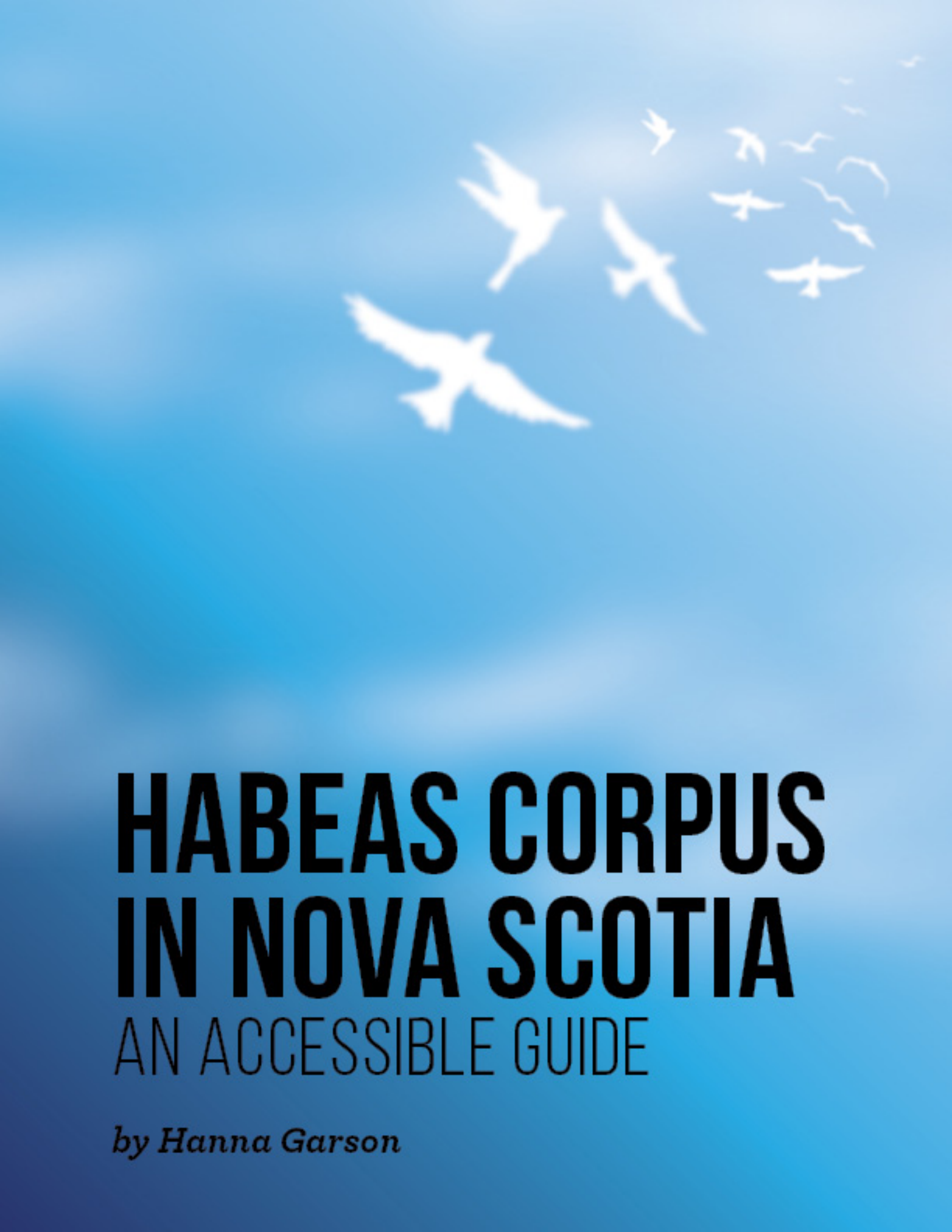

HABEAS CORPUS IN NOVA SCOTIA

AN ACCESSIBLE GUIDE

by Hanna Garson

HABEAS CORPUS IN NOVA SCOTIA

AN ACCESSIBLE GUIDE

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HABEAS CORPUS: THE PRACTICE IN NOVA SCOTIA

What Is 'Habeas Corpus'?

In the past: Habeas corpus applications were mainly used to challenge the legality of a person's detention. If an individual believed they were wrongfully convicted, they could use the writ of habeas corpus to come before the court and argue that their liberty had been unlawfully restrained.

Today: A prison sentence necessarily reduces one's liberty, but only to a certain extent, as explained by the CCRA ss. 4(d). However, within the prison setting, there are a range of liberties to which the incarcerated individual is still entitled. The writ of habeas corpus is one tool that can be used to address situations where this **residual liberty** has been unlawfully restricted, for example, by being held in segregation, or a "prison within a prison".

How Does One Apply For Habeas Corpus In Nova Scotia?

The following is a "nuts and bolts" account of the use of habeas corpus applications for prisoners, intended for lawyers and other advocates interested in representing prisoners in habeas corpus applications, as well as self-represented litigants.

PRACTICAL QUESTIONS: ACCESS, CIVIL PROCEDURE FORMS, LEGAL STEPS IN NOVA SCOTIA

The Reality Of The Situation

Most often, applications for habeas corpus are made by self-represented incarcerated individuals. People in prison are generally not able to afford a lawyer and habeas corpus applications are not covered by Nova Scotia Legal Aid. Thus people have to represent themselves in applications for habeas corpus in Nova Scotia.

How does an individual in prison learn how to file a notice of habeas corpus? The number of habeas corpus applications filed by self-represented incarcerated individuals in Nova Scotia, as well as across the country, has skyrocketed over the past few years. Incarcerated individuals and their families learn about habeas corpus mainly through word of mouth, communicating with one another, as well as from various prisoners' rights groups and advocates attempting to spread the word.

However, learning that habeas corpus is a potential avenue of redress is only the first challenge. The individual must then access the proper Civil Procedure Form, and fill it out correctly, in order to be given the chance to argue their case before the Nova Scotia Supreme Court.

