

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Haynes v. Attorney General of Nova Scotia*, 2023 NSSC 311

**Date:** 20230925

**Docket:** *Hfx*, No. 523515

**Registry:** Halifax

**Between:**

Anthony Scott Haynes

*Appellant*

v.

Attorney General of Nova Scotia

*Respondent*

***Habeas Corpus, Stage Two Decision***

**Judge:** The Honourable Justice Christa M. Brothers

**Heard:** May 25, and June 8, 2023, in Halifax, Nova Scotia

**Supplemental  
Submissions:** June 14, July 14 and August 18, 2023

**Counsel:** Anthony Scott Haynes, both Self-Represented and for a period  
of time represented by Leslie Hogg and Harry Critchley  
Duane Eddy, for the Respondent

**By the Court:**

**Procedural History**

[1] On May 8, 2023, Anthony Scott Haynes ("Haynes") filed a Notice for *Habeas Corpus* ("Notice"). He is currently in custody at the Central Nova Scotia Correctional Facility ("CNSCF") in Dartmouth. In his Notice, he alleges that his deprivation of liberty began on January 1, 2022 and continued as of the filing of his Notice. During the hearing, he focussed his complaints on a more recent period of time in April and May, 2023

[2] On May 11, 2023, Justice Arnold heard stage one of this matter and scheduled the stage two hearing for May 25, 2023. The hearing proceeded as scheduled. On June 8, 2023, a recorded telephone conference was held to discuss additional facility records. A further appearance was to be held on June 22, 2023, for final submissions and a decision. On June 14, 2023, the court received correspondence from Leslie Hogg ("Hogg"), stating:

This letter is to confirm that I have just been retained by Mr. Haynes in relation to the above noted matter. It is my understanding that the matter is scheduled for decision on June 22, 2023.

I am respectfully requesting an adjournment in order to file additional evidence and make further submissions.

All of which is respectfully submitted this 14<sup>th</sup> day of June, 2023.

[3] Hogg was seeking to reopen Haynes's case. The Attorney General of Nova Scotia ("AGNS") did not oppose. The court agreed to adjourn the matter to give Hogg time to review the file, prepare additional submissions, and file a notice of new counsel.

[4] On June 20, 2023, the court advised counsel for Haynes that she intended to move to re-open the matter and adduce additional evidence, the motion should be filed with dispatch. On June 27, 2023, the court wrote again, asking when counsel would be attending to review the file materials already submitted on the *habeas corpus* application. Harry Critchley ("Critchley"), subsequently attended to review the file for Hogg.

[5] On July 17, 2023, Hogg wrote to the court and counsel as follows:

I am making efforts to have contact with our client. I need instructions from him before I can confirm. However, I am hopeful that subject to those instructions, documents will be filed in the next two weeks.

[6] The court received nothing further from Hogg or Critchley. On August 17, 2023, the court wrote to all counsel to determine whether applicant's counsel intended to introduce additional evidence or make additional submissions.

[7] On August 18, 2023, Hogg wrote to the court and counsel as follows:

Good afternoon all,

My apologies for the delay. I have had some difficulty in reaching my client.

As such, at this time, we are looking to proceed with the decision given the delay.

...

Please advise of dates that work to have the matter heard.

Thanks again for your accommodation and assistance in the matter.

### **Complaints raised by Haynes**

[8] Haynes is on remand at the CNSCF. He was admitted to the facility on December 31, 2021. He is currently housed in West 2, an open protective custody dayroom. There are 32 cells in West 2. Fourteen of those cells, including Haynes's cell, have the capacity to hold 2 people. The maximum capacity is 46 people and there were 46 people housed in the unit at the time of this application.

[9] Haynes filed an application for *habeas corpus* on May 8, 2023, alleging that he is being deprived of his liberty by CNSCF's frequent use of rotational lockdowns. Haynes testified that rotational lockdowns began in the summer of 2022, and carried on into 2023, starting in April. He said there have been a total of 89 days since December 31, 2021, where he has had less than two hours outside the cell, and that there have been days where he has not been let out at all. Haynes testified that he was expecting another summer of lockdowns.

[10] Additionally, Haynes alleged that he is not being offered time in the airing court.

[11] In the Notice, Haynes sought "punitive damages", and to "make change so others don't have to suffer, such as I". It was explained to Mr. Haynes that the only

remedy available on an application for *habeas corpus* is an order that he be released from the conditions of confinement referred to in the Notice if the AGNS could not justify any impact on his residual liberties.

[12] CNSCF's use of rotational lockdowns in the face of staffing shortages was a recurring theme in Crownside *habeas corpus* applications in May and June 2023. The use of these rotational lockdowns and their impact on those in custody have now been addressed by this court on numerous occasions.

