inc.) explains as follows:

> An assessment order takes priority over an interim release order and consequently, no interim release order or detention order may be issued during the period of the assessment order.

[41] The Crown agrees, in effect, with the position advanced by F. that if the Detention Order made by Judge Burrill occurred while F. was under a period of assessment:

> ... then Judge Burrill would not have had the jurisdiction to make the Detention Order after Mr. F.'s bail hearing.

[42] The Transcripts filed on this application indicate the hearing began on July 8th and continued on July 12th, with the decision on July 13th. The assessment ordered by Judge Kimball, directed a written Assessment Report be filed no later than July 5th, 2004. The Assessment Report is dated June 25th, 2004, and was referred to by Judge Burrill prior to the commencement of the bail hearing. During closing submission, the applicants and Crown agreed the report was first before Judge Burrill on June 30, 2004. I am therefore satisfied there was jurisdiction and section 672.17 is not applicable in these circumstances.

[43] While on assessment F. was allegedly involved in an altercation that resulted in an assault charge. He appeared on June 28 before Judge Shearer, also of the Nova Scotia Provincial Court, and a bail hearing was conducted and F. was granted bail in respect to this charge. F., nevertheless, suggests this hearing was statutorily precluded by s. 672.17. Since he was granted bail, the issue is moot. However, a reading of s. 672.17 clearly indicates it is only in respect to the offence, or any included offence, for which the assessment is ordered, that no order of interim release or detention may be made. S. 672.17 is not applicable to the hearing in respect to the assault charge since no assessment was ordered in respect to that charge.

[44] F., in respect to his appearances in Provincial Court, before and during the bail hearings, alleged deficiencies and errors on the part of a number of the Provincial Court Judges involved and in at least one instance, "bias" on the part of one of the Judges. Among the errors or deficiencies alleged, was the failure of some of the Judges to exercise discretionary authority in his favour and the failure of some to direct the Facility to provide him with resources, including a computer loaded with Microsoft Word, a private untapped phone, a second cell to house his documents, pens, paper and a tape recorder. He said these were necessary to enable him to prepare for the hearings. He also suggested there was a failure by some of the Judges to

order the Crown to provide the names of its intended witnesses, and the will-say of the police officers involved. He also said he was denied access to his wife, and that nothing was done about this by the Provincial Court Judges, and this denial of access and communication with his wife continues.

[45] Not all failures by a Court, Correction Services or other persons involved in the administration of justice are necessarily, even when substantiated, appropriate matters for *habeas corpus*.

[46] In *Miller v. The Queen* (1985), 23 C.C.C. (3d) 97 at p. 118, Justice LeDain, in delivering the judgment of the Court, stated:

> I do not say that *habeas corpus* should lie to challenge any and all conditions of confinement in a penitentiary or prison, including the loss of any privilege enjoyed by the general inmate population. But it should lie in my opinion to challenge the validity of a distinct form of confinement or detention in which the actual physical constraint or deprivation of liberty, as distinct from the mere loss of certain privileges, is more restrictive or severe than the normal one in an institution.

[47] Issues of access to resources to prepare for court are matters to be addressed with the trial courts involved. They are not matters for which relief by way of *habeas corpus* lies. As also noted by Justice LeDain in *Miller v. The Queen, supra,* at pp. 117-118, in respect to the availability of *habeas corpus* as a form of relief:

> ...The general importance of this remedy as the traditional means of challenging deprivations of liberty is such that its proper development and adaption of the modern realities of confinement in a prison setting should not be compromised by concerns about conflicting jurisdiction. ... Confinement in a special handling unit, or in administrative segregation as in *Cardinal and Oswald* 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 in fact a new detention of the inmate, purporting the rest on its own foundation of legal authority. It is that particular form of detention or deprivation of liberty which is the object of the challenge by *habeas corpus.* It is release from that form of detention that is sought. For the reasons indicated above, I can see no sound reason in principle, having to do with the nature and

role of *habeas corpus,* why *habeas corpus* should not be available for that purpose.

[48] Clearly, *habeas corpus* relates to unlawful detention or detention that "involves a significant reduction in the residual liberty of the inmate". Issues such as resources to prepare for trial, access to one's spouse and observance of rules within the institution are not matters that relate to either the lawfulness or unlawfulness of the detention, or involve significant reductions in the residual liberty of the inmate. They are not, as such, matters for which *habeas corpus* lies.

[49] As noted earlier, a further issue raised by F. was the absence of any opportunity for him to challenge the evidence presented by the Crown on his bail application. Rather than calling witnesses, the Crown, in opposing his release had made submissions and tendered exhibits. F. says many of the police officers whose statements were "read in" were present in the court at the time. F. says his fundamental right to challenge the evidence presented was denied, when the witnesses that form the basis of the Crown's submissions, were not required to testify. The issue, F. says, was his right to "make full answer and defence" to the Crown's position in respect to his application for release.

[50] At issue is s. 518 (1)(e) of the *Criminal Code* wherein a Justice, in a proceeding, under s. 515, is entitled to "receive and base his decision on evidence considered credible or trustworthy". This statutory provision has been used as authority for a Judge to find evidence presented by way of prosecutorial submission, "credible and trustworthy in the circumstances of each case" and therefore sufficient to deny judicial interim release. Since remand pending trial obviously involves "loss of liberty", *habeas corpus* would be an available remedy, if found appropriate.

[51] However, since the denial of bail by Judge Burrill, F. has been before Supreme Court Justices on a number of occasions with respect to his continued detention. As observed earlier, Chief Justice MacKeigan in *Bell v. Director of Springhill Medium Security Institution, et al, supra,* held that an order in the nature of *habeas corpus* will lie to direct "the person having custody of the person" to bring him before the Court.

[52] Clearly, not only has F. been brought before the Court, a review of the reasons given by some of these Judges clearly demonstrates that the issue of the presentation of evidence by the Crown, without the right of cross-

examination before Judge Burrill was raised and considered on at least some of these occasions.

[53] In an application for review under s. 520, heard before the then Associate Chief Justice M. MacDonald, now Chief Justice of Nova Scotia, on November 5, 2004, this issue was raised. The Chief Justice, at p. 6, summarized as one of the issues raised by F.:

> Now in the case at bar Mr. F. alleges certain errors committed by the learned Provincial Court Judge and these alleged errors include that because the material tendered before Provincial Court Judge Burrill was by way of submission of counsel and the tendering of exhibits, there was no actual evidence, per se, for the learned Provincial Court Judge to consider. He refers to the decision of R. v. Hajdu, which is reported in (1984) 14 C.C.C. (3d) 563.

[54] Chief Justice MacDonald after noting F. had referred to the decision in *R. v. Hajdu* as supporting his position there was no evidence before Judge Burrill, comments that a contrary conclusion was arrived at in *Regina v. Dhindsa, et al* (1986) 30 C.C.C. (3d) 368 which, according to the Chief Justice "confirmed the ability to have the material filed before the court entered by way of submission".

[55] Chief Justice MacDonald then referred to the decision of the Nova Scotia Supreme Court, Appeal Division in *R. v. Slaney* (1985), 67 N.S.R. (2d) 390 as authority for the proposition that "a Judge hearing a bail application may still find evidence or may still find materials filed by way of submission to be credible and trustworthy".

[56] In *R. v. Slaney* the Crown presented hearsay evidence to support the denial of the accused's interim release pending trial. The accused testified denying the facts alleged by the Crown in its submission. The hearing Judge then apparently denied the Crown's request to call the investigating police officer to testify. At para. 6, Chief Justice MacKeigan, on behalf of the Court, stated:

> The Crown argued in the first instance that the representations by counsel constituted sufficient information to support the refusal of bail and that the learned judge erred in not so ruling. It is true that such representations are commonly and quite properly accepted under s. 457.3(1)(d) and (e), if defence counsel accepts or does not dispute them or if the judge considers them, even though hearsay, to be credible or trustworthy in the circumstances. Here, however, defence

> counsel specifically denied all the representations of fact made by Crown counsel, except the prior criminal record. The learned judge, in the light of this unusual manoeuver, perhaps was correct in saying that left him with no evidence.

[57] Chief Justice MacDonald decided Judge Burrill "did, in fact, find the material that was tendered credible and trustworthy in the circumstances", adding it was not a case where F. "categorically denied the events that allegedly occurred on the day in question". He found Judge Burrill did not err in proceeding as he did.

[58] Additionally, Chief Justice Kennedy, on a further application held on December 22nd, 2004, for review of the denial of bail by Judge Burrill, again pursuant to s. 520, also addressed the issue of the tendering of evidence on the original hearing by submission rather than by the calling of witnesses. He said, in agreeing with the decision and reasons of then Associate Chief Justice MacDonald on this issue, there was no demonstrable error by Judge Burrill in allowing the evidence to come before him in the manner he did. By finding the evidence trustworthy and credible, Judge Burrill had committed no error. Chief Justice Kennedy recognized the tendering of evidence by submission would preclude cross-examination of the persons whose submissions were being read in, adding this method of receiving evidence, notwithstanding its obvious deficiencies, has been considered by bail hearing judges and used in determining bail application under s. 515(10) for some time.

[59] In an application under s. 525, Justice W.D. Pickup, following a hearing on October 25, 2004, concluded:

> As to the issue whether continued detention should be ordered, I have read carefully the transcript and I have heard Mr. Woodburn, I have heard Mr. F.'s arguments which I summarized earlier. I am satisfied that under the circumstances the continued detention of the accused is justified.

[60] To the extent the issue only relates to the discretion exercised by Judge Burrill to accept the evidence as submitted by the Crown, and to have found it credible and trustworthy in the circumstances, these are matters, as noted, that have already been canvassed by one or more Justices of this Court and are not matters for which F., dissatisfied with the results received to date, is entitled to obtaining a further determination by another Justice. As was stated in respect to the application for this Court to assume jurisdiction in

respect to the child, it is not the practice of this Court to sit in review of decisions made by other Justices in respect to the same circumstances and legal issues. There are exceptions, such as in family law in the determination of custody and/or support and on bail reviews. They are not applicable in respect to the issue of whether or not it is appropriate for Judge Burrill to have received the evidence in the manner in which he did.

[61] F. filed a Notice of Appeal in respect to the decision of Chief Justice MacDonald, and the matter was placed before the Nova Scotia Court of Appeal.

[62] On an application by the Crown, heard in Chambers on December 16, 2004, to strike F.'s Notice of Appeal from the decision of Chief Justice MacDonald, Justice Roscoe offered him the following option:

> I suppose there is two things that could happen. Either I could hear the Crown's application and unless you have some case law that I am not aware of, it would appear that they have a good point to make on their Application to Strike. Or, I can, you can withdraw your Appeal from Associate Chief Justice MacDonald. And one of those things should happen today. So and I am prepared for either of them to happen. If you want to go ahead on the Crown's application, I can hear that and give a decision and or, you can withdraw your Notice of Appeal and start over in the Supreme Court, like you intend to do anyway, which is what's going to happen, no matter which of those things we do. The only consideration you might want to think about is if I deal with it on the merits, if I hear Mr. MacQuarrie's application and the end result is that I say there is no jurisdiction in this court to hear an Appeal from a *520 Bail Review*, then that's going to be the law in this province for you and for everybody else until it goes to the Supreme Court of Canada. So you won't be able to come back here on any other time trying to appeal, no one else will either, a *520 Bail Review.* If you just withdraw your Appeal that question, that issue, is still up in the air to be decided possibly some other day, by some other Judge or me some other week.

[63] F., after considering his option of resisting the Crown's Application to Strike for the purpose of continuing his appeal from the decision of Chief Justice MacDonald or to abandon the appeal in view of the scheduled further review before Chief Justice Kennedy, opted for the latter.

[64] By abandoning his appeal it was not necessary for Justice Roscoe to decide this question. In *R. v. Slaney*, supra, the Nova Scotia Supreme Court, Appeal Division considered the issue of the manner of presentation of evidence before the Judge hearing the bail application. Whether, and to what extent, the nature of the charge and statutory provisions then existing may affect the jurisdiction of the Nova Scotia Court of Appeal to consider this question in the case of F., remains to be determined. The effect, if any, of the Charter on this question also remains, at least in Nova Scotia, to be decided. Whether or not F. is entitled to raise in the Court of Appeal an issue as to the validity of the hearing before Judge Burrill, is a matter for the Nova Scotia Court of Appeal, and the Justices thereof, to determine.

[65] *Habeas corpus* is not, in respect to this issue, a remedy available to F. on this Application, at least at this time. On the other hand, if, as has been suggested, there is no right to have decisions in respect to the denial of bail, and particularly the issue of the presentation of evidence on the initial bail application, reviewed by the Nova Scotia Court of Appeal on an Appeal from a denial of bail, then F. may be entitled to have the issue of the validity of the initial hearing determined on an Application for *habeas corpus* either in this Court or on an appeal to the Court of Appeal, pursuant to s.14 of the Liberty of the Subject Act.

