SUPREME COURT OF NOVA SCOTIA
Citation: *Wilband v. R.*, 2024 NSSC 128

Date: 20240501
Docket: 531813
Registry: Halifax

Between:

Ryan Taylor Wilband

Applicant

v.

Attorney General for Nova Scotia

Defendant

DECISION

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	April 9, 2024
Written Decision:	May 1, 2024
Counsel:	Ryan Taylor Wilband, on his own behalf Terry Kelly for the Attorney General

By the Court:

1 – Introduction

[1] Mr. Wilband has been an inmate at the Central Nova Scotia Correctional Facility ["*CNSCF*"] in Dartmouth, Nova Scotia most recently since February 13, 2024.

[2] He filed an Application for *habeas corpus* relief on March 21, 2024.[1]

[3] Mr. Wilband has previously filed a successful application for *habeas corpus* relief regarding his daily unlock times while on remand at CNSCF in October/November 2023 – see my reasons in *Wilband v. Nova Scotia (Attorney General*), 2024 NSSC 12 (presently under appeal) - "*Wilband No.1*".

[4] Mr. Wilband again claims that due to staff shortages at CNSCF he is still locked in his cell for an unreasonable amount of time each day.

[5] I somewhat agree with his position.

2 – Background

[6] Typically, the greater the staff shortage at the jail on any given day, the less time out of cell inmates receive, and the more likely that a Court could conclude that either the reasonableness of the decision-making in relation thereto and/or the reasonableness of the outcome are "unreasonable" as contemplated by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 83.

[7] In its Notice of Contest and arguments, the Attorney General ("AG") argues that there can be no material deprivation of residual liberty in relation to Mr. Wilband, if he is experiencing, as a result of staff shortages, similar deprivations of residual liberty that are experienced by the general population inmates as a whole.

[8] The AG maintains its position that I rejected in *Diggs v. Nova Scotia (Attorney General*), 2024 NSSC 11 and *Wilband No. 1*.

[1] On March 24, 2024, Justice Arnold set down this Application for hearing on April 9, 2024.

[9] I continue to rely on my reasoning in *Diggs*/*Wilband No. 1*.

[10] In his Application document, under "Grounds for review" and "Why do you say that the deprivation of liberty is unlawful?", Mr. Wilband checked off the following two categories, and wrote thereunder:

> **The decision was procedurally unfair.**
>
> - Daily lockdowns are occurring and it's once again becoming the norm. I'm experiencing extreme anxiety and having difficulty with my daily lockdown decisions.
>
> **Is there any other reason that the deprivation of liberty is unlawful?**
>
> - Habeas corpus is for 'the here and now' and is intended to release a person from a presently ongoing deprivation of liberty or material deprivation of residual liberty. This place is back to their same bad behaviour therefore I would like to have a 'show cause hearing' bail review – seeking to be returned to your Honourable Court for Criminal Code review of detention. Please refer to paragraph 28 of Justice Rosinski's decision – Wilband v Attorney General of Nova Scotia, 2024 NSCC 12.

[11] Under the preprinted "Please provide any additional reasons for your Application that have not been considered by the questions above", he further wrote:

> Justice Rosinski declared that the lockdowns I'm experiencing are unlawful and my liberties are being deprived.

[12] Let me briefly address his positions.

[13] I am satisfied that the decisions made herein were made with a sufficient level of procedural fairness to Mr. Wilband, however, Mr. Wilband has been unlawfully deprived of his residual liberty once again.

3 - Using a fixed number of hours as the minimum reasonable hours daily unlock time is not appropriate

[14] The AG has argued that this Court should consider endorsing a 7-hour minimum starting point threshold of "reasonable" daily unlock time.

[15] Mr. Wilband referenced my reasons in *Wilband No. 1*, wherein I did not use a standard of a minimum of 7 hours daily unlock time.

[16] Had I done so then, I would have concluded he had experienced an unlawful material deprivation of his residual liberty during **26 of 27 of the dates** in question between **October 31 – November 28, 2023 (96%)**.

