SUPREME COURT OF NOVA SCOTIA

Citation: Wilband v. Nova Scotia (Attorney General), 2024 NSSC 12

Date: 20240112
Docket: 528024
Registry: Halifax

Between:

Ryan Taylor Wilband

Applicant

v.

Attorney General of Nova Scotia

Respondent

Decision on Habeas Corpus Application

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	November 28, 2023, in Halifax, Nova Scotia
Counsel:	Hanna Garson and Emma Arnold, for the Applicant Andrew Hill, for the Respondent

By the Court:

Introduction[1]

[1] Mr. Wilband has been a remanded inmate at the Central Nova Scotia Correctional Facility [“CNSCF”] since September 13, 2023. He is, what is referred to in the jurisprudence as, a low risk “general population inmate” and was housed in the West 2 Unit.

[2] His evidence was that he spent the first two weeks in administrative segregation, for reasons unrelated to this decision.

[3] The evidence confirms that between October 31 and November 28, due to Correctional Services staffing shortages, he has continually been confined to his cell for extraordinarily long periods of time each day.

[4] In my opinion, but for 4 days, due to lockdown decisions, he was likely materially deprived of his residual liberty on a daily basis.

[5] I highlight that: for **3 days** he had no time out of his cell; for a **further 7** days he had two hours or less out of cell; for a **further 4** days he had three hours or less out of cell; and for a **further 3** days he had less than four hours out of cell.

[6] Mr. Wilband filed Applications for *habeas corpus* relief on October 30 (re – the lockdowns) and November 2 (re – “fresh air”/Airing Court time).

[7] I considered them as being two parts of one Application.

The evidence and the limitations of habeas corpus[2]

[8] Presenting credible evidence for the Respondent were Deputy Superintendent [“D/S”] Ryan Hill and Chief Superintendent Jeffrey Awalt- including Exhibits 1 and 2 (“Rotation schedule” for West 1 Unit and West 2 Unit-

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[1] As I did in Mr. Durrell Diggs’s case, 2024 NSSC 11, I commend Ms. Garson and Ms. Emma Arnold on behalf of the PATH Legal Group for agreeing to represent Mr. Wilband on a *pro bono* basis. By doing so they have elevated the legal discourse and been of great assistance to the Court in its consideration and resolution of the issues raised.

[2] I also rely herein on the jurisprudential authorities I cited in *Diggs* and my reasoning therein.

where Mr. Wilband was housed) and D/S Hill's recording of his daily CCTV reviews to ascertain the daily time-out-of-cell Mr. Wilband received each day between November 15 and 27, 2023 inclusive – Exhibit 3.

[9] I accept Mr. Wilband's evidence (*viva voce* testimony and his written evidence: affidavit and Exhibit 4) as reliable/credible. His evidence is also consistent with the evidence of the Respondent.

[10] Moreover, although pursuant to s. 57 of the *Correctional Services Act*, every inmate is entitled to a minimum of 30 minutes of fresh air exposure each day, (i.e., known as "Airing Court time"), he likely only received such on **5** occasions during those 28 days.[3]

[11] Mr. Wilband claims that the material deprivation of his residual liberty started (i.e., lockdowns) October 17, 2023; and regarding his Airing Court time, the deprivation started Tuesday, October 31, 2023, "when I left segregation and was put on a living unit [the West 2 Unit]".

[12] As I alluded to in my reasons in *Diggs v. AGNS*, *habeas corpus* is for "the here and now" – not historical claims or hypothetical future/anticipated claims of deprivation of liberty.

[13] It is intended to "release" a person from a presently ongoing deprivation of liberty or material deprivation of residual liberty.

[14] Therefore, I believe it appropriate to only consider the evidence relevant to Mr. Wilband's Application in light of the strictly relevant dates (i.e., depending on the circumstances of the case generally, and in this case: several days immediately preceding the filing date of November 2, 2023, and to the date of hearing itself).

[15] In future, in the ordinary course, no more historical evidence than that should be required to decide the issues in a similar *habeas corpus* Application.

