IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

Citation: *Abbass v. The Western Health Care Corporation*, 2017 NLCA 24
Date: 20170413
Docket: 201501H0037

BETWEEN:

ANDREW ABBASS — APPELLANT

AND:

THE WESTERN HEALTH CARE CORPORATION — FIRST RESPONDENT

AND:

JEHANARA TALPUR — SECOND RESPONDENT

Coram: Green C.J.N.L., Rowe* and White JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador Trial Division, 201504G0083

Appeal Heard: April 12, 2016
Decision Filed: April 13, 2017

Reasons for Judgment by the Court

Counsel for the Appellant: Joan Dawson
Counsel for the First Respondent: Jamie Merrigan Q.C.
Counsel for the Second Respondent: Irene Muzychka Q.C.

* The Honourable Malcolm H. Rowe was appointed to the Supreme Court of Canada on October 28, 2016. He deliberated upon this matter and participated in this reserved judgment subsequent to that date pursuant to authority granted by section 31 of the *Judicature Act*, RSNL 1990, c. J-4.

Per Curiam:

[1] The use of *habeas corpus* as a remedy for challenging wrongful deprivation of liberty has been alive and well in Newfoundland and Labrador ever since, in 1817, Chief Justice Forbes issued it, with *certiorari* in aid, to the gaoler at Ferryland to have a prisoner brought before him in St. John's to inquire into the legality of his imprisonment and sentence: *Re Patrick Kent* (1817), Tucker's *Select Cases of Newfoundland 1817-1828*, 54.

[2] In fact the power of the superior court to engage in judicial review of administrative legality has been a part of the inherent jurisdiction of the Newfoundland and Labrador Supreme Court as a means of maintaining the rule of law ever since Forbes C.J. and his successor, Tucker C.J. so declared it in *Hutton, McLea & Co. v. Kelly* (1818), 1 Nfld. L.R. 105 at 107; *Clift v. Holdsworth* (1819), 1 Nfld. L.R. 167 at 168; *Conrad et al v. Driscoll et al* (1820), 1 Nfld. L.R. 201 at 204; and *Hunter & Co. v. Hernamen and Howard* (1823), 1 Nfld. L.R. 285 at 293-297.

[3] The issue engaged in this case is whether *habeas corpus*, as developed in the modern law in Canada, is available to challenge the legality of an individual's detention under the *Mental Health Care and Treatment Act*, SNL 2006, c. M-9.1 (*MHCT Act*) in the face of a provision in the legislation that provides a separate means for a detained person to seek release from his or her detention.

[4] On the facts of this case, the appellant, Mr. Abbass, has already been released by different means. Even though the specific issue is therefore moot, we are of the view that the issue is of such general importance for similar cases in the future that the Court should nevertheless hear and determine the appeal. We are mindful of the observations of LeBel J. in *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502:

> [14] Despite being moot, this appeal merits a decision in the circumstances of this case. The nature of *habeas corpus* applications involving the transfer and segregation of inmates is such that the factual circumstances of a given application can change quickly, before an appellate court can review the application judge's decision. This means that such cases will often be moot before making it to the appellate level, and therefore "capable of repetition, yet evasive of review" (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at p. 364)…

[5] The same could be said about this case. See also *Arsenault v. Eastern Health*, 2015 NLTD(G) 126.

Background

[6] On April 7, 2015, members of the Royal Newfoundland Constabulary attended at Mr. Abbass's home and detained him for an assessment under the *MHCT Act*. The motivation was concern over the content of certain tweets issued by Mr. Abbass on Twitter which potentially expressed anger relating to a recent shooting of an individual by a policeman. He was taken to the psychiatric unit at Western Memorial Hospital operated by the first respondent in Corner Brook. There, two physicians, one of whom was the second respondent[1], completed the necessary paperwork that resulted in his involuntary admission to the hospital.

[7] Mr. Abbass challenged his detention by bringing an application for an order of *habeas corpus*, claiming that (i) he was not suffering from any mental disorder; (ii) the certificate of involuntary admission did not cite any grounds for his detention; (iii) his detention was therefore unlawful and not in compliance with the *MHCT Act*; and (iv) his rights under section 10 of the *Canadian Charter of Rights and Freedoms* had been violated.