[17] Had I used the 7 hour daily unlock time standard in Mr. Diggs' case, I would have concluded that he was unlawfully deprived of his residual liberty in **+90%** of those dates.

[18] In *Diggs*, wherein I did not use a standard of a minimum 7 hours of daily unlock time, I concluded that Mr. Diggs had experienced an unlawful deprivation of his residual liberty during at least **36 of 51 of the dates** between **September 13 – November 23, 2023** (**70%**).

[19] Using a minimum of 7 hours daily unlock time would lead one to conclude that Mr. Wilband was unlawfully deprived of his residual liberty on 9 of the 18 days (**50%)** in issue here (between March 17-19 and March 24 up to and including April 7, 2024).

[20] Adoption of a minimum 7 hour daily unlock time would provide a clearly defined target for correctional facilities and provide a formulaic division between "reasonable" and "unreasonable" amounts of daily unlock time.

[21] While such an approach is superficially attractive, as it would provide simple clarity and certainty as to what is a "reasonable" outcome, the concept of a "reasonable outcome" is necessarily contextual and contemplates a range of outcomes rather than a hard target such as a 7- hour minimum daily unlock time.

[22] I will add here that, my experience suggests that there is typically a range of reasonable daily unlock times that are less than the maximum/ideal daily unlock time, (approximately 10 plus hours), which presumes "ideal" conditions.[2]

[23] While not adopting or endorsing a fixed minimum "reasonable" daily hours of unlock time threshold *per se*, I will say that, in analysing *habeas corpus* applications of this nature and based upon my lengthy experience with such applications in the past in similar circumstances, and having heard the more recent particularized evidence in *Diggs*, *Wilband No.1*, and the present case, in my opinion,

[2] In *Diggs* the witness for the AG spoke in terms of 10 – 12 hours daily as "ideal" unlock time, whereas CNSCF Deputy Superintendent Tabiri in this case spoke in terms of 10 hours as the likely maximum reasonably attainable daily unlock time. I see no inherent conflict between their evidence but find it appropriate to consider 10 hours daily as more realistic as an achievable "ideal".

7 hours or more of daily unlock time would tend to fall within the "reasonable outcomes" range.

4 - The measures taken by Correctional Services to avoid unreasonable daily unlock time outcomes

[24] I recall the credible evidence of Chief Superintendent Jeffrey Awalt in *Diggs* and *Wilband No.1*, provided to this Court on November 27 and 28, 2023.

[25] Chief Superintendent Awalt testified that he had been appointed to that position in July 2023. On behalf of Correctional Services he was tasked to, and after ongoing consultations with the Union and Nova Scotia Correctional Services, undertook and directed, more fulsome, systemic, and aggressive measures to reduce the impact of the ongoing staffing shortages that had persisted to date at CNSCF.[3]

[26] These ongoing measures also included following up on my suggestions in *Diggs*, which I drew from the Covid 19 systemic responses in Nova Scotia Correctional facilities, that in order to alleviate the unreasonable daily unlock times from recurring, Correctional Services should consider: "over staffing"; inter-facility transfers; more generous use of earlier releases from sentences, to the extent permitted by law and otherwise appropriate; and contacting the Crown and counsel for remanded inmates in an effort to revisit bail for such alleged offenders who, on reflection and by consent, might be appropriate candidates for bail.

[27] Chief Superintendent Awalt stated that the plan envisaged there being "an assessable positive effect on staffing for CNSCF by **March 2024**, with a full staffing complement estimated by **July 2024**. The goal once a full staffing complement is available, would be in phase 2 to move back to a direct supervision model which I am aware is better for both inmates and staff in terms of safety and service provision for inmates." (para 51 *Diggs*)

[28] Chief Superintendent Awalt provided what I found to be encouraging particulars that the plan would, in the near to middle term, have a noticeable impact on improving the staffing shortage problem at the Central Nova Scotia Correctional Facility.

