SUPREME COURT OF NOVA SCOTIA

Citation: *Cox v. Nova Scotia* (*Attorney General*), 2020 NSSC 81

Date: 2020-01-03
Docket: Halifax, Nos. 495077, 495078, 495076, 495075
Registry: Halifax

Between:

Kaz Cox, Andreko Crawley, Jake Lilly and Sophon Sek

Applicants

v.

Attorney General of Nova Scotia, representing Her Majesty In Right of the Province of Nova Scotia, And Central Nova Scotia Correctional Facility

Respondents

DECISION

Judge:	The Honourable Justice Darlene Jamieson
Heard:	January 3, 2020, in Halifax, Nova Scotia
Oral Decision:	January 3, 2020
Written Decision:	February 28, 2020
Counsel:	Kaz Cox, Andreko Crawley, Jake Lilly and Sophon Sek, Self-Represented Applicants Adam Norton, Counsel for the Attorney General of Nova Scotia

By the Court:

Introduction

[1] The Applicants are presently housed at Central Nova Scotia Correctional Facility ("CNSCF", "the Institution" or the "Burnside Jail"). In the individual Notices for *Habeas Corpus* filed by Messrs. Sophon Sek, Jake Lilly, Andreko Crawley and Kaz Cox ("the Applicants") on December 23, 2019, they seek writs of *Habeas Corpus* against the Institution. It was agreed by counsel for the Attorney General and the Applicants that these matters would be consolidated and heard together.

[2] Messrs. Sek, Lilly and Crawley are currently on West 4 Unit ("West 4") known as the Intensive Direct Supervision for Offender Reintegration Unit (IDR). The IDR is a unit with less inmates that attempts to reintegrate offenders back into the general population.

[3] Mr. Cox is currently on the Close Confinement Unit ("CCU") at CNSCF. Mr. Cox's December 23, 2019 Habeas Corpus Application relates to segregation on West 4. Mr. Cox is no longer on West 4 and is no longer on rotation there. Mr. Cox was placed in CCU and currently an adjudicative process is under way as a result of a December 31 incident.

[4] I will very briefly summarize the positions of the parties. I am going to address the evidence and what I have taken from the evidence. It is not my intention to attempt to summarize or recite all of the evidence or submissions. I will touch upon elements and portions of the most pertinent evidence and arguments. I have, however, weighed and considered all of the evidence and submissions in arriving at my ruling.

[5] Each Applicant filed a Notice for *Habeas Corpus*. All are dated December 23, 2019.

Mr. Sek's Application

[6] Mr. Sek's Notice for *Habeas Corpus* is brief. In it he says it is impossible to leave detention because of "staffing issues, not on sanctions, 23-hour lockdown since December 2, 2019". He further says that the detention is illegal because: "Not on sanctions. Receiving less than ordered time for confined inmates. Being

denied spiritual rights." Nothing else is offered in the Notice other than the standard boilerplate of the Court-issued form. Mr. Sek filed Exhibit 5, being a log of time spent outside his cell since December 23, 2019. The log indicates Mr. Sek has had several days since December 23 with 1.5 hours out of his cell and then, on December 31, he was out of his cell for two hours, January 1 for 2.2 hours and January 2 for 2.4 hours. In his direct evidence Mr. Sek provided his rationale for proceeding with the *Habeas Corpus* application. Mr. Sek took issue with a number of things including:

1. He gave evidence that many days he has been on 24-hour lockdown, then 23 hours, noting that the most time out of his cell has been two hours on January 1 and 2.
2. He has limited family contact.
3. He has limited medical contact and no chaplains.
4. He is concerned about who stayed on North 3 after the incident and who went to CCU and West 4 and why.
5. He says there has been a lack of disclosure and communication about his situation.
6. He says the Applicants pose no threat to staff or other inmates.

Mr. Lilly's Application

[7] Mr. Lilly's Notice for *Habeas Corpus* is brief. In it he says he was detained without reasons having been given. He further says it was impossible to leave detention because of: "lockdown 23 hours a day, short staffed, not on sanctions and not given my hours I'm entitled to, am locked down all day." His application states the detention is illegal because: "I did 12 days in CCU and am still on CCU status with no explanation, went to CCU (Dec. 2, 2019) left (Dec. 14, 2019) am on West 4 but receiving the same status as CCU, haven't gotten my two hours out yet. I have been on West 4 for 10 days." Part of the document is cut off but appears to indicate he is not receiving a maximum amount of information about the reasons why he is on West 4. Nothing else is offered in the Notice other than the standard boilerplate of the Court-issued form. In his direct evidence Mr. Lilly provided his rationale for proceeding with the *habeas corpus* application. He took issue with a number of things including:

1. He is barely able to call his lawyer
2. He is not on sanctions

3. There has been no communication from staff as to why he is on lockdown.

4. He has not been out of CCU for more than three hours since December 23, 2020.

Mr. Crawley's Application

[8] Mr. Crawley's Notice for *Habeas Corpus* is brief. In it he says he was not given a reason/no paperwork for being detained. He further says it is impossible to leave detention because of: "short staffed central correctional facility short staff an [*sic*] should not be subject to 23-hour lockdown." The Notice for *Habeas Corpus* states that the detention is illegal because "it's cold, and less food, can't work on case, lack of jurisdiction." It further says the grounds for review are: "I am locked up 23 hours a day because they are short staff. Not on any levels 3 or SMP memorandum close confinement form. I am locked up with no just cause, no info [*sic*] on why I am locked up 23 hours. Locked up with no lawyers calls. Disagreement of being locked at time when could be working on case." Nothing else is offered in the Notice other than the standard boilerplate of the Court-issued form. Mr. Crawley chose not to give evidence but did make oral submissions. During his submission he provided the Court with a copy of the Order issued in the matter of *Dylan Robert Douglas Gogan* v. *The Attorney General of Nova Scotia et al.* (Hfx. No. 445712) and also some materials concerning *Habeas Corpus* procedure.

Mr. Cox's Application

[9] Mr. Cox's Notice for *Habeas Corpus* is brief. In it he says it is impossible to leave detention because of "staffing issues, not on any sanctions, 23 hr. lockdown daily since December 2, 2019." He further says that the detention is illegal because: "not on sanctions. Receiving less than ordered time out of cell for confined inmates. Being denied spiritual rights." Nothing else is offered in the Notice other than the standard boilerplate of the Court-issued form. In his direct evidence Mr. Cox provided his rationale for proceeding with the *habeas corpus* application. He takes issue with a number of things including:

1. He says, contrary to the affidavit of Deputy Superintendent Ross, he was locked down on December 2, 2019 on North 3 and then on December 5 he was moved to West 4. He was adjudicated on December 8, 2019.

2. He says that only on December 6 and 27 was he out of his cell for two hours.
3. He indicated concerns about the Institution not following its Close Confinement Policy.
4. He says he did not receive his two hours out of cell between December 28 and 31, 2019.

[10] In response to each application, the Attorney General filed a brief and an affidavit of Deputy Superintendent of CNSCF, Mr. Brad Ross. All were sworn on January 2, 2020.

Is Mr. Cox's Application Now Moot?

[11] Before I turn to the merits of the Applications for *Habeas Corpus*, I will address the Attorney General's submission that Mr. Cox's Application is moot. The day prior to the hearing, the Attorney General provided the Court with a letter taking the position Mr. Cox's Application was moot because he was no longer on the West 4 unit and a different adjudicative process was under way to determine the amount of time he would spend in CCU**.** Despite counsel for the Attorney General indicating the letter had been forwarded to Mr. Cox, it had not been received by Mr. Cox at the date of the hearing. I decided to hear Mr. Cox's Application and the evidence before addressing the Attorney General's argument concerning whether Mr. Cox's application was moot. The following is my decision in this regard.

[12] Mr. Cox's December 23, 2019 *Habeas Corpus* Application relates to segregation/lockdown on West 4. Mr. Cox is no longer on West 4 and is no longer on rotation there. Mr. Cox was placed in CCU and currently an adjudicative process is under way as a result of a December 31 incident. Mr. Cox says he was moved to CCU as a cover up. Deputy Superintendent Ross says there was an item of contraband in Mr. Cox's cell that led to an intervention team having to enter his cell. I do not have the entirety of the facts of this matter before me and it may well be subject to a further *Habeas Corpus* application. What I do know is that Mr. Cox is no longer on West 4. Therefore, his circumstances are no longer the same as the other three Applicants.

[13] Courts usually do not hear and decide matters when there is no longer controversy -- no longer a live issue. Because Mr. Cox is no longer on W4, the *Habeas Corpus* Application he filed relating to West 4 segregation issues is now

moot. Our Court of Appeal said in ***Springhill Institution v. Richards,*** 2015 NSCA 40, that factual circumstances of a *Habeas Corpus* application can change quickly and are often moot by the time it reaches them. Indeed, they are often moot by the time they reach this Court.

[14] The lawfulness of the detention of Mr. Cox on West 4 is no longer in issue. His *Habeas Corpus* Application relates to his prior time on West 4 and not his current CCU situation. Mr. Cox is free to file a further *Habeas Corpus* application in relation to any concerns he may have with regard to his present circumstances on CCU. However, I cannot hear any issues relating to his current CCU situation as that would require a further *Habeas Corpus* application.

[15] The rotational concerns raised by Mr. Cox in relation to his time on West 4 are the same as the other three Applicants and I have considered Mr. Cox's evidence in relation to those three applications.

Consideration of *Habeas Corpus* Applications – Messrs. Sek, Lilly and Crawley

[16] I now return to consideration of the Applications of Messrs. Sek, Crawley and Lilly.

Position of the Respondents

[17] The Respondents acknowledge that the inmates' residual liberty has been infringed. However, the Institution says that, given the circumstances, this infringement is justified. In this regard, they say this restriction is justified due to safety and security concerns.

[18] The Respondents agree there are staffing issues at the facility. The Respondents say these issues relate to workplace safety, work refusals, incidents involving searching the facility for weapons, and the ability to administer the facility by having some units shut down in other ranges to allow the rotation of units such as West 4. The Respondents contend that the decision to place these individuals on West 4 was a reasonable one, based on the safety and security of the individuals themselves, the correctional staff, and concerns with the facility being able to make administrative decisions regarding the entire prison population. The Respondents say that the Court should not interfere with day-to-day safety and security of the facility by releasing the Applicants from their rotations. They say

this restriction is justified due to the threats to the safe and secure operation of the Burnside Jail.