[66] Additionally, F. appeared to suggest, from time to time, that the section of the *Criminal Code* which has been cited as authority for Judge Burrill to have accepted evidence in the manner in which he did is not valid having regard to various of the provisions in the *Charter.* We are not aware of any notice having been provided under the *Constitutional Questions Act*, R.S.N.S., 1989, c.89, as amended, for a *Charter* challenge on the validity of the *Criminal Code* provisions in question. As such, it would be inappropriate to further canvass the issue of whether there is a question as to the validity of the relevant *Criminal Code* provision or whether it is a matter to be canvassed by *habeas corpus* or under some other proceeding.

[67] The remaining procedural matters arising at the hearings in relation to his application for judicial interim release, or any review of earlier hearings, that are now raised by F. can be reviewed at further judicial interim release hearings held pursuant to ss. 520 and 525 or by way of appeal. They are not matters for this court on an application for *habeas corpus. Habeas corpus* is not the appropriate remedy. Additionally, any question as to the

adequacy of the reasons given by the Provincial Court Judge for sending F. for an assessment is for appeal not *habeas corpus*.

[68] The allegation of "bias" is, of course, an issue that could warrant Charter relief, and perhaps *habeas corpus,* if substantiated. However, after hearing F., including the references to bias in the transcripts of the hearings in the Provincial Court, there is nothing supporting his allegation of bias on the part of any of the Provincial Court Judges. The allegation remains what it is, a bare unsubstantiated allegation of bias. As such, there is, in the circumstances, no basis for either *habeas corpus* or Charter or any other relief.

(C) The Manner or Form of Detention

[69] Following the denial of bail by Judge Burrill, F. was remanded to the Facility. Another issue raised by F., and one which this Court is prepared to consider on this *habeas corpus* application, is whether the conditions of his detention violate his rights. The issue is whether the nature of the confinement can ground a *habeas corpus* application, notwithstanding the detention itself is lawful.

[70] With this Application, F. filed an Affidavit deposed to on July 26th, 2004, wherein he makes a number of allegations concerning the level of restraint and restrictions imposed on him during his remand at the Facility.

[71] In paragraph 7 of his Affidavit, he enumerates a number of difficulties he says he has experienced in respect to accessing his files and the disclosure materials provided by the Crown. To the time of the Affidavit, he says with one exception of "approximately 3 ½ hours while in cells at the Court House, he has never been provided with a cassette recorder player for the over 100 tapes he has. He has had access to a T.V. and video player on only two occasions while in segregation. He acknowledges he has had a computer but only during the period preceding his Affidavit of July 26, 2004. He says he has been constantly moved between "the West 5" Unit of the Facility and "the North 5" Lockdown and Segregation without legal authority and his "privileged visits, professional visits", are being video recorded and possibly audio recorded. He says the only telephone to which he has had access is recorded. In the visiting area, he states there are no papers, pens, pencils or documents allowed and he suggests there is a risk the phone located there is being taped, listened to or recorded. He alleges the legal disclosure documents he has are continually being shuffled by the

Respondents, "under the disguise of security". He says the removal and confiscation of staples, clips, fasteners and binders continues and all attempts by him to have his legal materials dealt with appropriately have failed.

[72] F. says he and his wife have been denied proper medical treatments since incarceration, including "... treatment for shock, separation attachment disorder, the neurological effects and symptoms of laser gun burns and my sensitivity to eggs." He adds that he and his wife were denied humanitarian escorted leave to attend the funeral of "[...]" as well as being denied grooming aids without having to pay for them and phone contact with his wife. He alleges he has been the subject of malicious prosecution with "... another alleged offender while at Forensic Hospital." He says he's continually had to shower in filthy conditions**.**

[73] F. suggests, in paragraph 9, a number of deficiencies and failures, previously referenced and reviewed, relating to his various appearances in the Provincial Court. However, each of these allegations could or should have been raised at the review hearings held in respect to his continued detention. In view of the decision in *R. v. Pearson, supra,* they are not matters for *habeas corpus*, but rather matters that are capable of being reviewed in the course of a judicial interim release review hearing. The remaining allegations, in paragraph 9 of his Affidavit, are focused on the various appearances in the Provincial Court, and as such do not relate to his present detention, manner of detention, and the level of restraint and restrictions imposed on him at the Facility.

[74] During his testimony he repeated some of the allegations of mis-treatment, deprivation and failures or omissions by the Facility as outlined in his affidavits and Notice of Application, adding a number of new ones. Some of the allegations he referred to in his testimony include:

(a) Denial of right to counsel;
(b) Denial of contact with his co-accused, V.;
(c) Denial of his right to make phone calls;
(d) Denial of access to a computer with the Word software program;
(e) Denial of his right to do legal work while not under the eye of a Facility camera;
(f) Denial of his right to attend his mother's funeral'
(g) Having to pay excessive costs to use the available payphone;
(h) Having his phone calls recorded;

(i) Being subjected to excessive canteen charges for personal care items;
(j) Denial of medication and medical treatment;
(k) Denial of his right to call witnesses, read statements from witnesses, and question his accuser at disciplinary hearings;
(l) His assertion he doesn't understand the level system used by the Facility in determining the seriousness of an alleged offence;
(m) Lack of information on rules relating to visiting privileges;
(n) Lights being left on at night causing him sleep deprivation;
(o) Denial of "yard";
(p) Denial of reimbursement for toiletries taken from his cell while he was in solitary;
(q) Denial of shampoo to wash his hair;
(r) Lack of a complaint process, resulting in the Facility staff doing as they please;
(s) Denial of his receiving a copy of his complaint about his daughter being denied breast milk;
(t) Violation of a Court Order by the failure of the Facility to arrange for his transportation to a hearing in the Supreme Court (Family Division);
(u) Denial of access to an electrical outlet for the recorder provided at the request of Justice Wright;
(v) Denial of two cells while at the Facility, which he was given while on Assessment, in order to house his documents in the second cell;
(w) Denial of the ability to prepare for bail hearings;
(x) He alleges that some of his documents are missing;
(y) A lack of rules guiding proceedings of the Review Boards;
(z) Difficulty by his wife and family in sending him documents;
(aa) Bias by at least one Provincial Court Judge;
(bb) Private counsel visits are video taped, and possibly audio taped;
(cc) Denial of a copy of the Rules and Procedures of the Review Boards;
(dd) The failure to positively respond to his request for a private phone and 24 hour access to his documents;
(ee) Denial of his right to view videos of events for which he was charged with disciplinary offences;
(ff) That he has been in segregation in violation of Standard Operating Procedures, (S.O.P.), in that the period is not to exceed 10 days without approval;

(gg) That when on North 5 the phones are shut off when he is let out of his cell;
(hh) That the room provided to lay out his materials is not large enough;
(ii) He says he is not given enough time in the Resource Room. By the time he has his materials out, his time is expiring and he has to put them away again;
(jj) He is denied correspondence while in segregation;
(kk) He says on July 6, 2004 six boxes of his materials were turned away at the Facility;
(ll) He has been moved without legal authority;
(mm) He has been denied access to a telephone while in segregation;
(nn) He does not get his amenity pack of personal items daily;
(oo) He has to put his name on a list for a haircut;
(pp) He continues to have difficulty in phoning V.;
(qq) His papers are shuffled so that he has difficulty in keeping them in order;
(rr) He has requested, apparently without success, to see a doctor for the affects of laser gun;
(ss) He has requested counselling, including in respect to the death of his mother, but was told there was no money available for counselling;
(tt) The showers in North 5 are not cleaned and he is showering in filth;
(uu) He only gets 2 meals a day on weekends;
(vv) The decision to bar V. from the Facility after his altercation with Sergeant Henwood, (herein "Henwood).

[75] In addition, while examining Deputy Superintendent of Operations, Paul Martell, (herein "Martell"), he suggested he was denied the right to attend Native services to which he was entitled because his daughter was a native person.

[76] V., in her evidence, indicated agreement with some of the complaints by F.. James E. Gale, a former inmate at the Facility, also testified reiterating and confirming a number of the complaints made by F..

[77] F. says an inmate has rights and is sometimes given privileges. He asserted during cross-examination that open or fresh air, medical treatment, food, right to call and receive calls from his lawyers, possession of his "legal" papers are rights. These are, he says, the only rights to which an inmate is entitled. The other entitlements, he says, are privileges and can be denied

by the Facility. In his oral submission he stated he was only seeking his rights and was not interested in any privileges the Facility might provide.

[78] The foundation of his submission is unclear. Nevertheless, absent conduct that makes the reasonable provision of these "rights" impossible, or virtually impossible, there is little to disagree with the general nature of his submission. It is, however, not correct to say, an inmate cannot be "disentitled for any reason". Failure to respond to a call for yard or fresh air time, the throwing of food or not cooperating in medical treatment would justify the Facility administration in denying, limiting or restricting some or all of these so called "rights". In any event, these are not matters for *habeas corpus*. They are circumstances for which an inmate might wish to avail themselves of the offender complaint procedure that is, and was, available. The process is summarized in the Offenders Handbook:

> **OFFENDER COMPLAINT PROCESS:** is for a situation where an Offender feels they have been given conflicting written or verbal information from Staff and they need clarification. It is NOT for appealing sanctions or discipline or behavior or breaches of rules. Offenders are to submit in writing (within 10 days) to the Superintendent outlining all the details, date of the conflict, nature of the complaint, names of other staff or offenders involved , how you attempted to resolve the conflict and the resolution being requested. Once the written complaint is received, an investigation takes place, usually conducted by the Deputy Superintendent or delegate. This person will then meet with you to attempt to resolve the matter.

[79] He has expressed concerns about the Facility holding his mail, alleging, in effect, it was another form of punishing him. The process for handling mail is also outlined in the Offenders Handbook:

> **Hand Delivered Mail:** staff do not accept hand delivered mail unless it is directed to a Classification Officer for case planning purposes. It is also not permitted for an Offender to have visitors (lawyers, volunteers, AA/NA, E-Fry etc.) take correspondence out or bring it into the facility. On occasion, a Captain may make an exception for case planning purposes.
>
> **Censorship:** all letters, incoming and outgoing, can be searched for contraband with the exception of letters to and from lawyers marked "Personal and Confidential", a Member of Parliament of Canada, a Member of the Legislative Assembly of Nova Scotia, the Deputy

> Minister of Justice, the Executive Director of Correctional Services, the Director of Adult Facilities, or the Ombudsman's Office. These individual's correspondence may be forwarded without opening or delay. Confidential letters may be opened in front of you for visual inspection (not censorship) to ensure no hazardous items are contained therein. (e.g. metal clips)
> **Sending Mail:** Offenders are to properly address the letter, giving their name and return address as well. Letters are to remain open so staff can inspect prior to sealing for the mail. The content of the letter cannot contain information about staff or other Offenders or Institution rules & regulations as per Section 17 of the NS Corrections Act.
> **Letter Writing Materials:** writing materials and stamps are obtained through the Canteen Services. Offenders who do not have funds to purchase materials can submit a request for one stamped envelope & paper once a week on the last canteen day to the Canteen Clerk.

[80] Another complaint, as previously noted, is the failure of the Facility to provide grief counselling or the counselling he was ordered to take under his existing Probation Order. These, like many of the other complaints made by F., are not matters for which *habeas corpus* lies, even in the circumstances of their having been substantiated. The offender grievance procedure provides the vehicle for addressing these complaints.

[81] The suggestion by F. that his access to the Courts has been "blocked" is clearly without foundation since he has attended at the Provincial Court for the Province of Nova Scotia on a number of occasions, as well as the Nova Scotia Supreme Court (Family Division), the Nova Scotia Supreme Court and the Nova Scotia Court of Appeal.

[82] F. suggests in paragraph 12 that:

> ... the Nova Scotia Judiciary are now in conflict.

There is nothing in his submissions, whether oral or written, that raises any arguable issue of "conflict" within the Nova Scotia Judiciary with respect to F..

[83] In preparation for the *habeas corpus* hearing, a number of hearing dates were held in respect to production issues relating to the original Respondents, including the Crown, the Sheriff's Department and the Facility. In seeking to avoid production of certain documents and materials the Facility advanced two basis for a claim of confidentiality and privilege,

namely that four documents related to third party informers and therefore the release of these documents would identify the informers, and secondly other policies and procedures not being released related to security issues and the safety and security of the institution would be jeopardized by the release of these policies to F..

[84] In her response to the request by F. to produce its S.O.P. Ms. Murphy, by letter dated September 3, 2004 stated the following:

> The provisions of the ***Corrections Act*** appertain to safety and rehabilitation considerations for offenders, however, there are also broader concerns in relation to the community. It is Correctional Services' position that release of any policy and procedure or standard or operating procedure in relation to the management administration and operation at the Central Nova Scotia Correctional Facility could jeopardize the safety and security of offenders as well as staff at the Institution.

[85] This Court responded that to the extent any documents were not being produced on the grounds of confidentiality, privilege or otherwise, they could not be relied upon by the Facility in responding to any allegations of mistreatment, or cruel or unusual restraint or restriction on F.'s rights.

