

SUPREME COURT OF NOVA SCOTIA

Citation: *Keenan v. Nova Scotia (Attorney General)*, 2023 NSSC 217

Date: 20230714

Docket: Hfx. No. 524271

Registry: Halifax

Between:

Mark Keenan

v.

The Attorney General of Nova Scotia

DECISION ON *HABEAS CORPUS* APPLICATION

Judge: The Honourable Justice Joshua Arnold

Heard: June 19, 2023, in Halifax, Nova Scotia

Counsel: Mark Keenan, self-represented Applicant
Adam Norton, counsel for the Respondent

Overview

[1] There is a significant problem at the Central Nova Scotia Correctional Facility. It is seriously understaffed. As a result, the inmates have been subject, off and on, to rotational lockdowns for months. Whether on a general population range or on a protective custody range, because of the chronic staffing shortages, all inmates are subject to close confinement for significant periods of time. The rotational lockdowns create havoc with the daily schedule. Inmates do not know if or when they will be released from their cells. Programming has been impacted, but not cancelled completely. Calls to lawyers have been impacted. Visitation has been impacted. Meals have been impacted. Tensions are high. Inmate-on-inmate intimidation and violence, as well as inmate-on-staff intimidation, abuse and violence, is an issue, which leads to more lockdowns and more staffing shortages.

[2] The facts related to this application are very similar to the facts in *Richards v. Nova Scotia (Attorney General)*, 2023 NSSC 220, and *Sempie v. Nova Scotia (Attorney General)*, 2023 NSSC 218, as the events occurred either at the same time or very close in time in the CNSCF.

[3] An inmate's mental health can be negatively impacted by close confinement (*Winters v. Legal Services Society*, [1999] 3 S.C.R. 160, per Cory. J., in dissent but not on this point, at paras. 65-67; *Canadian Civil Liberties Association v. Canada (Attorney General)*, 2019 ONCA 243, at paras. 72-77. See also: *British Columbia Civil Liberties Assn. v. Canada (Attorney General)*, 2019 BCCA 228).

[4] The applicant, Mark Keenan, says that he is regularly locked in his cell for more than 22 hours per day. There was an incident on Mr. Keenan's range in May 2023 and every inmate on the range was placed on a Behaviour Management Program, which included more time locked in. Mr. Keenan was not actually involved in the incident, so complained about being placed on a BMP. Also, at one point, for a stretch of 31 hours he was not released from his cell at all. He says that more aggressive, pushier and/or more disruptive inmates are getting more unlock time because the jail staff does not enforce equitable unlock time. Mr. Keenan has asked the court for relief or help of some sort by way of *habeas corpus*. However, he does not want to be released from his cell for longer than the other general population inmates at CNSCF.

Facts

[5] Mark Keenen filed two applications for *habeas corpus*, one on May 31, 2023, and one on June 6, 2023. As noted above, in his applications he complains of being locked in his cell for too long. He requests a remedy, and in his written application filed May 31, 2023, wrote: “Not my decision. My time does not count. On remand. Bail hearing???” There was no remedy identified on the June 6, 2023, application. During the course of the hearing, Mr. Keenan emphasized that he did not want to be released from his cell for longer than the majority of the other inmates at CNSCF. He was otherwise open to any sort of remedy that might address his ongoing time subject to rotational lockdowns.

[6] Two witnesses testified on this application. Assistant Deputy Superintendent John Landry testified on behalf of the AGNS. Mark Keenan testified on his own behalf.

[7] The affidavit of ADS Landry, sworn June 14, 2023, was tendered and he also gave *viva voce* evidence. He said that generally all units at the CNSCF are subject to the rotational lockdowns and all inmates are basically receiving the same time out of their cells.

[8] ADS Landry said that the lockdowns are the result of chronic understaffing. Almost every day management has to juggle labour disruptions including work refusals, vacation and sick days, and unexplained last-minute absences. Management have tried to fill in for the missing staff. Some days the cells are not unlocked at all, some days they are unlocked for a couple of hours or less, and some days more than a few hours. Rarely is the unwritten target of 12 hours unlocked per day achieved. As a result, tensions are high. Tension can lead to inmate-on-inmate violence which leads to more lockdowns, resentment by the uninvolved inmates toward the involved inmates, more violence and then even fewer staff at the jail if some are required to transport injured inmates to hospital. Inmate-on-staff violence results in staff either unable to, or refusing to, come to work, and even more lockdowns.