[8] On the return of the application and Mr. Abbass's appearance in Court, counsel for the hospital raised a preliminary question "as to whether this is an appropriate matter to proceed by way of *habeas corpus* because there is a clearly outlined appeal mechanism available [under the *MHCT Act*]." Counsel for Mr. Abbass took the position that he was illegally detained without any mental health diagnosis and that, accordingly, any alternative review procedures contained in the *MHCT Act* would have no application. Such procedures, counsel argued would only have application once a person was properly detained under the *Act.* Furthermore, it was submitted that the urgency of determining the legality of the initial detention, as opposed to conducting a review of whether he should continue to be detained justified resort to *habeas corpus.*

[1] The question of whether the certifying physician should have been named as a party to the proceeding was not addressed in argument and not specifically raised by the Court. Accordingly, the issue is left open for another day.

The Decision

[9] The judge accepted the hospital's submissions, declared that he would exercise his discretion to decline[2] jurisdiction, and dismissed the application. The judge referred to and relied on the Supreme Court of Canada decision in *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, as well as the Ontario Superior Court decision in *Capano v. Centre for Addiction and Mental Health*, 2010 ONSC 1687, for the proposition that a court hearing a *habeas corpus* application should decline jurisdiction where the legislature has put in place a separate "complete, comprehensive and expert" procedure for review of the detention. The judge referred to the legislation that was under consideration in the *Capano* decision (which led the Court in that case to decline jurisdiction) and concluded:

> I find that those attributes of … the Ontario legislation [are] quite similar to what is contained in our legislation. So it is … my finding that … as there is a comprehensive scheme in the [*MFCT Act*] providing for broad rights of review and appeal, I feel I am bound by the decision of the Supreme Court of Canada, and I must dismiss the application for *habeas corpus*. Therefore, the applicant must … be returned to the medical facility in accordance with the [*MHCT Act*].

Issues and Standard of Review

[10] The issues on appeal concern whether the judge properly decided to decline jurisdiction to deal with the *habeas corpus* application.

[11] Generally speaking, *habeas corpus* should *prima facie* be available whenever the legality of a detention is brought into question. Access to it is enshrined in section 10(c) of the *Canadian Charter of Rights and Freedoms.* Blackstone described it as "the great and efficacious writ in <u>all</u> manner of illegal confinement" (Blackstone, *Commentaries of the Laws of England* (Oxford: Clarendon Press, 1768),Vol. 3, p. 131; emphasis added) and Newfoundland's seventh chief justice, Sir Francis Forbes, writing in 1829 when subsequently serving as Chief Justice of New South Wales, called it "a high prerogative writ and so much the right of the subject as to render it <u>compulsory on the judges</u> … <u>to grant it</u> (quoted in Paul Halliday, *Habeas*

[2] The formal order initially issued following judgment in fact declared that the Court "does not have jurisdiction" to hear the *habeas corpus* application. However, it was subsequently amended after the current appeal was filed to read that the court "declines" jurisdiction to hear the application. Because it was not dealt with in argument, we pass no opinion on the propriety of (or even whether the applications judge had, by virtue of the doctrine of *functus officio,* the authority to make) such an amendment once an appeal from the initial order had been initiated. For the purposes of this appeal, the formal order under appeal will be treated as the one that expressed the decision to decline jurisdiction.

Corpus: From England to Empire (Cambridge, Mass: Belknap Press, 2010), p. 82, citing *In re Jane New*, Dowling, Select Cases, v. 2, Archives Office of NSW, 2/3462, [1829] NSWSupC 11; emphasis added). Thus, it becomes important to define the circumstances where this "great writ of liberty" should legitimately be denied. The Canadian cases have indicated that there are some limited exceptions to the general rule of availability. One of them is where there is an alternative efficacious procedure available for addressing the applicant's claims of illegal detention. Whether the procedure under consideration falls within the defined exception is a question of law on which the judge hearing the *habeas corpus* application must be correct.

