SUPREME COURT OF NOVA SCOTIA
Citation: *Jennings v. Nova Scotia (Attorney General)*, 2023 NSSC 148

Date: 20230511
Registry: Halifax
Docket: Hfx No. 523157

Between:

Jonathan Rex Jennings

Applicant

v.

Attorney General of Nova Scotia

Respondent

DECISION

Judge: The Honourable Justice Jamie Campbell

Heard: May 10, 2023, in Halifax, Nova Scotia

Counsel: Jonathan Jennings, self-represented Applicant
Caitlin Menczel, for the Respondent

By the Court (orally):

[1] Jonathan Rex Jennings filed an application for *habeas corpus* on April 24, 2023. In it he said that he was being detained illegally at the Central Nova Scotia Correctional Facility (Burnside).

[2] His complaint was that inmates do not have equal times out of their cells because some "take it upon themselves to delay locking up". He goes on to say the following;

> The anger and animosity among us detainees is exacerbated by the staff not fairly and consistently enforcing the rotations, and this is the BEST case scenario, and this happens for half of the time.

[3] Mr. Jennings goes on to say that this has been happening more and more so that only 4 cells are being opened at once for each rotation.

> People manipulate the rotations and stay out longer than allowed which in turn causes severe mental anguish.

[4] He says that his anxiety is "through the roof" because of the way he is treated.

> I'm not privvy to the inner workings of this place nor do I understand the politics of the upper-echelons and the policies they dictate, but I do feel that my rights are being infringed on.

[5] As a remedy Mr. Jennings asked for monetary compensation in an amount that would convey the message to those responsible that this should stop.

[6] During the Motion for Directions on April 27, 2023, I told Mr. Jennings that in my opinion, financial damages cannot be awarded in a *habeas corpus* application. They are about the recovery of a person's liberty or residual liberty and not about monetary compensation. Mr. Jennings was given more time to consider the nature of the remedy that he sought. He did not provide any information in advance of the hearing on May 10 about what remedy he was seeking.

[7] During the hearing of the application yesterday, Mr. Jennings fairly acknowledged that he really could not ask for compensation. For Mr. Jennings this was never about money. Asking for credit in sentencing would be a problem because he has not been found guilty of any offences for which he could be

sentenced. He is after all on remand waiting for his trial. He very politely expressed his genuine frustration while at the same time saying that he appreciated the work that was being done by the management of Correctional Services to try to cover for missing staff.

[8] Mr. Jennings just wants someone to do something.

Mr. Jennings Situation

[9] Mr. Jennings is on remand. Like many people in Burnside, he is in custody waiting for his trial to take place. He came into the facility on Christmas Day last year. Most recently he has lived in the North 3 Living Unit which is an open Protective Custody dayroom. Those in that unit have full privileges. There are 32 cells and 14 of those have the capacity to hold 2 people. The maximum capacity is 46 people and there are 46 people housed in the unit now.

[10] The unit is attached to an airing court and those in the unit have access to that airing court when they are out of their cells. At the time that Mr. Jennings filed his application he was not on any disciplinary sanctions and is not now subject to any sanctions. He was not subject to any rotation for disciplinary reasons. He was not subject to close confinement as that is defined in the Correctional Services Policy 43.00.

[11] From April 10 to April 27, 2023, the records obtained by viewing CCTV footage indicate that Mr. Jennings' time outside of his cell was above 2 hours each day except for April 19, when he was unlocked for only an hour and 10 minutes. From April 27 to May 8 Mr. Jennings' cell was unlocked for periods well in excess of 2 hours each day, except for April 30, when it was unlocked for an hour and 50 minutes. He was out every morning, every afternoon and about half of the evenings.

[12] The period of time out of his cell is not decreasing but has increased over the last month. Since April 27 the times are:

- April 27 – 3 hours, 54 minutes
- April 28 – 9 hours, 47 minutes
- April 29 – 4 hours, 13 minutes
- April 30 – 1 hour, 50 minutes

- May 1 – 4 hours, 46 minutes
- May 2 – 3 hours, 55 minutes
- May 3 – 7 hours, 57 minutes
- May 4 – 2 hours, 30 minutes
- May 5 – 9 hours, 54 minutes
- May 6 – 3 hours, 26 minutes
- May 7 – 10 hours, 25 minutes
- May 8 – 8 hours, 29 minutes

Those times include Mr. Jennings' court appearances and medical treatments.

[13] Deputy Superintendent Brad Ross filed an affidavit and gave evidence at the hearing. He said that rotations were put in place to make sure that individuals got an equal amount of time outside of their cells without compromising the safety and security of the unit. The rotations were required to deal with critical staff shortages.

Rotations

[14] Rotations or rotational lockdowns mean that some of the inmates in a unit are out of their cells while others remain locked in. When there are not enough staff to provide supervision, it is not safe to have everyone unlocked at the same time.