[9] ADS Landry advised that a recent hiring push for about 30 new guards resulted in only eight being hired. The only solution to the problem he could propose is finding a way to hire more staff. ADS Landry stated:

ADS Landry: Sure, at the...well, the captains make the decision at 6:45 where staff go, depending on their numbers, and then if we have less than one in the control post and five on the units, it means that the unit – if we have that number, then the unit’s fully unlocked. Then we can redeploy to

outside to watch the airing court or a number of different programs. It's been, I'll say, tough over the past 15 or 16 months to get to those numbers. It hasn't been most of the days. Uh, then, so the staff will then...the captains in the morning will try to deploy staff so that we have as many in the units to open. And then, if they can't get five, we have a managers' meeting at 8:30 in the morning where, we realize the importance of opening the cells, we will get program officers to do video visits so that officer can go work a unit. We'll shut down Admitting as soon as everybody goes to court and send those people up to a unit. Managers will, we've done it, gone on Medical TAs and sent the staff back because managers can work at a hospital with an inmate just by themselves, they're not unionized, and we send the two unionized people back to help out, giving one in each unit, increasing the numbers. It's basically all hands on deck and try the best we can to open up the living units and there's many different times during the day where it gets re-evaluated, depending on what's going on and who needs what.

Mr. Norton: Okay, can you describe what reasons there have been for these staffing numbers that you indicated?

- A. Yeah, there is an attendance concern, first off. Secondly, there is Medical TAs that, at times in the past year, we've had seven individuals in the hospitals around Halifax. So, that's 14 staff in the run of a day...sorry, 28 staff in the run of a day that would have to be on that. There's staff assaults. I believe there was 10 staff assaults from Tuesday morning 'til Wednesday at supper last week. So, a lot of those are off work. They might be off work for a long period of time or a short period of time, but that has a definite impact. Obviously, the people in custody get frustrated, so, then they're speaking out because they're on rotations or whatever. They're not happy with staff and will say negative comments towards staff. That doesn't encourage them to come back to work the next day. It's just a vicious cycle where the individuals in custody are put on rotations because of not enough staff and then the staff, obviously, are doing more work. That doesn't make them want to come to work. I guess the bottom line is...is that we want the persons in custody to be out as much as possible. It's better for them, it's better for us – we don't have to serve them individual meals to their cells and do all the...do all the extra work, which is taxing on our staff, and when you're short numbers, you don't want more work, you'd rather do less. I don't mean that in a lazy way, but there's other stuff that has to be done and something has to give. You can't do everything with less staff.
- Q. You mentioned attendance issues. Could you describe what that means?
- A. Staff are off on Workers' Comp. because they get assaulted or fall down at work or whatever. That has an impact. Sick Time, Family Illness, training...can you tell me what the question was again?

- Q. The question was just in regards to what the definition of “attendance” meant to you when you described it.
- A. Attendance is staff able and willing to come to work and there seems to be less attendance because we can’t get enough people hired to work in the facility. There’s trouble in law enforcement across the country and since Covid it’s even worse. We just tried to hire 30 people and we got eight and that’s been a continuous pattern over the past two years or so. We just can’t get enough staff to work, which is not good for either side, I’ll say.
- Q. And what, if any, attempts have you made to try and ensure that staff are present at the facility?
- A. Well, we try to hire more. We try to help out as much as we can, the Management Team, so, whether that’s going down and helping with the medication or doing rounds or meal times, hospital TAs, work different units so that there’s more staff available. You know, from the Superintendent down, we’ve all worked in the units over the past year, and way more than what we would like to be doing.
- Q. You mentioned at paragraph 35, there’s reference to work refusal. Can you describe what that is?
- A. Well, the staff, because of the low staffing numbers in the building, or security concerns whether, um, if a unit is behaving...misbehaving, making threats, being assaultive, staff would like more staff there – at least the minimum of five on the unit, in order to open them up. We had seven...17 work refusals in the past couple of weeks where the staff thought that the security concerns were too much, that they didn’t want to unlock the units. I know, at least on one day, there was four staff on the unit and they still had concerns. There was four staff and a couple new recruits, who are not sworn in and they’re not fully up and running, but they would have had up to six people and they still didn’t want to unlock them because they had concerns.
- Q. And what is the effect when there is a work refusal on the unit?
- A. So, staff will say they’re refusing under the Occupational Health and Safety Act to do the work that’s expected of them. They get ordered to do the work, they then fill out their Occupational Health and Safety reports and they have a meeting...emergency meeting as soon as possible and try to resolve those issues. The effects are that the individuals in custody get less privileges, obviously. They’re either on rotations or no rotations because of this, there’s lots of in-fighting between staff because some want to and some don’t want to. There’s usually a couple that are leading that charge and others are more willing to follow, I’ll say, and that’s a negative in my opinion for everybody. If there’s a real, legitimate safety concern, management would say, “You are not to open,” or “You are to put them on two cell rotations, or sixteen cell rotations.” We’ve had

something within the past two months where we suggested that, we being management, that they put them on four-cell rotations, 'cause there were safety issues, and the staff said, "We want to open them up, left-side, right-side, or none at all." And we said, "Well, we don't think it's safe to have that many out," and we suggested that it gets limited and the staff, for some reason, said that they wanted more people out or none at all.