[12] If the exception, on a correct analysis, does apply, then the judge has a discretion (but not a duty) to decline to grant the remedy. That decision is reviewable on the same standard as any other discretionary decision. See *Langor v. Spurrell* (1997), 157 Nfld. & P.E.I.R. 301 (NFCA) at paragraph 33.

[13] If the conclusion on this analysis is that the judge should have assumed jurisdiction and dealt with the *habeas corpus* claim, then the following subsidiary questions potentially arise: (i) whether the record is complete enough for this Court to decide the substantive issue of legality of detention; and (ii) if so, what relief, if any, should be granted.

Availability of *Habeas Corpus*

[14] As noted by Blackstone, *habeas corpus* is in principle available to inquire into the legality of a detention whenever a person has been detained and he or she alleges that the detention is unlawful and raises a legitimate question as to the lawfulness of the detention. On the return of the writ in court following service, the applicant for relief has the burden of proving the existence of the detention but the person or authority that is doing the detaining has the burden of establishing that the deprivation of liberty was lawful: *May*, paragraph 74. That is why when an application for *habeas corpus* is served on the detaining authority there is a duty upon that person or body, not only to bring the "body" of the detained person before the court but also to make a return to the court of all documents and other evidence pertaining to the lawfulness of the detention in response to the allegation.

[15] If the court is not satisfied with the legality of the lawfulness of the detention upon a facial review of the documents offered as authority for the detention, it can order the applicant's discharge forthwith. However, even if

the detention documents appear to be facially valid, the court may also, in appropriate cases, look beyond the facial validity of those documents and, especially when *certiorari* is sought in aid, examine the underlying circumstances of the whole record to determine whether the detention is in fact legal and if it is not, take appropriate action (*Mission Institution v. Khela*, paragraph 35). In either case, if the conclusion is that the detention is not justified, the applicant is entitled to an order that he or she be released. In that sense, the granting of the remedy of release is, unlike the other prerogative remedies, not discretionary. See generally, on the historical development of the writ of *habeas corpus*, *May*, per LeBel and Fish JJ. at paragraphs 19-50; Debra Parkes, "The 'Great Writ' Reinvigorated? *Habeas Corpus* in Contemporary Canada" (2012), 36 Man. L.J. 351; and Halliday, *passim*.

[16] Difficulties arose, however, where the applicant for relief had available to him or her a means under another legal procedure in which to challenge the legality of the detention decision. Cases occurred, for example, where it was alleged that the applicant could have achieved an appropriate result by way of judicial review in the Federal Court in immigration cases (*Peiroo v. Canada (Minister of Employment and Immigration)* (1989), 69 O.R. (2d) 253 (C.A.)) and in prisoner incarceration cases (*Hickey v. Kent Institution*, 2003 BCCA 23). *Habeas Corpus* was denied in those cases.

[17] The Supreme Court's decision in *May* nevertheless reinvigorated the *habeas corpus* remedy in the area of concurrent or overlapping jurisdiction. LeBel and Fish JJ. wrote for the majority:

> [50] Given the historical importance of *habeas corpus* in the protection of various liberty interests, jurisprudential developments limiting *habeas corpus* jurisdiction should be carefully evaluated and should not be allowed to expand unchecked. The exceptions to *habeas corpus* jurisdiction and the circumstances under which a superior court may decline jurisdiction should be well-defined and limited. In our view, the propositions articulated by the Court of Appeal in these cases, as in *Hickey* … unduly limit the scope and availability of *habeas corpus* review and are incompatible with this Court's jurisprudence. … In principle, the governing rule is that provincial superior courts should exercise their jurisdiction. However, in accordance with this Court's decisions, 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.

(Emphasis added.)

[18] See also, to similar effect, paragraphs 34-35 and 44 of the same decision, and also *Chaudhary v. Canada (Public Safety and Emergency Preparedness)*, 2015 ONCA 700.