[86] In responding to counsel for the Facility, V. by Affidavit deposed to on the 26th day of July, 2004, to which is attached an earlier Affidavit of June 13th, 2004, addressed the issue of the child, an issue that is not now before this Court, but rather before the Nova Scotia Supreme Court (Family Division) and to some extent the Nova Scotia Court of Appeal. In her Affidavit of July 26th however, she details in paragraph 10 what she describes as the "illegal detainment: L. R. F.". She also asks for an independent investigation, a matter not before this Court, relating to her treatment while incarcerated, the issue of the police attendance at [...] and the subsequent death of M.M. F., and an allegation of aggravated assault causing bodily harm and the use of a laser gun by the Halifax Regional Police on May 21st, 2004. Again, matters not before this Court on this application.

[87] In respect to the issue of F.'s continued detention, V. in stating "there is no legal basis to keep" F. in custody makes the following assertions:

- ➜ fundamental laws were ignored at the hearing for his release. There were no witnesses, no cross-examination, there was no case

➜ preparations were grossly impeded by agents working for the Department of Justice at both Nova Scotia Corrections and the Court as was the case with me and notwithstanding court orders; agents unbinding and shuffling documents, losing boxes, denying access to computer, denying files, office supplies, equipment, reliable courier, and private legal communications;

➜ laws respecting husband and wife continue to be violated. Further, communication as co-accused and self represented was denied, our repeated requests to have our bail review heard together was ultimately ignored;

➜ laws of equity respecting Larry's release were ignored otherwise he would home, with me. There is absolutely no evidence, including police reports to warrant bringing firearms charges against my husband. His mother and I were also in the house at the time the warning shot was fired in an effort to protect the family, protect [...] M.

[88] In addition, V. says they were denied the ability to properly prepare for hearings relating to the charges brought against them.

[89] In respect to these allegation, the first one deals with the procedure adopted by the Provincial Judge at the bail hearing and, as earlier noted, is an issue that has been considered by a number of Supreme Court Judges on bail reviews.

[90] In respect to the alleged failure to have their bail reviews heard together, as a matter of procedure, this is for review rather than *habeas corpus*, as is the reference to the "laws of equity", respecting F.'s release, being ignored.

[91] The Affidavit of June 13th, 2004 focuses on the issue of the child and Orders issued out of the Nova Scotia Supreme Court (Family Division). As such, these are matters for that Court and no further comment will be made herein with respect to the allegations therein contained.

[92] By Interlocutory Notice of Application dated the 3rd day of September 2004 V. filed an Application "for writ of prohibition with mandamus and certiorari in aid". Reference is made in the Application to sections of the *Criminal Code of Canada* and the Nova Scotia *Civil Procedure Rules* and among the relief sought is the provision to F. of the "right to the service of legal documents, a pen and paper, possession of all legal materials, access to

a telephone between 8:00 a.m. and 10:30 p.m. and access to co-accused self-represented co-applicant wife, which includes ability to exchange legal papers at the Facility." The Order further sought mandamus against the Sheriff's Department, prohibiting agents from unbinding materials, removing clips and staples from documents and shuffling legal papers, together with an Order in respect to the production of undisclosed materials.

[93] The sworn Affidavit of V., dated the 3rd day of September, 2004, and filed on the same date, details the background in respect to the birth and her subsequent absconding with three of her children in October 2000 and the legal proceedings that resulted therefrom, F.'s involvement with respect to his daughter, and their combined involvement with the Children's Aid Society in the Province of Ontario, as well as the Nova Scotia Supreme Court (Family Division) at Halifax. The Affidavit further deposes to the birth of her daughter in Halifax in December 2003, Court Orders granted by Associate Chief Justice Smith, and the events of May 2004, when the Halifax Regional Police arrived to take care and custody of the child pursuant to the Order of Associate Chief Justice Smith. The Affidavit then refers to the matters raised in the claim for relief, the issue of telephone calls and allegations with respect to the "cruel and inhuman treatment" that F.'s alleges he received while incarcerated.

[94] To the extent the Interlocutory Notice of Application relates to the manner of detention of F., these are issues raised in the *habeas corpus* and therefore will be dealt with as part of this application. To the extent the issues raised in the Interlocutory Notice of Application relate to the child, these are matters before the Nova Scotia Supreme Court (Family Division) and as in respect to the other notices and materials in which issues with respect to the child are raised, are to be dealt with by that court.

[95] In response, counsel for the Facility has filed a number of Affidavits, including, in respect to the issues of the manner of detention and restriction on privileges of F., two Affidavits by Martell, sworn to on September 22nd, 2004 and November 19th, 2004 and an Affidavit of Henwood, a Unit Sergeant, employed with Correction Services at the Facility, sworn to on November 19th, 2004. In respect to the claims in relation to the Respondent, the Sheriff's Department, counsel has filed the Affidavit of David Horner, sworn to on the 22nd day of September, 2004. Although, some of the Respondents have filed other Affidavits, they relate primarily to issues of

production as opposed to the specific issues raised in relation to the manner of detention and the restrictions on F.'s privileges and/or rights while detained at the Facility.

[96] In his Affidavit of September 22nd, 2004, Martell acknowledged there were six boxes of materials delivered to the facility by a family member of F., "... which the Facility refused to accept delivery of given that there was no indication that the boxes contained disclosure or emanated from a law firm or legal counsel." Martell states that while F.'s boxes of disclosure are put through an x-ray scanner upon their return from his various court appearances, "... they are not physically searched and have not been searched without F.'s presence." Martell indicates it is not the policy of the Facility to allow offenders to have any more than two boxes of disclosure in their cells at any given time, having regard to the size of the cells. However, F. has been told on a number of occasions "... that he has a resource room available for his use in order to peruse the Crown disclosures and prepare for his various court proceedings, in which resource room he has the opportunity to access all of the boxes of disclosure at one time." Martell says F. has not requested use of the resource room. He comments that running notes made on July 16th, 2004 indicate, "... - that on that date Mr. F. was offered access to the resource room to review his disclosure. F. declined the opportunity to use the room stating it would not meet his needs." Again reference is made to a running note on July 17th, 2004 in which it is further suggested F. was offered the use of the resource room for the purpose of reviewing the disclosures, which offer was accepted by F..

[97] In giving evidence F. referred to the offer for him to access the resource room. He testified there were two different rooms offered. The first although large enough to house his boxes, was not sufficiently large to enable him to remove and organize his materials. The second room, the resource room, was sufficiently large. However, he was not afforded sufficient time to remove and organize his materials and prepare his case for court. By the time he removed his materials from the boxes, he had to return them because his allotted time in the resource room was expiring. He also said he felt insecure in the resource room, testifying to a degree of paranoia and violence existing in the Facility.

[98] Martell says that when F. was moved to the North 5 Unit, " ... he was advised he was entitled to two boxes of disclosure in his cell at any one period of time." In respect to an allegation concerning the unavailability of

video and audio cassette players, Martell states F. was advised that due to the limited availability of such equipment, a request must be submitted in advance of the date and time which he wishes to access them. In reference to F.'s complaints about the lack of telephone access, he deposes:

> ... And although Mr. F. received a copy of the Offender Handbook which was explained to him by Sergeant Mahoney, he continues to submit Offender Request Forms and Offender Complaint Forms to the administration of the Facility to hurl accusations and make derogatory comments rather than following proper procedure to provide the name and telephone number of the person sought to be contacted so that the names can be added to the list for each offender.

[99] In respect to his inability to meet with V. to prepare his case, Martell states the Offender Handbook, at p. 18, contains all of the information in relation to persons visiting offenders at the Facility. Martell deposes that because V. is F.'s wife, and not his legal counsel, "he does not have access to visitation with her in a closed room". Visits are monitored and occur within an environment wherein a glass partition separates them from each other and their means of communication is via a telephone.

[100] Martell refers to an incident that occurred on August 29, 2004 when F. attempted to pass a document to V. to take out of the Facility, contrary to a rule outlined in the Offenders Handbook. He says F. assaulted Henwood, which assault amounted to a Level III offence, resulting in F. being placed in segregation. During this altercation, Martell says, according to Henwood, V. "was cursing and make derogatory comments and encouraging F.'s aggressive behaviour".

[101] In respect to the issue of discipline and the use of the level system for disciplinary matters and sanctions Martell at para. 17 states the Offender Handbook outlines:

> ... the offenders responsibilities and rights as well as the authority under the **Corrections Act** and the Institution rules per the **Corrections Act**.

[102] He adds it is clearly outlined that Offenders who do not comply with the rules and regulations will be written up by the staff on an incident report. He says a "Unit Review Board, (herein "U.R.B."), conducts a hearing, and that during the hearing the inmate has an opportunity to explain their actions. "In the offence reports is indicated the situation that arose, the level

that was assigned it, the investigation that was done, the hearing that was held before the U.R.B. and any sanction which was imposed by the U.R.B.

[103] In relation to the provisions for the review of offences occurring in the Institution, Martell, at para 18 comments that:

> ... all Level 3 offences must go to the Institution Review Board (herein "I.R.B.") for review purposes.

[104] Many Level II offences are also, he says, similarly reviewed by the Board. "This is so that the most serious offences are thoroughly reviewed in relation to the incident and the sanctions."In respect to the issue of the segregation of F., Martell at para 19, says F. was "sanctioned to ten days segregation as a result of the assault occurring on August 29, 2004". He says F. remained there longer because he refused to be moved to the North Unit that he be returned to the West Unit**.** F. told staff he would "remain in administrative segregation until he was placed back in the West Unit". Martell says offenders in segregation must have their case reviewed every ten days, and if there is to be an extension of their time in segregation he is obliged to make the request to the Senior Superintendent, who will then forward the request to the Director of Corrections for permission. "Even though F. , of his own accord, determined to remain in segregation, there must still be a request made to the Director to approve his remaining in segregation."

[105] In his second Affidavit, deposed to on November 19, 2004, Martell, in respect to the issue of the manner of F.'s detention, at paras 5 and 6, deposed that whenever F. was housed in segregation it was in response to behaviour that attracted the sanction and was ordered as a result of an appearance before the U.R.B. He adds F. was always afforded the opportunity to attend before the Board to explain his behaviour. The maximum period an offender may be placed in segregation is ten days. After 10 days he must review the circumstances, and if further time is warranted he must seek approval. He never was in the position of requesting an extension in respect to F.. The only occasion he "remained in segregation longer than 10 days, was at his own insistence, when he was denied his request to return to West 5 Unit and he refused to go to North 5 Unit, choosing instead to stay in segregation."

[106] In paras. 6 and 7, in respect to his receiving hot meals, and in response to F.'s assertion he has been denied proper food while incarcerated, Martell says in segregation an offender is provided with "well-balanced meals" but

they are "provided in a form which does not present a safety hazard to Corrections Staff, whereby the offender could throw hot food on a staff member, and in a form which will not constitute an easily -made mess by being tossed around the inmate's cell.

[107] While testifying, Martell stated the Facility is now serving hot meals to inmates who are in segregation.

[108] In concluding, he deposes in para 8 that "Inmate F. has been treated with the same respect as any other inmate at the Facility" adding that he, "by virtue of his being a self-represented litigant, has been afforded more opportunities and liberties in relation to preparing for his court cases then any other offender."

[109] On examination by F., Martell testified that the denial of F.'s request to attend his mother's funeral was made after a meeting between Superintendent Kelly, Chaplain Kaufman and himself, although Superintendent Kelly made the ultimate decision. He described it as an informal meeting and the denial was because of a concern for F.'s safety. Martell explained that they were concerned about his safety because of a lack of knowledge of his relationship with his other family members. For this reason, they developed an alternative, offering him an opportunity to attend at his mother's wake. F. did not accept the alternative.

[110] In respect to F.'s offender request of June 6th, Martell said he had responded to F. he was not sure of the nature of the request being made by F.. Having reviewed a number of offender requests filed during the course of this hearing, I fully understand the comment by Martell. Many were difficult, if not impossible to decipher, both as to what F. was requesting and why.

[111] Martell acknowledged to F. that North 5 is a highly-restricted unit and operates as a step-down unit from segregation. He testified if an offender is in segregation, and they are to be moved out, they may then be put in the step-down in North 5. He agreed it has more restrictions than the general units. He said to be moved to North 5 is not a second sentence, although there is a board hearing before this "step-down" is undertaken. This apparently was given in response to F.'s assertion that North 5 is simply another form of segregation, and F.'s assertion it was more odious than the detention that is actually described as "segregation" or "the hole". Noteworthy is Martell's assertion that a further board hearing is held before the movement to North 5. However, it appears F. was never invited to attend these board hearings. If this was indeed the case, it raises issues as to

the validity of these board hearings, affecting the movement and detention of F. to admittedly a more restrictive environment than that of the general prison population.

[112] Martell testified the decision to ban V. following her altercation with Henwood was an I.R.B. decision made by him. F. was not invited nor was V.. During this portion of his examination by F., he stated offenders only attend I.R.B. hearings by invitation.

[113] In response to F., Martell agreed the *Court and Penal Institution Act*, R.S.N.S. 1967, c.67, as amended, had been repealed. He said it was replaced by the *Corrections Act*, R.S.N.S., c.103, as amended, and the Regulations made in respect to disciplinary matters were the same as under the repealed *Act.* In order to save money, the information reports given to newly admitted offenders referred to the repealed *Act* rather than the *Corrections Act,* supra.