### **AGNS Response**

[13] The AGNS filed a Notice of Contest on May 10, 2023. In it, the AGNS acknowledges that the applicant's liberty had been deprived. In the Notice of Contest, the AGNS admits that rotational schedules have been implemented on West 2, where Haynes resides. Whether a rotational schedule is necessary is determined day by day, and the decision is communicated verbally to persons housed on that unit. The AGNS acknowledges that dayrooms throughout the CNSCF are normally unlocked from 7:00 am to 12:00 pm; 1:30 pm to 5:30 pm and 7:00 pm to 10:00 pm. As stated in the Notice of Contest, the evidence of Deputy Superintendent Rachel Critchley ("DS Critchley") was that the use of rotational lockdowns is an operational decision to ensure the safety and security of the facility, persons in custody, and staff.

[14] DS Critchley sworn an affidavit dated May 12, 2023, and testified on May 25, 2023. Her evidence is generally consistent with evidence given by other CNSCF staff who testified in *Downey v. AGNS*, 2023 NSSC 204; *Rankin v. AGNS*, 2023 NSSC 267; *Keenan v. AGNS*, 2023 NSSC 217; *Sempie v. AGNS*, 2023 NSSC 218; and *Richards v. AGNS*, 2023 NSSC 220. Additionally, the AGNS filed an affidavit of Deputy Superintendent of Administration Richard Verge ("DS Verge") on June 22, 2023. This affidavit provided records concerning West 2 and the North Unit from April 11, 2023 – May 30, 2023, as well as airing court logs. This information allowed the court to compare Haynes's conditions of confinement to those persons housed in general population.

[15] DS Critchley testified that rotational lockdowns are implemented throughout the facility in response to inadequate staffing. The unit captains start their shifts at 6:00 am and learn what the staffing complement will be for the day. She added, however, that the captains must be mindful that the staffing complement is not just for the West 2 unit. The staff are allocated throughout the facility. The unit captains then decide whether the units will be unlocked that day, and for how long.

[16] DS Critchley explained that the required staffing ratio is an occupational health and safety decision. It represents the number of officers needed on the floor for safe operations, including the ability to respond to any emergency codes. She testified that the ratio allows the facility to maintain regular routine operations while being able to respond effectively if there is a disturbance in a dayroom. DS Critchley added that it is more difficult to have sufficient staffing numbers from Monday to Friday because staff are required for court appearances, programs, medical clinics, and so on. She said they cannot pull resources away from those areas to move staff to the units to unlock. On days where there is insufficient staffing to unlock the units, CNSCF implements rolling rotations or unlocks. These rotational lockdowns are not designed as punishment and have no disciplinary purpose. The goal is to implement the least restrictive lockdown possible while maintaining the safety and security of inmates and staff.

[17] DS Critchley testified that when a decision is made in the morning that staffing levels are insufficient, any rotational lockdowns are implemented facility wide. She said:

Regardless if it's a protective custody dayroom or general population dayroom, if the decision is made in the morning based on the staffing ratio, it will be implemented facility wide. So it will be the west and the north will be on the same rotation.

[18] There was not much evidence provided in terms of what is being done to alleviate the staffing issues. DS Critchley testified that new staff were scheduled to start within the next two weeks. She said it was possible that West 2 would be fully unlocked that week, adding that it had been fully unlocked at times during the previous week. She conceded, however, that staffing is more difficult in the summer due to staff vacations.

[19] On cross-examination, DS Critchley acknowledged that there have been days where inmates have been given less than two hours outside their cell. She further agreed that there have been days where inmates have gotten no time outside of their cells, but she added that it is an uncommon occurrence.

[20] DS Critchley acknowledged that rotational lockdowns impose additional stress on individuals in custody, as well as on staff members. She stated that any time that individuals are forced to spend extra time in their cells, confined with another person not of their choosing, it can lead to tension growing in the dayroom. According to DS Critchley, it is never their desire to put people in confinement for

longer than necessary. The staff are trying to manage the facility as best they can with the staff that they have.