[19] The Respondents concede that the Applicants' residual liberty interests are currently being infringed because the reduction of the Applicants' day room privileges to the alleged one hour per day is a more restrictive condition of confinement than that of the general inmate population. The Attorney General says North 3 is now on six-hour rotation, given the facility-wide security and safety issues, including issues due to shortages of staff.

[20] The Respondents say there exists a rational, intelligible and objective basis for keeping the Applicants on rotation on West 4. They submit that release of the Applicants from their current conditions may further cause work stoppages which could have profound effects on the safety and security of the entire facility.

[21] The Attorney General says the Assistant Deputy Superintendent, Mr. Adam Smith, is discussing expectations with the individuals on the unit and attempting to reintegrate them into the general population in the new unit known as the IDR Unit. Once the Deputy Superintendent and senior management determined the individuals were not receiving at least two hours out of their cell on the rotations, directions were given that this would be the practice going forward. The Attorney General says this further demonstrates a reasonableness of the Deputy Superintendent's actions.

Burden of Proof

[22] As noted, counsel for the Attorney General has accepted that the placement of the Applicants into rotation or lockdown on West 4 does constitute a deprivation of their residual liberty. As a result of this acknowledgement, the burden of proof shifts to the Respondents to prove that the deprivation is lawful and reasonable.

[23] At this point it is helpful to consider the legal framework within which applications for *Habeas Corpus* must be decided.

The Law

[24] As stated by the Supreme Court of Canada in ***May v. Ferndale,*** 2005 SCC 82, at para 22, *Habeas Corpus* is a crucial remedy in the pursuit of two fundamental rights protected by the *Canadian Charter of Rights and Freedoms*:

> 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.

[25] The case of ***Khela v. Mission Institution***, [2014] S.C.J. No. 24 , a decision of the Supreme Court of Canada, is helpful and instructive. It set out the following test for applications such as this at paragraph 30:

> 30 To be successful, an application for habeas corpus must satisfy the following criteria. First, the applicant must establish that he or she has been deprived of liberty. Once a deprivation of liberty is proven, the applicant must raise a legitimate ground upon which to question its legality. If the applicant has raised such a ground, the onus shifts to the Respondents authorities to show that the deprivation of liberty was lawful.

(See also para. 74 of ***May v. Ferndale Institution***)

[26] Counsel for the Respondents acknowledges that the first branch of this test has been met. The Applicants have been on lockdown for lengthy periods, including for up to 23 hours per day. Therefore, I will move on to the final component of the analysis -- can the Institution demonstrate that the deprivation is lawful and reasonable?

[27] The Nova Scotia Supreme Court, in ***Cain v. Canada (Correctional Services),*** 2013 NSSC 367, summarized the role of provincial Superior Courts, like this one, in reviewing decisions of prison administrators on *Habeas Corpus* matters. Justice Van den Eynden (as she was then) stated as follows, at para. 34:

> 34 In short, this Court's role is not to determine whether the administrative segregation and/or the security classification was the ‘proper decision’ but rather whether the Respondents had the jurisdiction to make those decisions and whether such decisions were lawful and reasonable in the circumstances, taking into consideration the rights and procedural safeguards which Mr. Cain is to be afforded at law.

[28] In ***May v. Ferndale Institution***, ***supra,*** the Supreme Court of Canada explained that, for a deprivation of liberty to be lawful, the decision must be within the jurisdiction of the decision maker. It was also clarified that lawfulness further requires the decision to be reasonable. As the Supreme Court of Canada previously said in ***Khelo, supra,*** at para. 75, "to apply any standard other than reasonableness in reviewing such a decision could well lead to the micromanagement of prisons by the courts."

[29] The Supreme Court of Canada previously held in ***Khela (supra)*** and ***May (supra)*** that determining the question of whether or not the decision was lawful includes an assessment of the decision's reasonableness. For example, the majority of the Court in ***Khela, supra,*** said:

> 52 As I mentioned above, on an application for *habeas corpus*, the basic question before the court is whether or not the decision was lawful. Thus far, it is clear that a decision will not be lawful if the detention is not lawful, if the decision maker lacks jurisdiction to order the deprivation of liberty (see, for example, *R. v. G. (J.P.)* (2000), 130 O.A.C. 343 (Ont. C.A.)), or if there has been a breach of procedural fairness (see *May*, *Miller* and *Cardinal*). However, given the flexibility and the importance of the writ, as well as the underlying reasons why the jurisdiction of the provincial superior courts is concurrent with that of the Federal Court, it is clear that a review for lawfulness will sometimes require an assessment of the decision's reasonableness.
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> …
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> 65 Ultimately, weighing these factors together leads to the conclusion that allowing a provincial superior court to conduct a review for reasonableness in deciding an application for *habeas corpus* would lead to greater access to a more effective remedy. Reasonableness should therefore be regarded as one element of lawfulness.
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> …
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> 67 … jurisdiction is one requirement to be met for a decision to be lawful. On its own, however, this requirement is not sufficient to make a decision lawful. A decision that is within the decision maker's jurisdiction but that lacks the safeguards of procedural fairness will not be lawful. Likewise, a decision that lacks an evidentiary foundation or that is arbitrary or unreasonable cannot be lawful, regardless of whether the decision maker had jurisdiction to make it.

