**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *NBP v. Nova Scotia (Attorney General)*, 2017 NSSC 77

**Date:** 20170323
**Docket:** CRP No. 460481
**Registry:** Pictou

**Between:**

NBP

Applicant

v.

The Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia and the Superintendent of the Northeast Nova Scotia Correctional Facility

Respondents

---

**LIBRARY HEADING**

---

**Restriction on Publication: Section 110 *YCJA***

| | |
|---|---|
| **Judge:** | The Honourable Justice Peter P. Rosinski |
| **Heard:** | March 13, 2017, in Pictou, Nova Scotia |
| **Written Decision:** | March 23, 2017 |
| **Subject:** | *Habeas corpus* and youth offenders; *Youth Criminal Justice Act* |
| **Summary:** | NBP was serving a youth sentence for second-degree murder at Waterville, which is the only full service custodial youth facility in Nova Scotia. On September 4, 2016, he was seen on videotape to be instrumental in creating, participating in, |

and encouraging other youth to participate in, a chaotic and violent ongoing disturbance at the Youth Centre in which numerous youths took part. Four adults staff members were very seriously injured. As discipline for his involvement he was placed in "close confinement" for 12 days at the Northeast Nova Scotia Correctional Facility, on the authority of the Executive Director/provincial director of Correctional Services. After those 12 days, the provincial director continued to have him serve his sentence at North Nova. On February 15, 2017, NBP made an application for *habeas corpus* seeking a return to the Youth Centre to continue serving his sentence. In the interim he had turned 18 years of age.

**Issues:**

(1) (a) has NBP demonstrated that he has been subjected to a deprivation of residual (i.e. relative to liberties afforded to other similarly situated youth offenders) liberty, regarding his transfer to North Nova, and his continued detention there? and

(b) has NBP shown there is a legitimate basis for him to argue that any such deprivation of liberty was without legal justification?

(2) If so, the burden shifts to the Crown, to demonstrate that the deprivation of liberty was legally justifiable. The Crown must establish that each of the following aspects were lawful:

(a) the transfer to, and continued housing of, NBP at North Nova;
(b) that there were sufficient levels of procedural fairness accorded NBP, regarding the transfer, and continued housing decisions;
(c) in the circumstances, were the decisions to transfer to, and continue to house NBP at, North Nova reasonable?

**Result:**

NBP established a significant deprivation of residual liberty, and that there were arguable grounds for the court to enter

into a substantive inquiry as to the lawfulness thereof. The court concluded that:

(a) in transferring NBP to North Nova, pursuant to s. 45(d) *Correctional Services Act*, the provincial director did not change NBP's level of custody. NBP was temporarily housed in one of two double bunk Transition Housing Units (THUs) available exclusively to youth offenders. Even at an adult facility like North Nova, the *Designations of Correctional Facilities* regulation permits North Nova to be used "for temporarily housing youth offenders", provided that prior permission had been granted by the Executive Director of Correctional Services, and the youths were separately housed from adult offenders. As a matter of statutory interpretation, the court determined that "temporarily housing" was properly considered to have been the legal basis for the transfer, and continued housing, of NBP at North Nova;

(b) NBP was afforded expressed procedural fairness during his initial transfer to North Nova on disciplinary grounds for the 12 day "close confinement" sanction. Thereafter NBP was afforded procedural fairness in substance – he had continuous contact with counsel, his family, and the ability to formally voice his objections to his continued housing at North Nova to the administration of that correctional facility. Instead, on October 18, 2016 or earlier, he determined and made known that he wished upon turning 18 years of age, to serve the remainder of his custodial sentence in a provincial correctional facility. Correctional Services set that motion in process.

(c) the provincial director's decision was reasonable in all the circumstances.

The court found that at least up until March 13, 2017, the temporary housing of NBP at North Nova, while serving his

sentence, was lawful. The application for *habeas corpus* is dismissed.

**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *NBP v. Nova Scotia (Attorney General)*, 2017 NSSC 77

**Date:** 20170323
**Docket:** CRP No. 460481
**Registry:** Pictou

**Between:**

NBP

Applicant

v.

The Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia and the Superintendent of the Northeast Nova Scotia Correctional Facility

Respondents

**Restriction on Publication: Section 110 *YCJA***

| | |
|---|---|
| **Judge:** | The Honourable Justice Peter P. Rosinski |
| **Heard:** | March 13, 2017, in Pictou, Nova Scotia |
| **Counsel:** | Rickcola Brinton, for the applicant<br>Glenn Anderson, Q.C., and Peter McVey, Q.C., for the respondents |

**By the Court:**

## Introduction

[1] This *habeas corpus* application is brought by a youth offender who was exceptionally transferred to the youth offender Transition Housing Units (THUs) of the "adults only" Northeast Nova Scotia Correctional Facility (North Nova), as a result of disciplinary disturbances in a designated youth facility. He has not been returned to the youth facility since expiration of the 12-day period of disciplinary temporary housing at the adult facility. He has been there for 200 days.

[2] NBP is serving a youth sentence for second-degree murder. He will remain in custody until at least May 29, 2019.

[3] Throughout the time before his sentence, and to the date of this hearing, he has been rated to be a serious risk for violence while in custody. There have been disciplinary incidents of assault/threats; possessing or use of contraband; and possession of a weapon and drugs.

[4] On September 4, 2016, a videotape at the Nova Scotia Youth Centre (Youth Centre) at Waterville, recorded an ongoing chaotic and violent episode in which numerous youths took part. NBP was seen to be instrumental in making this happen, and personally had violent physical contact with four adult staff members, who received significant injuries. He was taken to local RCMP cells immediately following the incident. A level III disciplinary report pursuant to s. 86(1)(d) of the *Correctional Services Regulations* (*CSR*) made under s.94 of the *Correctional Services Act* (*CSA*) was completed. NBP was given an opportunity to explain his position regarding the September 4, 2016 events. He admitted what he had done. A copy thereof was provided to NBP.

[5] As a consequence, a Correctional Services adjudicator penalized him by confining him to a cell for 15 days, of which he had already served three, leaving 12 days as of September 7, 2016. This also resulted in a loss of privileges (phone, visits, canteen). This penalty was confirmed by the Director of Correctional Services, Angelo Visentin.

[6] By September 6, 2016, pursuant to s. 45(d) *CSA*, NBP had been transferred to North Nova. It is an adult correctional facility near New Glasgow, yet also designated to hold young persons in two Transition Housing Units (THU).

[7] Though his disciplinary sanction of 12 days "close confinement" (ss. 74-75 *CSA*) ended September 19, 2016 (privileges being reinstated after seven days), he has continuously remained there as at March 13, 2017.

[8] Chris Collett, Executive Director, Correctional Services, Nova Scotia Department of Justice, stated that:

> The reasons he has not been transferred to the Nova Scotia Youth Centre are:
>
> (a) the risk of violence and injury to young persons and staff at the Nova Scotia Youth Centre that he would pose if he was transferred to that facility;
>
> (b) his threats to injure staff at the Nova Scotia Youth Centre and to encourage other young persons to do the same;
>
> (c) his desire to be [sic] serve the remaining portion of his youth sentence in a provincial correctional facility for adults and intention to make an application to do so as soon as he turned 18 years of age on December 21, 2016…
>
> Holding [NBP] in [North Nova] is:
>
> (a) necessary to mitigate the risk of violence and injury to young persons and staff in the Nova Scotia Youth Centre and its security;
>
> (b) in the best interest of [NBP] and the young persons and staff in the Nova Scotia Youth Centre.
>
> The decision to have [NBP] continue to be held in [North Nova] would be reconsidered if circumstances change.

