

SUPREME COURT OF NOVA SCOTIA

Citation: *Pratt v. Nova Scotia (Attorney General)*, 2023 NSSC 159

Date: 20230523

Docket: Halifax, No. 521035

Registry: Halifax

Between:

Maurice Pratt

Applicant

v.

Attorney General of Nova Scotia Representing His Majesty
in the right of the Province of Nova Scotia

Respondent

DECISION

Judge: The Honourable Justice John A. Keith

Heard: February 17, 2023, in Halifax, Nova Scotia

Counsel: K. George Singh, for the Applicant
Adam Norton, for the Respondent

By the Court:

BRIEF SUMMARY OF FACTS AND CONCLUSION

[1] The Applicant, Maurice Pratt, was scheduled to stand trial in the Nova Scotia Supreme Court. On January 29, 2023, Mr. Pratt was transferred from an Ontario correctional facility to the Central Nova Scotia Correctional Facility ("CNSCF") to facilitate his attendance at trial.

[2] On February 1, 2023, certain CNSCF staff members expressed concern about Mr. Pratt and his history of violence. In response, a supervisor created a Behavioural Management Plan form for Mr. Pratt ("**BMP#1**"). A copy of BMP#1 is attached at Schedule "A" to this decision, as it is the focal point of this application.

[3] BMP#1 was for staff notification only. It provided a description of Mr. Pratt's history and directed staff to exercise caution and implement additional security measures when interacting with Mr. Pratt. Because BMP#1 did not restrict Mr. Pratt's privileges or residual liberties, Mr. Pratt was not made aware of it.

[4] CNSCF uses the same BMP form for at least two different purposes. Some times, as here, the BMP form is used to solely for the purpose of telling staff about specific security or safety protocols established for a particular inmate. It is not intended to affect the inmate's residual liberties in any way.

[5] Other times, the BMP form is used to correct negative behaviours identified in an inmate. In that instance, the inmate is given a copy of the BMP and becomes subject to discipline for non-compliance with the terms of the BMP.

[6] The BMP form does not specify which particular purpose is intended in any given circumstance. The reader might be able to deduce its purpose based on the content, but it is not made explicit.

[7] During the morning of February 6, 2023, Mr. Pratt became angered by an issue that arose just before being transported to the Law Courts for the beginning of his jury trial. He refused to move. A staff member told Mr. Pratt that he must attend at his upcoming trial and mistakenly added that Mr. Pratt was subject to BMP#1, which required him to be on "good behaviour". BMP#1 did not refer to an

expectation of "good behaviour". The staff member also did not appear to realize that BMP#1 was for staff notification only or that Mr. Pratt was unaware of it.

[8] Mr. Pratt did not know a BMP could be used solely as a means of communicating with staff. Mr. Pratt understandably but wrongly assumed that CNSCF unfairly put him at risk of being disciplined for failing to comply with a BMP he did not know existed. He became fixated on BMP#1.

[9] Mr. Pratt has a capacity for excessively angry, rigid and confrontational reactions (including violence or threats of violence) when faced with a situation he believes is unjust. That is how he responded to the news of BMP#1.

[10] Mr. Pratt was not to blame for the BMP confusion. However, his response was exceedingly angry and disproportionate in the circumstances.

[11] Immediately after Mr. Pratt left for court, a CNSCF officer cited him for two disciplinary level infractions related to this incident (disobeying an order and detrimental behaviour). The next day, February 7, 2023, an adjudicator found Mr. Pratt guilty and he confined Mr. Pratt to his cell for two days.

[12] Also on February 7, 2023, Mr. Pratt filed his Notice for *Habeas Corpus*. A hearing was subsequently scheduled for February 17, 2023.

[13] As of February 9, 2023, Mr. Pratt completed his punishment for the two disciplinary levels. However, he was immediately placed on a new BMP ("**BMP#2**"). BMP#2 relaxed the restrictions associated with his two disciplinary levels but still involved moderate restrictions on Mr. Pratt's residual liberties.

[14] On February 17, 2023, just prior to the hearing, any restrictions on Mr. Pratt's residual liberties were lifted and BMP#2 was terminated.