[16] This is particularly appropriate in the case of ongoing lockdowns, where the "decision" that effects a material deprivation of Mr. Wilband's residual liberty is

[3] That is, between October 31 – November 28, 2023, his circumstances temporally follow and are similar to those of Mr. Durrell Diggs, Hfx No. 527613 (who claimed that he was materially deprived of his residual liberty under such lockdowns between September 13 and November 3, 2023). Some of the legal arguments and my legal conclusions therein are applicable to Mr. Wilband's Application. Counsel in Mr. Wilband's case agreed that I could contextually consider the evidence presented in Mr. Diggs's case.

the daily decision each day when there is a staffing shortage, to impose partial or total lockdowns on all inmates.

[17] Nevertheless, if necessary, I would be prepared to consider dates from before those several days to fairly highlight contextual circumstances.

[18] In any event, I note that even if a Court were to conclude that there has been a material deprivation of Mr. Wilband's residual liberty on many, if not all, of the days he claims that there was, *habeas corpus* is very ill-suited to remedy the present set of circumstances.

[19] Traditionally, deprivations of liberty (or material deprivations of residual liberty) were sourced in identifiably discrete decisions made by staff in correctional facilities which resulted in static outcomes.

[20] For example, as a result of a disciplinary violation, an inmate could be penalized by having to serve 5 days in disciplinary segregation.

[21] The decision is made on one occasion and the material deprivation of residual liberty is for a fixed period of time.

[22] *Habeas corpus* is intended to operate by way of a quick Court-supervised scrutiny of the decision:

1. Was there a deprivation of liberty or material deprivation of residual liberty?
2. Having given an opportunity for the State authority to justify its position, was the decision lawfully made/justifiable?

[23] All of this was to happen quickly in order to allow a meaningful remedy should the deprivation of liberty be found to be unlawful.

[24] With continual lockdowns due to staffing shortages, which require multifactorial daily decisions whether to impose a lockdown, the decisions the Court must examine are discrete, yet although with static outcomes (i.e., daily), the consequences are also limited to one day only, and thus by the time the Court is asked to scrutinize a preceding day's decision, those matters are factually moot.[4]

[4] These circumstances can be distinguished from other static, although continuing circumstances, as in *Clarke-McNeil v. Nova Scotia (Attorney General)*, 2021 NSSC 266.

[25] In such circumstances, the Court cannot, in a timely manner, effect the traditional remedy, which is "release" of an inmate from the deprivation of liberty/material deprivation of residual liberty.

The Order sought and the Order to be granted

[26] Under "remedy sought" Mr. Wilband initially requested that this Court:

1. [October 30] "To tell the facility that they must offer fresh air or else dismiss my charges. I was held unlawfully in segregation for two weeks, now I have segregation and I am deprived of fresh air. Something should and must be done."
2. [November 2] "Get me out of this place, segregation, and dismiss my charges out of Kentville because of my deprivation of liberty."

[27] His counsel, Ms. Garson, presented written and oral argument on his behalf, once she was retained on or about November 17, 2023.

[28] In her brief, she elaborated regarding the relief Mr. Wilband seeks:

> The Applicant is requesting a remedy clearly within the bounds of s. 24(1) [*Charter of Rights*]
>
> … It is the role of the Court to rule on the lawfulness of the liberty deprivation of the Applicants.
>
> The response to such a ruling lies within the discretion of the Respondent.
>
> A declaration that the lockdown of the Applicant was unlawful would then place the onus on the Respondent to more expediently address the issues underlying the unlawful nature of their conditions of confinement.
>
> However, should this Honourable Court have further concerns, this Honourable Court retains the discretion to order as it did in *Downey and Gray v. Attorney General (Nova Scotia)*, 2020 NSSC 213, order that Mr. Wilband (who remains at CNSCF) be returned to this Honourable Court for *Criminal Code* review of his detention.[5]

[5] While, as I noted in *Diggs*, the Court has the authority to consider the bail of a remanded inmate as a remedy in *habeas corpus* proceedings, in present circumstances, *inter alia*, the evidence is no longer fresh, and thus I would be required as a prerequisite, to consider through a "show cause hearing" whether Mr. Wilband is still in circumstances rising to a material deprivation of residual liberty that is not justified/lawful, before deciding whether he should be released from custody pending the hearing of his criminal trials. While this process notionally exists and as a

[29] It is an unresolved question, whether, upon the Court concluding under the traditional *habeas corpus* analysis that an unjustifiable/unlawful material deprivation of liberty has occurred, the Court is entitled to consider a remedy under s. 24(1) of the *Charter* simply by virtual of the inclusion of s. 10(c) of the *Charter* in the pleadings and argument.