[19] It was on the basis of a conclusion that there was a "comprehensive" scheme in the *MHCT Act* "providing for broad rights of review and appeal" that the applications judge in this case felt justified in declining jurisdiction. To determine the correctness of that determination, and whether he applied the proper standard to determine whether an exception to granting *habeas corpus* applied, it is necessary to review the statutory scheme that provides for the detention of an individual and for the subsequent review of that detention.

The Mental Health Care and Treatment Act

[20] The *MHCT Act*, among other things, provides for the involuntary admission and detention of persons in a hospital psychiatric unit. There are three basic ways in which the process can be initiated.

[21] The first, under section 18, follows from the issuance of a "first" certificate of involuntary admission by a physician following a psychiatric examination (however that may have occurred), thereby authorizing the apprehension of the person named in the certificate and the conveyance of that person to the psychiatric facility for an "involuntary psychiatric assessment." There is no suggestion in this case that the apprehension and detention of Mr. Abbass occurred in this manner.

[22] The second manner of initiating the involuntary admission process is described in section 19 which provides that "anyone" who has reasonable grounds to believe that a person (a) has a mental disorder; (b) as a result of the mental disorder has caused or is likely to cause harm to himself or herself or others or is likely to suffer physical or mental deterioration or serious physical impairment; and (c) refuses to submit to a psychiatric assessment, may apply to a judge for an order for a psychiatric assessment of that person. There was no court order made in this case authorizing Mr. Abbass's detention.

[23] The third and final manner of initiating the process provides in section 20 for apprehension by a peace officer who has reasonable grounds to believe the same circumstances outlined in section 19 exist and "it is not

feasible in the circumstances to make an application for an order under section 19." In taking this route, the peace officer must provide the person conducting the assessment with a written statement setting out, among other things, the grounds upon which the peace officer formed his or her beliefs that led to the apprehension; section 21(2)(c). (I would note in passing that there is nothing on the record to indicate that it was not feasible for the apprehending police officer to make an application for a court order under section 19).

[24] Upon being brought to the psychiatric facility, the person concerned is obliged to submit to a psychiatric assessment. Section 16 provides, insofar as it applies to this case, that a person may "only" be admitted and detained "under the authority of two certificates of involuntary admission." Section 17 sets out the form and contents of certificates of involuntary admission:

> (1) A certificate of involuntary admission shall be in the approved form and shall contain the following information:
>
> > (a) a statement by a person described in subsection 17(2) that he or she has personally conducted a psychiatric assessment of the person who is named or described in the certificate within the immediately preceding 72 hours, making careful inquiry into all of the facts necessary for him or her to form an opinion as to the nature of the person's mental condition;
> >
> > (b) a statement by the person who has conducted the psychiatric assessment referred to in paragraph (a) that, as a result of the psychiatric assessment, he or she is of the opinion that the person who is named or described in the certificate
> >
> > (i) has a mental disorder, and
> >
> > (ii) as a result of the mental disorder
> >
> > (A) is likely to cause harm to himself or herself or to others or to suffer substantial mental or physical deterioration or serious physical impairment if he or she is not admitted to and detained in a psychiatric unit as an involuntary patient,
> >
> > (B) is unable to fully appreciate the nature and consequences of the mental disorder or to make an informed decision regarding his or her need for treatment or care and supervision, and

> (C) is in need of treatment or care and supervision that can be provided only in a psychiatric unit and is not suitable for admission as a voluntary patient;
>
> (c) a description of the facts upon which the person who has conducted the psychiatric assessment has formed the opinion described in subparagraphs (b)(i) and (ii), distinguishing between the facts observed by him or her and those that have been communicated by another person;
>
> (d) the time and date on which the psychiatric assessment was conducted;
>
> (e) the dated signature of the person completing the certificate of involuntary admission; and
>
> (f) another matter required by the regulations.
>
> (2) A certificate of involuntary admission shall be completed and signed as follows:
>
> (a) the first certificate of involuntary admission may be completed and signed by a physician, nurse practitioner or other person authorized by the regulations; and
>
> (b) the second certificate of admission shall be completed by a psychiatrist or, where a psychiatrist is not readily available to assess the person and complete and sign a second certificate, by a physician who is a person other than the person who completed and signed the first certificate.

