SUPREME COURT OF NOVA SCOTIA
Citation: *Foeller v. Nova Scotia (Attorney General)*, 2023 NSSC 149

Date: 20230511
Registry: Halifax
Docket: Hfx No. 523296

Between:

Dakoda Foeller

Applicant

v.

Attorney General of Nova Scotia

Respondent

DECISION

Judge: The Honourable Justice Jamie Campbell

Heard: May 11, 2023, in Halifax, Nova Scotia

Counsel: Dakoda Foeller, self-represented Applicant
Andrew Hill, for the Respondent

By the Court (orally):

[1] Dakota Aulenback Foeller filed an application for *habeas corpus* on April 28, 2023. In it he claimed that he did not have reasonable access to a lawyer because the administration of the Central Nova Scotia Correctional Facility had denied him the right to call a lawyer. Mr. Foeller said today that he was not getting enough time out of his cell and not getting out of his cell at certain times when he was scheduled to speak with his lawyer.

[2] This is another *habeas corpus* application about the implications of the rotational lockdown at the CNSCF put in place to deal with staff shortages.

Mr. Foeller's Situation

[3] Mr. Foeller is being held in the North 2 Unit at Burnside. It is an open living unit for Protective Custody inmates. Those in that unit have full administrative privileges. Mr. Foeller was not subject to any disciplinary sanctions and was not subjected to close confinement as defined in Correctional Services Policy 43.00. During April and May 2023 North 4 has been subject to a rotational lockdown schedule rather than having a full unit unlock every day.

[4] The rotational schedule was implemented for some of the same reasons as set out in *Clarke-McNeil v. Nova Scotia (Attorney General)*, 2021 NSSC 266. In that case Mr. Clarke-McNeil said that he was not getting enough time out of his cell and could not get to the phones to make important phone calls related to his court appearances. The facility was dealing with both construction disruption and staffing issues.

[5] In that case Deputy Superintendent Ross testified that it had been difficult to recruit new staff. The qualifications and prerequisites for positions had been dropped in some respects to allow for a quicker turnaround and greater breadth of people who might be eligible to work as correctional officers. Training was also required. It had to be put in place before a person could take the job and those efforts had been affected by the pandemic. Justice Rosinski found that the institutional response was justifiable and lawful.

[6] Mr. Foeller's circumstances are virtually identical to those of Mr. Jennings in *Jennings v. Nova Scotia (Attorney General)*, 2023 NSSC 148. That decision was released this morning following Mr. Jennings' hearing yesterday. In that decision I held that rotational lockdowns were reasonably required to respond to the staffing

issues and were reasonably implemented to limit the adverse impacts to the inmates.

Lockdowns

[7] The Supreme Court of Nova Scotia has, in several cases, confirmed that rotational lockdowns are legally justified. Courts do not insert themselves into the administration of provincial jails by replacing the decisions of prison administrators with ones that judges prefer. Those who are responsible to run those facilities must be given latitude to respond to the circumstances that they face to preserve the safety and security of the institution.

[8] In this application Deputy Superintendent Ross once again gave evidence. He explained that it takes one control officer and 5 correctional officers to have a full unlock on unit. In other words, to have everyone out of their cells at the same time, there must be 6 officers. Normally, that would mean having cells unlocked from 7:30 am to noon, 1:30 pm until 6 pm and from 7 pm until 10 pm. But when staff are missing, it is not safe to have everyone out at the same time. So, only half of the inmates can be out. Sometimes fewer than half can be out if staffing levels are lower.

[9] The management of the facility cannot require staff to open the cells when they are understaffed. If they did they would face an Occupational Health and Safety complaint and potentially a work refusal. They have to manage with the resources they have. And lockdowns are a way to manage the facility while trying to provide time out of cells for inmates.