[114] In referring to an offender complaint of July 16, re his being denied the right to attend a First Nation Smudge service, F. asserted his daughter was a First Nations person and this gave him the legal right to participate in her heritage. Martell said he could not recall anything in the *Corrections Act*, supra, or Regulations made thereunder, dealing with the issue of religion and religious services. However, I note the Offender Handbook does contain provisions detailing the procedure to be followed by an inmate wishing to attend "religious services/programs" or "spiritual counselling." In respect to F., he testified it was a Unit decision as to who can attend a particular ceremony or service, including whether it is a "Sweat Lodge" or "Smudge". He said Captain MacNamara never brought this issue of F. attending any of these services to his attention nor was he aware it was brought to Superintendent Kelly's attention.

[115] On examination by V. he said I.R.B. hearings are checks and balances on the hearings that are held daily. The I.R.B., he said, look at the process of the U.R.B. as well as the fairness of the decision. He said the S.O. P. outlining the roles and responsibilities of the I.R.B. and the U.R.B. hearings was outdated. It did not reflect how the two Boards then operated.

[116] Henwood, in his Affidavit of November 19th, 2004, says he is a Unit Sergeant on the North Unit "... and that while housed in North 5 Unit, F. 'has engaged in extremely disruptive, aggressive and assaultive behaviour towards Corrections' staff'." He cites a number of incidents of misconduct by F., including an occasion when F. assaulted him during the altercation

that followed F. being denied permission to give documents to V.. The incident, he deposes "resulted in Inmate F. being confined to segregation and V. being banned from the Facility."

[117] At para 5, he denies F. was ever "denied access to his disclosure" adding the Facility "arranged a resource room within which F. was able to have all of this disclosure at one time." He was only denied access to all his disclosure in his cell at one time, citing a potential safety hazard given the size of the cell and the volume of disclosure.

[118] Henwood further deposes that each time F. engaged in behaviour which attracted a level, the level was written up and explained to F. as well any sanction and the reasoning therefore. Henwood, continues:

> This is particularly significant in relation to any Level 3 offences which Inmate F.'s behaviour attracted. With a Level 3 offence, there is an obligation for the offender to attend before the Unit Review Board (the "URB") which is held before three Corrections staff sitting as the Board, and he is afforded the opportunity to respond to the Level 3 offence as well as provide any explanation or justification. Inmate F. was afforded the opportunity to appear before the Unit Review Board and respond to all Level 3 offences to which he was subject during his stay at the Facility.

[119] In his testimony, Henwood expanded on his version of the events surrounding the altercation with F. and V. and leading to the denial of further access by V. to the Facility.

[120] In respect to amenity packs, he said F. was told he had to request them on Fridays, and that they were only issued once a week.

[121] He said in response to V. that F. was advised of the procedure for requesting the use of recorders, and he often did not follow the prescribed procedure. When he did follow the procedure, he received a response, referencing an Offender Request Form dated September 8.

[122] He said in his experience on U.R.B.'s no witness has been called by an inmate and inmates have not been permitted to view videos, although they have been viewed by the Board. He has never been cross-examined nor have inmates been permitted to cross-examine their accuser. On his recollection, only F. has ever asked for the right to cross-examine him at one of these hearings, and it was not permitted.

[123] He testified that the witnesses are interviewed at the investigation stage, which occurs immediately following the event. A Sergeant is assigned to

interview the inmate in question together with any witnesses. He says this is done at this stage in order to expedite the matter. He responded to the Facility counsel that he has never been asked by F. to speak to a witness.

[124] In respect to interaction with the Ombudsman, he said he has seen the Ombudsman at the Facility and has received calls from the Ombudsman expressing concern on behalf of inmates.

[125] He described the routine in the North Unit, including North 5. He agreed, on occasion, F. was denied yard. He said the showers in North 5 are fine and he would let his children use the showers. He also testified that in North 5 the phones are activated at 8:00 a.m. If an inmate requested to change his "yard" time it would be facilitated.

[126] In respect to and to the extent the Applicants seek relief against the Nova Scotia Sheriff's Department, David Horner, Director of Sheriff's Services filed an Affidavit deposed to on September 22nd, 2004. In his Affidavit, Mr. Horner states the only responsibility of the Sheriff's Services is the transportation of F. from the Facility to various court houses and housing him during the day while the court is not in session. He indicates officers are obliged to perform searches of offenders and any documentation that an offender brings with them while in transport and while being held in holding areas, "... for contraband which may be fashioned into a weapon thereby jeopardizing the offender's safety, the safety of the public and the safety of the officers."

[127] Mr. Horner attaches to his Affidavit what is described as an Incident Report and Content List dated July 9th, 2004 wherein the Sheriff's Officer advised that F. had several items, "... including scissors, in his cell which could be used as weapons." A search of F.'s cell was performed and those items which were regarded as contraband were seized and delivered to V.. Mr. Horner indicated the search was performed in the presence of F..

[128] In respect to the transportation of F.'s boxes of disclosure, he says the Sheriff's Services does not have the resources, nor the manpower, nor the vehicle availability or capacity to transport several boxes of F.'s disclosure to and from the Facility. He further indicated the obligation of the Sheriff's Services is to ensure that subjects are searched before they are accepted into the custody of Sheriff's Services and all persons in custody are to be searched when entering a holding Facility, as it is possible for prisoners to obtain contraband from other prisoners during transport. He says if an

officer feels a threat to themselves or others, a subsequent search may be conducted. He states:

> Therefore, it is not incorrect to assume that a person in custody could be searched several times during his stay in Sheriff's custody, ... as he would easily have the ability to hide or obtain contraband that could be used or made into a weapon.

Law and Argument

Nature of Prison Disciplinary Hearings

[129] Although in the context of a Charter s. 11(h) application, the majority of the Supreme Court of Canada, in *R. v. Shubley*, [1990] 1 S.C.R. 3, decided that "prison disciplinary hearings were not criminal proceedings", Justice Cory in *Winters v. Legal Services Society* (British Columbia)][1999] 3 S.C.R. 160 who dissented in R. v. Shubley, supra, on this issue, at para 50 references from the decision of then McLachlin, J. writing for the majority:

> The internal disciplinary proceedings to which the appellant was subject lack the essential characteristics of a proceeding on a public, criminal offence. Their purpose is not to mete out criminal punishment, but to maintain order in the prison. In keeping with that purpose, the proceedings are conducted informally, swiftly and in private. No courts are involved.

[130] Chief Justice McLachlin applying the definition of "true penal consequences" by Wilson, J. in *R. v. Wigglesworth,* [1987] 2 S.C.R. 541, held a true penal consequence, that would attract the application of s.11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity. The prison disciplinary court, on the other hand, is involved in the maintaining of order within the prison. Justice Cory then cites from the Chief Justice at p. 23 of *R. v. Shubley*, supra:

> I conclude that the sanctions conferred on the superintendent for prison misconduct do not constitute 'true penal consequences' within the *Wigglesworth* test. Confined as they are to the manner in which the inmate serves his time, and involving neither punitive fines nor a sentence of imprisonment, they appear to be entirely commensurate with the goal of fostering internal prison discipline and are not of a

> magnitude or consequence that would be expected for redressing wrongs done to society at large.

[131] Justice Cory in *Winters*, supra, observed that Justice Wilson and he dissented in *Shubley,* supra, in that they found “solitary confinement” to be a “true penal consequence”. He stated he had found “close confinement” was a punishment distinct in kind from the incarceration to which the general prison population is subjected. At para 53 he added:

> ... solitary confinement is not simply an alternative manner of imprisonment in which a prisoner may serve his sentence. It is a punishment different in kind from general incarceration and reduces the residual liberties that even an incarcerated individual possesses.
>
> At p. 9-10:
>
>> Solitary confinement certainly cannot be considered as a reward for good conduct. It is, in effect, an additional violation of whatever residual liberties an inmate may retain in the prison context and should only be used where it is justified. ... I would conclude, therefore, that solitary confinement must be treated as a distinct form of punishment and that its imposition within a prison constitutes a true penal consequence. [Emphasis added]

[132] However, he then stated he “must follow the reasons of the majority” in *Shubley*, supra. Like Justice Cory, I, too, am bound by the majority reasons in *Shubley*, supra. Likewise, if solitary confinement is not a “true penal consequence” then any lesser sanction or punishment would also not be a “true penal consequence.”

[133] However, there still remains the issue of procedural fairness in the context of prison disciplinary hearings. Procedural fairness is an essential element of disciplinary hearings whether in the context of “true penal consequences” or of “non-penal punishment and sanctions.” However, the nature and elements of the procedural fairness will obviously vary, with stricter requirements in the case of hearings with “true penal consequences”.

The Review Boards

[134] In respect to Level II and Level III offences, inmates are provided with hearings before the “Review Boards”. S.O.P., Central Nova Scotia Correctional Facility in the Section entitled, “Behaviour Management” revised 19 July 2001, and being Subject No. 10:10.00 provides for a U.R.B.

to review all incidents in the Unit that are classified as Level II incidents. For all Level III incidents the S.O.P. stipulates they are to be reviewed by an I.R.B.

[135] However in testifying, as previously noted, Martell stated that for some time the practice has been for all Level II and III offences to be heard before a U.R.B., with the I.R.B. reviewing and monitoring the fairness of the U.R.B. hearings. He acknowledged there is no revised S.O.P. authorizing this change in the roles and responsibilities of the two Boards.

[136] The authority for the S.O.P. providing for the two Boards is stated to be "Correctional Services Policy and Procedure 10.10.00 (herein C.S. P & P.)." The C.S. P. & P., issued September 1, 1997 in the Section entitled "Behaviour Management" and the subject "Disciplinary Hearing" provides for a Disciplinary Committee to be composed of three individuals, to include the Superintendent or Deputy Superintendent, a supervisor and one staff representative". Where one of the stipulated members is unable to act, or the necessary position does not exist, the Superintendent "shall" appoint a person to act on the Committee.

[137] The Offender is to be given, in advance of the disciplinary hearing, at least 48 hours notification of the charges. Appeal of disciplinary actions are stated as being treated as grievances under the "Offender Grievance Procedures".

[138] The C.S. P. & P. provides for two scales of possible disciplinary sanctions, depending on whether the event is viewed as a minor offence or a major offence.

[139] C.S. P. & P. Subject No. 10.06.00, in section 2.3 defines the offence levels:

2.3.1.1 Level I Offences deal with minimal breaches of the institution rules and regulations.

2.3.1.2 Level II Offences deal with a more serious breach of rules and regulations of the institution.

2.3 1.3 Level III Offences deal with the most serious breaches of the institution rules and regulations.

[140] The C.S. P. & P. in section 2.5 defines as offences:

2.5.1 gambling

2.5.2 neglect performing the work and duties assigned

2.5.3 damaging or wasting institutional property

2.5.4 making a gross insult by gesture, use of abusive language, or other act, directed to or at any person

2.5.5 having in possession any article not authorized by the Superintendent
2.5.6 disobeying a lawful order given by an employee
2.5.7 smuggling, conspiring or attempting to smuggle any article either into or out of the correctional facility
2.5.8 destroying or defacing private or public property
2.5.9 conduct that is detrimental to the welfare of other offenders or to the program
2.5.10 attacking of threatening to attack another person within the correction facility
2.5.11causing, conspiring or attempting to cause a disturbance, breach of the peace or riot
2.5.12 committing or attempting to commit an indecent act
2.5.13 being in an unauthorized place or leaving or attempting to leave the limits of the correctional facility, without being escorted by an employee or without permission of the Superintendent
2.5.14 giving or offering a bribe or reward to an employee
2.5.15 counselling or aiding and abetting another offender to do any act in contravention of the Act, these Regulations or the rules
2.5.16 obstructing an investigation conducted or authorized by the Superintendent
2.5.17 willfully breaching or attempting to breach any provisions of the Act, Regulations or these rules
2.5.18 willfully breaching or attempting to breach any term or condition of a Temporary Absence

[141] It then continues, in sections 2.6 and 2.7:

2.6 Institutional offences may be designated as Level I, II or III, depending on the severity of the violation and as determined by the Institution Offence Level System.
2.7 All offenders shall be advised of the Behaviour Management Process during offender orientation.

[142] The obvious vagueness in the definitions of the three levels is ameliorated by the schedule identifying various misconducts, a brief description of the different levels for each type of misconduct and the ranges of cell confinement, loss of privileges and loss of remission that could result on a guilty verdict on each. The degree of description for each type of

inappropriate behaviour would appear to be sufficient to enable an inmate to understand the potential penalties associated with each.

The Offender Handbook

[143] Each inmate, including F., on admission receives an "Offender Handbook". Matters of discipline and the level system of behaviour management and the composition and role of the U.R.B. are outlined in the Handbook. Although summary in nature, the Handbook describes the procedures followed when an offender is alleged not to have complied with the Rules and Regulations of the Institution. It states that for serious breaches of the rules a U.R.B. conducts a hearing, and that during the hearing the offender has a chance to explain their actions. The three levels are briefly explained, as is the composition of the U.R.B. and the I.R.B. "to deal with the most serious incidents". A list of some of the sanctions or penalties that may be imposed by the Review Boards is then provided.