[25] The keys to involuntary admission and detention are (i) the opinion of the person conducting the psychiatric assessment that the person has a mental disorder and that as a result of that disorder he or she is experiencing the conditions and facing the circumstances listed in section 17(1)(b)(ii)(A)-(C); and (ii) the formal completion and issuance of the two certificates of involuntary admission in the form and containing the information stipulated in section 17, especially the "description of the facts" forming the basis of the opinion in the certificate that justifies the admission and detention.

[26] Until the foregoing processes are completed, the apprehended person cannot be involuntarily detained or treated under the *MHCT Act* and must be informed that he or she has the right to leave the facility: section 23(1). If the involuntary admission process is properly completed, on the other hand, the

person must be admitted to the unit (section 24) and may be subjected to involuntary treatment including administration of medication (section 35). We reject the hospital authority's submission that "the Act does not require a diagnosis of a particular disorder as a prerequisite to involuntary admission but rather contemplates that the purpose of an involuntary admission could include attempting to obtain a diagnosis via diagnostic procedures" (First Respondent's Factum, paragraph 67).

[27] Once detained in the unit, the involuntary patient has a number of rights stipulated in Part II of the *Act.* He or she also has rights of automatic review of his or her medical status (section 33) as well as the right to apply to the Mental Health Care and Treatment Review Board under section 64(1)(a) "to review the issuance of certificates of involuntary admission". The Board also has jurisdiction to deal with complaints of denial of the rights in Part II, which includes rights to information about the purposes of the patient's detention and copies of the certificates of involuntary admission. The Board has the broad investigatory powers of a commissioner acting under the *Public Inquiries Act*, SNL 2006, c. P-38.1 and the *Public Investigations Evidence Act*, RSNL 1990, c. P-39.

[28] The type of orders a panel of the Board can make are described in section 72:

> (1) In its decision, a panel may
>
> (a) with respect to an application under paragraph 64(1)(a), confirm the person's status as an involuntary patient if it determines that the criteria for admission as an involuntary patient set out in subparagraphs 17(1)(b)(i) and (ii) were met at the time of the hearing of the application, notwithstanding a technical defect or error in a certificate of involuntary admission or certificate of renewal, or cancel the certificate, where it determines that the criteria for admission as an involuntary patient were not met at the time of the hearing of the application, and order the person to be released from the psychiatric unit, subject to a detention that is lawfully authorized otherwise than under this Act;
>
> (Emphasis added.)

The Correctness of the Decision to Decline Jurisdiction

[29] The essential question for consideration on this appeal is whether the statutory procedures for review of an involuntary patient's detention under the *MHCT Act* can be characterized as a "complete, comprehensive and expert procedure for review of an administrative decision" as described in

May, so that a potential exception to the automatic right to the use of the *habeas corpus* procedure applies.

[30] We start with the observation in *May* that superior courts must not decline to hear *habeas corpus* applications "merely because another alternative remedy exists" and appears to be "more convenient" (paragraph 44). The alternative procedure must be complete, comprehensive and expert in its nature and "at least as broad as *habeas corpus* and no less advantageous*."* (*May*, paragraph 63; see also *Peiroo*, pp. 261-262). In assessing the procedure involved in *May*, the majority identified five factors to consider: (1) the choice of remedies and forum; (2) the expertise of the superior courts; (3) the timeliness of the remedy; (4) local access to the remedy; and (5) the nature of the remedy and the burden of proof (paragraph 65).

[31] Counsel for Mr. Abbass submitted that the review procedure in the *MHCT Act* did not meet the "complete, comprehensive and expert" standard because that procedure only operates once it is determined that the patient has been lawfully detained, i.e. once the test for involuntary admission has been made out and the proper formal paperwork has been completed. In this case, it is the legality of the initial detention that is being challenged. Mr. Abbass submits that not only was it not established that he was suffering from any mental disorder but the certificates of involuntary admission did not comply with the *Act* and did not provide the justification for the detention.