[30] The majority in ***Khela***, ***supra,*** concluded at para. 72 that "reasonableness" is a legitimate ground upon which to question the legality of a deprivation of liberty in an application for *Habeas Corpus*. The majority went on to indicate that the then applicable caselaw (including ***Dunsmuir***) relating to the reasonableness

standard of review for judicial review was applicable to *Habeas Corpus* applications. It said, at paras. 73 and 74:

> 73 A transfer decision that does not fall within the 'range of possible, acceptable outcomes which are defensible in respect of the facts and law' will be unlawful (*Dunsmuir*, at para. 47). Similarly, a decision that lacks 'justification, transparency and intelligibility' will be unlawful (*ibid.*). For it to be lawful, the reasons for and record of the decision must 'in fact or in principle support the conclusion reached' (*N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.), at para. 12, quoting with approval D. Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy', in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304).
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> 74 As things stand, a decision will be unreasonable, and therefore unlawful, if an inmate's liberty interests are sacrificed absent any evidence or on the basis of unreliable or irrelevant evidence, or evidence that cannot support the conclusion, although I do not foreclose the possibility that it may also be unreasonable on other grounds. Deference will be shown to a determination that evidence is reliable, but the authorities will nonetheless have to explain that determination.

[31] The Supreme Court of Canada recently set out a revised framework for judicial review of administrative decisions in the companion decisions of ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65 and ***Bell Canada v. Canada (Attorney General),*** 2019 SCC 66**.** The Court said in ***Vavilov*** that the revised standard of review analysis begins with a presumption that reasonableness is the applicable standard of review in all cases. There are limited exceptions to this presumption that were set out by the Court; however, they have no applicability to these applications.

[32] The Court said that a reasonableness review aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law. The majority further said that the focus is on the decision actually made (para. 83). The Court said:

> 83 … Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the 'range' of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the 'correct' solution to the problem. … Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

[33] The Majority also indicated that in conducting a reasonableness review the court should be attentive to the application by decision makers of specialized knowledge. They said that expertise can play a role in the application of the reasonableness standard:

> 93 An administrative decision maker may demonstrate through its reasons that a given decision was made by bringing that institutional expertise and experience to bear: see *Dunsmuir*, at para. 49. In conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons. Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision. This demonstrated experience and expertise may also explain why a given issue is treated in less detail. (see also para 145)

[34] In this case the Respondents led evidence through Deputy Superintendent Ross. Deputy Superintendent Ross possesses knowledge and related practical experience in matters of institutional safety and security. I found Deputy Superintendent Ross to be reliable and credible. He gave evidence in a straightforward manner. He acknowledged there were problems on West 4 and at the facility generally, including staffing issues due to workplace safety, work refusals, etc.

[35] In determining whether a decision is reasonable the Court in ***Vavilov, supra*** provided the following direction:

> [101] What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. **The first** is a failure of rationality internal to the reasoning process. **The second** arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. There is however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable.
>
> [102] To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a 'line-by-line treasure hunt for error': …
>
> (Emphasis added)

In considering whether a decision is in some respect untenable, the Court said :

> [106] It is unnecessary to catalogue all of the legal or factual considerations that could constrain an administrative decision maker in a particular case. However, in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.

[36] While the above comments were made in the context of written reasons having been given by the decision maker, the majority of the Court noted that in many cases neither the duty of procedural fairness nor the statutory scheme will require that formal reasons be given at all (para 136). In this regard the majority stated:

> [137] Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote: see, e.g., *Catalyst*; *Green*; *Trinity Western University*. However, even in such circumstances, the reasoning process that underlies the decision will not usually be opaque. <u>It is important to recall that a reviewing court must look to the record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision:</u> *Baker*, at para. 44. For example, as McLachlin C.J. noted in *Catalyst*, '[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations, and the statements of policy that give rise to the bylaw': para. 29. In that case, not only were 'the reasons [in the sense of rationale] for the bylaw . . . clear to everyone', they had also been laid out in a five-year plan: para. 33. <u>Conversely, even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli*.</u>
>
> (Emphasis added)

<u>The Evidence of the Respondents</u>

[37] I have previously summarized the evidence of the Applicants and will now briefly summarize the evidence of the Respondents.

[38] Counsel for the Institution entered four Affidavits of Deputy Superintendent Ross, sworn on January 2, 2020. Each affidavit relates to one of the Applications filed and each has a number of attached exhibits.

[39] Exhibit 2 is the affidavit of Mr. Ross relating to the circumstances of Mr. Sek. The affidavit has nine exhibits attached, including Mr. Sek's Order of Detention and Notice to Appear, Institutional Security Assessment, the Department of Justice Activity History from September 27, 2019 to December 27, 2019, Adjudicative Level Report, a report of Mr. Adam Smith, Assistant Deputy Superintendent; an incomplete rotational schedule for West 4 unit.