[15] At the hearing, I requested (and subsequently received) supplementary written submissions from counsel on the issues of mootness, identifying the form of residual liberty being restricted, and possible remedy.

[16] For reasons discussed below, the application is dismissed. In my view, Mr. Pratt's release from any restrictions rendered the matter moot and I decline to exercise the residual discretion to grant other ancillary remedies beyond release.

[17] That said, one issue merits further comment in *obiter*. This proceeding originates with BMP#1 and was complicated by the cascading effects of BMP#1. In

my view, the practise of using a BMP form for the alternate purpose of staff notification only is flawed. If the BMP form is used for staff notification only (i.e. the inmate is unaware of it), the form should explicitly clarify that:

- (a) the purpose is for staff communication only and it is not intended to restrict the inmate's residual liberties;
- (b) the inmate is not aware of the BMP; and
- (c) the BMP neither imposes new behavioural expectations upon the inmate nor puts the inmate under any additional risk of discipline.

FACTS

[18] As indicated, Mr. Pratt arrived at CNSCF on January 29, 2023 to facilitate his attendance at a jury trial scheduled to begin a few days later. He was originally assigned to an area reserved for newly admitted inmates pending medical clearance. On February 1, 2023, Mr. Pratte was transferred to a general population unit in CNSCF called "West 1" on February 1, 2023.

[19] Immediately upon being transferred to the general population unit, a CNSCF staff member completed an "Occurrence Reporting Form" expressing concerns around Mr. Pratt's history of violence against staff and other inmates. That staff member asked that a Behavioural Management Plan "be created and communicated to staff regarding inmate and violent history."

[20] A few hours after that, at about 11:00 p.m. on February 1, 2023, a CNSCF supervisor determined that the staff member's concerns were legitimate. He created a Behavioural Management Plan ("BMP#1") for Mr. Pratt (Schedule "A" to this decision). He also completed a "corrective action" form acknowledging that staff was not made aware of Mr. Pratt's prior history and that a "BMP was created and sent to Justice HFX to communicate previous history to current correctional services staff".

[21] BMP#1 began with a reference to Mr. Pratt's "proven capability of violence which presents a significant risk to the correctional facility..." It also described Mr. Pratt's history with weapons and described him as "unpredictable" and capable of exhibiting an "explosive temper while incarcerated". At the same time, BMP#1 confirmed that Mr. Pratt was not under any sanctions and that "provided Inmate PRATT is not serving disciplinary sanctions, he will be provided regular privileges as provided to an inmate on any other unit."

[22] The primary purpose of BMP#1 was to direct staff to exercise caution when dealing with Mr. Pratt and implement additional security measures (e.g. additional staff) when interacting with Mr. Pratt, most notably the presence of two officers when interacting with and/or escorting Mr. Pratt. In an affidavit filed with the court, Rachel Critchley, Deputy Superintendent as CNSCF, explained that "Mr. Pratt was not provided with a copy of this BMP as this was designated as a staffing notification concerning safety and security, and it did not infringe upon [Mr. Pratt's] residual liberties." (paragraph 19) At the *habeas corpus* hearing, Deputy Superintendent Critchley testified that the same supervisor who created the BMP#1 at 11:00 p.m. on February 2, 2023 also designated it for staff notification only.

[23] It is not entirely clear how a BMP#1 becomes "designated" for this particular purpose or what factors bear upon (or were applied during) the designation process. During oral testimony, Deputy Superintendent Critchley clarified that designating a BMP for staff notification purposes occurs somewhat informally.

[24] Perhaps more importantly for present purposes, there is nothing on the BMP form itself to confirm that the BMP was designated for staff notification only. The reason such clarity would be useful is because CNSCF uses the same BMP form and process for different reasons and functions. For example:

1. Sometimes, the BMP is develop expectations and outcomes to correct negative behaviours attributed to a particular inmate. It appears, based on Deputy Superintendent Critchley's affidavit, that this type of BMP is sometimes called "BMP(SMP)". The SMP acronym stands for "Security and Sentence Management Plan". A "BMP(SMP)" is developed through a somewhat elaborate process in which input is sought from a number of individuals. At paragraphs 44 and 45 of Deputy Superintendent Critchley's affidavit, she explains:

44. A Behaviour Management Plan (SMP) is created in collaboration with the senior management team, Assistant Deputy Superintendents of Operations (ADSO'S), captains, Security Risk Management Officer's (SRO's), and social workers. In most circumstances it is a collaborative approach and/or a standalone decision depending on the situation and the status of the inmate. Various factors are considered when developing and placing an inmate on an SMP.