[3] I appreciate that Correctional Services' response involved the input, efforts and implementation by many persons beyond Chief Superintendent Awalt, and they (including specifically the Union representatives who participated) are all to be commended for having aggressively addressed the underlying issues leading to the persistence of material staff shortages at the CNSCF.

[29] These measures have borne fruit.

[30] Nevertheless, as anticipated, more work still needs to be done to consistently achieve reasonable daily unlock times.

5 - Mr. Wilband's present Application

[31] Regarding Mr. Wilband's present Application, Deputy Superintendent Tabiri testified on April 9, 2024, that he has been with Correctional Services since 2018, and was promoted to Deputy Superintendent at CNSCF on August 28, 2023.

[32] I found him credible and was impressed by the implementation efforts and favourable systemic results that he recounted in his evidence - including that CNSCF had 14 new recruits in January 2024 (11 of whom remain in those positions), that most of the present group of 19 recruits is expected to shortly take up their positions, a further number from a following group of 14 will take of their positions by July 2024, and CNSCF is on track to have a full staffing complement in or about July 2024, such that the staffing shortages experienced by Mr. Wilband in the past 6 months will no longer be a material factor insofar as the daily unlock time inmates experience at CNSCF.[4]

[33] The improved daily unlock times are reflected in Mr. Wilband's own experience at CNSCF as between October/November 2023 and March/April 2024.

[34] Notably, in *Wilband No. 1*, during the latter part of October and into November 2023, his daily unlock time was found to be less than 7 hours on:

- **November** 1, 2, 3, 4, 5, 6,8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, and 27- namely, for **96%** of the relevant days.

[35] More recently, Mr. Wilband's daily unlock time was found to be less than 7 hours on:

- **March** 17, 18, 19, 25, 31, **April** 2, April 3, April 6 - namely, for **45%** of the relevant days.[5]

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[4] Greater detail of these implementation efforts and favourable systemic results, appear in Deputy Superintendent Tabiri's affidavit at paras. 14 – 22; 30 – 52.

[5] The AG noted that between March 20 and March 23, 2024, inclusive, Mr. Wilband was subject to disciplinary confinement to his cell and consequently those days are not relevant to the *habeas corpus* Application. I agree.

[36] For the days of March 17, 18, 19, 25, 31, April 2, and April 3 (out of cell time for each being: 4.5; 4.0; 2.45; 5.5; 4.25; 3.45; and 5.0 hours) Mr. Wilband was likely unlawfully, materially deprived of his residual liberty, and I am prepared to issue a declaration to that effect as I conclude on such dates his daily unlock time was an "unreasonable" outcome.

[37] As I noted in *Diggs* and *Wilband No. 1*, in part due to the passage of time between Mr. Wilband's presently claimed unlawful detention (March 17 – April 8), the hearing of the evidence (April 9) and rendering of the decision, even upon demonstration of a material deprivation of residual liberty, the "release" of Mr. Wilband from the argued material deprivation of residual liberty, is no longer an effective remedy and/or would no longer otherwise be appropriate.

[38] I decline to conduct the requested bail hearing, at which Mr. Wilband would argue for his "release" from a continuing material deprivation of his residual liberty, as I do not have recent evidence about this, and for other reasons I will elaborate upon later.

[39] Next, I will briefly examine Mr. Wilband's position.

[40] He was an inmate at the CNSNF until he was transferred to the Northeast Nova Scotia Correctional Facility ("*Northeast Nova*") on January 3, 2024.

[41] He was transferred back to CNSCF on February 13, 2024, and at all material times was housed in the North 3 dayroom which is an open "Protective Custody" dayroom with full privileges – considered by CNSCF witness(es) as equivalent to being a "General Population inmate with full privileges".[6]

[42] Mr. Wilband claims his deprivation of liberty started on February 13, 2024, and the reason why his liberty is being deprived was due to the "shortage of staff".

[43] I find that I should only examine the period starting three days before his application was dated and onward – therefore I will examine the period March 17 – April 8, 2024, inclusive.