[9] On February 15, 2017, NBP filed a Notice of Application for this court to conduct a *habeas corpus* hearing, and examine the lawfulness of his continued detention at North Nova.

[10] If NBP demonstrates that he has been subjected to a deprivation of residual (i.e. relative to liberties afforded to other similarly situated youth offenders) liberty, then the court will have to go on to consider the various aspects of the lawfulness of his continued detention at North Nova: was there legal authority to initially transfer him to North Nova, and to continue to hold him there? Was he accorded procedural fairness once transferred to North Nova? Was the initial decision to transfer him, or the decision to continue to hold him there, reasonable?

[11] I conclude the answer to each of these questions is "yes". The application is dismissed.

## Background

[12] NBP was born December 21, 1998. For brutally stabbing to death Daniel Pellerin on August 29, 2014, he was found guilty of having committed second-degree murder and sentenced on June 24, 2015 to a so-called IRCS (Intensive Rehabilitative Custody and Supervision) order, pursuant to s. 42(2)(r)(iii) of the *Youth Criminal Justice Act* (*YCJA*).

[13] That sentencing order put him under sentence for three years and 326 days (remand credit of 39 days already deducted) in custody, to be followed by three years conditional supervision in the community.[1]

[14] Up to September 5, 2016, he had been serving his sentence at the Youth Centre. During the relevant times herein, that was the only youth custody facility operating on a continuous basis and in a full service manner in Nova Scotia. Thus, for youth cases proceeding elsewhere in the province, youths in custody awaiting trial or sentencing, are housed at Waterville, and transported by Correctional Services staff to their court appearances throughout the province.

[15] While in custody, on July 10, 2015, NBP committed an assault. He was sentenced on October 29, 2015 to a consecutive sentence of 21 days, comprised of a period of 14 days custody and 7 days under supervision in the community [2]

[16] More significantly, on September 5, 2016, NBP was transferred from the Youth Centre to North Nova, "following a September 4, 2016 riot in which he participated and for which he stands charged with eight offences including, taking part in a riot, assaulting a peace officer with a weapon, and three counts of assaulting peace officers causing bodily harm." The "peace officers" referenced were staff authorized to be in charge of youths at the Youth Centre.

---

[1] See sentencing decision 2015 NSPC 38, and decision regarding the admissibility of victim impact statements 2015 NSPC 34 per Derrick JYC. Conditional supervision is provided for in s. 105 of the *YCJA*. An IRCS sentence may only be ordered: for very violent offences; when the youth is suffering from a mental illness or disorder, a psychological disorder or an emotional disturbance; there are reasonable grounds to believe a plan of treatment and intensive supervision developed for the youth might reduce their risk of recidivism; and the provincial director has concluded the program is available and the youth's participation is appropriate – s. 42 (7) *YCJA*. Notably, such sentences continue in effect after the young person becomes an adult upon turning 18 years of age – s. 42(17) *YCJA*.
[2] See ss. 42(2)(n) and 42(16) (c )(ii) *YCJA*.

[17] The Admission Form filled in upon NBP's arrival at North Nova, shows he was there serving a sentence, not on remand. [3]

**Why there was a deprivation of NBP's residual liberty** [4]

[18] NBP does not dispute being placed in "close confinement" as a result of the incident September 4, 2016. However, he does dispute being transferred to North Nova to be in "close confinement" there.

[19] While strictly speaking, the mere transfer of him to North Nova for purposes of "close confinement" there could conceivably involve a deprivation of his residual liberty, based on the evidence presented, I am unconvinced that is so in the circumstances.

[20] That is, I am unpersuaded that NBP has demonstrated that "close confinement" as between youths so restricted at the Youth Centre and restricted at North Nova (being placed in the THU) are significantly different.

[21] However, I am concerned that after September 19, 2006, when his close confinement ended, NBP's detention at North Nova, may have resulted in him having a significantly substantial change in conditions and therefore, less residual liberty (i.e. to have access to as fulsome programs, activities, and social interaction with peers) than other similarly situated youth offenders at the Youth Centre. As Justice Van den Eynden recently observed in *Gogan v. Canada (Atty. Gen.)*, 2017 NSCA 4:

> 64 ..... *Habeas corpus* is an important and constitutionally protected remedy.
>
> 65 Not every administrative decision made by prison authorities will attract a *habeas corpus* remedy. It will depend on the circumstances of the alleged deprivation and the applicable legal principles.

[22] Next I ask myself, whether there exists "a legitimate basis upon which to challenge the administrative decision" (*Gogan*, para. 64)? There is a legitimate

---

[3] John Landry affidavit, Exhibit 1

[4] Regarding the issues in this case, I am guided by the following decisions: *R. v. Miller*, [1985] 2 SCR 613; *Dumas v. LeClerc Institute*, [1986] 2 SCR 459; May v Ferndale Institution, 2005 SCC 82; *Mission Institution v. Khela*, 2014 SCC 24; *Boone v. Ontario (Community Safety and Correctional Services)*, 2014 ONCA 515*; Gogan v. Canada (Atty. Gen.)*, 2017 NSCA 4; *Springhill Institution v. Richards*, 2015 NSCA 40. In *Dumas*, Lamer J. identified three categories of deprivation of liberty: (1) the initial deprivation of liberty; (2) a substantial change in conditions amounting to further deprivation of liberty; (3) and a continuation of the deprivation of liberty.

basis to proceed to a substantive consideration of the lawfulness of NBP's detention.

[23] While there are arguable grounds here related to whether NBP's detention at North Nova is vulnerable because of procedural fairness concerns, and the reasonableness of security/safety concerns, I conclude there is a significant issue regarding whether there is a valid legal basis for the transfer to, and continued detention of NBP at North Nova.

**Why there was a lawful basis for transfer of NBP to North Nova, and his continued detention there to date**

[24] Section 49 of the *YCJA* reads:

> Warrant of Committal
>
> (1) When a young person is committed to custody, the youth justice court shall issue or cause to be issued a warrant of committal.
>
> (2) A young person who is committed to custody may, in the course of being transferred from custody to the court or from the court to custody, be held under the supervision and control of a peace officer or in any *place of temporary detention* referred to in subsection 30(1) that the provincial director may specify.
>
> (3) Subsection 30(3) (detention separate from adults) applies, with any modifications that the circumstances require, in respect of a person held in a *place of temporary detention* under subsection (2).
>
> [my italics]

[25] The warrant of committal for the three year, 326 day, custodial portion of the sentence, confirmed that "the custodial period is to begin effective immediately, and the level of custody is to be secure."

[26] "Youth custody facility" is defined in s. 2 of the *YCJA*:

> *means a facility designated under subsection 85(2) for the placement of young persons* and, if so designated, includes a facility for the secure restraint of young persons, a community residential centre, a group home, a childcare institution and a forest or wilderness camp.
>
> [my italics]

[27] Section 85 of the *YCJA* reads:

Levels of Custody

(1) In the youth custody and supervision system in each province *there must be at least two levels of custody for young persons distinguished by the degree of restraint* of the young person in them.

(2) *Every youth custody facility* in a province that contains one or more levels of custody *shall be designated* by

a) in the case of the youth custody facility with only one level of custody, being the level of custody with the least degree of restraint of the young persons in it, the Lieutenant Governor in Council or his delegate; and

b) in any other case, the Lieutenant Governor in Council.