[10] The specific evidence tendered on behalf of the AGNS in relation to Mr. Keenan was included in the affidavit of ADS Landry, which included notes made by D/S Rachel Critchley. D/S Critchley did not testify at the hearing. Mr. Keenan reviewed D/S Critchley's notes and agreed that they were accurate. In relation to Mr. Keenan specifically, D/S Critchley undertook a video review of his time out of cells on selected dates. Those notes, as agreed to by Mr. Keenan, state:

27. The following list represents the times on each date noted when Mr. Keenan's cell was unlocked:

May 26, 2023

- West 3, cell #18, Mr. Keenan unlocked:
 - 1909-2011 hrs -
- Mr. Keenan was out of his cell with his peers for a total of **1 hour 2 minutes**

May 27, 2023

- West 3, cell #18, Mr. Keenan unlocked:
 - 0754-0840 hrs
- Mr. Keenan was out of his cell with his peers for a total of **46 minutes**

May 28, 2023

- West 3, cell #18, Mr. Keenan unlocked:
 - 0909-1038 hrs
- Mr. Keenan was out of his cell with his peers for a total of **1 hour, 29 minutes.**

May 29, 2023

- West 3, cell #18, Mr. Keenan unlocked:
 - 1010-1206 hrs
- Mr. Keenan was out of his cell with his peers for **1 hour, 56 minutes.**

May 30, 2023

- West 3, cell #18, Mr. Keenan unlocked:
 - 1143-1205 hrs
- Mr. Keenan was out of his cell with his peers for a total of **22 minutes.**

May 31, 2023

- West 3, cell #18, Mr. Keenan unlocked:
 - 1920-2039 hrs
- Mr. Keenan was out of his cell with his peers for a total of **1 hour, 19 minutes.**

June 1, 2023

- West 3, cell #18, Mr. Keenan unlocked:
 - 1340-1438 hrs
- Mr. Keenan was out of his cell with his peers for a total of **58 minutes.**

June 2, 2023

- West 3, cell #18, Mr. Keenan unlocked:
 - 1000-1115 hrs
 - 2144-2148 hrs
- Mr. Keenan was out of his cell with his peers for a total of **1 hour 19 minutes.**

June 3, 2023

- West 3, cell #18, Mr. Keenan unlocked:
 - 1012-1106 hrs
- Mr. Keenan was out of his cell with his peers for a total of **54 minutes.**

June 4, 2023

- West 3, cell #18, Mr. Keenan unlocked:
 - 0718-0834 hrs
 - 1334-1436 hrs
 - 1913-1953 hrs
- Mr. Keenan was out of his cell with his peers for a total of **1 hour, 58 minutes.**

June 5, 2023

- West 3, cell #18, Mr. Keenan unlocked:
 - 1336-1505 hrs
- Mr. Keenan was out of his cell with his peers for a total of **1 hour, 29 minutes.**

June 6, 2023

- West 3, cell #18, Mr. Keenan unlocked:
 - 1012-1208 hrs
 - 1550-1737 hrs
 - 2047-2219 hrs
- Mr. Keenan was out of his cell with his peers for a total of **5 hours, 15 minutes.**

June 7, 2023

- West 3, cell #18, Mr. Keenan unlocked:
 - 0800-1206 hrs
 - 1508-1736 hrs
 - 2039-2217 hrs
- Mr. Keenan was out of his cell with his peers for a total of **10 hours, 12 minutes.**

June 8, 2023

- West 3, cell #18, Mr. Keenan unlocked:
 - 0713-1203 hrs
 - 1347-1738 hrs
 - 1905-2031 hrs
- Mr. Keenan was out of his cell with his peers for a total of **10 hours, 7 minutes.**

June 9, 2023

- West 3, cell #18, Mr. Keenan unlocked:
 - 1113-1206 hrs
 - 1543-1741 hrs
 - 2040-2219 hrs
- Mr. Keenan was out of his cell with his peers for a total of **4 hours, 30 minutes.**

28. I note from further review of Mr. Keenan's second application, that he has plead that he has been kept in his cell "for 24 hours or more at a time sometimes for 70 hours".
29. The CCTV footage review notes that Mr. Keenan was not confined to his cell between May 26, 2023, to June 9, 2023, for "70 hours". **However, there was one occasion between May 30 and May 31, 2023, that Mr. Keenan was in his cell for approximately 31 hours.**
30. Between May 30th until June 1st, 2023, the CNSCF was placed on reduced operations due to operational requirements because of the relocation / movement of inmates between three dayrooms within the facility (the "relocation").
31. The relocation was also completed with a low staff to inmate ratio, which required the use of the facility management team to facilitate, coordinate, and complete the moves with the least amount of impact on the unit operations.
32. In addition to the relocation, CNSCF experienced labour disruptions due to the submissions of work refusals on June 3rd, 2023 and June 9, 2023, by Correctional Officers. These are ongoing and they have had a varying impact on daily operations. The work refusals were put before the Joint Occupation Health & Safety (JOHS) committee.
33. An emergency meeting was scheduled for Monday, June 12th, 2023, to determine a resolution or interim measures until the work refusals can be remedied.
34. As a result of the emergency JOSH meeting, the parties agreed to eight (8) recommendations that were submitted to the superintendent on June 13, 2023.
35. The work refusal is still active, however, as the date of this affidavit, effort continue to be made to ensure a full staffing compliment so it does not impact our ability to conduct rotations.
36. **In review of the 31 hr gap in between Mr. Keenan rotations on May 30 - May 31, 2023, this was due to the officers not enforcing the rotation schedule and allowing individuals in the dayroom to dictate rotations. This meant that they did not follow the schedule which would have given fair and equitable time out of their cells.**
37. **I am advised by the unit manager, Deputy Superintended Rachel Critchley, and I do believe that this shortcoming was addressed with the Control officer and the Captain on duty.**
38. While on the rotational schedule set out in the Expectation Letter, Mr. Keenan was not subject to a rotation for disciplinary purposes, but was