[44] He has raised three major issues for consideration:

1. Has he experienced a material deprivation of residual liberty?; and, if so

[6] The only evidence presented on the Application was the affidavit, and Exhibits with examination in Court, of Deputy Superintendent Ohene Tabiri. I found his evidence to be credible, and the records reliable.

2. Has the AG satisfied the Court that that its decisions were made lawfully i.e. within its legislative jurisdiction, that the process by which it came to those daily decisions and the outcomes themselves were both reasonable? If not,
3. Is Mr. Wilband's preferred remedy, "bail review", within the authority of the Court, and if so, should such process be undertaken?

[45] I answer these questions as follows:

1. The proper approach is as I set out in *Diggs* (e.g. paras. 82,104, and 150) – i.e. whether there is a material deprivation of residual liberty requires a comparison of what daily unlock time out of cell general population inmates would receive under normal operating conditions (ideally on the evidence here a maximum of 10 hours daily according to Deputy Superintendent Tabiri, and I am satisfied that 7 hours is within a range of reasonable outcomes) and what daily unlock time out of cell Mr. Wilband actually received.

   As noted above, there are days where there is a material deprivation of Mr. Wilband's residual liberty;

2. Senior Correctional Services staff made the decisions to reduce the unlock times for inmate in issue here lawfully – i.e., there was a legal basis to do so and the process by which they came to those decisions was sufficiently procedurally fair, however I find the identified specific daily outcomes were not reasonable.

   Let me add here that, to the extent that staff shortages are foreseeable, which in my opinion they were in the case of Mr. Wilband, there is a correspondingly proportionate obligation on Correctional Services staff to take all reasonable measures to ensure that these shortages do not occur, so as to avoid an outcome such as a material reduction in inmates' normal daily time out of cell.[7]

3. Although I have previously noted in *Diggs* (paras. 34-37 and 155-157) and *Wilband* (para. 28 footnote 5) that this Court would appear to have

[7] See my reasons in *Coaker v. Nova Scotia (Attorney General)*, 2018 NSSC 291, wherein I approved of rotating lockdowns in response to ongoing security threats within CNSCF. I appreciate that in *Coaker* at Footnote 14 I cited as *obiter dicta*: "[see] *Ogiamien v. Ontario (CSCS)*, 2017 ONCA 667 at paragraphs 57, 58 and 61 – 62, where the Court noted that 'even lockdowns imposed because of staff shortages are imposed to ensure the security of the institution and the safety of the staff and inmates'…".

> the authority pursuant to s. 6 of the *Liberty of the Subject Act*, RSNS 1989, c.253 as complemented by *Nova Scotia Civil Procedure Rules* 7.15 and 7.16 to consider the bail of a remanded inmate as a remedy in *habeas corpus* proceedings (as it must be, since sentenced inmates cannot receive "bail" under the *Criminal Code* - except possibly in relation to appeals - or in my opinion under the *Liberty of the Subject Act*) and Mr. Wilband was at the relevant times a remanded inmate, I have serious misgivings about invoking this apparent authority.

[46] The *Criminal Code* includes a comprehensive statutory process for bail reviews.

[47] This Court should be very reluctant to usurp or override the jurisdiction under the *Criminal Code* - which gives the responsibility for bail to specific levels of court (Provincial Court or Supreme Court, and in relation to appeals, to the Nova Scotia Court of Appeal).

[48] There may also be a constitutional question about whether the Province has authority to legislate in relation to "bail" for persons who are directly subject to the provisions of the *Criminal Code*, it being federal legislation.

[49] Moreover, as to parties involved, the *Criminal Code* process would engage the authority to conduct bail hearings by, either the independent Nova Scotia Public Prosecution Service, or the Public Prosecution Service of Canada - in contrast to "bail" processes under ambit of *habeas corpus* applications, in which the Crown is typically represented by the Attorney General of Nova Scotia (if in relation to Provincial Correctional Facilities).