(3) The provincial director shall, when young person is committed to custody under paragraph 42(2)(n),(o),(q),or (r) or an order is made under subsection 98(3), paragraph 103(2)(b), subsection 104(1), or paragraph 109(2)(b), determine the level of custody appropriate for the young person, after having taken into account the factors set out in subsection (5).

(4) The provincial director may determine a different level of custody for the young person when the provincial director is satisfied that the needs of the young person and the interests of society would be better served by doing so, after having taken into account the factors set out in subsection (5).

(5) The factors referred to in subsections (3) and (4) are:

(a) That the appropriate level of custody for the young person is the one that is least restrictive to the young person, having regard to

(i) the seriousness of the offence in respect of which the young person was committed to custody and the circumstances in which that offence was committed,

(ii) the needs and circumstances of the young person, including proximity to family, school, employment and support services,

(iii) the safety of other young persons in custody, and

(iv) the interest of society;

(b) that the level of custody should allow for the best possible match of programs to the young person's needs and behaviour, having regard to the findings of any assessment in respect of the young person; and

(c) the likelihood of escape.

(6) After the provincial director has determined the appropriate level of custody for the young person under subsection (3) or (4) , *the young person shall be placed in the youth custody facility that contains that level of custody specified by the provincial director*.

(7) The provincial director shall cause a notice in writing of a determination under subsection (3) or (4) to be given to the young person and a parent of the young person and set out in that notice the reasons for it.

[my italics]

[28] As I read these sections, the Youth Court makes an initial determination of the appropriate level of custody, but the provincial director has "final say" throughout the duration of the youth sentence.

[29] Sections 86 and 87 of the *YCJA* read:

Procedural Safeguards

86 (1) The Lieutenant Governor in Council of a province shall ensure that procedures are in place to ensure that the due process rights of the young person are protected with respect to a determination made under subsection 85(3) or (4), including that the young person be

(a) provided with any relevant information to which the provincial director has access in making the determination, subject to subsection (2),

(b) given the opportunity to be heard; and

(c) informed of any right to a review under s. 87.

(2) where the provincial director has reasonable grounds to believe that providing the information referred to in paragraph (1)(a) would jeopardize the safety of any person or the security of a facility, he or she may authorize the withholding from the young person of as much information as is strictly necessary in order to protect such safety or security.

Review

87 (1) a young person may apply for a review under this section of a determination

(a) under subsection 85(3) that would place the young person in a facility at a level of custody that has more than a minimal degree of restraint; or

(b) under subsection 85(4) that would transfer a young person to a facility at a level of custody with a higher degree of restraint or increase the degree of restraint of the young person in the facility.

(2) The Lieutenant Governor in Council of a province shall ensure that procedures are in place for the review under subsection (1), including that

(a) the review board that conducts the review be independent;

(b) the young person be provided with any relevant information to which the review board has access, subject to subsection (3); and

(c) the young person be given the opportunity to be heard.

> (3) Where the review board has reasonable grounds to believe that providing the information referred to in paragraph (2) (b) would jeopardize the safety of any person or the security of the facility, it may authorize the withholding from the young person of as much information as is strictly necessary in order to protect such safety or security.
>
> (4) The review board shall take into account the factors referred to in subsection 85(5) in reviewing a determination.
>
> (5) A decision of the review board under this section in respect of a particular determination is final.

[30] During the relevant periods here, Diana MacKinnon was the Executive Director, Correctional Services, Nova Scotia Department of Justice, between June 24, 2015 and January 31, 2017, when Chris Collett took over her position. In Nova Scotia, that position has been designated as "Provincial Director" as defined and referred to in the *YCJA*.

[31] The Executive Director/Provincial Director has powers pursuant to the *Correctional Services Act,* SNS 2005 c. 37, as amended. Section 45 thereof reads:

> Notwithstanding any correctional facility named in a committal order, the Executive Director may: [5]
>
> (a) direct that an offender be held in custody in a lockup facility, pending admission to a correctional facility;
>
> (b) determine the correctional facility to which an offender is to be admitted;
>
> (c) determine the correctional facility to which an offender is to be admitted as a result of a transfer under an exchange of service agreement;
>
> (d) *authorize the transfer of an offender from one correctional facility to another, if it is necessary or advisable for the purpose of providing appropriate security, safety or correctional services.*
>
> [my italics]

[32] Although I conclude below that in transferring NBP to North Nova, the provincial director did not, in relation to September 19, 2016 forward, change the "level of custody" imposed on NBP, arguably NBP may have been entitled to a review of that decision pursuant to s. 87(1)(b) *YCJA*. NBP made no application for such review.

---

[5] Which includes the warrant of committal herein– see definitions of "committal order", "correctional facility", "custody", and "offender" in s. 2 *Correctional Services Act*, which all expressly or impliedly relate to adult as well as youth offenders

[33] As noted earlier, Chris Collett gave compelling reasons why NBP has not been transferred back to the Youth Centre. He was relying on s. 45(d) as his authority for having transferred NBP to North Nova.

[34] North Nova is designated as a correctional facility, pursuant to the *Designations of Correctional Facilities* regulation made under clauses 3(1)(b) and (d) of the *Correctional Services Act*- NS Reg. 2/2012 as am. by NS Reg. 244/2016.

[35] Section 3(1) of the *CSA* reads:

> The Minister may:
>
> (a) Establish correctional facilities;
>
> (b) Designate or remove the designation of any place as a correctional facility;
>
> …
>
> (d) Designate a correctional facility for
>
> i. Housing a specific group or classification of offenders;
>
> ii. Open custody, secure custody or temporary detention;
>
> iii. The purpose of any provision of this *Act* or any enactment.
>
> …

[36] Section 7 of the *Designations of Correctional Facilities* regulation reads:

> (1) the Northeast Nova Scotia Correctional Facility, located at 10202 Sherbrooke Road, Pictou County, Nova Scotia, is designated as a correctional facility.
>
> (2) the Northeast Nova Scotia Correctional Facility is *designated for housing adult male offenders only.*
>
> (3) *despite subsection (2*), *the Northeast Nova Scotia Correctional Facility may be used*
>
> (a) subject to Section 10, and for temporarily housing adult female offenders, including adult female offenders serving intermittent sentences; and
> (b) *subject to Sections 10 and 11, for temporarily housing youth offenders*.
>
> [my italics]

[37] Section 11, thereof, reads:

> *Temporary housing youth offenders in correctional facilities that are not designated for youth offenders is permitted only if:*

> (a) prior permission has been granted by the Executive Director or the Executive Director's designate and the following requirements can be met:
>
> (i) the requirements respecting separate housing in the *Youth Criminal Justice Act* (Canada); and
>
> (ii) for female youth offenders, the requirements respecting female offenders in Sections 41 and 42 of the *Act* and Section 74 to 77 of the *Correctional Services Regulations*; or
>
> a youth justice court judge or justice makes an order under Section 30 of the *Youth Criminal Justice Act (Canada).*
>
> [my italics]

[38] In contrast, s. 8 reads:

> (1) The Nova Scotia Youth Centre, located at 1442 Country Home Road, Waterville, Nova Scotia, is designated as a correctional facility.
>
> (2) *The Nova Scotia Youth Centre is designated for housing youth offenders who are in open custody or secure custody or who have been remanded into custody.*
>
> [my italics]

[39] NBP says that: by transferring him to North Nova, the provincial director was acting and subject to ss. 85, 86 and 87 of the *YCJA*, while simultaneously relying on his authority in s. 45(d) of the provincial *Correctional Services Act*. However, because NBP is a youth, he *must* also respect ss. 85, 86 and 87 of the *YCJA.*

[40] The question presents itself whether, in making the transfer of NBP to North Nova, the provincial director had determined that it was appropriate to effect, and had effected, a "different level of custody" for NBP pursuant to s. 85(4) *YCJA*? I find that he did not do so. While the September 19, 2016 forward level of restraint at North Nova may have been different to a degree, it remained reflective of a "secure" level of custody, and not a change of the level of custody, from "open" to "secure". Although North Nova is <u>not</u> designated for "housing youth offenders who are in open custody or secure custody", pursuant to ss. 7 and 11(a) of the *Designation of Correctional Facilities* regulations, the provincial director has authority, in proper cases, to "temporarily" house at North Nova, youth offenders who are serving youth sentences.