Legal education materials are not readily available for those detained in prison. Federally, section 97 of the *Corrections and Conditional Release Regulations*, and the Commissioner's Directive 720 (Education Programs and Services for Inmates) provide that an incarcerated individual has the right to 'reasonable' access to legal materials. However, exercising this right is not so simple, especially in circumstances that would trigger the need for a habeas corpus application – for instance, in segregation.

How is an incarcerated individual to know what forms to request, how to fill out the forms, or where to submit the forms? Additionally, even if the incarcerated individual does know which forms to request, some corrections staff deny these requests.

The rest of this handbook intends to provide the how-to nuts and bolts for filing a habeas corpus application in Nova Scotia that may otherwise be difficult to find when behind bars.

The Relevant Nova Scotia Civil Procedure Rules, Forms

- NS Civil Procedure Rule (CPR) 7: Judicial Review and Appeal
- NS Civil Procedure *Form 7.12 Notice of Habeas Corpus:*
    - See Appendix A for a blank form, and Appendix B for an annotated form designed to assist incarcerated individuals with their habeas corpus application.

Step-By-Step On Pursuing Habeas Corpus in Nova Scotia

Submit Form 7.12: the incarcerated individual must submit a completed *Form 7.12 Notice of Habeas Corpus* to the prothonotary's office of the provincial court by mail.

Addresses of the Prothonotary's Office:

Amherst Supreme Court Prothonotary
16 Church Street
3rd Floor
Amherst, NS B4H 3A6

Antigonish Supreme Court Prothonotary
11 James Street
Antigonish, NS B2G 1R6

Digby Supreme Court Prothonotary
119 Queen St.
P.O. Box 1089
Digby, NS B0V 1A0

Halifax Supreme Court Prothonotary
The Law Courts
1815 Upper Water St.
Halifax, NS B3J 1S7

Kentville Supreme Court Prothonotary
87 Cornwallis Street
Kentville, NS B4N 2E5

Pictou Supreme Court Prothonotary
69 Water Street
P.O. Box 1750
Pictou, NS B0K 1H0

Port Hawkesbury Supreme Court Prothonotary
15 Kennedy Street
Port Hawkesbury, NS B9A 2Y1

Sydney Supreme Court Prothonotary
136 Charlotte Street
Suites #1 & #2
Sydney, NS B1P 1C3

Truro Supreme Court Prothonotary
1 Church Street
Truro, NS B2N 3Z5

Yarmouth Supreme Court Prothonotary
164 Main Street
Yarmouth, NS B5A 1C2

Judge assesses form: Upon receipt of completed Form 7.12 Notice of Habeas Corpus, the prothonotary gives the form to a judge, who has discretion to either:

- Return the Notice of Habeas Corpus, refusing the submission, as the form was filled out incorrectly or did not identify a recognized basis for arguing that the detention was illegal;

  OR

- Convene a preliminary meeting with the habeas corpus applicant and respondents (**typically held by teleconference**), at which:

  - The judge may, if the Notice of Habeas Corpus is filled out incorrectly, give guidance to the incarcerated individual on amending the errors (instead of refusing the application);
  - The applicant may be asked for clarification on elements of the application, such as remedy sought;
  - The parties may set hearing dates, and/or;
  - There may be discussion of mootness (i.e. is the complained-of deprivation of liberty no longer occurring?) Sometimes, a court will hear a challenge despite the fact it is moot (for instance, because it is a frequently occurring problem that is difficult for prisoners to bring before the courts).

Judge completes CPR Form 7.13: The judge, after the teleconference, fills out CPR Form 7.13 which directs the respondent correctional institution decision-makers to produce the relevant records, and to bring/transport the habeas corpus applicant to the court at the set date and time for the hearing. *See Appendix C for an example of this Order.*

- A Transportation Order may be required to ensure the habeas corpus applicant is brought to the court for the hearing.

Production of records: Pursuant to CPR Form 7.13, the respondent (the correctional decision-makers) should produce all of the relevant records to the habeas corpus applicant, as well as to the court.

Habeas Corpus Hearing in Court:

- The correctional institution must bring their affiant (the correctional employee who will be giving testimony), which will often be the deputy superintendent of the institution or someone in management.
- The habeas corpus applicant should note that:
  - They are an important source of evidence for their case. Therefore they must be prepared to testify, and should spend time considering what to discuss in their testimony;
  - If the applicant is self-representing, they should consider which questions to ask during their opportunity to cross-examine the affiant produced by the respondent.

LEGAL TEST FOR HABEAS CORPUS:

There are two elements to the legal test for establishing habeas corpus, as explained in the leading case, *Khela v Mission Institution,* 2014 SCC 24 [*Khela*]:

1) **A deprivation of residual liberty**: this must be proven by the applicant, who must also "*raise a legitimate ground* upon which to question the legality of the deprivation]; and

2) **The deprivation of liberty is unlawful**: Importantly, as explained below, once the applicant raises a legitimate ground of illegality, the onus shifts to the respondent correctional institution/Attorney General to prove that the deprivation of liberty *was lawful*].

Step One: Deprivation of Residual Liberty:

In order to be successful in a habeas corpus application, the applicant must establish that their liberty has been restricted over and above the basic restrictions that necessarily accompany being imprisoned. The burden of proof lies upon the applicant at this first stage of the proceeding. What constitutes a "residual deprivation of liberty" according to the case law?