[144] The Offender Handbook, although providing an outline of the discipline procedure, does not detail the rights available to an inmate on a hearing conducted before either of the two Boards. In this regard it also now appears the practice is for the hearings at which the offender is entitled to attend, and provide a response to the allegations, are limited to the U.R.B. hearings. Deputy Superintendent Martell testified offenders attend the I.R.B. by "invitation". Clearly they do not attend as of "right" notwithstanding the S.O.P. on Disciplinary Hearing, issued as DRAFT and revised, 19 July 2001, and identified as Subject No.: 10.10.00 Subsection 3.1 which stipulates the I.R.B. will include the offender, and the unit captain, a Sergeant, Captain or other Manager and a Unit Correctional Worker. Subsection 3.2 provides:

> The I.R.B. shall meet to review all Level III incidents which occur within the Institution.

Procedural Fairness in the Prison Context

[145] Counsel for the Facility, in a written pre-hearing submission, identifies the issue, in respect to the manner of detention, as one of procedural fairness, citing *Cardinal v. Kent Institution* [1985] 2 S.C.R. 643. The question, in the submission of counsel, is whether there has been a denial of procedural fairness in relation to F.'s manner of detention.

[146] Integral to this issue is the nature and form of “procedural fairness” to which an inmate is entitled. It is clear that administrative hearings, in contradiction to judicial or quas-judicial hearings, do not require the same level of procedural fairness.” Also, as addressed earlier, hearings with the potential for “true penal consequences” will attract a higher level of procedural fairness than hearings without such a potentiality.

[147] In *Cardinal, supra,* segregation was imposed following an alleged involvement by the Appellants in a hostage taking incident. The Director continued the segregation notwithstanding a recommendation by the Segregation Review Board for the offenders’ release into the general population. The Director indicated the refusal to follow the Board’s recommendation was on the ground their release from segregation, before the disposition of the criminal charges pending against them, would “probably” or “possibly” introduce an unsettling element into the prison population. The Appellants were not informed of the reasons for the refusal to follow the Board’s recommendation nor were they given an opportunity to be heard as to whether the Director should follow and act in accordance with the Board’s recommendation. The Appellant’s challenged their continued confinement in administrative disassociation or segregation by an application for *habeas corpus* with *certiorari in aid*.

[148] The Supreme Court of Canada in an unanimous judgment rendered by Justice LeDain held that although the initial imposition of administrative disassociation or segregation on the Appellants was a lawful exercise of the Director’s discretionary authority and was not carried out unfairly, the Director failed to follow procedural fairness by not informing the Appellants of the reasons for his decision to continue the administrative disassociation or segregation notwithstanding the Segregation Review Board’s recommendation to the contrary. The Court held the Director was under a duty of procedural fairness in exercising the authority conferred on him with respect to the administrative disassociation or segregation. At para 14 Justice LeDain continues:

> ... This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges, or interests of an individual: (citations omitted) In Martineau (No. 2), supra, the

> Court held that the duty of procedural fairness applied in principle to disciplinary proceedings within a penitentiary.

[149] At para 21 Justice LeDain commented:

> ... because of the serious effect of the Director's decision on the appellants, procedural fairness required that he inform them of the reasons for his intended decision and give them an opportunity, however informal, to make representations to him concerning these reasons and the general question whether it was necessary or desirable to continue their segregation for the maintenance of good order and discipline in the institution.

[150] In deciding that the Director failed to afford the appellants a fair hearing on the question whether he should act in accordance with the recommendation of the Segregation Review Board, Justice Le Dain held this rendered their continued segregation unlawful. At para 24, he continued:

> They, therefore, had a right on *habeas corpus* to be released from administrative dissociation or segregation into the general population of the penitentiary.

[151] In respect to the balancing of the entitlement of inmates to procedural fairness in disciplinary hearings with the obligation on prison officials to manage their institutions, Justice Sirois of the Saskatchewan Court of Queen's Bench in *Maltby v. Saskatchewan (Attorney General),* [1982] S.J. No. 871, at paras. 407, made the following observations:

> As a rule courts uniformly refrain from considering challenges to routine administrative assignments. Courts do not sit to superintend the administration of jail and penitentiary systems. What courts do sit to do is to insure that those who administer that system comply with the requirements of the Canadian Constitution. The duty to confront and resolve constitutional questions regardless of their complexity and magnitude is the very essence of judicial responsibility. When these arise the courts cannot simply abdicate their function out of misplaced deference to some sort of hands off doctrine.
>
> The lawful incarceration of the applicants as remand inmates bears with it necessarily reasonable limitations of their rights previously enjoyed in a free and democratic society. These restrictions are no doubt the sort of reasonable restrictions that the framers of the *Canadian Charter of Rights and Freedoms* envisioned when they included in section 1 the words ... "guarantees the rights and

freedoms set out in it subject only to such reasonable limits prescribed by law ...” (emphasis mine). The institution may and certainly must place restrictions and limitations on the rights of the applicants so that sufficient security will ensure that they will remain in custody and will not pose a danger to themselves or to other inmates or staff.

In the case of a complaint under the *Canadian Bill of Rights,* a ‘balancing approach’ in dealing with a prisoner’s complaint is utilized. Note **Solasley v. Government of Canada** (1979), 30 N.S.R. 380 at 396., American authorities have long used this ‘balancing approach in dealing with infringements of rights guaranteed under the American Constitution. In **Bell, Attorney General, et al v. Wolfish et al.,** October Term 1978, 441 U.S. 520, Mr. Justice Rehnquist said at p. 537: Not every disability imposed during pre-trial detention amounts to ‘punishment’ in the constitutional sense however. Once the government has exercised its conceded authority to detain a person pending trial it obviously is entitled to employ devices that are calculated to effectuate this detention. Traditionally, this has meant confinement in a facility which no matter how modern or how antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial. Whether it be called a jail, a prison or a custodial center, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee’s understandable desire to live as comfortably as possible and with as little restraint as possible during the confinement does not convert the conditions or restrictions of detention into ‘punishment.”

Besides ensuring that the remand inmate will remain in custody, be present at his trial and not pose a danger to himself, other inmates and staff, the government also has legitimate interests that stem from its need to manage the facility in which the individual is detained. This may require administrative measure required to maintain security and order at the institution and make certain that no weapons or illicit drugs reach the inmate. This efficient management of the detention facility - a valid objective that may justify imposition of conditions

> and restrictions of pre-trial detention that are not intended as and do not indeed constitute punishment.

[152] After referencing the foregoing, counsel for the Facility, in her written submission, continues:

> Courts provide the system of checks and balances for the administration of jails and prisons, as indicated by Justice Sirois above, yet, it is also clear that the essence of management of a facility for offenders requires accommodation of situations that do not mirror the ordinary or usual functioning of society.

[153] A review of authorities, although primarily in respect to the federal prison system, confirms procedural fairness in the context of an administrative hearing is clearly distinct from procedural fairness in the course of a judicial or quasi-judicial hearing. These cases suggest that most hearings are of an administrative rather than judicial or quasi-judicial nature. *Martineau v. Matsqui Institution*, [1978] 1 S.C.R. 118 is but one of a number of cases that have held prison disciplinary hearings to be administrative rather than judicial, or quasi-judicial, proceedings. Although there are no specific rules as to what is required by way of procedural fairness, it is clear, as was held in *Cardinal*, supra, that it encompasses the right to be informed of the nature of the allegations and having an opportunity, however informal, to make representations.

[154] In respect to F., and his appearances before the U.R.B., it is clear he was informed of the nature of the allegations and provided an opportunity to make a statement in response.

[155] F. says the U.R.B. only permitted him to make a statement in response to the accusation made against him. He says the person who filed the complaint against him, what he calls his "accuser", was not present nor available for cross-examination and that he has never been permitted, despite his request on at least three occasions, to call evidence in response to a complaint or accusation.

[156] Nothing in the evidence presented by the Facility disputes this assertion by F..

[157] Denault, J, in *Hendrickson v. Kent Institution* (1980), 32 F.T.R. 296, (F.C.T.D.),albeit also in the context of a Federal Institution, at paras 10 and 11, made the following observations:

> The principles governing the penitentiary discipline are to be found in *Martineau (No.1) (supra) and Martineau v. Matsqui Institution*

Disciplinary Board (1979), 30 N.R. 119; 50 C.C.C. (2d) 353 (S.C.C.)*; Blanchard and Disciplinary Board of Millhaven Institution*; *Re Howard and Presiding Office of Inmate Disciplinary Court of Stony Mountain Institution,* and may be summarized as follows:

1. A hearing conducted by an independent chairperson of the disciplinary court of an institution is an administrative proceeding and is neither judicial nor quasi-judicial in character.
2. Except to the extent there are statutory provisions or regulations having the force of law to the contrary, there is no requirement to conform to any particular procedure or to abide by the rules of evidence generally applicable to judicial or quasi-judicial tribunals or adversary proceedings.
3. There is an overall duty to act fairly by ensuring that the inquiry is carried out in a fair manner and with due regard to natural justice. The duty to act fairly in a disciplinary court hearing requires that the person be aware of what the allegations are, the evidence and the nature of the evidence against him and be afforded a reasonable opportunity to respond to the evidence and to give his version of the matter.
4. The hearing is not to be conducted as an adversary proceeding but as an inquisitorial one and there is no duty on the person responsible for conducting the hearing to explore every conceivale defence, although there is a duty to conduct a full and fair inquiry or, in other words, examine both sides of the question.
5. It is not up to this Court to review the evidence as a court might do in a case of a judicial tribunal or a review of a decision of a quasi-judicial tribunal, but merely to consider whether there has in fact been a breach of the general duty to act fairly.
6. The judicial discretion in relation with disciplinary matters must be exercised sparingly and a remedy ought to be granted “only in cases of serious injustice” (Martineau No. 2, p. 360).

In the present case, I see no breach of duty to act fairly by the independent chairperson. It appears from the transcript of the oral evidence that the applicant was present, he was given full opportunity to hear evidence, to give his version of the case, to cross-examine the witnesses, and he even was offered the possibility of an adjournment

> or to call other witnesses, which he declined. *(Citation references omitted)*

[158] The requirement for an "independent chairperson" to conduct hearings of "serious disciplinary offences" arises out of the Regulations promulgated under the Federal *Corrections and Conditional Release Act*, Stats. Can. 1992 , Vol. 1, C. 20. A similar requirement is not present in the Correctional Facilities Regulations for the Province of Nova Scotia. In the federal system the institutional head, or his designate, normally only hears "minor disciplinary offences", while the "serious disciplinary offences" are heard by a tribunal with the "independent chairperson". The Nova Scotia system, on the other hand, appears consistent with that in a number of other provinces.

[159] On the question of the composition of the Board, all being employees of the Facility, unlike the Board in *Hendrickson,* supra, in *Morin v. Saskatoon Correctional Centre* (1990), 86 Sask. R. 269 (Sask. Q.B.), an inmate alleged there was a reasonable apprehension of bias arising from the conduct and composition of a prison disciplinary panel constituted under Saskatchewan legislation. Baynton, J. rejected this contention, holding that neither the conduct nor the composition of the disciplinary panel raised a reasonable apprehension of bias. There was no monetary or other incentive for the panel members to find an inmate guilty, and there was a standing policy by which a staff member who was involved in initiating charges did not sit on the panel. Further, there was a right of appeal from a panel decision. The panel's composition, while it arguably created an overlap between adjudicatory and investigative functions, was authorized by statute.

[160] The authorities frequently refer to the sixth criterion set out in *Hendrickson,* supra, that there be "serious injustice". This aspect of procedural fairness in the prison discipline context was discussed in *Cardinal,* supra, where Le Dain, J., at para 15, cited Pigeon, J. in *Martineau (No. 2)*, supra, at p. 637:

> ...It is specially important that the remedy be granted only in cases of serious injustice and that proper care be taken to prevent such proceedings from being used to delay deserved punishment so long that it is made ineffective, it not altogether avoided.

[161] In *Cardinal v. Kent Institution*, supra, as noted earlier, the Director continued to hold the Appellants in segregation, notwithstanding the recommendation by the Segregation Review Board to return them to the general prison population. Justice LeDain observed that the Director had

spoken to the Appellants, but did not inform them of the reasons for his refusal to follow the recommendations of the Board, nor did he grant them an opportunity of a hearing before him. Justice LeDain in referring to *R. v. Miller, supra,* noted:

> ... that habeas corpus will lie to determine the validity of the confinement of an inmate in administrative segregation, and if such confinement be found to be unlawful, to order his release into the general inmate population of the institution. There is no significant difference ... between confinement in administrative dissociation or segregation, ... and confinement in a special handling unit, as in Miller, supra. Both are significantly more restrictive and severe forms of detention than that experienced by the general inmate population.