[41] Embedded in the above-noted question, is another: what is the meaning of the wording in s. 7(3)(b) and s. 11 of the *Designations of Correctional Facilities* regulation?

[42] NBP suggests that in transferring him to North Nova, *and* leaving him there to live in the THU for 200 days, the Executive Director/Provincial Director has, as a matter of fact, placed him in a "different level of custody",[6] even if formally, on paper as it were, the provincial director considers there to have been no change in his "level of custody".

[43] How many formal "levels of custody" are there in the youth custody and supervision system in Nova Scotia? There are two levels: open and secure custody. The level of restraint is what distinguishes them. I was presented with no evidence regarding what are the distinguishing features between open and secure custody. Nor was evidence presented regarding what range of restraints would encompass "secure custody". It is thus difficult to distinguish if NBP was placed in "a different level of custody" when he was transferred to North Nova. There is no evidence before me, or legal basis provided, that suggests placing a youth offender in the THUs at North Nova is formally considered "secure custody". Yet, given that NBP has always been in secure custody, and that he was "temporarily" housed at North Nova, I infer that he remained in what correctional authorities considered "secure custody" while there.

[44] Perhaps, more significant however, is the answer to the question: can a youth offender serve 200 days of his secure custody sentence in the THUs at North Nova?

[45] The Attorney General argues that the THUs at North Nova "may be used… subject to ss. 10 and 11, for temporarily housing youth offenders",[7] and that includes serving a sentence in secure custody.

---

[6] See the affidavit of John Landry, para. 10, and his associated testimony: "NBP has been held in one of the THUs since October 4, 2016 [sic]. He is secured in his cell from 10 PM until 7 AM (8 AM on weekends), and during routine facility non—movement periods each day, such as mealtimes. Otherwise, NBP has full access to the common room. This is the same routine as other young persons held on one of the THUs and adult offenders housed in the adult portion of NNSCF."

[7] Section 7, and 11 *Designations of Correctional Facilities*, Reg. made under clauses 3(1)(b) and (d) of the *Correctional Services Act*, NS Reg.2/2012 as am. by NS Reg 244/2016). Use of the wording "temporarily house" appeared in 2011-2012. A fuller review of the regulations history is revealed by: N.S. Regs. 2/2012; 54/2012; 218/2014 to 220/2014; and 244/2016.

[46] I must consider, as a matter of law, for how long may a youth offender be housed at North Nova, before they can no longer be said to be “temporarily” housed there?

[47] Strictly speaking, this is a matter of statutory interpretation, which will be informed by the facts in any given case. While in the context of “judicial review”, which is akin to this *habeas corpus* review of the legality of NBP’s detention, the majority reasons in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, sounded important general principles:

> Issue 1: Review of the Adjudicator's Statutory Interpretation Determination
>
> A. Judicial Review
>
> 27 As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.
>
> 28 By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.
>
> 29 Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: Crevier v. Attorney General of Quebec, [1981] 2 S.C.R. 220, at p. 234; also Dr. Q v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 21.

> 30 In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy. As noted by Justice Thomas Cromwell, "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority; second, legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and defined according to the intent of the legislature in a contextual and purposeful way; third, legislative supremacy is affirmed and the court-centric conception of the rule of law is reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" ("Appellate Review: Policy and Pragmatism", in 2006 Isaac Pitblado Lectures, Appellate Courts: Policy, Law and Practice, V-1, at p. V-12). In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.

[48] The principles of statutory interpretation in this case arise from the *Nova Scotia Interpretation Act*, RSNS 1989, c. 235, and guidance from our Court of Appeal. [8]

[49] In *Nova Scotia (Director of Public Safety) v. Dixon*, 2012 NSCA 2 per Bryson, J.A. and in *R. v. R.V.F.*, 2011 NSCA 71, per Beveridge, J.A. at para. 29, our Court of Appeal, harkened backed to Chief Justice MacDonald's fulsome comments on statutory interpretation in *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)* 2009 NSCA 44, where he wrote:

> 36 The Supreme Court of Canada had endorsed the "modern approach" to statutory interpretation as expounded by Elmer Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) at p. 87:
>
> > ... the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> See *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at 41; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667; and *Imperial Oil Ltd. v. Canada; Inco Ltd. v. Canada*, 2006 SCC 46, [2006] 2 S.C.R. 447.
>
> 37 It is suggested by some that this approach is no more than an amalgam of the three classic rules of interpretation: the Mischief Rule dealing with the object of the enactment; the Literal Rule dealing with grammatical and ordinary meaning of the words used; and, the Golden Rule which superimposes context. See Stéphane Beaulac & Pierre-Andre Côté in Driedger's "Modern Principle" at the Supreme

[8] Recently, see *Waterman v. Waterman*, 2014 NSCA 110.

Court of Canada: Interpretation, Justification, Legitimation (2006), 40 Thémis 131-72 at p. 142.

38 In any event, as Professor Ruth Sullivan explains in Sullivan on the Construction of Statutes, 5th ed. (Markham: LexisNexis Canada Inc., 2008) beginning at p. 1, this modern approach involves an analysis of: (a) the statute's textual meaning; (b) the legislative intent; and (c) the entire context including the consideration of established legal norms:

The chief significance of the modern principle is its insistence on the complex, multi-dimensional character of statutory interpretation. The first dimension emphasized is textual meaning. ...

A second dimension endorsed by the modern principle is legislative intent. All texts, indeed all utterances, are made for a reason. Authors want to communicate their thoughts and they may further want their readers to adopt different views or adjust their conduct as a result of the communication. In the case of legislation, the law-maker wants to communicate the law that it intended to enact because that law, as set out in the provisions of a statute or regulation, is the means chosen by the law-maker to achieve a set of desired goals. Law-abiding readers (including those who administer or enforce the legislation and those who resolve disputes) try to identify the intended goals of the legislation and the means devised to achieve those goals, so that they can act accordingly. This aspect of interpretation is captured in Driedger's reference to the scheme and object of the Act and the intention of Parliament.

A third dimension of interpretation referred to in the modern principle is compliance with established legal norms. These norms are part of the "entire context" in which the words of an Act must be read. ...

39 That said, applying these dimensions is often easier said than done. Professor Sullivan elaborates at p. 3:

The modern principle says that the words of a legislative text must be read in their ordinary sense harmoniously with the scheme and objects of the Act and the intention of the legislature. In an easy case, textual meaning, legislative intent and relevant norms all support a single interpretation. In hard cases, however, these dimensions are vague, obscure or point in different directions. In the hardest cases, the textual meaning seems plain, but cogent evidence of legislative intent (actual or presumed) makes the plain meaning unacceptable. If the modern principle has a weakness, it is its failure to acknowledge and address the dilemma created by hard cases. [Emphasis by author]

40 Thus in considering whether s. 36 applies to the facts of this case, Professor Sullivan would invite us to answer three questions:

Under the modern principle, an interpreter who wants to determine whether a provision applies to particular facts must address the following questions:

* what is the meaning of the legislative text?