The Supreme Court of Canada, in *Khela*, stated that "Decisions which might affect an offender's residual liberty include, but are not limited to, administrative segregation, confinement in a special handling unit and, as in the case at bar, a transfer to a higher security institution." (para 34)

- **Segregation (Administrative and/or Disciplinary)/Close Confinement**
    - Involuntary administrative segregation, disciplinary segregation and close confinement are three examples of "prisons within a prison" that deprive inmates of their liberty;
    - *See Brauss v. Canada (Attorney General)*, 2016 NSSC 269 [*Brauss*] for a case that provides an example of this situation. (In fact, *Brauss* illustrates each of the three main forms of deprivation of liberty recognized in the case law: involuntary segregation, increased security classification, and involuntary transfer to a higher-security institution.)
- **Increased Security Classification**
    - As noted, *Brauss* is one example of a well-recognized form of deprivation of residual liberty: increased security classification.
    - Also see *Gogan v. Canada (Attorney General)*, 2017 NSCA 4, where an initial security classification (rather than a shift from one to another) was recognized as a deprivation of residual liberty. Specifically, transfer from the Regional Reception Centre (RRC) at Springhill where classification was first made to segregation at Springhill and then a maximum security facility (Renous) was recognized as a deprivation of residual liberty.
    - In that case (*Gogan* 2017 NSCA 4) the court recognized a "hierarchy of deprivation" in the federal correctional context "going from least restraint to greatest as follows: minimum security institute; medium security institute; RRC detention unit; maximum security institute; solitary confinement/administrative segregation." Whenever one is transferred to a higher security context, one can claim deprivation of residual liberty.
- **Involuntary Transfer**

- The increase of a prisoner's security classification, say from medium to maximum, may result in their involuntary transfer to a more secure institution. For instance, an inmate who is housed in a medium security penitentiary may be transferred to a maximum security penitentiary if their new security classification requires it.

- This type of transfer is considered a deprivation of liberty because it results in the inmate being placed in a more restrictive institutional setting, as explained in *May v Ferndale* (2005) 3 SCR 809.

    See *Bradley v. Correctional Service Canada, 2012 NSSC 173* for a case that provides an example (it is a challenge to both an increased security classification and a related involuntary transfer).

- **Continuation of Deprivations of Liberty**

    - The original decision to reduce an inmate's liberty may have been lawful; however, continuing that deprivation of liberty may not be. For example, an inmate may be lawfully placed in segregation, but kept in segregation longer than they should be. This may be subject to a habeas corpus application.

        See *Bradley v. Canada (Correctional Service), 2011 NSSC 503* for a case that provides an example of this situation.

Step Two: Grounds for an Unlawful Deprivation of Liberty

The habeas corpus applicant must next **raise a legitimate ground** as to why the deprivation of their liberty is unlawful.

The Court has recognized in *Khela v Mission Institution*, 2014 SCC 24 that it is not fair to make inmates prove the unlawfulness of a particular deprivation of liberty. Rather, the party who has caused the deprivation must be able to justify the deprivation, and so the burden lies on correctional authorities to demonstrate that the deprivation of residual liberty meets the tests of "lawfulness" and "reasonableness".

- **Challenging Lawfulness**

    - **Lack of Jurisdiction:** One ground upon which to show that a deprivation is unlawful is that the decision-maker in question did not have the authority to make the decision being challenged.

        See *May v. Ferndale Institution*, [2005] 3 SCR 809, 2005 SCC 82 at paragraph 77. The prisoners argued that a transfer was outside the decision-maker's jurisdiction, because it was *arbitrary* and so inconsistent with the "principles of fundamental justice" under s.7 of the Canadian Charter of Rights and Freedoms. (The arbitrariness claim did not succeed in the circumstances of that case, but the prisoners did succeed on the basis of lack of procedural fairness).

    - **Breach of Procedural Fairness:** The Department of Corrections and the employees of Corrections owe a duty of procedural fairness to the incarcerated individuals impacted

by their decisions. Many of the ways in which a correctional decision-maker can breach the duty of procedural fairness deprive the incarcerated individual of any real way to challenge the decision if they think the decision is unfair. These include, but are not limited to:

(i) insufficient/ lack of disclosure about the decision being made or avenues to challenge the decision;

- See *Khela v Mission institution, 2014 SCC 24* for an example. In federal corrections, s.27(3) of the CCRA governs what CSC must disclose when making decisions impacting residual liberty and the limited reasons they can rely on to hold information back. *Khela* discusses this section's requirement that CSC disclose "all the information" to be relied on in a decision to transfer, or a summary of that information. Exceptions must strictly accord with s.27(3), including the processes set out there and in *Khela*;

(ii) improper procedure for verifying evidence used against an inmate;

- See *Richards v Springhill Institution*, 2014 NSSC 121 (upheld on appeal in *Richards v Springhill Institution*, 2015 NSCA 40) for an example;

(iii) denial of right to counsel;

- There have not yet been cases where habeas corpus was granted due to a prisoner being denied **state-funded counsel (i.e. legal aid)**. (See, eg, *Bradley v. Canada (Correctional Service), 2011 NSSC 463*). However, in *Richards v Springhill Institution*, 2014 NSSC 121 the court recognized that habeas may be granted where there is a deprivation of liberty and the prisoner is not afforded the right to retain and instruct counsel within a reasonable time (see para 73).
- The decision of *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62 recently established that, when facing segregation, an inmate has the right to legal counsel to argue against allegations and reasons held by Corrections to support their decision to segregate. (However, the court did not specifically grant a right to state-funded counsel, or legal aid). This decision has been appealed;

(iv) lack of notice about the decision or an opportunity to challenge the decision;

OR

(v) not giving reasons for the decision.

- **Challenging Reasonableness:**

  - As explained in *Khela v Mission institution, 2014 SCC 24*, when reviewing whether the Prison Authority's decision was reasonable, the Court will – looking to the record and evidence – determine whether the decision was within a range of possible, reasonable conclusions.

  - Whether a decision is reasonable depends on whether the decision has a justification, and whether the decision-making process was transparent and intelligible. Reasonableness also requires that the decision is defensible in regards to the facts and the law of the case. An unreasonable decision may not be supported by evidence, and may be arbitrary. Unreasonable decisions are unlawful in the habeas corpus context per *Khela v Mission*.

    See *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 for a discussion of the concept of reasonableness in law. This case is not a habeas corpus, but the concept of reasonableness still applies as a way of making a habeas corpus challenge.

  - An illustration of a successful challenge based in part on unreasonableness (specifically, insufficient evidence) is *Richards v Springhill Institution*, 2014 NSSC 121 .

REMEDIES

What will happen if the habeas corpus application is successful? The Supreme Court of Canada, in *Khela*, states that where a habeas applicant is successful, "all a provincial superior court can do is determine that the detention is unlawful and then rule on a motion for discharge." That is, the remedy is to remove the person from the situation that has been found to be an illegal deprivation of liberty.