### **Rotational Schedule for West 2**

DATES	TIME OUT	TOTAL TIME OUT
May 1/23	07:40 – 10:15 14:45 – 16:00	3 hrs, 50 mins
May 2/23	08:27 – 10:14	1 hr, 47 mins
May 3/23	09:03 – 10:45 14:30 – 16:07	2 hrs, 37 mins
May 4/23	10:45 – 12:00 15:45 – 17:47	3 hrs, 2 mins
May 5/23	07:00 – 12:00 13:30 – 17:30 19:00 – 22:00	12 hrs
May 6/23	08:11 – 12:05 13:37 – 16:15	5 hrs, 44 mins
May 7/23	07:02 – 12:00	4 hrs, 58 mins
May 8/23	10:00 – 11:00 13:30 – 15:39 19:09 – 20:30	4 hrs, 30 mins
May 9/23	09:30 – 12:00 15:46 – 16:50	4 hrs, 30 mins
May 10/23	09:30 – 12:00 19:00 – 19:35	3 hrs, 5 mins
May 11/23	07:00 – 09:30 13:30 – 15:30	4 hrs, 30 mins
May 12/23	09:30 – 12:00 15:35 – 22:00	6 hrs, 25 mins
May 13/23	19:00 – 20:30	1 hr, 30 mins
May 14/23	09:30 – 12:00 15:50 – 17:30	4 hrs, 10 mins
May 15/23	08:00 – 10:06 14:40 – 17:30	4 hrs, 56 mins
May 16/23	08:00 – 09:00 14:10 – 15:45	2 hrs, 35 mins
May 17/23	09:30 – 12:00 15:30 – 17:40 20:30 – 22:00	5 hrs, 45 mins
May 18/23	07:05 – 09:38 13:40 – 17:30	9 hrs, 23 mins
May 19/23	08:19 – 09:42	1 hr, 23 mins
May 20/23	08:30 – 12:05 16:09 – 17:09 19:05 – 20:30	6 hrs
May 21/23	13:45 – 15:40	1 hr, 55 mins
May 22/23	Missing rotation schedule	
May 23/23	09:40 – 12:00 15:45 – 17:40 20:40 – 22:08	5 hrs, 43 mins

May 24/23	07:17 – 09:32 16:55 – 17:30	2 hrs, 5 mins
May 25/23	09:48- 12:15 15:30 – 19:00	5 hrs, 57 mins
May 26/23	08:23 – 10:18 13:30 – 15:27	3 hrs, 52 min
May 27/23	07:15 – 09:40 15:58 – 16:15 21:12 – 21:21	2 hrs, 50 mins
May 28/23	08:00 – 10:00 15:15 – 16:15	3 hrs
May 29/23	09:30 – 12:00 13:30 – 17:35	6 hrs, 35 mins
May 30/23	11:14- 13:11 20:30 – 20:57	2 hrs, 24 mins
May 31/23	15:35 – 16:07 20:40 – 22:00	1 hr, 52 mins

## Law and Analysis

[21] The evidence provided to the court shows that throughout the months of April and May, Haynes's time out of cell was comparable to those held in the general population. Additionally, his time and access to airing court was similar to those in general population. This evidence has been reviewed by this court on many occasions in other matters. For Haynes's application to be successful, he must establish that he has been deprived of his residual liberty. Like those other applicants who have come before the court recently, Haynes cannot demonstrate that he has experienced a form of detention distinct and separate from that imposed on the general population.

[22] The facts related to this application are very similar to the facts in *Downey, supra*; *Richards, supra*; *Sempie, supra* and *Keenan, supra*.

[23] Unfortunately, for Haynes, despite being subjected to rotational lockdowns, he is not subject to a "prison within a prison" as compared to other inmates at CNSCF. There is no remedy provided by *habeas corpus*.

[24] Haynes's situation parallels the circumstances in *Downey, supra*, concerning rotational lockdowns and access to airing court. Haynes is not subject to more restrictive conditions of confinement than other inmates at CNSCF.

[25] Recently in *Downey, supra*, I adjudicated a similar application. The only difference is that Downey was housed in an open protective custody unit in North 3, while Haynes is housed in West 2. Downey-like Haynes, was subjected to rotational

lockdowns which confined him to his cell more than usual. However, Downey's circumstances, like Haynes's, were not appreciably different than others in general population, as the rotational lockdowns were implemented throughout the whole facility, due to the staff shortages. Consequently, my comments in *Downey, supra* are equally applicable to Haynes:

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 CNCSF. 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.

[26] The court in *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667, 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 the applicant Nguyen was not entitled to the remedy of *habeas corpus* because *he did not face conditions of confinement more restrictive than those faced by other remanded inmates*. The same is true of Haynes. According to DS Critchley's evidence, when a decision is made to implement rotational lockdowns due to staffing shortages, those lockdowns are implemented across the entire facility. Individuals

housed in the general population dayrooms and the protective custody dayrooms are all given similar time outside their cells. As such, the remedy of *habeas corpus* is not available.

[27] The most I can do in this matter is to, once again, express my deep concern about the frequent use of rotational to deal with staffing issues at CNSCF. The rotational lockdowns are obviously having an impact on the health and wellbeing of people in custody.

### **Conclusion**

[28] Ostensibly, some reasonable steps are being taken by administrators of the CNSCF to respond to staffing issues. It is clear that they are doing the best they can with the amount of staff they are given. But, this is really not good enough. People are suffering more restrictive conditions of confinement which are unrelated to their own conduct. Each day, those in custody do not know how much time they will be getting out of their cell, if any. It is all dependent on staffing levels. There are requirements for how we treat people in custody, and subjecting them to lockdowns for reasons that are out of their control is quite concerning, and not reflective of how those in custody be treated.

Brothers, J.