subject to a form of administrative close confinement for purposes of safety and security as defined by Correctional Services Policy 43.00.00.

[Emphasis added]

[11] The time out of cells as reported by D/S Critchley, and agreed to by Mr. Keenan, is only a snapshot of his actual situation. For example, ADS Landry said that on June 15 there was a serious incident, workplace disputes and refusals to work that resulted in additional lockdowns with less time out of cells. ADS Landry suggested that the rotational lockdowns will continue until the staffing issues are sorted out.

[12] Mr. Keenan said that some days he is not out of his cell for more than 1.5 hours and other days it is longer:

Mr. Keenan: Monday the 12th: We were out all morning in the airing court, half rotation, which means half of the...half of the day room was out for a couple hours and then the other half of the day room was out for a couple hours. We were on half hour...half-rotation in the evening, which means half the unit was out for two hours, the other half was out for whatever the time was. Tuesday...

...

The Court: Do you have a guesstimate of how long you were out on Monday altogether?

A. Three hours.

Q. Okay. So, now, the 13th.

A. Tuesday the 13th, I was out from 10:00 A.M. until noon. Then we were on a lockdown 'til supper and we were locked down...were locked down the rest of the day.

Q. So, on the 13th you were out for how long, then?

A. Uh, two hours and there was no outside airing court.

Q. Okay.

A. And the 14th, we were locked down the morning, we were outside from 4:00 – 6:00 P.M. and then we were locked down all night. So, I got two hours. And my...my complaint about my time out is going right back to my...when I first got to the institution February 13th, but I don't have the logs for that.

Q. Okay. So, I'm still going to ask you the same question and then you can tell me whatever else you want to tell me.

A. Okay.

- Q. Go ahead.
- A. Uh, the 15th I was out from 11:20 – 12:15 and that was it for the day, we were locked down for the rest of the day.
- Q. So, one hour?
- A. One hour. Friday, was outside for 15 minutes and one hour in the day room.
- Q. So, one hour and 15 minutes?
- A. Yes. Saturday, we were out an hour and a half.
- Q. Okay.
- A. Sunday, 2:00 – 3:30 and no outside recreation.
- Q. Okay.
- A. We were not allowed to go outside.
- Q. So, now, what else did you want...I interrupted you, what else do you want to...?
- A. Okay, my...for not getting out of my cell, it goes right back to when I was over in the North Unit, which is on the opposite side of the jail. From February 13th right up until today, I have only...there's been so many days, over 20 or 25 days, that I've been locked in my cell for 24, 48, 72 hours at a time and that's going from both units, and I have complaints down...receipts for complaints I put in for the Superintendent for the North Unit, which I still have not received back yet. I haven't received my complaints back yet, to tell me why I was locked in my cell for two or three or four days at a time. I put in a request, I put in complaints about my...not getting receipts back about my complaints, and I had no...and it's not this guy here – it's another superintendent on the North Unit.
- Q. Okay, and when you're locked in a cell, are you locked in with somebody else?
- A. No, I'm designated single cell...or single residency in a cell, there's nobody allowed in the cell.
- Q. Alright, okay, and you've heard Assistant Deputy Superintendent Landry testify that...that it's basically equal between whether you're General Population or Protective Custody or whether you're North or West or whatever that, basically, these rotational lockdowns are equal...
- A. Yes.
- Q. ...in relation to everybody is going through the same thing. Is that accurate?

- A. Uh, no, because I have a complaint in that we were out...I have the receipt of the complaint down there, that our...our day room was locked down, and we...we got out...I went for a Tylenol 'cause I had a headache, for the medication, and when I looked around, the rest of the West Unit, the other units were out in their day room, their cells were open. I don't know if they were on some type of rotation or not, but we were all...we were all...our day room was locked down, nobody was outside.
- Q. Okay, but is that...that's one day you're describing. What about most days?
- A. Most days, I'm going to say it's...it's probably accurate that everybody's doing the same thing, everybody has the same rotations. This isn't just for me, it's for everybody in the institution.
- Q. Okay, I hear you, but you're making the application for you...
- A. Yes.
- Q. ...and this is a *Habeas Corpus* application, and they are very specific on what we can and can't do...
- A. Okay.
- Q. ...so I'm just wondering about you...
- A. Okay.
- Q. Okay? So, what else? Is there anything else?
- A. Other than being locked in my cell and for being put on a BMP (Behaviour Management Program) for something that I didn't do. My behaviour's been pretty good, I haven't broken any rules or anything, and being not let out of my cell...it affects you.
- Q. How does it affect you?
- A. Mentally. You know, you get depressed. I'm used to working out every day. You know, three, four, five days in a row you don't feel like working out 'cause you're not getting out of your cell. You know, you lay in bed most of the...