[32] Very little information was placed before the applications judge or in the record in this Court as to the circumstances that led up to the detention of Mr. Abbas.[3] No statement from the peace officer who apprehended Mr. Abbass is part of the record. All we have are the two certificates of involuntary admission. Mr. Abbass's full medical chart and record of subsequent assessments and treatment were not presented to the court. This was because the issue of whether the court should decline to hear the application was made as a preliminary application before a hearing on the merits was fully organized and held.

[3] In fact, some additional information was attempted to be submitted in this Court but its reception was objected to on the basis that an application for reception of additional evidence had not been made. Counsel for Mr. Abbass agreed at the opening of the appeal hearing, that the appeal should proceed without reference to this additional material.

[33] Essentially, all this Court has is the material that was returned by the health authority in response to the *habeas corpus* application by way of justification that the detention was lawful. That essentially consists of the two certificates of involuntary admission.

[34] The first certificate certified that a psychiatric assessment of Mr. Abbass commenced at 5:31 PM on April 7, 2015 and concluded 19 minutes later at 5:50 PM. The certificate is a pre-printed form that states that the person examined "has a mental disorder" and then repeats the language of section 17(1)(b)(ii) (A) - (C). Following that, there is a space for the physician to write, in response to the words on the form "My opinion is based on:" his reasons for the conclusion that the patient is suffering from a mental disorder.[4] In this case, the following appears on the form:

> -Pt. facing forensic/court on Thursday
>
> - some sx consistent with paranoia
>
> - making allegations on twitter after recent events and fatal shooting lead to questions of patient + public safety
>
> - needs observation +/- forensic + assessment

[35] The second certificate was completed five minutes later. The form is essentially the same as the previous one, but it contains the following: "The following facts and reasons for my opinion above [that the patient is suffering from a mental disorder] are as follows:" The hand-written response contains the following:

> Andrew Abbass was brought to the ER by RNC under the Mental Health Act for a psychiatric assessment, after he allegedly made statements on Twitter expressing anger with reference to the fatal shooting of a person in Eastern NL last weekend. In order to establish Mr. Andrew Abbass' personal safety as well as public safety, further observation and assessment is necessary in a secure facility as the least restrictive measure at this time.

[36] As previously noted, section 17(1)(c) requires a certificate of involuntary admission to contain:

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[4] The definition of mental disorder, taken from the *MHCT Act*, s. 2(1)(k), is included on the form: " a disorder of thought, mood, perception, orientation or memory that impairs (i) judgment or behavior, (ii) the capacity to recognize reality, or (iii) the ability to meet the ordinary demands of life, and in respect of which psychiatric treatment is advisable.

> A description of the facts upon which the person who has conducted the psychiatric assessment has formed the opinion … , distinguishing between the facts observed by him or her and those that have been communicated by another person.

[37] Both certificates primarily contain a recitation of the circumstances (presumably relayed by others because they did not lie within the physicians' personal knowledge) under which Mr. Abbass was brought in for assessment. Aside from asserting, as part of the pre-printed form, that he suffers from a "mental disorder" the certificates make no attempt to identify the mental disorder in question (except, possibly, in the case of the first certificate, that there are some symptoms "consistent with paranoia") and certainly do not set out any "facts" within the physicians' own knowledge (such as observations, interactions or answers to questions) that in the words of section 17(1)(c) are the facts "upon which the person who has conducted the psychiatric assessment has formed the opinion". Certainly, the generalized references to personal and public safety and anger as well as the need for further observation and assessment cannot constitute the "facts" contemplated by section 17(1)(c) without showing that by virtue of their significance and nature they relate to and meet the criteria of harm to oneself or others and inability to appreciate the nature and consequences of the mental disorder (assuming one was specifically identified) or to make an informed decision regarding treatment, as set out in section 17(1)(b)(ii)(A)-(C).

[38] The certificate is not merely a piece of paper that evidences a decision that has been made. It is *the* authority in itself to intrude upon the liberty and privacy of an individual. Without the existence of the piece of paper, properly completed, the authority does not exist.