[30] If there is a finding of an unlawful deprivation of liberty or material deprivation of residual liberty, can an inmate therefore also claim a violation of s. 10(c) of the *Charter*, and have access to relief pursuant s. 24 of the *Charter*?

[31] In the present case, no amended Notice of *habeas corpus* was filed requesting this relief – although it was referenced in counsel's written Brief provided on behalf of Mr. Wilband, and counsel for the Attorney General did not object to Mr. Wilband notionally relying upon s. 10(c) of the *Charter*.

[32] Regarding the jurisprudence, see for example: *R v. Sarson*, [1996] 2 SCR 223 at para. 43; *Hamm v Canada (Attorney General)*, 2019 ABQB 247 at paras. 77-97 (see also 2021 ABCA 109 and 329); *Toure v. Canada (Public Safety and Emergency Preparedness)*, 2018 ONCA 681 at para. 79 – leave to appeal refused: [2018] SCCA No. 436; *Haug v. Warden of Dorchester Institution et al*, 2020 NBCA 32.

[33] I provisionally incline to the view that reliance, *per se*, on a purported violation of s. 10(c) of the *Charter* as a pathway to s. 24 *Charter* relief in the present circumstances, is <u>not</u> consistent with the summary nature of the common law *habeas corpus* process.[6]

"remedy", there is no jurisprudence that sets out the <u>extent of the jurisdiction this Court has to consider the bail of a remanded inmate, and the mechanics of how to proceed</u>. Some preliminary questions come to mind: If the criminal matter remains in Provincial Court, would this Court thereby be usurping or interfering with the authority of the Provincial Court? If the criminal matter is in Supreme Court, and a trial judge has been appointed and is "seized" with the matter, could it, and should it, be referred to that Justice or should it be the *habeas corpus* Justice who decides the bail matter? Presumably, the Prosecution Service responsible for the alleged "criminal" charges (the Nova Scotia Public Prosecution Service or the Public Prosecution Service of Canada as the case may be) should conduct <u>the bail hearing</u> on behalf of the "Crown". However, I note that counsel for the Attorney General of Nova Scotia conducts <u>the *habeas corpus* hearing</u> on behalf of the Provincial "Crown". I exercise my discretion not to engage the bail provisions, but rather leave it to Mr. Wilband, should his circumstances not have changed, to make a further application for *habeas corpus*. He could also argue to the relevant Criminal Court that there has been a material change in his circumstances as a result of the effect of the prolonged lockdowns, or other bases for revisitation of his existing remand, in support of his renewed bail application to the extent permitted under the *Criminal Code of Canada*. He could also formally request from the Respondent a transfer to a correctional facility where there are no, or lesser, frequent daily lockdowns due to staff shortages.

[6] See *Diggs*, 2024 NSSC 11, at para. 31.

[34] Consequently, Mr. Wilband cannot herein claim relief pursuant to the *Charter of Rights* under the guise of a common law *habeas corpus* application.

[35] However, I do have authority pursuant to the common law to make a declaration regarding the lockdowns and Mr. Wilband's loss of residual liberty.[7]

Conclusion

[36] I am satisfied that Mr. Wilband has experienced a material deprivation of residual liberty as a result of the continual lockdowns between October 31 and November 28, 2023.

[37] As I noted in the *Diggs* decision, the circumstances of which are very similar to these, the daily responses from CNSCF decision makers, when seen in context, were not always "reasonable".[8]

[38] I am satisfied for the following dates consecutively his daily time out of cell was:

> Nov. 1-**20 mins**.; **0 mins**; **4 hrs**;**0 mins**; **4 hrs**; **4 hrs**; attendance at Court; **1.5 hrs**; **1.5 hrs**; 6 hrs; 10.5 hrs; 6.5 hrs; 6.5 hrs; **4.5 hrs**; **4.5 hrs**; **1.5 hrs**; **0 hrs**; **1 hr**; **2 hrs**; **3.5 hrs**; 5-6 hrs; **2 hrs**; **3.5-4.5** hrs; **3 hrs**; 5 hrs; 5-6 hrs; **2.5-4.0 hrs** - Nov. 27**.**