> * what did the legislature intend? That is, when the text was enacted, what law did the legislature intend to adopt? What purposes did it hope to achieve? What specific intentions (if any) did it have regarding facts such as these?
>
> * what are the consequences of adopting a proposed interpretation? Are they consistent with the norms that the legislature is presumed to respect?
>
> 41 Finally, in developing our answers to these three questions, Professor Sullivan invites us to apply the various "rules" of statutory interpretation:
>
> In answering these questions, interpreters are guided by the so-called "rules" of statutory interpretation. They describe the evidence relied on and the techniques used by courts to arrive at a legally sound result. The rules associated with textual analysis, such as implied exclusion or the same-words-same-meaning rule, assist interpreters to determine the meaning of the legislative text. The rules governing the use of extrinsic aids indicate what interpreters may look at, apart from the text, to determine legislative intent. Strict and liberal construction and the presumptions of legislative intent help interpreters infer purpose and test the acceptability of outcomes against accepted legal norms.

[50] Ultimately, the words in the relevant regulation(s) and statutes in issue here, should be "read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of [the Provincial Legislature]".

[51] This involves a consideration of:

1. What is the meaning of the legislative text?
2. What did the legislators intend?
3. What are the consequences of adopting a proposed interpretation?

[52] Our *Interpretation Act* states:

> s. 9(5) Every enactment shall be deemed remedial and interpreted to ensure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment
>
> (b) the circumstances existing at the time it was passed
>
> (c) the mischief to be remedied
>
> (d) the object to be attained
>
> (e) the former law, including other enactments upon same or similar subjects
>
> (f) the consequences of a particular interpretation; and
>
> (g) the history of legislation on the subject.

…

s. 13 Except when a contrary intention appears, where an enactment confers power to make regulations…, expressions used therein have the same respective meanings as in the enactment conferring the power.

…

s. 19 In an enactment,

…

(j) where a word is defined, the definition applies to other parts of speech and tenses of that word;…

[53] A good starting point is to recall that the *Youth Criminal Justice Act*, came into effect in 2003, in response to criticisms of the *Young Offenders Act*. Among the transitional provisions, s.165 of the *YCJA* reads:

(6) Subject to subsection (7), any place that was designated as *a place of temporary detention* or open custody for the purposes of the Young Offenders Act… and any place or facility designated as a place of secure custody for the purposes of that Act is deemed, as of the coming into force of this section, to have been designated for the purposes of this Act as

(a) in the case of *a place of temporary detention*, a *place of temporary detention*; and

(b) in the case of a place of open custody or secure custody, a youth custody facility.

(7) if the Lieutenant Governor in Council of a province makes an order under Section 88 that the power to make determinations of the level of custody for young persons and to review those determination be exercised in accordance with the *Young Offenders Act*,…, the designation of any place as a place of open custody or secure custody for the purposes of that *Act* remains in force for the purposes of Section 88, subject to revocation or amendment of the designation.

[54] Regulations regarding the province of Nova Scotia reflected this change: see the *Designations of Courts and Facilities* made under ss. 2, 13, 30, 85, 88 and 157 of the *Youth Criminal Justice Act* – N.S. Reg. 92/2003 as amended; and *Designations of Correctional Facilities* made under clauses 3(1)(b) and (d) of the *Correctional Services Act*.

[55] The 2003 *Designations of Courts and Facilities* read in part:

The Governor in Council… effective April 1, 2003, is pleased to

> (5) designate each of the Nova Scotia Youth Centre [deleted in 2006 were the Shelburne Youth Centre and the Cape Breton Young Offender Detention Centre]
>
> (a) a place of detention and custody pursuant to subsection 25(1) *Youth Justice Act*
>
> (b) a place of temporary detention pursuant to subsection 30(1) of the *Youth Criminal Justice Act*
>
> (c) a custody facility with the least degree of restraint of the young person pursuant to subsection 85(2) of the *Youth Criminal Justice Act*; and
>
> (d) a place of closed/secure custody pursuant to subsection 85(2) of the *Youth Criminal Justice Act*
>
> ….
>
> (9) delegate to the Deputy Attorney General the authority to designate a place or class of places of temporary detention pursuant to subsection 30(1) of the *Youth Criminal Justice Act,* and a place of detention pursuant to subsection 25(1) of the *Youth Justice Act*.

[56] In 2006, per OIC 2006-368, we find:

> the Governor in Council….is pleased, effective on and after July 1, 2006, to
>
> …
>
> designate the Cape Breton Youth Detention Facility at the Cape Breton Correctional Facility as
>
> (i) a place of detention and custody pursuant to subsection 25(1) of the *Youth Justice Act*;
>
> (ii) a place of temporary detention pursuant to subsection 30(1) of the *Youth Criminal Justice Act*; and
>
> (iii) a youth custody facility with one or more levels of custody pursuant to subsection 85(2) of the *Youth Criminal Justice Act*.

[57] In the *YCJA*, we see multiple references to a "place of temporary detention" – ss. 30, 49 and 165(6). In Nova Scotia, the equivalent statute for young persons who violate provincial enactments, including municipal bylaws, is the *Youth Justice Act*, SNS 2001 c. 38.

[58] Sections 25 and 26 of that *Act* read:

> 25 (1) A young person who is *detained in custody or committed to custody* under this *Act* shall be held in a facility designated for the detention of young persons except where youth justice court judge or, where a judge is, having regard to the circumstances, not reasonably available, a justice authorizes other detention, being satisfied that

> (a) the young person cannot, having regard to the young person's own safety and or the safety of others, be detained in a place of detention for young persons; or
>
> (b) no place of detention for young persons is available within a reasonable distance, but in such case every effort shall be made to hold the young person separate and apart from any adult.
>
> (2) Subject to subsection (1), the Governor in Council may designate facilities to which a young person may be committed to serve a period of custody and may make regulations respecting such facilities.
>
> 26 The provincial director, or the appointee of the provincial director may transfer a young person in custody from one facility designated for the custody of young persons to another.
>
> [my italics]

[59] "Justice" is defined in the *Youth Justice Act* as: "means a justice of the peace or a judge of the provincial court and includes two or more justices where two or more justices are, by law, required to act or, by law, act or have jurisdiction".

[60] To reiterate: of significance within *Designations of Courts and Facilities* are the following sections:

> The Governor in Council… is pleased to…
>
> (5) designate each of the Nova Scotia Youth Centre as
>
> *(a) a place of detention and custody* pursuant to subsection 25(1) of the *Youth Justice Act*;
>
> *(b) a place of temporary detention* pursuant to subsection 30(1) of the *Youth Criminal Justice Act*;
>
> (c) a custody facility with the least degree of restraint of the young person pursuant to subsection 85(2) of the *Youth Criminal Justice Act*; and
>
> (d) a place of closed/secure custody pursuant to subsection 85(2) of the *Youth Criminal Justice Act*.
>
> …
>
> (9) delegate to the Deputy Attorney General the authority to designate a place or class of places of temporary detention pursuant to subsection 30(1) of the *Youth Criminal Justice Act*, and a place of detention pursuant to subsection 25(1) of the *Youth Justice Act*.
>
> [my italics]

[61] Notably, by OIC 2006-368, we find:" The Governor in Council…is pleased effective, on or after July 1, 2006, to

(a) revoke the designation of the Cape Breton Young Offender Detention Centre… as a place of detention in custody, a place of temporary detention, a facility with the least degree of restraint of the young person and a place of closed/secure custody; and

(b) designate the Cape Breton Youth Detention Facility at the Cape Breton Correctional Facility as

(i) *a place of detention and custody* pursuant to subsection 25(1) of the *Youth Justice Act*;

(ii) *a place of temporary detention* pursuant to subsection 30(1) of the *Youth Criminal Justice Act*; and

(iii) a youth custody facility with one or more levels of custody pursuant to subsection 85(2) of the *Youth Criminal Justice Act*.