For example, if the decision to segregate an inmate was made unreasonably or unfairly, then the applicant will be released from segregation. See Appendix C for an example of such an order.

This does not prevent the inmate from being placed in segregation at any moment for a new disciplinary infraction. However, in order to protect against repeated misconduct on the part of corrections, a judge can give guidance to corrections on avoiding similar illegalities in the future: Charlie v. British Columbia (Attorney General), 2016 BCSC 2292.

Some applicants have sought other, positive remedies under s.24(1) of the *Canadian Charter of Rights and Freedoms* (statements of Beveridge JA in *Springhill Institution v. Richards*, 2015 NSCA 40 lend some support to this approach). But, for instance, the Ontario Court of Appeal has ruled that one cannot claim Charter damages (i.e. a monetary award) on a habeas corpus application *(Brown v Canada (Public Safety) 2018 ONCA 14*).

Further positive consequences of a successful habeas claim, apart from overturning the decision that led to the illegal deprivation, include:

1) **Important precedent may be set:** Future legal cases may be influenced by your successful case;

2) **Promoting other prisoners' knowledge about and defence of their rights:** The successful applicant may feel a degree of justice has ensued because they were heard in court. Other incarcerated individuals at the applicant's institution are likely to learn of the success by word of mouth, which may increase the chances of other prisoners bringing habeas corpus applications of their own.

WHAT WILL HAPPEN IF THE HABEAS CORPUS APPLICATION IS UNSUCCESSFUL?

Likely, nothing.

But, something to consider: There are recent cases in which individuals who had submitted repeated unsuccessful applications for habeas corpus have been burdened with costs as well as the label of vexatious litigant leading to their access to the court being expressly restricted. Alberta and Ontario are the provinces in which this has been most often occurring.

See *McCarger v Canada*, 2017 ABQB 416, *Ewanchuk v Canada (Attorney General)*, 2017 ABQB 237, *MacKinnon v Bowden Institution*, 2017 ABQB 574.

See *Attorney General of Canada v Mennes*, 2012 ONSC 3918 for a case in which an applicant was labelled as a vexatious litigant but not burdened with costs.

Relevant Statutes, Regulations and Policy:

For individuals held in a provincial jail (there are currently 4 adult jails and one "youth center" in Nova Scotia), the relevant legislation and policy in Nova Scotia is:

- The *Correctional Services Act*, SNS 2005, c 37;
- The *Correctional Services Regulations*, NS Reg 99/2006; and
- The *Correctional Services Policies and Procedures,* NS Department of Justice.

For individuals held in a federal prison (Springhill and the Truro Women's Prison), the relevant legislation and policy is:

- The *Corrections and Conditional Release Act,* SC 1992, c 20;
- The *Corrections and Conditional Release Regulations,* SOR /92-620; and
- The *Commissioner's Directive*s, Correctional Service Canada.

The following constitutional sources may be helpful. Each of these documents outlines your basic rights. When you feel your rights have been breached, you may want to read and refer to them:

- The *Canadian Charter of Rights and Freedoms* (especially sections 7, 8, 9, 10, 11, 12, and 15);
- *United Nations' Standard Minimum Rules for the Treatment of Prisoners* (the *Mandela Rules*); and
- *United Nations Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment*.

EXPANDING HABEAS CORPUS: CURRENT ISSUES, FUTURE REFORM

Habeas corpus not currently available to address unfair, unreasonable Parole Board decisions

Currently, resulting from an interpretation of *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 SCR. 809 (S.C.C.), provincial courts have the discretion to decline habeas corpus jurisdiction if there already exists a "complete, comprehensive and expert procedure for review" of the prisoner's confinement. The Parole Board of Canada (PBC) Appeal Division is considered to provide such a complete, comprehensive and expert procedure for review, as confirmed in *Blais v. Canada (Attorney General),* 2012 NSCA 109;

Wilson v Canada, AG 2013 NSCA 49; *Babinski v Canada (Attorney General)* , 2014 ONSC 6493; and *Woodhouse v William Head Institution*, 2012 BCCA 45.

As of yet, courts have (for the most part) chosen to employ this discretion to decline habeas corpus jurisdiction in parole matters. Meaning, if an incarcerated individual applies for parole (day or full parole) and is denied, and feels this denial is unjust or unreasonable, the court may decide to deny them access to habeas corpus to challenge the decision of the PBC. Instead, they must appeal the denial through the PBC Appeal Division. From there, they may seek judicial review in the federal court (a time-consuming and complex process compared with habeas applications).

Concerns exist over the fact that provincial courts have discretion to decline habeas corpus jurisdiction in the case of denial or revocation of parole. It is argued that the Parole Appeal Board should not be regarded as a "complete, comprehensive and expert procedure for review" of the prisoner's confinement in such cases. These procedures often do not provide a timely, adequate mechanism to protect the prisoner's liberty from unjust restrictions.

The purpose of conferring jurisdiction to hear habeas corpus applications upon Superior Provincial Courts is to allow an expedited review of correctional decisions to restrict liberty due to the high stakes of the situation. However, the *Corrections and Conditional Release Act* does not impose any timeline by which the PBC must hear the appeal. Meaning, the applicant may wait – still in prison – for months or years before their appeal is considered. Additionally, denials of parole are only appealable on limited grounds.

However, DG v Bowden Institution, 2016 ABCA 52,[*Bowden*], affirming *DG v Bowden Institute*, 2015 ABQB 373, provides precedent that habeas corpus can be used to challenge decisions of the PBC Appeal Division. In *Bowden,* the Court granted habeas corpus and certiorari in aid to the applicant DG, ruling that the PBC Appeal Division's revocation of his day parole was unlawful and procedurally unfair. Unfortunately, the decision does not challenge the holding of other courts that "the parole revocation process up to the conclusion of proceedings before the PBAD [appeal division] [. . .] is a complete, comprehensive and expert procedure and thus precludes recourse to *habeas corpus*." However, the decision is important in allowing that a PBAD (Appeal Division) decision may be challenged by way of *habeas corpus* rather than having to take the further time and expense of pursuing judicial review in the Federal Court.

What counts as a deprivation of residual liberty?