[40] Exhibit 1 is the affidavit of Deputy Superintendent Ross relating to the circumstances of Mr. Lilly. The affidavit has nine exhibits attached, including Mr. Lilly's Warrant of Remand, Institutional Security Assessment, nine Disciplinary Level Reports, Department of Justice Activity History from August 20 to December 27, 2019; Incident Reports, a report of Mr. Adam Smith, Assistant Deputy Superintendent, an incomplete rotational schedule for West 4 unit.

[41] Exhibit 4 is the affidavit of Deputy Superintendent Ross relating to the circumstances of Mr. Crawley. The affidavit has ten exhibits attached, including Mr. Crawley's Warrant of Remand, Institutional Security Assessment, three Disciplinary Level Reports, Department of Justice Activity History from November 7 to December 13, 2019, a report of Mr. Adam Smith, Assistant Deputy Superintendent, an incomplete rotational schedule for West 4 unit.

[42] Exhibit 3 is the affidavit of Deputy Superintendent Ross relating to the circumstances of Mr. Cox when he was on West 4 unit. The affidavit has ten exhibits attached including Mr. Cox's Warrant of Remand, Institutional Security Assessment, eight disciplinary level reports, the Department of Justice Activity History from August 22, 2019 to December 27, 2019, incident reports, a report of Mr. Adam Smith, Assistant Deputy Superintendent; an incomplete rotational schedule for West 4 unit.

[43] I have considered all of the details relating to each Applicant set out in the Affidavits. I will not set out in detail all of this evidence but I have considered it all in reaching my decision.

[44] Deputy Superintendent Ross's affidavits, while specific to each individual application, states that all of the Applicants were involved in an incident on December 2, 2019 at approximately 7:50 p.m., resulting in an inmate being assaulted and requiring hospital care due to life-threatening injuries. As a result of each of the Applicant's role in the incident, each was moved to a Close Confinement unit (CCU) as a temporary measure prior to adjudication (or directly to West 4). The following evidence specific to each individual Applicant is contained in Deputy Superintendent Ross's affidavits:

Mr. Sek

[45] Mr. Sek's role is described in the affidavit as: "Mr. Sek, along with a group of inmates, formed a barricade in front of a cell on the North Three Unit, where an inmate was being assaulted. Mr. Sec refused orders from correctional staff to move and prevented staff from entering the cell." The disciplinary adjudicative report, dated December 5, 2019, at Exhibit F attached to the affidavit, finds that "Mr. Sek can be seen as physically resistive when an officer attempted to enter North 3 by pushing his hands away during the incident and was clearly seen disobeying staff direction and aiding and preventing staff intervention."

[46] Mr. Sek received an adjudicative level for detrimental behaviour in relation to the incident on December 2, 2019. There are several errors in the affidavit of Deputy Superintendent Ross relating to the timelines concerning Mr. Sek. For example, Mr. Sek was moved directly from North 3 to West 4 IDR. As noted previously, the IDR is a unit with less inmates that attempts to reintegrate offenders back into the general population. Mr. Sek was placed on a rotational cycle on that unit.

Mr. Lilly

[47] Mr. Lilly's role is described in the affidavit as: "Mr. Lilly, along with a group of inmates, formed a barricade in front of a cell in the North 3 Unit, where an inmate was being assaulted. Mr. Lilly refused orders from correctional staff to move and prevented staff from entering the cell…".

[48] Mr. Lilly received two adjudicative levels for detrimental behaviour and disobeying a direct order in relation to the incident in December, 2019. He was given 12 days in CCU on December 4, 2019 requiring an Executive Director's approval. The disciplinary adjudicative report dated December 4, 2019 at Exhibit "D" states that inmate Jacob Lilly, along with another inmate, were seen arriving at

the exterior North Three Cell 08 and at 19:49:22 the inmates are observed closing over the cell door preventing anyone from exiting Cell 08 North 3. The Summary of Hearing Notes further states that various inmates prevented staff from intervening in the altercation.

[49] On December 16, on completion of his sanctions, Mr. Lilly was moved to West 4 unit (IDR) and was placed on a rotational cycle on that unit.

Mr. Crawley

[50] Mr. Crawley's role is described in the affidavit as: "On December, 2019 at 7:50 p.m. Mr. Crawley entered the cell on North 3 where an assault took place."

[51] Mr. Crawley received an adjudicative level for unauthorized movement and assaulting an inmate in relation to the incident on December 2, 2019. He was given ten days in CCU on December 4, 2019 and a five-day extension that had to be approved by an Executive Director. The disciplinary adjudicative report, dated December 4, 2019, states that various inmates including Mr. Crawley entered the North 3 cell of an inmate. In the Reasons for Finding, the report states the extension of five days was due to the seriousness of the incident and the concern of risk based on lack of compliance with staff direction, assaults resulting in serious injuries and potential use of weapons based on the injuries suffered.

[52] The affidavit indicates that Mr. Crawley attended court on December 13, 2019, and that it is believed he was released from court on a recognizance with a surety. On December 20, 2019, Mr. Crawley was readmitted to CNSCF West 4 Unit.