[my italics]

[62] The *Designations of Correctional Facilities* made under clauses 3(1)(b) and (d) of the *Correctional Services Act*, as amended, reads in part:

(5) (1) the Cape Breton Youth Detention Facility, located at 136 Gardiner Road, Sydney, Nova Scotia, is designated as a correctional facility.

(2) the Cape Breton Youth Detention Facility is designated *for housing youth offenders who are in open custody or secure custody or who have been remanded into custody.*

(3) despite subsection (2) and subject to section 10, the Cape Breton Youth Detention Facility may be used for temporarily housing adult offenders.

…

(7) (1) the Northeast Nova Scotia Correctional Facility, … is designated as a correctional facility.

(2) the Northeast Nova Scotia Correctional Facility is designated for housing adult male offenders only.

…

(4) despite subsection (2), the Northeast Nova Scotia Correctional Facility may be used

(a) subject to section 10, for temporarily housing adult female offenders, including adult female offenders serving intermittent sentences; and

(b) subject to Sections 10 and 11, *for temporarily housing youth offenders*.

(8) (1) the Nova Scotia Youth Centre… is designated as a correctional facility.

(2) the Nova Scotia Youth Centre is designated *for housing youth offenders who are in open custody or secure custody or who have been remanded into custody.*

(9) (1) the Southwest Nova Scotia Correctional Facility… is designated as a correctional facility.

(2) the Southwest Nova Scotia Correctional Facility is designated for housing adult male offenders only.

(3) despite subsection (2), the Southwest Nova Scotia Correctional Facility may be used

(a) subject to section 10, for temporarily housing adult female offenders, including adult female offenders serving intermittent sentences; and

(c) subject to sections 10 and 11, *for temporarily housing youth offenders.*

…

(11) *temporarily housing youth offenders* in correctional facilities that are not designated for youth offenders is permitted only if

(a) prior permission has been granted by the Executive Director or the Executive Director's designate and the following requirements can be met:

(i) the requirements respecting separate housing in the *Youth Criminal Justice Act* (Canada); and

(ii) for female youth offenders, the requirements respecting female offenders in ss. 41 and 42 of the *Act* and section 74 to 77 of the Correctional Services Regulations; or

(b) a Youth Justice Court judge or justice makes an order under s. 30 of the *Youth Criminal Justice Act* (Canada ).

[my italics]

[63] The latter reference to "order under s. 30" *YCJA* may be interpreted as suggesting therefore that use of the words "temporarily housing youth offenders" may be limited to those young persons "arrested and detained prior to being sentenced or…. detained with a warrant issued under subsection 59(6) (compelling appearance for review of sentence)". I conclude that on an examination of the whole of the provisions, and the reality that there is only one full time secure custodial facility in Nova Scotia, namely Waterville, that the intention of the legislature was to afford the Executive Director, but not the youth court judge, who in contrast deals with detentions pending trial/sentence appearances in court, flexibility and authority to have housed NBP at North Nova while serving his secure custody sentence.

[64] The provisions consistently contrast "place of temporary detention" and "temporarily housing youth offenders", with: "place of detention in custody"; and "housing youth offenders who are in open custody or secure custody or who have been remanded into custody".

[65] The legislature must have intended a difference. Use of the word "detention" tends to be associated with shorter periods of time – e.g. those where offenders are detained in premises designed for short stay intervals, such as while they wait in cells for their attendance in court. The Supreme Court of Canada has referred to the difference between "detention" and arrest, which are also distinguished on a constitutional basis in the wording of s. 10 of the Charter of Rights - see *R. v. Mann*, 2004 SCC 52.

[66] The shorter Oxford English Dictionary, third edition, (Oxford at the Clarendon Press), defines "detention" as follows:

> Keeping in custody or confinement; holding in one's possession or control.

[67] The same dictionary defines [to] "house" as:

> To receive or put into a house; to provide with a house to dwell in; to keep or store in a house or building.

[68] And "temporary" as:

> Lasting for a limited time; existing or valid for a time only; transient; made to supply a passing need.

[69] I have found no cases on point, and none have been presented to me, regarding the meaning of the 2011-2012 changes, which introduced the relevant wording “temporarily housing”.

[70] I recognize that when interpreting the *Youth Criminal Justice Act*, and associated “federal” regulations, I must not lose sight of, generally the principles contained in s. 3, and particularly those regarding custody and supervision, in s. 83. Having said that, the application of those principles is informed, to a lesser or greater degree, by the facts in any individual case.

[71] To my mind, use of the word “housing” connotes something ongoing, and therefore that extends beyond mere “detention”.

[72] As a matter of law, I would suggest that “temporary housing” extends also beyond “temporary detention”, which in the *YCJA* (ss. 49 and 165(6) ) is generally associated with detention pending a determination of bail/sentence.

[73] “Temporary housing” therefore connotes housing, though born of “a passing need”, the length of which, however, can be said to be the period between “temporary detention” and more permanent housing. It also suggests something exceptional – that which is “temporary” stands in contrast to something that is the ongoing norm, and not “temporary”.

[74] Therefore, how much time can pass before it is no longer valid to refer to a youth offender’s housing in a particular location as “temporary”, should in my opinion be sensitive to the legal and factual context in issue.

[75] Adopting a contextual analysis of what constitutes “temporary housing” in any given set of circumstances is not only factually necessary, but it also allows for differing perspectives thereon, given the specific legal context. In my opinion, this is consistent with the intention of the legislature to allow correctional services authorities some measure of flexibility in relation to their administration of correctional facilities. My interpretation is consistent with permitting such flexibility in proper cases.

[76] In the case at bar, the court is reviewing the lawfulness of 18 year old NBP’s detention at the THU (Transition Housing Unit), while he is serving a lengthy youth sentence in secure custody, and has over the last 200+ days, arguably given the Executive Director/Provincial Director a reasonable basis to be concerned that

his return to the Youth Centre would be an intolerable risk for its staff and other youth offenders.[9]

[77] I conclude that the transfer of NBP to the THU at North Nova to serve his level III discipline, was lawful. I also conclude that the continued housing of NBP at the THU while continuing to serve his sentence has remained lawful *to date*.

[78] I will elaborate below regarding the circumstances that are relevant to that determination, particularly to explain why his continued housing at North Nova was justifiable, under the rubric of my consideration whether the decision of the provincial director was "reasonable".

**Why there was no breach here of NBP's right to procedural fairness**

[79] I must correctly define the content of that duty, and apply it to the circumstances of this case, to assess whether there was a breach of NBP's right to procedural fairness - *Waterman,* 2014 NSCA, at para 23.

[80] As indicated earlier, I have found that in transferring NBP to North Nova, the provincial director did not change his level of custody. Therefore, s. 86 *YCJA* does not apply. If I am wrong about that, then NBP had the right to request a review of that decision under s. 87 *YCJA.* There is no evidence that he requested such review.