[15] Correctional Services Policy 43.00 deals with the use of administrative and disciplinary close confinement. Section 14 provides that inmates who are housed in a form of confinement but who have been provided with access to out of cell programs and privileges and can interact with other inmates for more than two hours each day are not in "close confinement". Mr. Jennings was not then in close confinement, except for April 19, 2023.

[16] Section 79 of the *Correctional Services Regulations*, N.S. Reg. 99/2006, provides authority for the implementation of rotational lockdowns. They have been held by the Supreme Court of Nova Scotia to be a necessary tool for prison administrators. The Court has noted that deference should be given to prison administration when rotations are used to maintain the safety and security of the institution. Those administrators are responsible for the safety and security of the

staff and of the inmates and they must have the latitude to act, as Justice Rosinski said, “quickly and decisively”. *Coaker v. Nova Scotia (Attorney General),* 2018 NSSC 291, para. 32.

[17] In *Pratt v. Nova Scotia (Attorney General),* 2018 NSSC 243, Justice Chipman found that the use of lockdowns for safety and security purposes can be lawful and reasonable and that a judge’s role is not to determine what decision they would have made in the circumstances. He noted that prison administrators must take into account many factors, including the safety and security of staff and inmates.

[18] That was confirmed in *Wallace v. Nova Scotia (Attorney General)*, 2021 NSSC 101, in which Justice Norton summarized the caselaw that confirms the authority of prison administrators to implement lockdowns. *Crawley v. Nova Scotia (Attorney General),* 2020 NSSC 221, *Alcorn v. Nova Scotia (Attorney General)*, 2020 NSSC 276, *Lambert v. Nova Scotia (Attorney General),* 2020 NSSC 282.

[19] Running a jail is a complicated undertaking. Safety and security are issues of primary concern. Everything that happens, it seems, can impact on multiple aspects of the operation. A security issue in one unit can mean that staff must be redeployed to another unit and the first unit has to be locked down. Some inmates cannot be placed in a unit with some others, but there is only one general population unit in the CNSCF. And inmates often do not want to be placed in protective custody because that can have implications for their ability to move back into the general population. The group with whom the administrators are dealing ranges from those who just want to do their time to those who are habitually and potentially violently disruptive. There are a lot of factors to juggle and one dropped ball can have dire consequences.

[20] Prison administrators cannot conjure resources out of thin air. If they attempt to move inmates around the province to other facilities, there are complications. The other facilities may not have room and there may also be issues with so called incompatibles.

[21] Judges therefore must exercise restraint in considering intervention.

Staffing Shortages

[22] Prison administrators must have the latitude to act quickly and decisively but they do not have the latitude to act capriciously or unreasonably. A rotational lockdown must be both reasonably justified and reasonably implemented.

[23] Deputy Superintendent Ross explained that staff shortages can happen for several reasons. Those in charge of running the facility really do not know until any given morning how many people they will have. When staff call in sick, they have to adjust for that. There can sometimes be as many as 40 video court appearances that require transport to the video booth in the facility. When someone is injured and requires hospital transport that takes staff away from the facility. Some inmates require additional escort because of their risk level. When security incidents happen, for example assaults within a unit, staff are required to go to that unit and are taken away from other units in the facility. All of that is happening in the context of a full complement of inmates and a limited complement of correctional staff.

[24] The management of the facility are trying to deal with that. Mangers, like Deputy Superintendent Ross, take on the roles that would normally be fulfilled by missing correctional officers. They do transports and deliver food trays. Deputy Superintendent Ross was called in to do a medical transport for an inmate to go to the hospital. He spent 13 hours at the Dartmouth General on April 30. That was the same day that Mr. Jennings was out of his cell for only one hour and 50 minutes.

[25] Deputy Superintendent Ross explained that efforts have been made to improve the recruitment and retention of staff. Training has been put in place to allow for staff to be accredited without affecting operations.

[26] When the lockdowns happen, inmates are not restricted from normal privileges. When outside of their cells, inmates can shower, use the telephone, watch television, go to the airing court or go to the canteen. They have less time in which to do it though.

[27] As for legal telephone calls the facility implemented a protocol during the pandemic that is still being used. Lawyers are able to contact the facility and list the inmates with whom they wish to speak. Staff arrange for those who are locked in to get to the telephones for those calls. Deputy Superintendent Ross said that when inmates ask to use the telephone to call their lawyers while they are locked down, others then claim that they need to call their lawyers as well and it can become unmanageable.

[28] One might well ask if a facility can be placed on lockdown just because there is a staff shortage. And it might be argued that government should be required to deal with those staff shortages so that those in provincial jails do not suffer from having a reduction in the time that they get to spend outside of their cells and do not have to deal with the stresses that Mr. Jennings has identified.