[10] The facility is short staffed. As Deputy Superintendent Ross said, being a correctional officer is a hard and perhaps rather undesirable job. It is, as he said, work in a negative and toxic environment. Those who do the job face verbal abuse and potentially violent assaults. Recruitment and retention are difficult. Staff absences are a chronic problem. The full complement of staff is about 50 and there have been days when they operated 20 short of the full complement. They cannot simply shut the facility. People have to be fed. They have to be transported. They have to be provided a safe environment in which to live.

Application of the Standard of Review

[11] The decision to implement a lockdown was based on staffing shortages. Those who operate the facilities can only do so with the resources that they have

been provided. Whether they should be provided with more resources is not an issue that can be addressed in the context of a *habeas corpus* application in its usual summary form. There may be constitutional, political or policy issues involved some of which may be justiciable, but that would not be through *habeas corpus* like this one.

[12] Mr. Foeller, others on North 4, and others within the Central Nova Scotia Correctional Facility have been affected by staffing issues. The amount of time that they spend outside of their cells has been reduced. But that reduction has been less than it was. The issue started with the Covid-19 pandemic and has continued. Staffing post-pandemic is an issue in many workplaces. But the amount of time that Mr. Foeller has had out of his cell from May 3 to May 8 has been an average of 7 hours and 39 minutes. During that time he was free to make use of the albeit limited facilities in the dayroom. He could interact with others, watch television, play videogames or use the telephone to call his lawyer. Deputy Superintendent Ross made it clear that when lawyer calls are scheduled every effort is made to accommodate them even for those who happen to be locked down at the time. I am not satisfied that the staff at the facility took any positive action to prevent Mr. Foeller from contacting a lawyer and gave him enough time out of his cell to be able to make those calls.

[13] Mr. Foeller wants to see much more by way of rehabilitative services. He notes that government should be spending more money on rehabilitating inmates because that would mean that eventually fewer jails would be required. That is an important public policy debate but it is not the proper subject matter for a *habeas corpus* application.

[14] The rotational lockdowns were implemented because there were not enough correctional officers to safely operate the facility in the normal way. The administration of the facility can only make efforts to hire and train more people. Whether they should be allocated more resources to do that is not an issue for this *habeas corpus*.

[15] A judge on a *habeas corpus* application would place safety and security at risk by ordering the end of the lockdown notwithstanding those staffing issues. Ordering that the government provide more resources to hire and train staff would involve the review of government policy and priorities which would not be appropriate particularly in the summary form of a *habeas corpus* application. The

court can only assess whether those responsible for the jail acted reasonably given the circumstances that they faced.

[16] The rotational lockdown was a reasonable response to the short staffing issue. It was the only way in which safety and security could be addressed with fewer people available to the work required.

[17] Mr. Foeller was not able to get out of his cell as much as he had done before. But a review of the CCTV footage shows that his cell was unlocked for an average of almost 7 and a half hours each day from April 24 to May 8. From May 3 to May 8 it was slightly more than 7 and a half hours. That is not a substantial infringement of liberty. There have been days that were significantly below that average, but some days were much more.

Conclusion

[18] The first issue for any *habeas corpus* application is whether there has been a deprivation of liberty. Mr. Hill for the Attorney General has noted that there have been multiple *habeas corpus* motions filed recently and argued that there should be some clarity provided about what constitutes a deprivation of liberty. It is a strain on resources to litigate each *habeas corpus* in succession when they are about the very same issue. I can only address the case before me. Mr. Foeller, despite getting a reasonable amount of time out of his cell is receiving less time out of his cell than inmates would receive in "normal circumstances" in the absence of a lockdown. There has, is this case, been a deprivation of liberty in that sense.

[19] The lockdown that was implemented was both reasonably required and reasonably implemented. The deprivation of liberty has been frustrating for Mr. Foeller and others, but it has been limited. This is not the proper forum to address policy issues like rehabilitation services or funding issues that relate to the governments resources of Correctional Services.

[20] For the same reasons set out in *Jennings*, the application for *habeas corpus* is denied.

Campbell, J.