[81] Before his initial transfer to North Nova, NBP was provided with an opportunity to present his position, and did receive a copy of the disciplinary report regarding the so-called "riot" which was the basis for transferring him.[10]

[82] In *Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817, at para. 22, Justice L'Heureux-Dube for the majority, wrote that "the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected".

[83] She went on to list five non-exhaustive general factors that have been recognized in the jurisprudence is relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. These are:

---

[9] See paras. 18- 20, Ralph Hayden affidavit regarding anticipated risks, and the level of injuries sustained by the four staff persons injured September 4, 2016.

[10] See Exhibit 6 affidavit Ralph Hayden – Deputy Superintendent Operations, Nova Scotia Youth Centre

1. The nature of the decision being made and the process followed in making it;
2. The nature of the statutory scheme and the "terms of the statute pursuant to which the body operates";
3. The importance of the decision to the individual or individuals affected;
4. The legitimate expectation (that a certain procedure would be followed), of the person challenging the decision;
5. The choices of procedure made by the authorized decision maker itself (particularly when the legislation leaves to the decision maker the ability to choose its own procedures or when the decision-maker has an expertise in determining what procedures are appropriate in the circumstances).

[84] NBP did not testify. I am, therefore, left only with the evidence presented by the Attorney General. Each of the Attorney General's witnesses were cross-examined. I found each of them to be credible.

[85] Having found procedural fairness was accorded to NBP regarding his initial transfer to North Nova, I turn then to examine the procedural fairness issue in the time between September 19, 2006 and March 13, 2017.

[86] Immediately after the expiry of his disciplinary 12 days remaining of "close confinement", and seven days loss of privileges, NBP remained at North Nova. Since September 20, 2016, he was aware of the provincial director's choice to house him at North Nova.

[87] Thus, he was necessarily alerted to the reality that he was not being returned to the Youth Centre.

[88] As his counsel points out, by virtue of being at North Nova, he had less fulsome programming opportunities (although he did still have access to educators, a social worker, a mentor and members of the IWK team who had been assisting him in Waterville) [11], had no contact with other youth offenders, or adults offenders; and had less freedom to move around in comparison to Waterville.

[11] See John Landry affidavit, paras. 19 – 20.

[89] Notably, there is no evidence that NBP at any time complained about his continued custody at North Nova. I note that North Nova has so called: "offender request form" forms which permit him to request contact with specific individuals including the Deputy Superintendent, Assistant Deputy Superintendent and Captain; and "offender complaint" forms.[12] NBP filled out numerous of such forms while at North Nova. In cross-examination, John Landry stated that NBP "was content to be in our facility – he told me he did not want to go back to Waterville".

[90] In his affidavit and testimony, Mr. Landry stated that NBP had to be "in his cell from 10:00 p.m. until 7:00 a.m. weekdays and 8:00 a.m. on weekends, and during routine facility non-movement periods each day such as mealtimes. Otherwise,… [he] has full access to the common room. This is the same routine as other young persons held on one of the THUs and adult offenders housed in the adult portion of [North Nova]."

[91] He continued at para. 11:

> [NBP] has the same privileges available to other young persons housed on one of the THU, and adult offenders housed in the adult portion of the facility, such as:
>
> a. recreation/fresh air;
>
> b. visitation; [13]
>
> c. television;
>
> d. radio;
>
> e. telephone; [14]
>
> f. canteen;
>
> g. newspaper.

[92] NBP requested that the provincial director make a s. 92 *YCJA* application to have him transferred to an adult facility. A Notice to Review was signed by the provincial director on December 8, 2016 [15]. The concluding paragraphs of a Report for the Court dated December 14, 2016 [16] state:

---

[12] See tab 18, Detention Records
[13] I note here that he had a list of 10 persons approved for visitation purposes as of September 30, 2016 – see Tab 18, Detention Records
[14] Which can be seen in the photos – exh. 4, John Landry affidavit
[15] See Tab 12, Detention Records
[16] See Tab13, Detention Records

> As indicated in this report, YP [young person] NBP has, despite consistent and intensive treatment, continued to gravitate towards becoming more rigid and pro-criminal despite all intervention, culminating in the planned assaults and assaults with weapon on peace officers on the night of September 4, 2016. All efforts to engage NBP have been exhausted, as noted in this document. Currently, per his request through his lawyer, NBP has stated he does not wish to continue with the joint treatment plan.

[93] "Live body" forms,[17] show him being transported: October 4, 2016, North Nova to Burnside Jail; October 5, 2016 to Kentville provincial court; October 6, 2016 back to North Nova; October 20, 2016 from North Nova to Burnside, and I infer from other records to Kentville provincial court and then back to North Nova. I also infer that NBP had legal aid or legal aid funded legal counsel at his court appearances. These were opportunities at which he could speak in person to counsel regarding his continued detention at North Nova. Throughout September 19, 2016 to March 13, 2017 he had access to a telephone, just outside his cell.[18]

[94] Contained at Exhibit 3 of Chris Collett's affidavit, is an email from NBP's psychologist, Dr. Simeon Hansen, to Roz MacKinnon regarding his two hour meeting on October 18, 2016 with NBP. It reads in part:

> During the conversation, NBP stated that he had instructed his lawyer to collapse the IRCS sentence and to request as soon as possible after his 18th birthday to be housed in an adult facility to serve the rest of his youth sentence. NBP stated that he was happy being housed in his current placement until his 18th birthday and under no circumstances should he be returned to the NSYF [Nova Scotia Youth Centre at Waterville]. NBP stated that should he be returned to the NSYF that "it would be the worst mistake they ever made" and that the youth facility "better be prepared" if he was forced to return.
>
> [my italics]

[95] In summary, it is clear that NBP had regular contact with counsel throughout the time period September 19 – March 13, 2017. He made it known that he did not wish to be returned to the Youth Centre. By October 18, 2016, he had started the process for a s. 92 *YCJA* application by the provincial director to transfer him to an adult facility to serve his sentence once he turned 18 years old on December 21, 2016. It was not until February 15, 2017 that he did an about-face, and announced he would be seeking relief from this court by way of an application for *habeas*

[17] See Tab 18, Detention Records
[18] See photos Exhibit 4, John Landry affidavit

*corpus*, and specifically that he be returned to the Youth Centre with the same privileges he had immediately prior to the "riot" incident on September 4, 2016.

[96] I note here again that NBP did not testify that he was denied any specific aspect of procedural fairness during this interval. Nothing in the evidence indicates he complained about his custody at North Nova.

[97] Keeping in mind the five factors mentioned in *Baker*, and the specific legal and factual context here, in relation to the decision to keep him in custody at North Nova, I cannot conclude that there is evidence of any tangible denial of procedural fairness.

[98] Moreover, bearing in mind that the onus at this stage is on the Attorney General, I note that even if some "procedural flaws" could be said to be identified in these circumstances, this does not necessarily amount to denial of procedural fairness, particularly where an inmate can be inferred to have been fully aware of the decisions taken, and rather than seek redress, the inmate with the benefit of legal counsel, embraced those decisions.

[99] In a careful examination of all the circumstances, I find no procedural unfairness rising to the level required to have the court invoke *habeas corpus* in favour of the inmate, NBP.