[39] It is therefore at least arguable that, as matter of facial validity alone, the admission and detention of Mr. Abbass in the hospital was not lawfully authorized. That is sufficient to justify the commencement of the *habeas corpus* process. Mr. Abbass is *prima facie* entitled to have that issue litigated and determined. The words of LeBel and Fish JJ. in *May* are relevant here:

> [71] … a writ of *habeas corpus* is <u>issued as of right</u> where the applicant shows that there is <u>cause to doubt the legality</u> of his detention.
>
> (Underlining added.)

[40] Counsel for Mr. Abbass points out that although the review procedure mandated by the *MHCT Act* speaks in terms of making an application "to review the issuance of certificates" (s. 64(1)(a)), the powers of a panel of the Board to issue an order is discretionary ("may") and is limited to confirming the patient's status as an involuntary patient if it determines that the criteria for admission "were met at the time of the hearing" and to cancelling the certificate where it determines that the criteria for admission "were not met at the time of the hearing" (s. 72(1)(a); emphasis added). In other words, the role of the Board is to consider whether there is a basis, using the admission criteria, for *continued* detention. It presupposes that the patient was legitimately admitted in the first place and only addresses the need to keep the patient in the psychiatric unit, not the legalities of whether actions were properly taken initially.

[41] We agree with this interpretation. The Board review procedure does not allow for the type of fulsome review of legality of detention that would be available in a *habeas corpus* application.

[42] The applications judge – and the hospital authority in this case – referred to and relied on the Ontario Superior Court decision in *Capano* as support for the proposition that the statutory review procedure in Newfoundland and Labrador should, contrary to the foregoing reasoning, be considered to be an appropriate procedure for review of the legality of Mr. Abbass's initial involuntary admission. *Capano* dismissed an application for *habeas corpus* seeking to challenge an involuntary admission of a patient detained in Ontario under that province's mental health legislation. D.M. Brown J. agreed with the hospital authority's submission that the applicable legislation did constitute a complete, comprehensive and expert procedure for review of the decision to detain the patient. He specifically held that the legislation in that case "affords an involuntary patient a right to apply to the [Board] to inquire into whether or not the prerequisites set out in the [Ontario legislation] for admission,… are met, i.e. whether the detention is lawful" (paragraph 35) and "gives the Board the authority to inquire into the lawfulness of a patient's detention" (paragraph 36).

[43] D.M. Brown J. interpreted the Ontario provisions as providing the reviewing board authority to review the initial legality of admission. That is an authority we have concluded, on an interpretation of the *MHCT Act*, is not conferred on the Board. Accordingly, the *Capano* decision is distinguishable. We would go further, however, and say that even if there is no material distinction between the statutory wording of the two provinces'

legislation, we disagree with the result in *Capano* and would decline to follow it as a precedent for interpreting the *MHCT Act*.

[44] Furthermore, we are satisfied that, even if the Board had authority to address the legalities involved, access to *habeas corpus* involves a much more timely and efficient procedure to address these issues than being required to go through the Board process. The Board process can take weeks from application to hearing to decision. The time lines are set out in sections 66, 67 and 71 of the *Act.* By contrast, when urgent issues regarding liberty of the subject are at stake– as is evidenced by this case – the superior courts give priority to *habeas corpus* applications and will, if necessary, re-organize their dockets to accommodate the earliest possible hearing date. The flexibility and availability of the *habeas corpus* procedure, when compared to the Board review procedure, also favours the former remedy.

[45] We are also of the view that when dealing with the question of legality of detention, the superior court has greater expertise than a Board review panel. The panel's focus, as described previously, is on whether there are continuing mental disorder issues that would justify further detention. Such questions are primarily of a medical nature which would call upon a developed expertise flowing from Board knowledge and experience. But the questions of the legality of initial deprivation of liberty, and whether the decision is properly supported by the type and degree of evidence required by law, as well as the formalities of certification, are matters that are quintessentially a judicial function.