Mr. Cox

[53] Mr. Cox's role is described in the affidavit as: "Mr. Cox, along with a group of inmates, formed a barricade in front of a cell on the North 3 Unit, where an inmate was being assaulted. Mr. Cox refused orders from correctional staff. Correctional officers were unable to get into the cell until the inmates eventually moved …". The disciplinary adjudicative report dated December 8, 2019, found at Exhibit D, states: "Based on review of CCTV and officers reports this finds it probable that inmate Cox was involved in the planning of this incident."

[54] Mr. Cox received an adjudicative level for detrimental behaviour in relation to the incident. Mr. Cox was moved to West 4 IDR unit directly from North 3 on December 5, 2019. Mr. Cox was placed on a rotational cycle on that unit.

[55] In addition to the above evidence that is specific to each individual inmate, I refer, in particular, to the following evidence from Deputy Superintendent Ross's Affidavit and the attached exhibits including the notes of Mr. Adam Smith, Assistant Deputy Superintendent, who is posted to the West Unit of CNSCF. Deputy Superintendent Ross's affidavit, at para. 13 (Exhibit 4) refers to a facility-wide weapons search originating on the West unit and states:

> 13. I have reviewed the notes of Assistant Deputy Superintendent Adam Smith, and can confirm that:
>
> > a. On December 11, 2019 at approximately 7 p.m., the entire West unit was locked down. This was due to credible information presented to staff that there were weapons on the West unit. Security and senior management decided that it would be necessary to commence a facility wide search. The incident from December 3, 2019 [*sic*] formed part of that decision making process.
> > b. On December 12, 2019 the search continued and utilized all available operational staff.
> > c. On December 13, 2019 the search was reviewed, and management decided it would continue. There were a limited number of staff members, and the inmates on West 4 were informed that the facility were attempting to get more staff on duty.
> > d. On December 14 and 15th, 2019 the facility was further short staffed due to work safety concerns and work refusals submitted by staff.

The four affidavits of Deputy Superintendent Ross indicate that he and senior management issued directions to ensure the inmates on the West 4 Unit were receiving a minimum of two hours of time outside their cells to interact with other offenders as is consistent with their policies.

[56] The affidavits further state:

> There have been continuing staffing issues, including work safety concerns and work refusals submitted by correctional services staff which has led to further lockdowns and rotations across the entire CNSCF.
>
> I can confirm that staff met weekly to discuss the possibility of extending rotational time on West 4 unit and reintegration of inmates into the general population.

> Assistant Deputy Superintendent Adam Smith confirmed to me that he spoke to the inmates on West 4 Unit about expectations and the intention to return them to the general population when that becomes a feasible option (Exhibit 1, paras 18-20).

This contact with the inmates is also confirmed in Assistant Deputy Superintendent Smith's December 30, 2019 notes which are attached as an exhibit to each affidavit.

[57] Counsel for the Attorney General conducted a direct examination of Deputy Superintendent Ross to clarify and expand on the affidavit evidence. He confirmed that being short-staffed was a reason for rotation on West 4. He said that North 3 is also on rotation with current out-of-cell time being six hours. He stated the current out-of-cell time for West 4 is two hours or more. Deputy Superintendent Ross indicated that during the timeframe in question there have been work refusals on both West 4 and North 3. He said they are working toward there being more out-of-cell time (three to four hours) on West 4 which was to happen either today or by the Monday following this hearing.

[58] I find that the affidavits of Deputy Superintendent Ross (despite the errors identified in relation to the movement of Mr. Sek and Mr. Cox) and the attached exhibits provide a detailed, clear account of the background and the decision-making framework around the placement of the Applicants on West 4 rotation or lockdown.

[59] The rotational schedules attached to Deputy Superintendent Ross's affidavit indicate that the three Applicants on West 4 have been gradually receiving increased time outside of their cells. For example: on December 26 Mr. Lilly's cell was unlocked on four occasions for varying amounts of time; Mr. Sek's cell was unlocked on three occasions and Mr. Crawley was out of his cell for more than three hours. On December 27 Mr. Lilly was out of his cell on four occasions which appear to equate to a period of between three to four hours. Mr. Crawley was out of his cell on four occasions. These timeframes are prior to Justice Arnold's decision to set these *Habeas Corpus* matters for hearing.

[60] Deputy Superintendent Ross was cross-examined by Messrs. Sek, Lilly, Crawley and Cox. Messrs. Sek, Lilly and Cox gave evidence. They were not cross-examined. Mr. Crawley chose not to testify.

[61] Prison administration and, particularly, superintendents have specific and sometimes special knowledge of safety concerns. They are in a better position than the Court in assessing and mitigating risks within prisons.

[62] My role is not to determine whether the placement of the Applicants on West 4 rotation was the correct decision. In making such decisions, prison administrators must take into consideration the safety and security of many stakeholders (i.e., staff, other inmates, the public, etc.). The Court's role is to determine whether the Respondents had jurisdiction to make the decision and whether the decision was lawful and reasonable in the circumstances. In this analysis I will consider jurisdiction and then the reasonableness of the decision. I will then address whether procedural fairness was afforded to the Applicants. The above factors requiring consideration are set out in the Supreme Court of Canada decision in ***Khela, supra.***

Jurisdiction

[63] Having reviewed all of the materials, listened to the evidence and having considered the positions of the parties, I am satisfied that the Institution had jurisdiction to take the steps they did.