[162] After holding the Director was under a duty of procedural fairness in exercising his discretion under the regulations in respect to administrative dissociation or segregation, he referenced the decision of the Supreme Court in *Martineau* (No. 2), supra, to the effect:

> ... that the duty of procedural fairness applied in principle to disciplinary proceedings within a penitentiary.

[163] In *Smith v. Fort Saskatchewan Correction Centre* [2002] A.J. No. 1472 the inmate, on appearing before the disciplinary board, requested to be represented by counsel. The board refused the request. Justice Clackson of the Alberta Court of Queen's Bench, after commenting that the charge faced by the inmate was serious, at para 38, added:

> In the environment of a prison, segregation and loss of the prospect of release are the most serious consequences a prisoner can face. Winters v. Legal Services Society, [1999] 3 S.C.R. 160. While the prospect of solitary confinement may not be enough in every case to justify legal representation at the hearing, that prospect coupled with the loss of early release eligibility strongly promotes representation by counsel.

[164] Justice Clackson, at para 45, summarized the arguments of the Respondents:

> The respondents argue that speed is important in prison discipline. Therefore a remedy ought to be granted only in cases of serious injustice. The respondents offer Martineau v. Matsqui Institution Disciplinary Board (No. 2((1979), 50 CCC (2d) 353 (SCC) in support of that proposition. Their argument is that this is not a case

> of serious injustice. I disagree. The previous analysis leaves little doubt that this matter was serious. There is little doubt that the applicant was not adequately represented. In the circumstances, it is reasonable to conclude that a serious injustice in the manner in which this case was handled has occurred. Therefore, while speedy processing of institutional charges is desirable, the need for speed must give way to the need for fairness. In this case fairness must dictate the pace.

[165] He then concluded the board erred in refusing to allow the applicant to be represented by counsel.

[166] The judicial restraint against interfering in prison administrative disciplinary decisions was re-iterated in the recent New Brunswick decision in *J.J.S. v. Atlantic Institution* (2004 NBQB 140) (N.B.Q.B.), where an inmate alleged his placement in administrative segregation violated the rules of procedural fairness. After referring to *Cardinal,* supra, Riordon, J. concluded that there was no evidence of serious injustice or unfairness saying:

> It is not the function of the Court to determine whether or not the decision to place Mr. J.J.S. in administrative segregation was the proper decision, that is a decision to be made by authorities at the prison. The Court must determine whether Mr. J.J.S. was afforded procedural fairness by the Atlantic Institution prior to coming to its decision and during the review process. From my review of the evidence before me, I am satisfied that authorities of the Atlantic Institution acted in a fair manner without bad faith. Mr. J.J.S. was given every opportunity to be heard. In addressing this duty of procedural fairness and what is considered to be a breach of fairness in the context of prison Administration, caution of course, must be exercised by the Courts ... .

[167] Maintaining this theme of "judicial restraint", Riordan J, referred to *Kelly v. Canada (A.G.)* (1987), 12 F.T.R. 296, (Fed.T.D.), at para. 32 where the Court, in turn, referred to a passage from *Cline v. Reynett* (unreported):

> ... except in clear and unequivocal cases of serious injustice coupled with *mala fides* or unfairness, judges, as a general rule, should avoid the temptation of using their *ex officio* wisdom in the solemn, dignified and calm atmosphere of the courtroom and substituting their own judgment for that of experienced prison administrators.

[168] An example of a case where the "seriousness" criterion was invoked is *Crews v. Canada (Procureur general)*, [2003] F.C.J. No. 1457 (Fed. T.D.). An inmate was sentenced to 20 days without television privileges after an incident in which he failed to clear a courtyard when directed to do so by a security guard after other inmates set a fire. The disciplinary court found he failed to comply with the order, and refused to permit him to see a videotape of the incident, finding it irrelevant. On judicial review, the Court at para 24 found no breach of the duty of fairness in the refusal to allow him to view the tape, noting that applying the criteria set out in *Hendrickson* ... there was no serious injustice done to Mr. Crews that would justify an intervention by this Court.

[169] There will be occasions when an inmate should have access to a video made of an event for which a disciplinary complaint has been made. Obviously, if it is to be given to the Board, the inmate should be entitled to view it so as to be in a position to respond. Also, on certain occasions when the evidence of the inmate and the prison staff member is at odds in a serious allegation, it may be necessary to permit the inmate, if he requests, to view the video. As stated by the Court in *Crews v. Canada (Procureur General),* supra, this will not always be necessary. The environment in which these events occur may not require making the video available to the inmate in all cases. However, from this, it should be not concluded, that, in the circumstances of serious charges, there will never be instances when an inmate should be given an opportunity to see the video recording of the event. In deciding whether to allow the inmate to view the video, the Facility is entitled to take into account matters of confidentiality and security having regard to its mandate to manage the Facility.

[170] Another decision of the Federal Court, Trial Division, has recently set out a two-step analysis for reviewing decisions by prison disciplinary panels. In *Terrault v. Cowansville Penitentiary* (2003), 250 F.T.R. 207 (Fed. T.D.), at para 19, the Court stated:

> ... I will adopt the line of authority resulting in *Hendrickson, supra,* which holds that the applicant must first show a departure from procedural fairness, and second, the serious injustice caused to him by it, or the tribunal's decision will be upheld. However, at the first stage of the analysis, after concluding there was a breach of procedural fairness, I will consider whether the facts fall within the exception stated in *Mobil Oil Canada Ltd. v. Canada-Newfoundland*

Offshore Petroleum Board, [1994] 1 S.C.R. 202 at paras. 38-39], in that the outcome of the case would have been the same even if procedural fairness had been fully observed. If the answer to this question is yes, it will not be necessary to go on to the second part of the test, namely the existence of serious injury.

(A) Restrictions, Harassments and Mis-Treatment

[171] On the question of the manner of his detention, F., as noted herein, suggests a number of restrictions, harassments and mis-treatments during the period of his remand at the Facility. On the other hand, as observed in *R. v. Miller,* supra, not all complaints of restriction, harassment or mis-treatment, even where substantiated, warrant relief or remedy by way of *habeas corpus*.

[172] Among the issues raised by F. in respect to his ongoing detention, is the failure of the Facility to provide him with three meals on weekends. He references s. 43(1) of the Regulations wherever it is stipulated: ...

The Superintendent shall provide all inmates with three meals a day.

[173] Martell, in responding to F., stated inmates had voted to have two meals on weekends, a brunch, apparently in the late morning and an evening meal. F. responded the inmates, by vote or otherwise, cannot deny him his right to three meals. Martell, on being examined by F., stated he, in fact, received three meals, but served at two "mealtimes". Since the first weekend meal was a brunch, it, in the opinion of Martell, constituted a "breakfast and a lunch" although provided at the one time.

[174] Clearly on this occasion F. is correct. He does not receive three meals on weekends. A "brunch" is not two meals, a "breakfast and a lunch." In the absence of a provision in either the Corrections Act, supra, or Regulations permitting waiver of the obligation to provide each inmate with three meals, seven days a week, F. is correct. Absent his individual waiver, he has been denied that to which he is entitled to under the Regulations. The Facility is not entitled to simply ignore the relevant Regulations.

[175] However, whether this failure is a matter for *habeas corpus* relief is another question. As already referenced from *R. v. Miller*, supra, *habeas corpus* is not the appropriate form of relief for each and every possible or actual breach of a person's rights or privileges. There are, in the circumstances of a valid inmate review or appeal process, other avenues that are more appropriate for breaches of this nature. *Habeas corpus* is for circumstances

involving liberty of the subject or the imposition of a form or level of detention or restraint that is unjustified absent an appropriately procedurally fair hearing.

[176] All allegations by prison authorities, involving Level II and III offences, require the convening of a procedurally fair hearing. However, as noted earlier, the characteristics of the hearing that are necessary in order to ensure procedural fairness will obviously vary depending on the risk of penalty or sanction that may be imposed. In one circumstance there is the risk of the inmate's liberty being further restrained or restricted. On the other hand, issues such as meals on weekends, the number of boxes an inmate may have in his cell, visitation, telephone access and access to resources such as computers and video tape machines, although important and deserving of avenues of redress, where appropriate, do not involve the form or degree of restraint for which *habeas corpus* will lie. Although procedural fairness is required, the nature and extent is less than when the liberty of the inmate is subject to further restraint by the imposition of a period of time in segregation.

[177] Absent Rules or Regulations stipulating additional inmate rights to present reasonable evidence, which clearly would include the right to call witnesses at Board hearings, it is clear that in the list of complaints and allegations by F. only the imposition of segregation or administrative dissociation would necessitate a level of "procedural fairness" greater than what would apparently have been satisfactory in *Cardinal*, supra, namely an opportunity to hear the allegation or charge and an opportunity to make response. Even on the evidence of F., he was advised of the charges and provided an opportunity to make response. He was also aware of his right to appeal, and, as such, was given the degree of "procedural fairness" appropriate for a hearing in which no segregation or administrative dissociation was imposed, or at risk. However, there is the right to present reasonable evidence as is outlined in the S.O.P. dealing with Board hearings. The issue, therefore, remains as to the effect, if any, of the denial of the right to F. to present evidence by the calling of witnesses, recognizing that at the time F. was not aware of this right under the relevant S.O.P.

(B) Administrative Dissociation or Segregation

[178] A person charged with an offence for which administrative dissociation or segregation is being sought, is entitled to know not only the charges they

face, but the nature of the Board adjudicating the charges, their right to be present, call evidence, challenge the evidence presented against them and the range of possible penalties they face in the event of an adverse verdict. In the absence of knowledge of the S.O.P. dealing with Behaviour Management, it does not appear inmates appearing before either Board are informed of their rights, apart from an outline of the allegations as they appear in the Offence Report and information on the penalties being recommended to the U.R.B. They are also, of course, provided a "chance to explain their actions".

[179] Considering the restrictions on the inmates residual liberty, in the event of administrative dissociation or segregation, two penalties or sanctions not included in the sample sanctions or penalties listed in the Offender Handbook, the need for a full disclosure of inmate rights and potential sanctions is clear.

[180] In *Cardinal v. Kent Institution*, supra, Justice LeDain, at para 4 held:

> Administrative dissociation or segregation, as it was called by the Director of Kent Institution in his evidence ... is a form of confinement involving severe restrictions on mobility, activity and association. It is described in the reasons for judgment of McEachern C.J.S.C. as follows:
>
> > The liberty and freedom of a prisoner placed in segregation is further reduced, and solitary confinement (a term the director does not accept) is a phrase used by prisoners to describe segregation

[181] Martell and Henwood testified to the average number of U.R.B.'s conducted each day. It appears that U.R.B.'s on some occasions last only a few minutes. The prison environment will often necessitate the imposition of penalties and sanctions without the degree of procedural fairness that can be expected in other environments. Yet it cannot be used, in the circumstance of potential administrative dissociation or segregation, as justification for abandoning at least a minimum level of due process.

[182] In *Gaudet v. Marchand* [1994] 3 S.C.R. 514, Chief Justice Lamer, on behalf of the Court, approved the reasons of Justice Rothman of the Court of Appeal of Quebec. An inmate was notified he was being transferred to a special handling unit, that would deprive him, as a prisoner, of much of his residual liberty. Justice Rothman, at paras 28-31 made the following comments:

> There is no doubt that prisoners, although deprived of much of their liberty, still have a residual liberty permitted to the general prison population of the institution in which they are detained (R. v. Miller [1985] 2 S.C.R. 613; Cardinal and Oswald v. Director of Kent Institution [1985] 2 S.C.R. 643; Morin v. National Special Handling Unit Review Committee [1985] 2 S.C.R. 662)
>
> Nor is there any doubt that confinement in a special handling unit, or in administrative segregation, involves a significant loss of residual liberty of the inmate. (Miller, supra, page 641)
>
> It is now accepted, as well, that habeas corpus with certiorari in aid is available as a remedy to challenge an unlawful deprivation of residual liberty before a Provincial Superior Court. (Miller, supra; Dumas v. Leclerc Institute [1986] 2 S.C.R. 459)
>
> Finally, there can be no doubt that in deciding to transfer appellant from the general penitentiary population of Donnacona to administrative segregation and to a special handling unit, the authorities owed a duty of procedural fairness to appellant. (Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police [1979] 1 S.C.R. 311; Martineau v. Matsqui Institution Disciplinary Board [1980] 1 S.C.R. 602; Cardinal and Oswald v. Director of Kent Institution [1985] 2 S.C.R. 643).