[39] The most recent evidence I have from Mr. Wilband regarding his times out of cell, as contrasted with that of D/S Hill (the 2nd column of hours below) are:

> (November 18 – 27, 2023)
>
> | | | |
> |---|---|---|
> | 1 hour | vs | 1 hour |
> | 2 hours | vs | 2 hours |

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[7] See also Justice Keith's reasons in *Adams v. Nova Institution*, 2021 NSSC 313 at paras. 25 - 63 regarding the availability of a declaration as ancillary to the remedy of "release" of an inmate.

[8] I wish to be clear that I am satisfied that the senior staff at the CNSCF were acting in good faith when making these lockdown decisions which also flow necessarily from the Joint Occupational Health & Safety Committee's Agreement and the ensuing 2014 Directive of then Superintendent Paulette MacKinnon regarding minimum levels of staff required to safely unlock inmates. Nevertheless, there remained according to the evidence that I accept in this case, other approaches as noted in *Diggs*, that CNSCF staff and the Chief Superintendent did not attempt to exploit to avoid the markedly foreseeable daily lockdowns consequent to daily staffing shortages. In this latter respect, the daily decisions were not "reasonable".

3.5 hours	vs	3.3 hours
5 hours	vs	6 hours
2 hours	vs	1 hour
3.5 hours	vs	4.45 hours
3 hours	vs	3.3 hours
5 hours	vs	5.35 hours
5 hours	vs	5.58 hours
2.5 hours	vs	3.59 hours

[40] At the time of writing, the circumstances may well have changed, perhaps even dramatically.

[41] I am not satisfied that it is appropriate for me to order Mr. Wilband "released" from his present circumstances, given 1) the time that has elapsed since the evidence presented was fresh; and 2) the specific daily decisions therein having been rendered factually moot.

[42] On the other hand, I am prepared to issue a declaration, such as I did in Mr. Diggs's case, that:

> between October 31 and November 28, 2023, almost without exception, there have been daily substantial deprivations of Mr. Wilband's residual liberty, and a significant number of the daily decisions made by Correctional Services were not "reasonable", as that term is used in *Vavilov v Canada (Minister of immigration)* 2019 SCC 18.

[43] I also recognize that pursuant to s. 57 of the *Correctional Services Act*, Mr. Wilband was entitled to Airing Court time:

> Outdoor activity
>
> 57 (1) A superintendent shall ensure that every offender is allowed at least thirty minutes a day for outdoor exercise.
>
> (2) Notwithstanding subsection (1), the superintendent may deny an offender access to outdoor exercise if
>
> (a) the weather conditions make it unsafe;
>
> (b) the offender is actively attempting to escape;
>
> (c) the offender poses an immediate threat to the security of the correctional facility; or

> (d) the offender poses an immediate physical threat to the safety of other offenders or employees. 2005, c. 37, s. 57.

[44] As a matter of statutory interpretation, I am satisfied that Mr. Wilband's circumstances do not fit within any of the statutory exceptions. He was entitled to a minimum of 30 minutes Airing Court time daily.

[45] I am satisfied that of the 28 days between October 31 and November 28, Mr. Wilband was only permitted Airing Court time on 5 days.

[46] On the other hand, as this point was not expressly addressed by counsel, I give no opinion regarding whether Mr. Wilband has established, on the days the Superintendent may have denied Mr. Wilband at least 30 minutes Airing Court time daily, that this effected a material deprivation of Mr. Wilband's residual liberty.[9]

[47] No costs were sought, and none are awarded.

Rosinski, J.

[9] The continual and lengthy period of time over which Mr. Wilband was denied Airing Court time is very disconcerting to the Court. Mr. Wilband's evidence was to the effect that between October 31 and November 27, he was only offered and had an opportunity to participate in Airing Court time on November 6, 10, 13, 20 and 24. In Exhibit 6 of D/S Hill's affidavit, the Respondent presents its evidence on the Airing Court time made available to Mr. Wilband. In not coming to a conclusion whether this did effect a material deprivation of residual liberty, I am doing so as it is not necessary or appropriate, bearing in mind the reasons in *R v. Sullivan*, 2022 SCC 19.