[64] Section 39 of the *Correctional Services Act* 2005 S.N.S., c. 37 (the "*Act*") outlines the duties of the Superintendent of the CNSCF, which include implementing policies and procedures to ensure the safe and secure operation, management and administration of the facility. Sections 74 and 75 of the *Act* provide authority and set out the requirements for placing a person in close or solitary confinement. The Attorney General notes that there is no required amount of time out of one's cell prescribed by the *Act*. The *Correctional Services Regulations,* at s. 79, address conditions for confinement in custody. For example, they state that the Superintendent may impose different conditions of confinement for different offenders within the correctional facility. Section 79 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.

[65] The more critical part of the analysis in the present circumstances is to determine whether the decision was lawful and reasonable in all of the circumstances.

Lawful and Reasonable

[66] As directed in ***Vavilov, supra***, in assessing the reasonableness of the decision I have looked at whether the decision is internally coherent and rational and whether the decision can be justified in light of the legal and factual constraints that bear on the decision to place the Applicants on West 4 IDR on rotation.

[67] I have previously reviewed the evidence as I accepted it from the affidavit and the *viva voce* evidence. I find that, substantively and procedurally, the decision to continue to implement a rotational schedule on West 4 was lawful and reasonable. I find, based on the evidence before the Court, that the Respondents' decisions to place the Applicants on rotation on West 4 IDR was reasonable. They were internally coherent, logical and rational decisions. The evidence presented by the Respondents illustrates a rational chain of analysis in coming to the decisions which is based on safety and security considerations (including evidence of the December 2 incident, staffing shortages including due to work refusals, a facility wide weapons search originating on the West unit, etc.). Further, I find the decisions to be justified in relation to the law and facts relevant to the decisions, including the governing statutory scheme, the evidence before the decision-maker, and the impact of the decision on the Applicants. There is no basis to find the decisions were untenable on the evidence before the Court.

[68] My role is not to determine what decision I would have made in the circumstances. In making the decisions, the administration must consider many factors including, most prominently, the safety and security of persons, both the inmates and the staff. The situation on December 2, 2019 resulted in life-threatening injuries to an inmate. For safety and security reasons the Applicants were either placed directly on West 4 or placed in CCU and when released from

CCU placed on West 4, IDR for gradual reintegration. This was a reasonable decision. However, due to work stoppages, work refusals and other facility-wide lockdowns for security reasons, including a search for weapons, the Applicants were locked down for periods of 23 hours on West 4. The Respondents have taken steps to ensure the Applicants are provided with at least two hours outside their cells and, as can be seen from the rotational schedule since December 23, the time outside cells is being gradually increased with immediate plans to increase it to three to four hours.

[69] In the result, I conclude the actions of the Institution were lawful and reasonable in the circumstances. Having concluded that the placement on West 4, IDR on rotation was made for reasons grounded in safety and security, considerations which I find to be valid, I conclude the decision was both lawful and reasonable.

[70] Mr. Crawley referred me to the case of ***Gogan v. Canada (Attorney General),*** 2018 NSSC, which involved two applications for *Habeas Corpus* filed by two federal inmates housed in a lockdown unit at CNSCF. The federal inmates challenged the lawfulness of the detention within the lockdown unit. In ***Gogan, supra,*** the decision to place federal inmates into a lockdown unit on admission and based solely on their federal status was found to be arbitrary. The case is distinguishable because, in the present matters, senior management reviewed the December 2 incident and threats to safety within the facility and placed the Applicants on West 4 IDR on rotation. Resulting work refusals and shortages caused further safety concerns, as did a weapons search on West 4. The particulars regarding the safety and security concerns are outlined in Deputy Superintendent Ross's affidavit and amplified by his evidence today.

Duty of Fairness

[71] The final part of the test asks me to consider whether the Institution has complied with its procedural duties and requirement of fairness. Decisions that affect the liberty interests of inmates must be made fairly. The Applicants raised various alleged breaches of the Close Confinement Policy. For example, the Policy, at 1.2 and 5.1 states :

> 1.2 Offenders placed in close confinement will be provided with offender privileges pursuant to Sections 54 to 58 of the *Correctional Services Regulations*.

> 5.1 In accordance with Section 57 of the *Correctional Services Act* and Section 81 of the *Correctional Services Regulations*, offenders on close confinement will be provided with 30 minutes of fresh air exercise daily.

[72] However, on review of the provisions of the *Correctional Services Act*, I note that it says at ss. 54 and 57 :

> 54(1) Subject to the regulations, where, in the opinion of a superintendent, security, safety and operational requirements reasonably permit, the superintendent shall permit an offender in custody to have visitors, including visitors appearing by way of video visitation.
>
> (2) Notwithstanding subsection (1), subject to the regulations and such reasonable limits as are necessary for the security of the correctional facility, the safety of persons and operational requirements, the superintendent shall allow an offender in a correctional facility to have reasonable access to the offender's spiritual advisor and the offender's lawyer. 2005, c. 37, s. 54; 2014, c. 46, s. 7.
>
> 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.