[46] Finally, the nature of the remedy required when issues of the sort in this case are raised and the burden of proof are better dealt with on a *habeas corpus* application. As LeBel and Fish JJ. emphasized in *May*, "on *habeas corpus*, so long as the prisoner has raised a legitimate ground upon which to question the deprivation of liberty, the onus is on the respondent to justify the lawfulness of the detention" (paragraph 71). If that justification is not made out, the person detained *must* be discharged. The proceeding places the focus on where it should be. The proceeding before the Board is more nuanced. While section 69(3)(c) provides that the standard of proof is on a balance of probabilities and the onus of proof is on the administrator, the person in charge of the facility or the attending psychiatrist, the focus is the need for continuing care and treatment rather on legal justifications for the existing detention and, in any event, it is within the discretion of the Board to issue any order. It does not engage the question of the initial lawfulness

of the detention as argued by counsel for the hospital, nor does it place an obligation on the hospital to prove the lawfulness of that initial detention.

[47] Thus, of the five factors mentioned in *May*, and mentioned above in paragraph 30, four of them favour a conclusion that the alternate procedure available under the *MHCT Act* is not "complete, comprehensive and expert" for review of the issues of legality raised by Mr. Abbass. In merely stating that there was a "comprehensive scheme" in the *Act* and that there were "broad rights of review and appeal", the applications judge did not apply the correct standard for determining this question.

[48] We conclude that the applications judge should not have declined to exercise his jurisdiction to hear and determine the *habeas corpus* application.

[49] Having reached this conclusion, it is not necessary to go on and consider whether, even if the alternative procedure was adequate, the court should nevertheless have exercised its discretion to hear the case in any event.

[50] That said, we state that the importance of this case and the fundamental issues at stake should not have been lost on the parties and the judge at the original hearing in their concern to deal with the technical legal issues that were raised.

[51] If anger about political events and words of defiance to authorities are dealt with as signs of mental illness, *a fortiori* mental illness warranting involuntary committal, then our society is in a dangerous place. Such anger and defiance are characteristic of political dissent. As the history of authoritarian societies has taught us, confinement in a mental institution is a particularly insidious way of stifling dissent, directly and through intimidation. Was this the intent of the police in this case? Did the physicians simply lend their authority to what the police asked them to do? Did they assume that a person who acts in the way Mr. Abbass did needs help and further assessment and observation, without turning their minds to the specific limited statutory criteria that would justify his deprivation of liberty? On the face of the materials before the applications judge these were possible (though, of course, not the only) interpretations of what occurred. The applications judge owed a duty to Mr. Abbass to look further into the circumstances, which to say the least appear to be extraordinary.

[52] The reality is that if you are involuntarily confined, you are viewed differently; you are seen as less credible. That is not how it should be but that is how it is. As well, there is the intimidation factor. If the police can take you away once and the physicians confine you, maybe they will do so again.

[53] Mr. Abbass felt that what the police and physicians did was without proper authority. He sought the vindication of having a Supreme Court judge affirm this. Whether Mr. Abbass was correct in his view or whether the police and the physicians acted properly is not the question before this Court. Rather, it is whether, when Mr. Abbass sought to challenge what had been done to him, the applications judge should have heard the matter.

[54] Should Mr. Abbass have been given an opportunity to seek his release on the basis that he should not have been confined in the first place? The applications judge in effect said no. In this he committed a fundamental error. The courts must always be there for the vindication of the citizen with what he or she views as the wrongful exercise of authority. Mr. Abbass was denied his day in court. He should have had it.

Remedy

[55] The appeal is allowed and the decision of the applications judge declining to exercise his jurisdiction to hear the appellant's *habeas corpus* application is set aside. The matter is remitted to the Trial Division for the continuation of the hearing.

[56] We would add that it is not appropriate for this Court to make a determination on the merits of the *habeas* corpus application as to whether the detention was in fact unlawful because the record to enable a proper determination in that regard may be incomplete. The decision to deal with the appropriateness of hearing the matter by way of *habeas corpus* as a preliminary matter diverted consideration from what was needed to make a determination on the merits.

[57] The appellant is awarded his costs in the Trial Division and on this appeal on a party-and-party basis calculated by reference to column 3 of the scale of costs.

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J.D. Green C.J.N.L

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M.H. Rowe J.A.

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C.W. White J.A.