[29] This court has briefly addressed the issue of staff shortages in the context of a *habeas corpus* application. In *Clarke-McNeil v. Nova Scotia (Attorney General),* 2021 NSSC 266, Justice Rosinski considered the lawfulness of rotations and the denial of airing court time when the Burnside facility was dealing with staffing shortages as well as construction activity. He said that the responses by prison administration were justifiable, lawful and appropriately within the realm of a reasonable outcome given the circumstances.

[30] *Habeas corpus* is an ancient writ. Like many ancient things that still exist and serve vital roles, it has changed over time. It has been said that it did not "evolve".

> Judges made it, transforming a common device for moving people about in aid of judicial process into an instrument by which they supervised imprisonment orders made anywhere, by anyone, for any reason…
>
> The important force driving the writ was the idea at its foundation; the prerogative, those aspects of legal authority possessed only by the monarch. As a prerogative writ, *habeas corpus* expressed the king's concern to know the circumstances whenever one of his subjects was imprisoned. By taking the idea and language into their own hands, the justices made a writ of majestic, even equitable, sweep that made it possible to protect the king's subjects. Halliday, Paul, *Habeas Corpus*: From England to Empire. The Belknap Press of Harvard University Press, Cambridge Massachusetts, London England, 2010 at page 9.

[31] The references to the ancient writ as a "bulwark of liberty" or to it having that majestic sweep, might suggest that a judge hearing an application for *habeas corpus* has almost unlimited authority. But judges are also bound by law and our authority is circumscribed by law.

[32] *Habeas corpus* is no longer frequently, if ever, seen as a way to set free political prisons who are taken by the authorities and placed in a cell with no legal process, no reasons given and no date for a possible release. It is now usually used to deal with the rights of people who are incarcerated and claim to have suffered a deprivation of residual liberties. It is not intended as a review process for all

decisions made by correctional authorities or a way of reviewing government's resourcing of correctional services.

[33] The issue is whether, based on the staff and resources that the prison authorities have, the rotational lockdown was reasonably required and reasonably implemented. If a judge were to say that the rotational lockdowns must end, despite the shortage of staff, that would place the safety and security of the facility, the inmates and the staff at risk. I feel quite safe in saying that is not what Mr. Jennings wants.

[34] If a judge were to order that government retain more staff to work in correctional facilities or increase the budget for Correctional Services, it would raise questions on several levels. Staff could not be retained immediately. What kind of staff? Could people with less training be hired to do the job? How long should government be given to hire these people? How many are required? The money to pay for staff would have to come from somewhere and that would involve the allocation of government resources or their reallocation from elsewhere in the budget.

[35] Those are issues with which a court can, in some circumstances deal. Courts do make orders requiring governments to spend more money or hire more staff or change their policies. But those are not issues for *habeas corpus* applications in this summary form, involving the administration of a provincial jail.

[36] *Habeas corpus* is intended as a prompt remedy for a situation involving the liberty of a person. Liberty is always an urgent matter. *Habeas corpus* applications take priority over any other business of the court because they involve liberty interests. *Habeas corpus* is usually a summary procedure to deal with those issues promptly. It should not be allowed to become routinely a drawn-out process of complex litigation.

[37] Broader constitutional, political or policy issues can be addressed in the proper form. If a person claims that their constitutional rights have been infringed by what they claim to be the government's failure to adequately resource provincial jails, that would require substantial evidence and would have to be litigated in a way that is not summary in nature.

Conclusion

[38] The questions are whether the administration of CNSCF had the legal authority to implement a lockdown, whether that lockdown was a reasonable response to the shortage of staff given the resources at the disposal of the administration and whether lockdown was implemented in a way that was reasonable.

[39] The Nova Scotia Supreme Court has consistently held that jail administrators have the legal authority to implement lockdowns.

[40] A lockdown to respond to staffing shortages is a reasonable step. There are only a certain number of staff available. They must be deployed in a way that protects their safety and the safety of the inmates and the facility. Whether more staff should be hired or more resources provided to the CNSCF is not an issue for summary *habeas corpus* proceeding.

[41] The rotational lockdown was implemented in a way that was measured and aimed at preserving as many privileges as possible given the constraints that were being faced. Mr. Jennings and others in his circumstances were given as much time out of their cells as possible given the number of staff available to be deployed. Management of the facility stepped up to do some of that work to allow inmates to have time unlocked from their cells. Inmates like Mr. Jennings were not deprived of their other privileges.

[42] It is a very bad situation. Staffing issues appear to be endemic in many sectors of the economy since COVID-19 struck. Many businesses struggle to find enough people to work. They respond in different ways. Within a correctional facility there are limited ways to respond given the concerns about safety and security. Inmates have felt the impacts. But the administration of the CNSCF had the legal authority to implement a lockdown, and the lockdown was both reasonably required and reasonably implemented. And now, reasonable steps are being taken to address the staffing issues.

[43] The application for *habeas corpus* is denied.

Campbell, J.