[73] I have concluded the Institution did meet its procedural duties under the governing statute and regulations.

[74] After the December 2, 2019 incident there were individual investigations and hearings resulting in decisions in relation to each Applicant's role in the December 2 incident. As a result of the incident, each was placed in either CCU or directly on West 4 for varying times. At the date of the *Habeas Corpus* Applications all were on West 4, an IDR unit. The purpose of the IDR is that, as a unit with less inmates, it attempts to reintegrate the inmates back into the general population. The evidence of Deputy Superintendent Ross is that, given the situation facility wide, the gradual reintegration of the Applicants was initially delayed.

[75] I point to the evidence at paragraph 13 of Deputy Superintendent Ross's affidavit filed in relation to Mr. Lilly's application and the notes of Mr. Adam Smith, Assistant Deputy Superintendent, contained as an exhibit to each of the four affidavits. The Assistant Deputy Superintendent states:

> On Wednesday, December 11, at approximately 1900 hrs. the entire West unit was locked down. This was due to credible information presented to staff that there were weapons on the West unit. This information was assessed by security and senior management and the decision was made that it would be necessary to commence a facility-wide search.
>
> …
>
> The search commenced on Thursday 12th December and utilized all available operational staff. The situation was reviewed and as a result the search continued into Friday 13th December… I personally updated all inmates of the information that I had and that we were doing all we could to get more staff on duty.
>
> The weekend of the 14th and 15th of December were also short-staffed compounded by work concerns and refusals submitted by staff. An aggravating factor in this was the December 2nd incident, and compounded by finding weapons in another unit in the West. This in turn led to either delayed or rotational unlocks, throughout the CNSCF in an attempt to give everyone time out of their cell. Unfortunately, pockets of disorder during the weekend across the jail further impacted on staff attempts to facilitate this…

[76] Since the filing of the *Habeas Corpus* applications on December 23, 2019, there has been movement toward the gradual reintegration of the Applicants to the pre-December 2 schedule. As noted, the rotational schedule, while incomplete, indicates increasing amounts of time outside of their cells.

[77] I reference again the decision in ***Cain v. Canada (Correctional Services), supra***. In the ***Cain*** case the issue of procedural irregularities had been strongly argued and were at the center of that application. The Court had the following to say:

> 47 Mr. Cain has raised procedural and due process concerns. Although the process followed by the Respondents might not be perfect, I find that overall on balance, Mr. Cain's segregation placement was handled in a manner that, in the circumstances of this case, was generally compliant with the Respondents' obligation at law, including ensuring due process and procedural fairness was appropriately afforded to Mr. Cain.
>
> (Emphasis added)

I adopt this analysis and rationale in the present case.

Conclusion

[78] I appreciate the frustration and concern expressed by the Applicants. However, the Applicants' roles, as determined at the disciplinary hearings relating to the December 2, 2019 incident, led to the CCU and segregation sanctions and placement on West 4 IDR and, regrettably, the rotation. Rather than 11.5 or 12 (or even six) hours per day outside of their cells, the Applicants on West 4 have endured days of restricted time including up to 23 hours per day due to safety and security concerns.

[79] This is obviously unfortunate and adversely affects the inmates. These effects have been extensively written about in learned journals and texts and each Applicant has spoken of his own personal situation. In the time since the filing of these *Habeas Corpus* applications there has been progress and in this regard a process has been started to return to the schedule that existed prior to December 2.

[80] I find the conduct of the CNSCF and the steps taken were appropriate and reasonable in the circumstances. I find the Applicants received proper disclosure of the facts and circumstances respecting placement in West 4 and on rotation. I find the investigations in relation to the December 2, 2019 incident and resulting sanctions which led to placement on West 4 on rotation to be justifiable. I find the Applicants were afforded due process. Their continued placement on the West 4 IDR unit on rotation is reasonable in these circumstances.

[81] The Applicants raised many concerns relating to CNSCF. However, my role is not to inquire into all areas/all aspects of the current functioning of CNSCF. My determinations today are solely in relation to the *Habeas Corpus* Applications of the Applicants who are before me and their circumstances on West 4 rotation or lockdown. Any other issues are for another day. While I have concerns about what I have heard concerning short staffing, lack of access to lawyers, sanitary conditions and prior lack of time out of cell, I am satisfied, in the particular circumstances before me, that the decision to place the Applicants on West 4 IDR on rotation/gradual reintegration was justified.

[82] I am encouraged by the progress described by Deputy Superintendent Ross and urge he and others at the Institution to move forward as soon as possible with the plans he described today whereby either today or Monday there will be more out-of-cell time. By way of wrapping up, I can only express the Court's sincere

hope that the rotational schedule will soon return to normal which, for all concerned, will be a positive move.

[83] For the above reasons I dismiss the *Habeas Corpus* Applications. I thank all for their attendance and I would also like to thank, Messrs. Lilly, Sek, Crawley and Cox for the well prepared, thorough and respectful way in which they presented their applications and made their submissions. Thank you to Mr. Norton for the efficiency in quickly addressing the matters before the Court.

[84] There will be no costs awarded. I ask that Mr. Norton prepare the orders.

Jamieson, J.