Many rights abuses experienced by inmates cannot be addressed through habeas corpus because they are not considered deprivations of residual liberty. What constitutes a deprivation of residual liberty for the purposes of habeas corpus? The answer is neither clear nor static. Meaning, what the courts accept as 'residual liberty' has changed, and may continue to change.

Hopefully, the courts will, over time, broaden their understanding of what constitutes residual liberty, and therefore more incarcerated individuals will have the option of addressing their rights abuses through habeas corpus.

What has not yet been considered deprivation of residual liberty:

- A loss of privileges;
- An "insignificant or trivial" limitation on rights;
- Denial of or inability to access rehabilitation programming;
- Rude, abusive, or inattentive staff;
- Exposure to dangerous inmates;
- Complaints about food, medical services, and hygiene;
- Complaints that the inmate grievance procedures are ineffective;
- Inadequate mail services and searches of mail, inadequate access to or excessively expensive telephone communications;
- Restrictions that impede legal research, document preparation, and litigation (see *McCargar* v. *Canada*, [2017] ABQB 416 at para 54);
- Being housed in a double occupancy room instead of the usual single occupancy (see *Mennes* v. *Canada (Attorney General)* [2008] 6424 (ON SC));
- Being double bunked (see *Piché v. Canada (Solicitor General),* [1984] 13 WCB 149, 17 CCC (3d) (FCTD));
- House arrest as a bail condition (see *R v. Ethier*, [2009] 11429 (ON SC)).

Lockdowns: It remains an open question whether lockdowns stemming from chronic understaffing constitute a deprivation of residual liberty sufficient to merit a habeas corpus application, with the Ontario Court of Appeal ruling that the frequency, length, and impact of such lockdowns are all important factors to be considered on a case-by-case basis (see *Ogiamien*, supra note 40 at para 37-69).

A recent habeas corpus case concerning frequent lockdowns held that the prisoner's application failed to the extent that the prisoner's conditions of confinement were not more restrictive than the conditions of the other prisoners.

It is possible that, over time, creative argumentation will lead to the courts expanding their view of what constitutes a residual deprivation of liberty. This would mean that habeas corpus would be able to address a broader range of rights deprivations in prison. However, encouragement of making such arguments must be accompanied by warning about the trend to burden applicants with costs and the title of vexatious litigant, as explained above.

The possibility of an expedited judicial review and interim injunction instead of habeas corpus

If one's situation is not considered a deprivation of residual liberty, an alternative route to address the situation, or to have the rights abuse ceased, is to apply for judicial review seeking an interim injunction.

Gates v. Canada (Attorney General), [2007] FC 1058 sets precedent for prisoners seeking interim relief in judicial review to address emergencies that could not otherwise be addressed within a suitable timeframe by the prison's internal grievance procedure.

In *Gates,* prisoners were exposed to extremely cold temperatures and were not provided with additional clothing or blankets. A judicial review was filed (habeas corpus was not available as low temperatures were not considered deprivations of residual liberty) at which time the applicants successfully sought an order for interim relief. The court issued an interlocutory injunction prohibiting Correctional Service of Canada (CSC) from allowing the temperature in the unit to drop below a certain level pending the final disposition. Because of the potential health repercussions, the court in *Gates* acknowledged there was need for expedited resolution of this complaint, and that applicants were therefore justified in departing from the requirement to exhaust internal grievance processes.

Gates provides valuable precedent, as the Federal Court (at paragraph 28) made clear its willingness to issue remedial orders in cases "where there are urgent substantive matters and evident inadequacy in the internal procedures."

The potential to apply *Gates* to conditions of confinement in general, but in particular provision of medical care, is especially important, as healthcare-related issues are consistently noted by the Office of the Correctional Investigator in their annual reports as amongst the most common complaints by federal prisoners.

> (See, for example, The Correctional Investigator of Canada, Annual Report of the Correctional Investigator of Canada, 2016-2017 (Her Majesty the Queen in Right of Canada) at 86-87).

IN CONCLUSION

Good luck with your habeas corpus.

For further assistance, contact the following organizations:

Nova Scotia Legal Aid:
902-420-6578
1-877-420-6578
1-877-777-6583
902-420-7800

Legal Information Society of Nova Scotia:
(902) 455-3135

Dalhousie Legal Aid:
(902) 423-8105

Mainland Nova Scotia Elizabeth Fry (for women):
(902) 454-5041

The John Howard Society (for men):
902.429.6429

East Coast Prison Justice:
6061 University Avenue
PO Box 15000
Halifax, Nova Scotia, Canada B3H 4R2
Email: eastcoastprisonjustice@gmail.com

APPENDIX A:
BLANK HABEAS CORPUS FORM

Form 7.12

20 No.

Supreme Court of Nova Scotia

Between: [complete heading as required by Rule 82 - Administration of Civil Proceedings]

[name] Applicant

and

[name] Respondent

Notice for *Habeas Corpus*

Applicant is detained
The applicant is detained at [name and address] .

The applicant is detained by [name and title] .

The applicant is detained [*because.../without reasons having been given*] .

It is impossible for the applicant to leave detention because [reasons] .

Applicant requests review
The applicant says the detention is illegal.

The applicant requests an order directing the respondent, and any other person who has control of the applicant and receives notice of the order, to bring the applicant and all documents relating to the detention before the court.

Grounds for review
The applicant says the detention is illegal because:
1

2
3 .

Contacting applicant
The prothonotary has been informed of all means of communications with the applicant. The authority or persons detaining the applicant may be contacted at the place of detention, and through other addresses, telephone numbers, fax numbers, email addresses given to the prothonotary.

Signature
Signed , 20

_____
Signature of applicant
Print name:

[or]

_____
Signature of counsel
[name] as counsel
for [name]

[or]

_____
Signature of agent approved by judge
[name] as approved agent for
[name]

Prothonotary's certificate
I certify that this notice for *habeas corpus* was filed with the court on , 20 .