[183] After noting the rule of confidentiality protecting the identity of police informers, in respect to affording procedural fairness, he continued, at para 35:

> Further, while the penitentiary authorities did have a duty to act fairly and to afford appellant an opportunity to know the reasons for the transfer and an opportunity to be heard or to make representations on his behalf, the prison context must be borne in mind. In Cardinal and Oswald (supra) the Supreme Court of Canada considered the duty of procedural fairness in the context or prison administration. Mr. Justice Le Dain observed (p. 654):
>
> > The question, of course, is what the duty of procedural fairness may reasonably require of an authority in the way of special procedural rights in a particular legislative and administrative context and what should be considered to be a breach of fairness in particular circumstances. The caution with which this question must be approached in the context of prison

> administration was emphasized by this Court in Martineau (No. 2), supra. Pigeon, J., with whom Martland, Ritchie, Beetz, Estey and Pratte JJ. concurred, said at p. 637:
>
> > I must, however, stress that the Order issued by Mahoney J. deals only with the jurisdiction of the Trial Division, not with the actual availability of the relief in the circumstances of the case. This is subject to the exercise of judicial discretion and in this respect it will be essential that the requirements of prison discipline be borne in mind, just as it is essential that the requirements of the effective administration of criminal justice be borne in mind when dealing with applications for certiorari before trial, as pointed out in Attorney General of Quebec v. Cohen ([1979] 2 S.C.R. 305).
> >
> > It is specially important that the remedy be granted only in cases of serious injustice and that proper care be taken to prevent such proceedings from being used to delay deserved punishment so long that it is made ineffective, it not altogether avoided.

[184] Then at paras. 36-39 before concluding “procedural fairness” was met, he states:

> The standards by which procedural fairness is measured are not immutable. They vary according to the context in which they are invoked. R. v. Lyons [1987] 2 S.C.R. 309, 361; R. v. Wholesale Travel Inc. [1991] 3 S.C.R. 154). A criminal trial to determine the guilt or innocence of an accused person is a different context from a hearing to determine the transfer of a prisoner from the general prison population to administrative segregation or a special handling unit and the hearing cannot be the same.
>
> In this case, appellant was given the opportunity to consult counsel and to make representations in person and in writing as to the reasons for the transfer.
>
> In my view, the authorities satisfied their obligation to act fairly, as indicated by the Supreme Court in Cardinal and Oswald (supra, p. 659):
>
> > The issue then is what did procedural fairness require of the Director in exercising his authority pursuant to s. 40 of the

> > Penitentiary Service Regulations, to continue the administrative dissociation or segregation of the appellants, despite the recommendation of the Board, if he was satisfied that it was necessary or desirable for the maintenance of good order and discipline in the institution. I agree with McEachern C.J.S.C. and Anderson J.A. that because of the serious effect of the Director's decision on the appellants, procedural fairness required that he inform them of the reasons for his intended decision and give them an opportunity, however informal, to make representations to him concerning these reasons and the general question whether it was necessary or desirable to continue their segregation for the maintenance of good order and discipline in the institution.
>
> In my respectful opinion, the authorities had no duty to provide appellant with copies of the statements given by informers, nor to afford appellant an opportunity to cross-examine these witnesses or the penitentiary authorities themselves. In a prison context, such a hearing would go considerably beyond procedural fairness into the realm of an unreasonable intrusion into the administration and security of the penitentiary.

[185] One of the deprivations of his right to make full answer and defence to the charges brought against him, is, in the submission of F., the absence of an opportunity to cross-examine the witnesses or prison authorities whose evidence formed the basis of the allegation or charge. In *Gaudet v. Marchand*, supra, Justice Rothman held procedural fairness, in the context of prison disciplinary hearings, did not include the right to "cross-examine witnesses or the penitentiary authorities themselves."

[186] Similarly, in *Armstrong v.* Canada (Commission of the Royal Canadian Mounted Police) (C.A.) [1998] F.C.J. No. 42, involving the discharge of the appellant on the ground of unsuitability, Justice Stone, at para 9 made the following observation and holding:

> The right to cross-examination, in essence, is the right to test the case against oneself. As the following passage from the decision in Innisfil (Corporation of the Township) v. Corporation of the Township of Vespra et al., [1981] 2 S.C.R. 145, at pages 168-169 reveals:

> ... it is not a necessary ingredient of natural justice that one who has submitted relevant evidence in writing or ex parte must be produced for cross-examination, provided that the evidence is disclosed and an adequate opportunity is given to reply to it.

There is little doubt in my mind that the appellant in the present case had a full opportunity to challenge the evidence against her, and I am therefore unable to conclude that the hearing before the Board lacked procedural fairness due to the absence of cross-examination.

[187] In *Armstrong*, supra, the appellant apparently never asked for the opportunity to cross-examine the authors of the statements in the RCMP's documentary evidence, and, in the view of Justice Shore, the evidence before the Board was not conflicting or contradictory. Nevertheless, the passage cited by Justice Stone clearly suggests cross-examination is not an essential element of procedural fairness.

[188] To similar effect, Justice MacDonald, in delivering separate reasons, at para 40 held:

> ... I am of the opinion that the Trial Judge was correct in stating that the rules of natural justice do not require that the appellant be granted the right to cross-examination in this case. The evidence before the Court was not contradictory and did not attack the appellant's credibility. Further, the Royal Canadian Mounted Police Act provides an extensive array of procedural rights and safeguards to satisfy the requirements of natural justice. As previously stated, courts should be sensitive to the reality that boards cannot be hindered by the same trappings we find in regular courts. Thus, the Trial Judge was correct in finding that the nature and effect of the statutory scheme did not deprive the appellant of her right to a fair hearing.

[189] Absent statutory or procedural rules or regulations granting the right to cross-examine witnesses, including prison staff, the denial of such a right may not be a failure to provide procedural fairness.

[190] However, where such a right is not given, there remains the necessity for the Board to ensure the inmate has a full opportunity to know the case they are to meet and to be provided with an opportunity to respond. In light of the Draft SOP Subject No. 10.10.00 revised 19 July 2001, subsection 4.3 that would include not only the right to make a statement but also the opportunity to "present reasonable evidence".

[191] In *Gravel v. Canada (Correctional Service)* [1999] F.C.J. No. 1569 the inmate was placed in segregation, received an upward adjustment in his security level and was transferred, against his wishes, to a maximum security institution. For security reasons, he was not given documents although apparently provided with "the gist of the reasons for all the decisions relating to him." He was found to have been given an opportunity to make full representations, and to have used the opportunity to make them both in person and in writing. His motion for judicial review was dismissed.

[192] To similar effect is the decision of the Federal Court of Appeal in *Blass v. Canada (Attorney General* [2002] F.C.J. NO. 810. There had been an incident in prison resulting in equipment damage. It apparently was viewed as jeopardizing the security of the institution. Blass was placed in segregation for 19 days. He denied any involvement in the incident. The Court allowed an appeal from the decision of the trial judge that "the prison authorities had breached the fairness principle by failing to give the inmate adequate information concerning the allegations behind his segregation."

[193] The Court of Appeal re-stated the issue as being whether the prison authorities "had reasonable grounds to believe that the respondent would interfere with the ongoing investigation". The trial judge was misled by the confounding of the cause of the respondent being place in segregation with the occasion of the placement. The reason for the placement was the fear he would interfere in the investigation not the result of any determination he had been an instigator.

[194] Authorities referenced by the trial judge, the Court held, "... did not deal with the requirements of procedural fairness with respect to administrative segregation during an investigation." As stated by Justice Pelletier, in the judgment of the Court, at para 20:

> ... Certain decisions made for the sake of the proper administration of the institution do not require the same degree of disclosure as decisions of a disciplinary nature. The decision to place the respondent in administrative segregation to ensure that he would not interfere with an ongoing investigation is clearly a decision made for the proper administration of the institution.

[195] Then, at para 22, he continued:

> I am of the opinion that the institutional head had reasonable grounds to believe that the respondent's presence in the general inmate

> population could interfere with the investigation, the purpose of which was to identify the instigator or instigators of the disturbance on April 22, 1999.

[196] Then at para 23, he concludes:

> With respect to the issue of procedural fairness, the penitentiary authorities informed the respondent that they believed his presence would interfere with the ongoing investigation and also told him the facts on which they based that conclusion. It was not necessary to give him more details about this information because, at that stage, the relevant issue was not whether he was an instigator or not, but whether he might interfere with the investigation. Once the respondent knew that there was information implicating him, and the reason that he was being confined was the fear that he might interfere with the investigation, he knew everything that there was to know. He could have tried to prove that the administration's fear was unfounded or that there were other ways to avoid the possibility that he would interfere with the investigation. There was no breach of procedural fairness.

[197] It is clear, absent rules or regulations to the contrary, it is not all decisions in response to breaches of prison rules or procedures that will necessitate a formal hearing before a Board with the attendant rights to call evidence. In this regard, Justice LeDain at para 15, references the statement by Justice Dickson (as he then was) in *Martineau* v. *Matsqui Institution Disciplinary Board* (No. 2), [1980] 1 S.C.R. 602 at p. 6:

> It should be emphasized that it is not every breach of prison rules of procedure which will bring intervention by the courts. The very nature of a prison institution requires officers to make "on the spot" disciplinary decisions and the power of judicial review must be exercised with restraint. Interference will not be justified in the case of trivial or merely technical incidents. The question is not whether there has been a breach of the prison rules, but whether there has been a breach of the [page 655] duty to act fairly in all the circumstances. The rules are of some importance in determining this latter question, as an indication of the views of prison authorities as to the degree of procedural protection to be extended to inmates.

[198] Relevant in the case of F., however, is the nature of his rights when appearing before either Board. In C.S. P. & P. Subject No. 10.10.00 in sections 2.2.5 and 2.2.6, it is stipulated:

> 2.2.5 ... When an offender pleads not guilty, all evidence pertaining to the incident shall be presented.
>
> 2.2.6 The offender shall be allowed to make a statement and present any reasonable evidence including written statements from others on his/her behalf.

[199] The stated policy and procedure in respect to the offender's rights at the hearing before the Board would appear to meet the requirements for procedural fairness in the conduct of a disciplinary hearing in which sanctions as severe as administrative dissociation or segregation are potential sanctions or penalties. In view of the fact the apparently relevant S.O.P. grants them to the inmate, although they are not outlined in the Offender's Handbook distributed at the time of the offender's admission, they clearly cannot be alleged to impose "an undue burden on prison administration or create a risk to security", both of which were recognized by Justice LeDain as considerations in determining procedural fairness in the context of the Director's refusal to follow the Board's recommendation.

[200] Three offence reports presented in evidence by counsel for the Facility specify the level of the offence, provide a brief description of the alleged events, the recommended penalty or sanction by the Facility employee reporting the incident, the hearing by the Board, including the response by the Offender to the statement of the alleged events and whether the Offender admitted them as written, denied the incident as written, or refused to admit or deny the incident. The Report also contains a summary of the hearing, including a brief outline of what the Offender may have said in response, together with the disposition by the Board and where appropriate, the penalty imposed and the signature by the members of the Board participating in the hearing. Nowhere in the Report is it indicated the Offender is advised of his right to present evidence on his or her behalf.

[201] In my view, such omission is a failure of procedural fairness since it is not sufficient a person appearing before a Disciplinary Hearing have the right to present evidence and therefore presumably to challenge the evidence of his accuser, procedural fairness necessitates the Offender knowing he has such a right.

[202] F., as noted, indicated on a number of occasions he was refused the right to call witnesses to challenge the reporting officer concerning the description of the events. Whether this was in fact the case is unnecessary to decide, since the real question is whether he was informed of his right to call such evidence. The denial is the failure to inform F. of his right to present evidence, as granted in the S.O.P. In the circumstances of such a failure, there was clearly a denial of procedural fairness.

[203] During his evidence Martell testified that notwithstanding the S.O.P. providing for Level II hearings before a U.R.B. and Level III hearings before a I.R.B. the practice, for some time, is to have all hearings before a U.R.B. Regulations and Operating Procedures duly made, bind not only those who may be subjected to their provisions but also those who are charged with the responsibility of enforcing them. Absent binding effect of such Regulations and Operating Procedures, on all parties, there is then some merit to F.'s assertion that in the Facility there are no rules and "they do as they please."

[204] A further fairness issue is the omission to provide F. with the evidence presented to the Board. Without entering into the propriety of the Board, apparently both investigating an alleged event, on its own, and then "acting as adjudicator", an essential feature of procedural fairness is the entitlement of the person charged to know the case they are to meet. Although security and other reasons may justify summaries of some of the evidence, procedural fairness, at a minimum, entitles the person charged to "know the case they have to meet" and be given at least an opportunity to respond. Although in "non-penal disciplinary hearings" all the trappings of a court trial may not be required, there are minimum standards, even in the context of a prison disciplinary hearing. Here, in addition, the inmate was granted by the S.O.P., although apparently unknown to the inmate, the right to present reasonable evidence.

[205] Although it was suggested by the respondents this right was accomplished by the Board, during the investigation, asking the inmate whether he had anyone he wished interviewed, this is a far cry from permitting the inmate to present the evidence directly to the Board charged with adjudicating his fate.

[206] The request by F. for access to any videos that may have shown the incident is also here relevant. Apparently, in at least some instances, the

Board does view the videos. However, on the evidence, it is clear that opportunity is not given to F..