[13] Mr. Keenan is open to any remedy that might address the inequitable time he is locked in his cell, in comparison with other inmates. The AGNS did not dispute that Mr. Keenan might be spending more time locked in because he is a cooperative inmate.

Legislation

Charter

[14] Section 10(c) of the *Charter of Rights and Freedoms* states:

10 Everyone has the right on arrest or detention

...

(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Civil Procedure Rules

[15] Civil Procedure Rule 7 states, in part:

7.02 Scope of Rule 7

...

(2) This Rule applies to each of the following:

...

(c) *habeas corpus* for civil detention, and an application for *habeas corpus* to which the *Criminal Code* applies is started under Rule 64 - Prerogative Writ;

...

...

7.13 Order for *habeas corpus*

(1) *Habeas corpus* takes priority over all other business of the court.

(2) When a notice for *habeas corpus* is filed, a judge must immediately do all of the following:

(a) appoint the earliest practical time, date, place, and means for a judge to give directions on the course of the proceeding;

(b) order any person detaining the applicant to bring the applicant before the judge in person, by video, or by telephone, at the set time and date;

(c) order a respondent to produce all documents relating to the detention immediately to the court;

(d) cause the parties to be notified of the time, date, place, and means of the hearing for directions.

(3) An order to bring the applicant before a judge may include the statement, "Failure to obey this order may lead to contempt proceedings."

(4) The order may be in Form 7.13.

7.14 Directions to determine legality of deprivation of liberty

A judge may provide directions necessary for a quick and fair determination of the legality of the applicant's deprivation of liberty, including any of the following:

- (a) set a date for the court to determine the legality of the deprivation of liberty and whether the hearing shall be held in person, by video conference, by telephone or by some combination of these means;
- (b) order a person detaining the applicant to bring the applicant before the court for the hearing in person, by video conference or by telephone;
- (c) set dates for filing affidavits and briefs;
- (d) order production of a document not already produced;
- (e) order attendance of a witness for direct examination, if the evidence is not obtained by affidavit;
- (f) order attendance of a witness for cross-examination;
- (g) determine what documents will constitute the record;
- (h) start a proceeding, under Rule 89 - Contempt, against a person who receives an order to bring the applicant before the judge or produce a document and fails to make every reasonable effort to comply with the order;
- (i) adjourn the proceeding and make any order necessary to obtain the presence of the applicant.

...

7.16 Final determination following *habeas corpus*

A judge may release or remand the applicant on determining whether or not the deprivation of liberty is legal.

7.17 Abuse of *habeas corpus*

(1) A person who applies for *habeas corpus* commits an abuse of process if both of the following apply:

- (a) the deprivation of liberty has already been determined to be legal by the court;
- (b) no new ground has arisen since the determination.

(2) The abuse may be dealt with under Rule 88 - Abuse of Process.

Correctional Services Act

[16] Section 74 of the *Correctional Services Act*, S.N.S. 2005, c. 37, states:

74 A superintendent may, in accordance with the regulations, place an offender in close confinement in a correctional facility, if

- (a) in the opinion of the superintendent, the offender is in need of protection;
- (b) in the opinion of the superintendent, the offender needs to be segregated to protect the security of the correctional facility or the safety of other offenders;
- (c) the offender is alleged to or has breached a rule of a serious nature; or
- (d) the offender requests.

Correctional Services Regulations

[17] Section 79 of the *Correctional Services Regulations*, N.S. Reg. 99/2006 states:

79 (1) A superintendent may impose different conditions of confinement for different offenders within the correctional facility.

(2) An offender held in a correctional facility may be restricted from associating with another offender held in the correctional facility.

(3) For reasons of safety, security or order in the correctional facility, a superintendent may restrict access to the correctional facility or part of it by

- (a) confining the offenders held in the correctional facility or those of them who are normally held in that part, as the case may be, to their sleeping areas; and
- (b) restricting entry to the correctional facility or that part, as the case may be.

Correctional Services Policy 43.000

[18] Section 14 of Correctional Services Policy 43.000 sets out the *goal* of having inmates out of their cells for a minimum of two hours per day:

14. Housed with Privileges

14.1 Individuals who are required to be housed in a close confinement unit but have been provided access to out of cell programs/privileges and to interact with other inmates in excess of two hours daily, do not meet the criteria of confinement and are “housed with privileges”.