_____
Prothonotary

APPENDIX B:
ANNOTATED HABEAS CORPUS FORM

20__ (year)

SUPREME COURT OF NOVA SCOTIA

Between: (Your name here (Name of Applicant))

APPLICANT

And

HER MAJESTY THE QUEEN THE ATTORNEY GENERAL FOR: check the box that applies to you

- ☐ **THE PROVINCE OF NOVA SCOTIA** (provincial prison)
- ☐ **CANADA** (federal prison)

THE SUPERINTENDENT OF THE: check the box that applies to you

- ☐ **NORTHEAST NOVA SCOTIA CORRECTIONAL FACILITY**
- ☐ **CENTRAL NOVA SCOTIA CORRECTIONAL FACILITY**
- ☐ **NOVA INSTITUTION FOR WOMEN**
- ☐ **SPRINGHILL INSTITUTION**
- ☐ **CAPE BRETON CORRECTIONAL FACILITY**
- ☐ **SOUTH WEST NOVA CORRECTIONAL FACILITY**

RESPONDENTS

Notice of *Habeas Corpus*

Applicant is detained

The Applicant is detained at (check the box that applies to you)

- ☐ **NORTHEAST NOVA SCOTIA CORRECTIONAL FACILITY**
- ☐ **CENTRAL NOVA SCOTIA CORRECTIONAL FACILITY**
- ☐ **NOVA INSTITUTION FOR WOMEN**
- ☐ **SPRINGHILL INSTITUTION**
- ☐ **CAPE BRETON CORRECTIONAL FACILITY**
- ☐ **SOUTH WEST NOVA CORRECTIONAL FACILITY**

The Applicant is detained by_____(name of superintendent), Superintendent of _____(name of prison)

The Applicant is detained in (check the box that applies to you)

- ☐ Segregation
- ☐ Maximum security unit
- ☐ Medium Security Unit
- ☐ Minimum security unit

It is impossible for the Applicant to be released because he/she/they is serving a sentence of _____

The Applicant requests a review

The Applicant says that his/ her/ their liberty is being restricted unlawfully as he/ she/ they: (check the box that applies to you)

- ☐ Are being held in segregation/ close confinement/ observation
- ☐ Have been placed in a higher security unit than before
- ☐ Have been given a higher security rating than I deserve
- ☐ Have been transferred to a higher security institution
- ☐ Other: _____

The Applicant requests an Order directing the respondent, and any other person who has control of the Applicant and receives notice of the Order, to bring the Applicant and all documents relating to the detention before the court.

Grounds for Review [Unlawful/Unreasonable] (check which applies to you)

The Applicant says the detention is unlawful/unreasonable because:

1. The decision deprived the Applicant of their residual liberty in a manner that is unlawful and unreasonable by: (check which applies to you)

    - ☐ not giving me notice that the decision was being made
    - ☐ not giving me a fair opportunity to challenge the decision
    - ☐ basing the decision on no evidence, insufficient evidence, or unverified evidence
    - ☐ not following the proper procedure that these decisions are supposed to follow
    - ☐ not giving me reasons for why the decision was made
    - ☐ not giving me enough reasons to be able to explain well why the decision was unfair.
    - ☐ the decision is arbitrary, there is no good reason for them to have made this decision.
    - ☐ Other: _____

2. The decision was unlawful and contrary to the principles of natural justice

3. The decision is contrary to the

   ☐ *Correctional Services Act* and *regulations* (for provincial prison)
   ☐ *Corrections and Conditional Release Act*, *Regulations* and Commissioner's Directives (for federal prison)

4. The decision was unreasonable.

Contacting Applicant

The prothonotary has been informed of all means of communications with the applicant. The authority or persons detaining the applicant may be contacted at the place of detention, and through other addresses, telephone numbers, fax numbers, email addresses given to the prothonotary.

_____

TO: Department of the Attorney General

AND TO:
Superintendent, _____ (name of correctional facility)

AND TO:
Solicitor for the Respondent

APPENDIX C:
EXAMPLE OF AN ORDER

2015 Hfx No. 445712

Supreme Court of Nova Scotia

Between:

Dylan Robert Douglas Gogan — Applicant

and

The Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia and Central Nova Scotia Correctional Facility — Respondents

2015 Hfx No. 445780

Supreme Court of Nova Scotia

Between:

Dylan Roach — Applicant

and

The Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia and Central Nova Scotia Correctional Facility — Respondents

Order

Before the Honourable Justice Gerald R. P. Moir

Dylan Robert Douglas Gogan and Dylan Roach made applications for *habeas corpus* challenging their close confinement at the Central Nova Scotia Correctional Facility while remanded there as "federal prisoners" who have business before the Nova Scotia courts.

The court found that they have been deprived of residual liberty, they raised legitimate grounds to question the legality of the deprivation, and the deprivation was, in fact, unlawful.

IT IS DECLARED that the close confinement of Mr. Gogan and of Mr. Roach is unlawful.

IT IS ORDERED that the superintendent of the Central Nova Scotia Correctional Facility afford Mr. Gogan and Mr. Roach opportunities to leave their cells and enjoy amenities for durations and of a quality similar to that afforded to and enjoyed by federal prisoners before the announcement dated December 18, 2014.

IT IS FURTHER ORDERED that the parties bear their own costs.

Issued December 8, 2015

~~Prothonotary~~

TANYA M. ALLAN
Clerk of the Court

IN THE SUPREME COURT
COUNTY OF HALIFAX, N.S.
I hereby certify that the foregoing document, identified by the seal of the court, is a true copy of the original document on the file herein