[50] In my opinion, while pursuant to the process of *habeas corpus* applications, this Court may have the authority to consider a review of "bail" for remanded inmates, as a matter of an exercise of discretion by this Court, invoking such process should be in exceptional circumstances only.

[51] I keep in mind that the *Liberty of the Subject Act* is of venerable vintage and origins, and it was adopted in Nova Scotia at least as early as 1884: c. 117 of the Revised Statutes of Nova Scotia, Fifth Series: "Securing the Liberty of the Subject".

[52] The present wording of the *Liberty of the Subject Act* (see for example s. 4) clearly harkens back to much earlier iterations thereof and must be understood in that context.

[53] The 1884 references therein to "the legality of such imprisonment" and the "discharge, bailment or recommitment" must be understood in context – at that time only the legality of the underlying warrant of committal or similar document that permitted the imprisonment of a person could be questioned – but not what is now referred to as "residual liberty".

[54] Until the seminal decision from the Supreme Court of Canada, *R. v. Miller*, [1985] 2 SCR 613 (1985 CanLII 22) clarified that *habeas corpus* relief should extend to a material deprivation of "residual liberty", or further carceral circumstances effected on an inmate ("a prison within a prison"), this situation persisted:

> After giving consideration to the two approaches to this issue, **I am of the opinion that the better view is that *habeas corpus* should lie to determine the validity of a particular form of confinement in a penitentiary** notwithstanding that the same issue may be determined upon *certiorari* in the Federal Court. The proper scope of the availability of *habeas corpus* must be considered first on its own merits, apart from possible problems arising from concurrent or overlapping jurisdiction. The general importance of this remedy as the traditional means of challenging deprivations of liberty is such that its proper development and adaptation to the modern realities of confinement in a prison setting should not be compromised by concerns about conflicting jurisdiction. As I have said in connection with the question of jurisdiction to issue certiorari in aid of *habeas corpus*, these concerns have their origin in the legislative judgment to leave the *habeas corpus* jurisdiction against federal authorities with the provincial superior courts. There cannot be one definition of the reach of habeas corpus in relation to federal authorities and a different one for other authorities. **Confinement in a special handling unit, or in administrative segregation as in *Cardinal*, is a form of detention that is distinct and separate from that imposed on the general inmate population. It involves a significant reduction in the residual liberty of the inmate. It is in fact a new detention of the inmate, purporting to rest on its own foundation of legal authority. It is that particular form of detention or deprivation of liberty which is the object of the challenge by *habeas corpus*. It is release from that form of detention that is sought.** For the reasons indicated above, I can see no sound reason in principle, having to do with the nature and role of habeas corpus, why habeas corpus should not be available for that purpose. I do not say that habeas corpus should lie to challenge any and all conditions of confinement in a penitentiary or prison, including the loss of any privilege enjoyed by the general inmate population. But **it should lie in my opinion 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**.
>
> [My bolding added]

[55] Therefore, I suggest that only when the legality of the underlying warrant of committal or similar document is in issue – i.e. whether the primary deprivation of liberty itself is illegal or not – should this Court consider the *Liberty of the Subject Act* and examine whether the Court should order bail for the inmate in question.

Conclusion

[56] I am satisfied that Mr. Wilband has experienced a material deprivation of his residual liberty as a result of the continual lockdowns between March 17 and April 8, 2024.

[57] For the following days he was materially deprived of his residual liberty: March 17, 18, 19, 25, 31, April 2, and April 3 (out of cell time for each being: 4.5; 4.0; 2.45; 5.5; 4.25; 3.45; and 5.0 hours).

[58] In all the circumstances, these outcomes were not "reasonable" ones, as contemplated by the Supreme Court of Canada's reasons in *Vavilov* at para. 83.

[59] I am prepared to issue a declaration that reads in part:

> It is declared that the lockdown of Mr. Wilband at the Central Nova Scotia Correctional Facility on the following dates was unlawful: March 17, 18, 19, 25, 31, April 2, and April 3, 2024.

Rosinski, J.