Law relating to Habeas Corpus

[19] Due to the rotational lockdowns, this court has been deluged with *habeas corpus* applications. The court has issued several recent decisions including Justice Campbell's decisions in *Foeller v. Nova Scotia (Attorney General)*, 2023 NSSC 149, and *Jennings v. Nova Scotia (Attorney General)*, 2023 NSSC 148; and Justice Brothers's recent decision in *Downey v. Nova Scotia (Attorney General)*, 2023 NSSC 204. Rotational lockdowns have been addressed in earlier decisions of this and other courts, including: *Wallace v. Nova Scotia (Attorney General)*, 2021 NSSC 101; *Cox v. Nova Scotia (Attorney General)*, 2020 NSSC 81; *Clarke-McNeil v. Nova Scotia (Attorney General)*, 2021 NSSC 266; *Coaker v. Nova Scotia (Attorney General)*, 2018 NSSC 291; *Ogiamien v. Ontario (Ministry of Community Safety and Correctional Services)*, 2017 ONCA 667.

[20] Additionally, as noted above, concurrent with the release of this decision, I have released two decisions in cases similar to this one (*Richards* and *Sempie*), dealing with the rotational lockdowns and also involving complaints of inequitable time out of cell by inmates on similar ranges.

[21] I fully adopt the reasons of Brothers J.'s very recent decision in *Downey* wherein she undertook a thorough review of the relevant cases and, in applying the test for *habeas corpus* in the circumstances of a rotational lockdown, reluctantly dismissed the application:

Applying the Test for *Habeas Corpus*

[89] For Mr. Downey's application to be successful, he must establish that he has been deprived of liberty. Once a deprivation of liberty is proven, Mr. Downey must raise a legitimate ground upon which to question its legality. If he raises such a ground, the onus shifts to the AGNS to show that the deprivation of liberty was lawful.

[90] The difficulty faced by Mr. Downey, and other individuals housed in CNCSF who seek to challenge the facility-wide rotational lockdowns, is that "deprivation of liberty" in this context means a form of detention "that is distinct and separate from that imposed on the general population" (*Miller, supra*, at para. 36). This is the "particular form of detention or deprivation of liberty which is the object of the challenge by *habeas corpus*" (*Miller, supra*, at para. 36). It is this comparatively more restrictive form of confinement that creates the "prison within a prison" described in the case law.

[91] In *Ogiamien*, the Ontario Court of Appeal noted that *habeas corpus* "may remedy living conditions in a prison where the inmate faces physical confinement or a deprivation of liberty that is more restrictive than the confinement of other inmates" including where an inmate has been placed in administrative segregation, confined in a special handling unit, or transferred to a higher security institution

(para. 88). The court held that Mr. Nguyen was not entitled to the remedy of *habeas corpus* because he did not face conditions of confinement more restrictive than those faced by the other inmates. The same is true for Mr. Downey.

[92] According to the evidence from D/S Ross, which Mr. Downey did not dispute, when a decision is made to implement rotational lockdowns due to staffing shortages, those lockdowns are implemented across the entire facility. The general population dayrooms and the protective custody dayrooms are all given as close as possible to equal time outside their cells. As such, the remedy of *habeas corpus* is not available.

[93] Although Mr. Downey's application cannot succeed, it has given the court the opportunity to express its deep concern about the routine use of rotational lockdowns to respond to staffing challenges at CNSCF. I accept that these lockdowns are having a detrimental impact on the health and wellbeing of the people in custody. These individuals are being confined to their cells for reasons that are outside their control. They never know from one day to the next how much time they will get outside of their cells, as the decision is made each morning when the unit captains arrive for their shifts. There is nothing that a person in custody can do to earn more time outside of their cell. This situation adds an extra layer of stress and anxiety to the day-to-day experience of persons in custody and staff, and can increase tensions in the dayrooms, as reported by D/S Ross.

[94] When courts sentence offenders to prison, they do so with the hope that those individuals can rehabilitate themselves and successfully reintegrate into the community. That is the premise of our criminal justice system. Confining persons in custody – many of whom may have pre-existing mental health issues – to their cells for exorbitant periods of time does nothing to assist and support their rehabilitation. Mr. Downey provided persuasive evidence of the toll this is taking on his mental and physical health. Even a person with robust mental health would find it challenging to be regularly confined to a cell, often for more than 20 hours per day, with little notice and no ability to earn more time out. This practice is dehumanizing, and it is setting these individuals up to fail. They deserve better.

[95] Staffing issues at CNSCF have been ongoing for over three years. I was provided with very limited information on this application concerning concrete steps being taken to alleviate the staffing shortage. While I accept that administrators like D/S Ross are doing the best they can with the available staff, this is cold comfort to Mr. Downey and others who have recently filed *habeas corpus* applications in relation to the rotational lockdowns at CNSCF. Nor will they find comfort in the fact that their onerous conditions of confinement are no more restrictive than those faced by their peers in protective custody and general population.