DEC 08 2015

Deputy Prothonotary

Tanya Allan
Deputy Prothonotary

APPENDIX D:
HABEAS CORPUS CASES

CASE	DEPRIVATION OF LIBERTY	ALLEGED ILLEGALITY	ASSESSMENT	RESULT
Richards v Springhill Institution, 2014 NSSC 121;upheld on appeal in *Richards v Springhill Institution*, 2015 NSCA 40	**Reclassification** from medium to maximum security after alleged attacks on fellow inmate	Insufficient procedural fairness in regards to disclosure, investigation	Breaches of procedural fairness are deprivations of liberty: relevant evidence (scoring matrix, evidence relating to the attacks) not disclosed; right to counsel compromised; investigation regarding attacks deficient; failure to act on information provided by unidentified inmate.	An increase in security classification is a deprivation of liberty
Cain v Springhill Institution, 2017 NSCA 75 (Justice Bourgeois)	**Transfer** from medium- to maximum-security institution	Materials used to reclassify were not properly disclosed; materials in his "file" were false and unproven. Inmate sought to be reclassified and to have undisclosed materials removed from his file.	Cain's objectives on appeal went beyond challenging his security classification	Removal of materials was not possible because it was outside the issue of *Habeas Corpus*; disclosure , as per s. 27(1) of the CCRA (1992), was met when the respondent provided a summary.
Mission Institution v. Khela, 2014 SCC 24	Involuntary **transfer** to higher security level prison	CSC did not make full disclosure of the information relied upon in their reclassification that lead to their decision to transfer.	The warden's decision did not fulfill the statutory requirements related to disclosure and the duty of procedural fairness. In making the transfer decision, the warden considered information that was not disclosed to Khela. Khela was also not given an adequate summary of this information. This lack of disclosure breaches the requirements of CCRA s. 27(3).	Previous to this appeal, Mr. Khela was already returned to a medium security institution

CASE	DEPRIVATION OF LIBERTY	ALLEGED ILLEGALITY	ASSESSMENT	RESULT
	Inmate was stabbed at institution, security intelligence officer in the institution heard from another inmate that Khela (the applicant) had hired other inmates to carry out the stabbing. The officer noted this in a report. As a result of this report Khela's security classification was overridden, and changed to maximum, and was transferred to a maximum security prison. Khela was given an Assessment for Decision (A4D) which explained that report was the reason for his transfer, but did not disclose the sources' names, what they said or why their information was considered reliable.		The information provided to Mr. Khela was not sufficient information to know the case he had to meet. Vague statements about source information and corroboration do not fulfill the requirement of section 27 of the CCRA: in order to fulfill the requirements of procedural fairness when considering a transfer, the decision-maker must provide to the inmate all the information that was contemplated in reaching the decision, or a summary of the information. This information must be disclosed to the inmate within a reasonable time before the final decision. Section 27 does allow for some exceptions to this disclosure, related to safety and security of the institution and individuals within it, but the onus is on institutional decision-makers to justify such an exception to disclosure (para 84). If the prison decision-makers have relied upon kits or anonymous information to support their decision to transfer, the decision-makers must explain why that information is to be considered reliable. If the result of believing this information is that the inmate's liberty will be further restricted, the decision-maker must also verify this evidence; "procedural fairness includes a procedure for verifying the evidence adduced against him or her" (para 85). "Reasonableness" is a "legitimate ground" upon which to challenge the legality of one's deprivation of liberty in a habeas corpus application. A decision will be considered unreasonable if an inmate's liberty is restricted without evidence, or restricted based on evidence that is unreliable or irrelevant, or does not support the conclusion.	Lack of disclosure breaches CCRAs.27(3) Procedural fairness includes a way to verify the evidence against Khela Deprivation of liberty will be unreasonable if made without evidence or based on evidence that is unreliable or irrelevant

CASE	DEPRIVATION OF LIBERTY	ALLEGED ILLEGALITY	ASSESSMENT	RESULT
May v. Ferndale Institution, [2005] 3 SCR 809, 2005 SCC 82	Involuntary transfer to higher security level prison. CSC reviewed the classification of each inmate, and determined based on the computerized reclassification scale that they needed to be a higher security classification. CSC then told each inmate of their reclassification and that it was due to application of the reclassification scale or failure to complete violent offender programming – no allegations of fault or misconduct.	Transfers did not fulfill requirements of disclosure as a part of procedural fairness: failure to disclose scoring matrix for one of the classification tools. Transfers were arbitrary and unfair, and made without any fresh misconduct or considering merits of each case.	The duty of procedural fairness requires that the decision-maker discloses the information that they relied upon to the individual impacted by the decision. The individual must be informed of the case he or she has to meet, and if the decision-maker does not provide sufficient information, the decision is void. CSC has a serious duty to disclose information used in making transfer decisions. If the decision to transfer was impacted by computer-generated scores, then its scoring matrix should have been disclosed. In order for a hearing to be fair, the parties must be given the opportunity to understand the case of the opposing party's so the party can present their case, address evidence that is prejudicial to their case, and bring evidence to prove their own position. As the scores weighed heavily in the decision made, and were not disclosed, the transfer decisions were unlawful. The appellants were deprived of information essential to understanding the computerized system which generated their scores. Without these scores, the inmates had no opportunity to respond meaningfully to their reclassification by rebutting the evidence relied upon by CSC. Habeas corpus is "not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose — the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty". The court should not decline habeas corpus jurisdiction only because there is another avenue to remedy the problem. Courts should be careful in their decision to decline a habeas corpus application and must give serious consideration to the constitutional mandate to provide timely and effective enforcement of Charter rights.	applicants were transferred back to min security institution Note: this was an application of 5 inmates. Applications were not joined but same arguments.

CASE	DEPRIVATION OF LIBERTY	ALLEGED ILLEGALITY	ASSESSMENT	RESULT
			Provincial superior courts should decline habeas corpus jurisdiction only where (1) a statute such as the Criminal Code, R.S.C. 1985, c. C-46, confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be; or (2) the legislator has put in place complete, comprehensive and expert procedure for review of an administrative decision. The prison's internal grievance procedure does not constitute a comprehensive and expert procedure for review of an administrative decision (at para 64).	
Bowden Institution v D.G., 2015 ABCA 223 *[Bowden]*, affirming DG v Bowden Institute, 2015 ABQB 373	Revocation of day parole; **jurisdiction** of a provincial superior court to hear habeas corpus application, rather than appeal revocation to Federal Court.		G would suffer irreparable harm by revocation of his parole; In Bowden v. DG 2016: The Federal Court process for judicial review is not a complete, comprehensive and expert procedure for review of an administrative decision.	2016: habeas corpus application was allowed to proceed in provincial superior court
Gates v. Canada (Attorney General), [2007] FC 1058	Temperature in temporary detention unit (TDU) too cold; because applicants didn't use the internal complaints process, did Federal Court lose jurisdiction.	Breach of the obligation to provide a **healthy environment**	The internal complaints process is not a complete statutory code; with potential health issues and seasonal problems, complaints must be resolved quickly; respondent offered no evidence directly challenging the complaints.	The CSC deprived applicants of a healthy environment; ordered to keep TDU temperature within a given range.
Gogan v Canada, 2017 NSCA 4	Did initial **classification** result in deprivation of residual liberty?	Initial classification (maximum) higher than results from offender assessment process and first CRS (medium) due to consideration of an alleged assault in temporary unit.		An initial security classification can be a deprivation of liberty given impact of classification on residual liberty and available remedy of returning X to temporary unit.