[207] A further issue raised by F. relates to the S.O.P's dealing with segregation discipline protocol. S.O.P. Subject no. 10.00 under the section entitled "Behaviour Management" stipulates in section 2 that adult offenders placed in the segregation unit for committing Level III incidents or who present continual behaviour problems will receive a defined term in segregation, as determined by the Unit Review Board. Section 2.2 and 2.3 further stipulates:

> 2.2 If an offender is recommended to remain in segregation longer than a ten (10) day period, then the North Unit Captain must submit a written request to the Superintendent who will in turn forward to the Director of Correctional Facilities for approval.
>
> 2.3 Where an offender is placed in segregation for a continuous thirty (30) days the North Unit Captain shall prepare a report for submission to the Deputy Superintendent of Operations outlining to the reasons for the continued segregation of the offender. Said report will be forwarded to the Minister pursuant to legislative requirements.

[208] It is undisputed that at least on one occasion F. remained in segregation longer than the 10 day period provided in s. 2.2 and there was no "written request" submitted to the Superintendent. On the other hand, Martell appears to have indicated that a further Board hearing was held at which the decision was made to move him to North 5. Upon the expiration of the period of segregation imposed on F., following the initial hearing before the U.R.B., he was advised of the decision that he would be moved to the North 5 section of the Facility rather than returned to the section he had occupied prior to the imposition of the period of segregation. F. refused. He indicated a number of reasons relating to the conditions in North 5 as compared to his previous unit, West 5. There is nothing in the legislation or regulations relating to the housing of inmates in a Facility that entitles an inmate to determine the unit in which they are to reside, providing, of course, the decision to continue a form of restrictive detention is made in an appropriately procedurally fair manner.

[209] Among the many allegations by F. was the condition of the Facility, particularly in North 5. These allegations were, in general, supported by Mr. Gale, who testified on behalf of F.. If true, they are serious and

indicate an environment in which no one in this country should be required to live, including inmates in Federal and Provincial Correctional Institutions. On the other hand, Henwood testified to a different assessment of the condition of North 5, particularly the condition of the showers. On questioning by F. he said he would have no problem with his own children using the showers in North 5.

[210] The conditions in North 5 are not an allegation on which I should or will make a finding. They are not matters to be dealt within a *habeas corpus* application. I, therefore, make no finding as to whether these allegations of unhealthy conditions in North 5, or the Facility as a whole have merit or not.

[211] Both F. and Mr. Gale testified that they had made complaints to the Ombudsman without success. The Ombudsman has not testified. These allegations about the prison conditions would appear to be matters for the office of Ombudsman to investigate or to, at least, respond as to why they are not within their mandate. Absent evidence from the office of the Ombudsman as to their role and responsibility in this area, if at all, further comment would not be appropriate.

[212] F. testified to a number of difficulties in making telephone calls in general, and to V. and legal counsel, or potential legal counsel, in particular. One of the complaints to which he testified, and which Mr. Gale also testified, was that F. was given his “yard” at a time the phones available to inmates during yard are not activated. If this was not the case, no one testified to the contrary. No explanation was given as to why the telephones would not have been activated during the times inmates were given “yard”. This again, is not a matter for *habeas corpus*. It is more appropriately to be dealt with in the offender grievance process, with its attendant right of appeal and review. If it occurred, and only or primarily in respect to F., as was clearly insinuated, if not stated, then it may be a matter for the Ombudsman as well.

[213] Another issue with respect to the use of telephones is the allegation, or apparent allegation, that he cannot have private communications with counsel. Since, at times he testified to having no counsel, it is difficult to see how this allegation could apply at such times. Since all incoming phone calls are preceded by a caution they are being recorded, it is clear this is not a surreptitious attempt to record conversations between client and legal counsel. Although not specifically addressed in the evidence, it is understandable in the prison context that the prison authorities know of any communications between inmates and outside parties. What is not clear, at

least, to me, from the evidence is that there is no procedure for private calls between inmates and counsel. In fact, the evidence is unclear, although F. testified to many suspicious, as to what telephone calls out of the Facility are actually recorded. The denial of the right to private communication with legal counsel is very serious, invoking the *Charter* and the right to counsel. I am, however, not satisfied it has been established on the evidence that such a circumstance here exists. If it does, then, of course, it is a very serious matter indeed.

[214] Yet, a further issue in respect to telephone calls to counsel concerned a telephone call to his counsel in Ontario, when during the course of the call he began to speak to V., who was then present in the legal counsel's office. The prison staff member hung up the call at this point. This again, if accurate, and I recognize the evidence of V. to a large extent mirrored that of F. on this event, it is not a matter for *habeas corpus.* Despite what appears to be uncontradicted evidence on this event, it is unnecessary to make a finding. Indeed, if the condition of the call had been that F. wanted to talk to the lawyer in Ontario, and that was the permission given, speaking to V. may have been a violation of the permission justifying the actions of the prison staff member. The grievance process, or proceedings relating to the right to counsel, and to speak to counsel, would appear to be the appropriate avenues of redress, if redress is warranted.

Conclusion

The Bail Hearing

[215] Issues as to seating at the lawyers table, pens, papers, access to resources to prepare for hearings, communications with co-applicant are for review and consideration by the trial or hearing judges involved. They are not matters for *habeas corpus.*

[216] The validity, including the jurisdictional basis for any hearing, as well as, matters of natural justice and the opportunity to make full answer and response can, in appropriate circumstances be matters for *habeas corpus*. However, F. has raised at least some of these issues, particularly the question of the receipt of evidence by the trial judge by way of submission rather than in the testimony of witnesses, in hearings pursuant to s. 520 of the *Criminal Code*. Having raised, albeit unsuccessfully, the procedure

adopted by the Provincial Court Judge for receiving evidence, it is not open to him to once again raise the same issue, before another Judge of the same Court. The only possible exception would be if there was in law, no right to appeal the decisions by the Supreme Court Justices. In such a circumstance, justice and fairness would entitle him to some avenue to have the issue of the procedures adopted by the Provincial Court Judge reviewed by the Court of Appeal. Although he appealed the decision of Chief Justice MacDonald, approving the procedure at the bail hearing, he later abandoned this appeal. No determination has therefore been made as to whether an Appeal can lie from a decision by a Justice under s. 520. If there is, that is the avenue for F. to pursue any further review of this question. If there is no right to appeal a s. 520 ruling, then either by *habeas corpus* in the Court of Appeal, or in the Supreme Court, with the right of appeal to the Court of Appeal, would appear to be at least two of the logical alternatives available to him.

[217] Until the Court of Appeal determines whether an appeal lies to that Court on the issue of the evidentiary procedure adopted in the bail hearing, and affirmed on review under s. 520, there is no jurisdiction to grant *habeas corpus*.

[218] I therefore make no comment on whether F. ‘s objection to the procedure adopted by the Provincial Court Judge has merit. I have decided that until the Court of Appeal rules otherwise, F. should, if he wishes, address the procedure adopted by the bail hearing Judge, and approved by two Justices of this Court, in the Court of Appeal.

The Manner and Form of Detention

[219] Other than hearings in which administration dissociation or segregation is imposed, the provisions of s. 2.2.6 of the C.S.P&P, having regard to the prison environment and the need to maintain order and discipline, meet the requirement for procedural fairness. However, when offenders are not made aware of their rights under s. 2.2.6, they are, in fact denied procedural fairness. It is not enough an offender is entitled to the rights outlined in s. 2.2.6, he must also be made aware he possesses them. This failure can be overcome by either providing a more detailed explanation of the disciplinary process in the Offender Handbook given at the time of admission, or by providing the offender with the relevant Standard Operating Procedures and Policies and Practices. (S.O.P. & P.& P.) By whatever means, it is essential that inmates be made aware of their rights.

[220] However, even in the event of such breach or breaches, in the circumstances of penalties and sanctions, other than administrative dissociation, segregation, or the hole, *habeas corpus* does not lie as a remedy or relief. These sanctions and penalties are not further restrictions on the residual liberty enjoyed by inmates in the general inmate population, rather, they are imposed in order to maintain internal order and discipline in the institution. In respect to the failure to notify F. of his rights under s. 2.2.6, he is entitled to a declaration he was denied procedural fairness; he is not entitled to *habeas corpus*, at least until the Facility has had an opportunity to correct the deficiency.

[221] It was not until near the end of Martell's in excess of three days of examination by F. that the roles of the U.R.B. and I.R.B. were advanced as being something other than as outlined in the S.O.P. filed by the Facility in response to the demand to produce its relevant documents and materials on this application. The acknowledgment by Martell that the Facility does not follow the S.O.P. in relation to the roles of the U.R.B. and I.R.B. is yet another instance of a failure to provide procedural fairness. In so determining, I recognize the S.O.P. is stated to be a "Draft". This S.O.P. was tendered on this hearing a part of the Policies and Procedures of the Facility. It is apparently the only Policy and Procedure relating to these two Boards. If this S.O.P. is not applicable, because it is only a "Draft" then effectively there is no policy and procedure delineating the roles of these two Boards, and as F. says "they do what they please".

[222] In respect to the hearings where administrative dissociation, segregation or the hole was imposed, I am satisfied procedural fairness, even in the context of the prison environment and the mandate to maintain internal order, discipline and security, requires at least the right to know the evidence being considered by the Board. In respect to information that for a variety of reasons may be of a confidential nature, such as evidence that might identify, or tend to identify, an informer, the entitlement is limited to having the "gist" of the evidence. In view of the penalty or sanction of administrative dissociation, segregation or the hole not being a true penal consequence, procedural fairness does not, at least in the prison context, include a right to cross-examine witnesses or prison authorities.

[223] In light of C.S.P. & P. s. 2.2.6 granting the inmate the right to "present evidence" , the inmate is entitled to call witnesses, as well as present documents and other written materials.

[224] However, even in the circumstances of a hearing where administrative dissociation, segregation or the hole may be imposed, regard must be had to the environment in which it is being held. An inmate cannot expect the degree of procedural fairness attendant on a “full trial” except “perhaps” in hearings involving potential for the most serious of penalties, such as administrative dissociation, segregation or the hole combined will transfer to a more restrictive environment and loss of remission. As noted earlier there is a need to balance the entitlement to procedural fairness in disciplinary hearings with the obligation resting on the prison authorities to manage the facility. Nevertheless, inmates are entitled to expect the Facility to observe its own rules and regulations and to both provide and communicate to inmates at least a minimum level of procedural fairness in disciplinary hearings.

[225] An inmate is entitled to due process before his residual liberty may be further restricted. Due process necessitates a procedural fair hearing. A procedurally fair hearing is one in which the accused inmate is entitled to, at least, certain minimum rights, including the right to know the evidence against them and to call evidence or present evidence in response, and is aware of these rights. F., by C.S.P. & P. s. 2.2.6 was given these rights, the only problem is that he was not aware of his right to call evidence.

[226] F. is entitled to a declaration that his right to a procedurally fair hearing was denied by the failure of the Respondent Facility to advise and permit him to call evidence, if he wished to do so. There is no writ of *habeas corpus* since his residual liberty, at the time of this hearing was not being limited or restricted. Other breaches, such as not receiving three meals on weeks, are not matters for which *habeas corpus* is available.

[227] On the other hand, F. by his own admission has received privileges apparently not given to all of the other inmates. Martell in his affidavit of November 19, 2004 as noted earlier, stated that:

> as a self-represented litigant, F. was given more opportunities and liberties in preparing for Court than was given to other inmates.

[228] In alleging there are no rules at the Facility, F. refers to the fact that although he was told he was only allowed 2 boxes of his documents and materials in his cell, at times he was permitted to have 4 boxes. Also, that he was told that he was only allowed 10 names on his list for making phone calls, yet he at the time of his evidence had 16 names. F. in saying there were no rules included, as examples, at least these two occasions where he

was given additional privileges. Additionally, it appears that F. was offered an additional room, connected to the Resource room, to keep and review his materials, his complaint being that the room was too small. It is not clear whether this room was available to other inmates as well. Since he was offered the opportunity to house his boxes in this room it would appear this was also a special privilege granted to F.. Henwood testified that F. was given permission to bring paper and pens to non-contact visits, and that this was a special privilege. This privilege he said was approved by Captain MacNamara, who was the Captain in charge of security risk management.

[229] It is difficult to assess fault on the Facility for failing to follow "rules or practices" when the complainant is the person who has been granted the advantage of the exception. Other inmates may well have reason to complain of the special privileges granted F.. It is difficult to see the merit of F.'s complaint.

[230] Apart from the issue of the disciplinary hearings, how they are conducted and the information provided to inmates as to their rights at such hearings, and providing them with such rights, the numerous complaints of mis-treatment, deprivations and failures by the Facility are matters to be addressed in the grievance process, including the rights of appeal and, to the extent permitted by law, for review by the Courts. These are not matters for *habeas corpus* or relief by way of declaration or otherwise on this application.

[231] Apart only in respect to the matter of the number of meals F. is given on weekends, I make no findings of fact on the other allegations. Since this is not the proper application to deal with these issues, findings of fact and the effect of such findings, are for the adjudicative bodies that should properly deal with them. The number of meals F. receives on weekends was not disputed. The attempted justification so lacked merit, and in view of the circumstances that the deficiency was ongoing even to the time of this hearing, it was necessary to make the finding that the Facility has breached Regulation 43(1).

J.