[96] The court has no power on this application to order the government to increase its efforts to hire and retain more staff. That said, there are striking similarities between the conditions of confinement at CNSCF during rotational lockdowns and those that were held to constitute cruel and unusual treatment

in *Trang, supra*. If creative and effective measures to hire and retain staff are not pursued, there may come a day when, in a suitable procedural context, the court can provide some form of remedy.

Conclusion

[97] Reluctantly, I have no choice but to dismiss Mr. Downey's application.

[22] Mr. Keenan's situation mirrors that in *Downey* on the issue of rotational lockdowns and *habeas corpus*. His complaint of inequitable time out of his cell due to more demanding inmates taking more than their fair share of unlock time is similar to the complaints in *Richards* and *Sempie*. Inmates bullying their way to more unlock time is an operational problem that is not the result of the government placing Mr. Keenan "in a prison within a prison". There is no remedy available to him under this writ. That said, there are some points of law, even if covered in the previously mentioned decisions, that bear repeating.

[23] Because s. 10(c) of the *Charter* is a constitutionally entrenched right, it must be interpreted broadly. The Supreme Court of Canada has explained that *habeas corpus* is available to address an inmate's loss of residual liberty, where an inmate is invalidly or unreasonably placed in a "prison within a prison" (*R. v. Miller*, [1985] S.C.J. No. 79, [1985] 2 S.C.R. 613, at para. 32). The writ of *habeas corpus* is very important in a democratic society and must be considered in a purposive and expansive manner; it can be used to address a variety of restraints on individual liberty, not merely cases of illegal incarceration (*R. v. Gamble*, [1988] 2 S.C.R. 595, at paras. 63-81). In *May v. Ferndale Institution*, 2005 SCC 82, LeBel and Fish JJ. explained the purpose, nature and scope of the writ:

21 According to Black J. of the United States Supreme Court, *habeas corpus* is "not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose -- the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty": *Jones v. Cunningham*, 371 U.S. 236 (1962), at p. 243. In his book, Sharpe, at p. 23, describes the traditional form of review available on *habeas corpus* as follows:

The writ is directed to the gaoler or person having custody or control of the applicant. It requires that person to return to the court, on the day specified, the body of the applicant and the cause of his detention. The process focuses upon the cause returned. If the return discloses a lawful cause, the prisoner is remanded; if the cause returned is insufficient or unlawful, the prisoner is released. The matter directly at issue is simply the excuse or reason given

by the party who is exercising restraint over the applicant. [Emphasis added.]

22 *Habeas corpus* is a crucial remedy in the pursuit of two fundamental rights protected by the *Canadian Charter of Rights and Freedoms*: (1) the right to liberty of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (s. 7 of the *Charter*); and (2) the right not to be arbitrarily detained or imprisoned (s. 9 of the *Charter*). Accordingly, the *Charter* guarantees the right to *habeas corpus*:

10. Everyone has the right on arrest or detention

...

(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

...

32 The same reasoning was also applied by this Court in *Cardinal* and *Morin*, the companion cases to *Miller*. In our view, the trilogy supports two distinct propositions. First and foremost, provincial superior courts have jurisdiction to issue certiorari in aid of *habeas corpus* in respect of detention in federal penitentiaries in order to protect residual liberty interests. This principle is crucial in these cases. In the prison context, the applicant is thus entitled to choose the forum in which to challenge an allegedly unlawful restriction of liberty. Under *Miller*, if the applicant chooses *habeas corpus*, his or her claim should be dealt with on its merits, without regard to other potential remedies in the Federal Court. The second proposition, which does not arise in these cases, is that *habeas corpus* will lie to determine the validity of the confinement of an inmate in administrative segregation, and if such confinement is found unlawful, to order his or her release into the general inmate population of the institution.

[24] The majority in *May v. Ferndale* also directed provincial superior courts, such as this court, to take a direct, hands-on approach by way of *habeas corpus* in providing oversight to inmate claims of unlawful deprivation of residual liberty in correctional institutions:

23 However, the right to seek relief in the nature of *habeas corpus* has not always been given to prisoners challenging internal disciplinary decisions. At common law, for a long time, a person convicted of a felony and sentenced to prison was regarded as being devoid of rights. Convicts lost all civil and proprietary rights. The law regarded them as dead. On that basis, courts had traditionally refused to review the internal decision-making process of prison officials: M. Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (2002), at pp. 47-50. By the end of the 19th century, although the concept of civil death had largely disappeared, the prisoner continued to be viewed in law as a person without rights: M. Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (1983), at p. 82.

24 It was this view that provided the original rationale for Canadian courts' refusal to review the internal decisions of prison officials. The "effect of this hands-off approach was to immunize the prison from public scrutiny through the judicial process and to place prison officials in a position of virtual invulnerability and absolute power over the persons committed to their institutions": Jackson, *Prisoners of Isolation*, at p. 82.