CASE	DEPRIVATION OF LIBERTY	ALLEGED ILLEGALITY	ASSESSMENT	RESULT
Bradley v Correctional Service Canada, 2012 NSSC 173	**Reclassification** from medium to maximum security due to alleged threat to officer	Segregation and allegation that inmate had no chance to challenge, due to non-disclosure of scoring matrix.		An increase in security classification is a deprivation of liberty; failure to provide scoring matrix is a determinative factor given its importance even if not the sole tool; factors in negative score led to unlawful and unreasonable reclassification and transfer.
Blais v. Canada (Attorney General), 2012 NSCA 109	Did provincial superior court err in refusing to hear HC application re revocation of day parole: **jurisdiction**?	Unsuccessful appeals to NPB Appeals division and Federal Court re: judicial review claiming lack of disclosure and denials of due process.	The procedure offered by the Corrections and Conditional Release Act is a complete, comprehensive and expert procedure for adjudicating parole matters	The lower court was correct in declining to exercise its habeas corpus jurisdiction
Wilson v Canada (Attorney General), 2011 NSSC 143 Upheld on appeal, *Wilson v. Correctional Services Canada,* 2013 NSCA 49	Should provincial superior court exercise **jurisdiction** under HC over a parole hearing after an unsuccessful appeal to the National Parole Board (NPB) Appeal Division?	Failure by NPB to follow its policies or principles of natural justice; the NPB based its decision on erroneous or incomplete information.	The statutory parole review regime, together with the right of judicial review by the Federal Court, is a complete, comprehensive and expert procedure for adjudicating parole matters	The court declined to exercise its habeas corpus jurisdiction
Gogan v Nova Scotia (Attorney General), 2015 NSSC 360	23 hour / day **confinement** of federal prisoners at provincial facility due to policy re overcrowding	No opportunity for confinement to be reviewed, as not in the segregation unit	Solitary confinement is a deprivation of residual liberty; the legality of confinement can be questioned on the basis of its severity, absence of an individual assessment, and the institution's stated reasons; the decision to hold all federal prisoners in solitary confinement is unreasonable, arbitrary, unsupported by evidence of greater risk.	Habeas corpus application was successful

CASE	DEPRIVATION OF LIBERTY	ALLEGED ILLEGALITY	ASSESSMENT	RESULT
Illes v Canada (Attorney General), 2016 ABQB 426	**Reclassification** from medium to maximum security and **involuntary transfer** for alleged involvement in the "institutional sub-culture and attempts to introduce contraband into the institution."	Decisions to reclassify and transfer him were unreasonable. Transfer decision was also procedurally unfair.	For an involuntary transfer decision to be procedurally fair, CSC staff must "give the inmate an opportunity to make representations with respect to the proposed transfer in person or, if the inmate prefers, in writing" (*CCRR*, s.12), as well as "all the information to be considered in the taking of the decision or a summary of that information" (*CCRA*, s.27(1)), except where reasonable grounds exist to believe that so doing "would jeopardize (a) the safety of any person; (b) the security of a penitentiary; or (c) the conduct of any lawful investigation" (*CCRA*, s.27(3)). Although the inmate was not provided with all the evidence against him, which clearly disadvantaged him, this did not infringe the exception outlined in *CCRA* s.27(3), and so was procedurally fair. For a transfer decision to be reasonable and lawful, it must have "justification, transparency and intelligibility" (*Khela* para 73-5), but the Warden provided no reasons for discounting applicant's rebuttal to the evidence against him and did not take into account the 5% discretionary range for the Security Reclassification Scale, which would have allowed the inmate to stay in the medium-security institution despite the reclassification.	The transfer decision was procedurally fair but unreasonable because the reasons to transfer were inadequate. Habeas corpus application was successful

CASE	DEPRIVATION OF LIBERTY	ALLEGED ILLEGALITY	ASSESSMENT	RESULT
Hamm v. Attorney General of Canada (Edmonton Institution), 2016 ABQB 440	Placement in **segregation** because staff received information from sources believed to be reliable that the three men were going to assault Correctional Officers.	Decision to segregate was procedurally unfair and unreasonable	A high level of procedural fairness is required in a segregation decision because of the negative impact of segregation, because it sentences the inmate to a "prison within a prison," and because the *CCRA* requires that the inmate be given the maximum amount of information about the reasons why they are being placed in solitary and given the appropriate opportunity to defend themselves. The decision to segregate was procedurally unfair because the institution did not lay either criminal or institutional charges against the men, which would have required them to wait to segregate them until after the disciplinary hearing and a finding of guilt. The Fifth Working Day Segregation Review was also procedurally unfair because it only considered conditions of confinement instead of the reason or basis for segregation and gave limited information to the inmates about the reason why they were segregated without invoking *CCRA* s.27(3). The decision to segregate was unreasonable because the institution did not explain why it chose to segregate the men to deal with the alleged problem without first exhausting other alternatives (e.g., moving the men to different units, changing the COs on duty). It was unreasonable to segregate one of the men who had been previously prescribed psychotropic medications without first making an assessment of his mental health. It was unreasonable for the institution to deny transparency in relation to its decisions concerning whether, and how, and where, aboriginal offenders should be further deprived of liberty. The decision to keep the men in segregation was unreasonable because it was not substantiated with evidence that they were a threat to the institution.	The decision to segregate was procedurally unfair and unreasonable. Habeas corpus application was successful.