**Why the decision taken by the provincial director was reasonable**

[100] I bear in mind that the Attorney General need only demonstrate that the provincial director's decision was one that was "within an appropriate range of outcomes" given the circumstances. Considerable deference must be afforded to prison administrators, as they have access to very specific information, sometimes protected by "privilege", which they are not always able to fully articulate, and because they also have specific education, training, and experience in relation to the administration of correctional facilities. I have no hesitation in agreeing with the sentiment stated by Justice Sirois in *Maltby v. Saskatchewan (Attorney General*), (1982) 2 CCC (3d) 153 (QB) at para. 20:[19]

> Prison officials and administrators should be accorded wide ranging deference in the adoption and execution of policies and practices that in their judgments are needed to preserve internal order and discipline and to maintain institutional security. Such considerations are peculiarly within the province and professional

[19] Which decision was cited with approval in *R. v. Marriott*, 2014 NSCA 28, para. 39

> expertise of corrections officials, and in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to the expert judgment in such matters – *Bell v. Procunier*, 417 US at 827. The unguided substitution of judicial judgment for that of the expert prison administrators on matters such as this would to my mind be inappropriate.

[101] An intensive rehabilitative custody and supervision order sentence, requires that the Executive Director/provincial director, and a rehabilitative team present the youth justice court with a proposal that the court finds to be appropriate within the range of possible sentences outcomes. In NBP's case, Judge Derrick stated:[20]

> I am satisfied that the joint recommendation for an IRCS sentence is the *only* appropriate sentence for BP under the YCJA.… No other youth sentence could possibly offer any hope of effectively confronting BPs complex issues and addressing and reducing his risk.
>
> [Emphasis in the original]

[102] By September 4, 2016, NBP had served approximately 14 months of his sentence. This court has not seen the videotaped events of September 4, 2016, and therefore uses the written allegations in relation thereto contained in the record before me, not for the truth of their contents, but rather as the information believed by the provincial director to be accurate, and upon which basis the reasonableness of his decision should be assessed.

[103] However, Dr. Jose Mejia, Physician Lead, Child and Adolescent Forensic Psychiatric Services (psychiatrist with practice focused in child and adolescent forensic psychiatry) did see the video in question, and was at the time actively involved in the rehabilitation efforts directed at NBP. In a September 6, 2016 letter written to Angelo Visentin[21], Superintendent of the Youth Centre, he stated:

> I had the opportunity to review two videotapes of the incident; one with – and one without – audio recording. The request was secondary to your concern about the risk that [NBP] and [the other major instigator] represent to [the Youth Centre]. Both individuals have been, and continue to be at this point, my patients at [the Youth Centre].
>
> …
>
> NBP is very well known for his impulsive and instrumental displays of violence, threats of violence, continuous violation of rules, introductions of drugs and

[20] Para. 35 sentencing decision, 2015 NSPC 38
[21] See Exhibit 1 from the *habeas corpus* hearing

> fabrication of weapons and intoxicants. He is also clearly manipulative and deceitful and despite the best efforts of a well structured team working in his intensive rehabilitation as per IRCS sentence, he has shown very few positive gains while taking advantage of every opportunity he gets to demonstrate his criminal skills and versatility. He has been also manipulative and uncooperative with psychopharmacological and psychotherapeutic treatment that does not meet his expectations or liking.…
>
> As per your request, I am expressing this professional opinion based on my own observations and the knowledge gathered through months of follow-up of both individuals. [What I viewed on the videotape's] should make us reconsider the future plans for rehabilitation of both men.… Considering these factors it is my humble and respectful opinion that NBP should have his IRCS sentence revoked and continue serving his sentence as an adult in a facility where the level of security can warrant the safety of staff and peers.

[104] The staff at the Youth Centre had developed a proposed specialized reintegration plan for NBP if he was returned there.[22]

[105] NBP's rehabilitative progress throughout his time at the youth Centre was punctuated by continual, and serious disciplinary incidents.[23]

[106] During the entire time he was at North Nova, there were no disciplinary incidents noted to December 14, 2016, and none otherwise in evidence from December 15, 2016 to March 13, 2017.[24]

[107] However, on February 23, 2017, IWK hospital staff, extraordinarily waived the confidentiality of their communications with NBP, as a result of the disturbing comments he had made earlier [email from Dr. Simeon Hanson to Roz MacKinnon of the IWK Hospital][25]:

> … concerned regarding [NBP's] presentation yesterday. He was agitated and extremely angry… stated that he should he return to the Nova Scotia Youth Facility that he should be placed back at his unit. He stated that any attempt to place them elsewhere would lead to "blood flowing". [NBP] then repeated that "he will show them [Youth Centre staff] blood will flow" if they tried and locate him elsewhere.… Given [NBP's] history, previous threats and his current state of mind I think there is a duty to pass this information on to Justice. As discussed I

---

[22] See Tab 14, Detention Records and para., 16 Ralph Hayden affidavit; and para. 16, Chris Collett affidavit
[23] See Tab 20 Detention Records, Report for the Court, dated December 14, 2016, prepared in support of the provincial director's application to allow NBP to withdraw from his IRCS sentence (s. 92(19)(c);) and be transferred to an adult facility (s. 92(1)) and Exhibit 5, Disciplinary Reports, to Ralph Hayden affidavit
[24] See Tab 13 Detention Records; December 14, 2016 email
[25] Tab 15, Detention Records

> am extremely concerned that he will require a psychiatric assessment and when/if he returns it would be prudent for a psychiatrist to see him as soon as possible.

[108] In his affidavit Chris Collett stated:

> 18 I am aware that [NBP] has not had contact with other young persons while being held at [North Nova] and that his clinical contact has been maintained. The reasons he has not been transferred to the [Youth Centre] are:
>
> a. The risk of violence and injury to young persons and staff at the Nova Scotia youth Centre that he would pose if he was transferred to that facility;
>
> b. his threats to injure staff at [the youth Centre] and to encourage other young persons to do the same;
>
> c. his desire to be serve [sic] the remaining portion of his youth sentence in a provincial correctional facility for adults and intention make an application to do so as soon as he turned 18 years of age on December 21, 2016.
>
> …
>
> 20 Holding [NBP] in [North Nova] is:
>
> a. necessary to mitigate the risk of violence and injury to young persons and staff in the [Youth Centre] and its security;
>
> b. in the best interest of [NBP] and the young persons and staff in [the Youth Centre].

[109] In summary, after an examination of all the circumstances, this court concludes that the decision of the provincial director to transfer NBP to North Nova, and house him there until March 13, 2017, was within a range of reasonable outcomes available to the director.

## Conclusion

[110] I conclude that NBP's transfer to North Nova, and his continued housing there to March 13, 2017, was lawful.[26]

---

[26] To the extent that I might have erred, and his serving his sentence at North Nova was not lawful, I would have been inclined to exercise my residual discretion to not order *habeas corpus* under the circumstances in any event- *Boone v. Ontario (Community Safety and Correctional Services)*, 2014 ONCA 515, at paras. 39-46; that is, had I found sufficient grounds to order *habeas corpus,* NBP would necessarily have been returned to the Youth Centre,

Rosinski, J.

and given my consideration of the factors in s. 85(5) *YCJA*, and the circumstances here: the well grounded safety and security concerns in the record (I note that of the four staff members injured on September 4, 2016, only one had returned to work by February 22, 2017); the fact that the Director has continued the application under s 92(1) to transfer NBP to an adult correctional facility which application is scheduled to be in court again March 23, 2017; that NBP will also be in Youth Court to answer the Sept. 4 2016 "riot" allegations and the Crown's application to have an adult sentence imposed on him under s 72 YCJA in early May 2017; it would not be in the interests of justice that the court return NBP to the Youth Centre in the interim, though having said that, I appreciate that C. Collett did state: "the decision to have NBP continue to be held in [North Nova] would be reconsidered if circumstances change."