25 **Shortly after certain serious incidents in federal penitentiaries occurred in the 1970s and reviews of their management took place, this Court abandoned the "hands-off" doctrine and extended judicial review to the decision-making process of prison officials by which prisoners were deprived of their residual liberty.** In *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, Dickson J. (as he then was) laid the cornerstone for the modern theory and practice of judicial review of correctional decisions:

In the case at bar, the disciplinary board was not under either an express or implied duty to follow a judicial type of procedure, but the board was obliged to find facts affecting a subject and to exercise a form of discretion in pronouncing judgment and penalty. Moreover, the board's decision had the effect of depriving an individual of his liberty by committing him to a "prison within a prison". In these circumstances, elementary justice requires some procedural protection. The rule of law must run within penitentiary walls. [Emphasis added; p. 622.]

...

27 In 1985, in the trilogy of *Miller, Cardinal*, and *Morin*, **the Court expanded the scope of *habeas corpus* by making the writ available to free inmates from restrictive forms of custody within an institution, without releasing the inmate. *Habeas corpus* could thus free inmates from a "prison within a prison"**. Each case involved challenges by prisoners of their confinement in administrative segregation and their transfer to a special handling unit. This unit was reserved for particularly dangerous inmates and was characterized by more restrictive confinement.

28 In *Miller*, Le Dain J., writing for the Court, recognized that confinement in a special handling unit or in administrative segregation is a form of detention that is distinct and separate from that imposed on the general inmate population because it involves a significant reduction in the residual liberty of the inmate. In his view, ***habeas corpus* should lie "to challenge the validity of a distinct form of confinement or detention in which the actual physical constraint or deprivation of liberty, as distinct from the mere loss of certain privileges, is more restrictive or severe than the normal one in an institution"** (p. 641). [Emphasis added]

[25] The writ of *habeas corpus* is not a stagnant remedy but has evolving purposes and principles (*Mission Institution v. Khela*, 2014 SCC 24, at paras. 29-30). Provincial superior courts generally have the authority to consider three different deprivations of liberty in the context of correctional law on a *habeas corpus* application: 1) the initial deprivation of liberty; 2) a substantial change in conditions amounting to a further deprivation of liberty; and 3) a continuation of the deprivation of liberty (*Gogan v. Canada (Attorney General)*, 2017 NSCA 40). That said, courts have traditionally limited *habeas corpus* remedies to current and ongoing detention, distinct from historical or future confinement or detention (*Ewanchuk v. Canada (Attorney General)*, 2017 ABQB 237 at paras. 23-25).

[26] No cases have been provided to me, nor could I find any through my own research, that specifically support the position that the court can provide any remedy on a *habeas corpus* application involving rotational lockdowns where all inmates are basically given equal time unlocked, even where that time unlocked is significantly less-than-optimal due to chronic understaffing. Nor could I find any involving inmates having less unlock time due to bullying by more demanding inmates who wanted more than their fair share of unlock time. However, as noted in *Downey*, there are decisions that denounce the protracted use of rotational lockdowns and *provide alternate remedial routes* where rotational lockdowns cause an inmate to spend too much time locked in a cell: *R. v. Passera*, 2017 ONSC 2799, aff'd 2019 ONCA 527, at paras 120-134; *R. v. Charley*, 2019 ONSC 6490, at paras. 58-68; *R. v. Ward-Jackson*, 2018 ONSC 178 at paras. 25, 50-53; and *Trang v. Alberta (Edmonton Remand Centre)*, 2010 ABQB 6 at paras. 174-178 and 1013-1027).

Analysis

[27] Aside from the blunder on May 30-31 where Mr. Keenan was not released from his cell for 31 hours, he is not officially subject to more close confinement than other inmates at the CNSCF. ADS Landry testified that the jail simply does not have enough staff to let inmates out for longer periods of time when understaffed, for the safety and security of the inmates and the staff. Until more staff is hired, and retained, nothing is likely to change. The entire prison is spending more time than optimal locked down. As noted above, except for the blunder on May 30-31, Mr. Keenan was not and currently is not “in a prison within a prison” due to the actions of the government.

[28] Mr. Keenan was clear that he did not want a remedy that would prejudice the other inmates. I have not been presented with any evidence as to how to allow Mr. Keenan more time out of his cell without impacting the entire prison, or the safety and security of the inmates and staff. Again, aside from his 31-hour lockdown when others were unlocked, he is not “in a prison within a prison.” And that incident is now in the past. The inequitable time out of his cell due to the “heavies’ monopolizing unlock time is an operational issue that has been brought to the attention of the CNSCF and should be addressed. Currently Mr. Keenan is not locked down more than the rest of the prison population as a result of the direct actions of staff. Until the chronic understaffing addressed, this problem will continue. Inmates in this situation, subjected to more significant restrictions on their liberty than might be optimal, might have remedies other than those available through a *habeas corpus* application, as was noted above. And the operational issue regarding the inequity raised by Mr. Keenan as the result of more demanding inmates taking more than their fair share of unlock time is not captured by the writ of *habeas corpus*.

[29] I simply cannot provide a remedy to Mr. Keenan under the writ of *habeas corpus*.

Conclusion

[30] Mark Keenan’s *habeas corpus* application is (reluctantly) denied.

Arnold, J.