45. A BMP is implemented to mitigate risk, to assist in maintaining the safety and security of staff".

An inmate who is placed on a BMP (SMP) may be disciplined or held accountable for failing to comply with the identified expectations or achieve the intended outcomes. Because the inmate faces additional disciplinary risk, a copy must obviously be immediately provided to the inmate;

2. Other times, like here, the sole purpose of the BMP is to communicate internally with staff. The inmate is not made aware of the BMP in this circumstance because it does not affect the inmate's existing liberties, identify new behavioural expectations for the inmate, or put the inmate at additional risk of discipline.

[25] On February 6, 2023, Mr. Pratt was in the dayroom and about to be escorted from the CNSCF to court for his trial. There was an incident at CNSCF earlier that morning which forced the institution to remain locked down until 7:30 a.m. This delayed normal routines and meant that Mr. Pratt was denied time for a morning shower before having to leave the institution for his jury trial.

[26] Mr. Pratt was upset and refused to leave for court as directed. He insisted on being given time for a shower. Staff apologized and explained that there was no time in advance of his upcoming jury trial. Mr. Pratt demanded time for a shower and refused to leave without it.

[27] A staff member attempted to secure Mr. Pratt's cooperation by telling him that he was "subject to a behavioural management plan". The staff member further told Mr. Pratt that this behavioural management plan "stated that he was to be on good behaviour." The staff member clearly did not realize that Mr. Pratt was not given notice of BMP#1 and that its existence would come as news to him. In addition, and even though there is generally nothing particularly controversial or offensive about the notion that Mr. Pratt be on "good behaviour", the staff member mistakenly suggested that this obligation was expressly confirmed in BMP#1. There is nothing in BMP#1 that speaks to an obligation to be on "good behaviour". Rather, BMP#1 established additional safety and security protocols which impinged upon staff only. In so far as Mr. Pratt was concerned, BMP#1 stated that his privileges remained intact and that he was otherwise to be treated as any other inmate.

[28] Mr. Pratt was caught off-guard. He was understandably surprised to be accused of failing to comply with the terms of a BMP he did not know existed. And he was sensitive to any disciplinary implications. Mr. Pratt demanded a copy of BMP#1.

[29] At the same time, CNSCF staff were appropriately focussed on transporting Mr. Pratt to court in time for the start of the impending jury trial. CNSCF attempted to de-escalate the controversy by offering to provide Mr. Pratt with a copy of BMP#1 upon his return from trial. Mr. Pratt was not satisfied.

[30] Despite his obligation to attend the upcoming trial, he said that he was "not fucking going" unless and until they gave him a copy of BMP#1. He then began shouting obscenities and insults at staff. He threatened to fight any staff member who attempted to move him. It took 20 minutes for staff to finally place Mr. Pratt in a van for transport to court so that he might make the commencement of his jury trial on time.

[31] Mr. Pratt's actions on the morning of February 6, 2023, led staff to cite him for the following two infractions:

1. Level 3, Section N for disobeying any lawful order given by an employee; and
2. Level 3, Section O for detrimental behaviour.

[32] In February 7, 2023, Wayne Horner, a CNSCF adjudicator, found Mr. Pratt guilty of these infractions *in absentia*. The form confirming this decision indicated that Mr. Pratt's absence was due to "safety/security reasons" but no explanation was given. Deputy Superintendent Critchley's affidavit elaborated that "It was determined by the adjudicator that Mr. Pratt's adjudicative level would be determined *in absentia*, with Mr. Pratt not being present [presumably because of his court commitments] and due to COVID-19 protocols." (paragraph 24)

[33] Mr. Horner imposed a penalty which confined Mr. Pratt to his cell for two days together with a related loss of privileges (the "**Disciplinary Sanctions**").

[34] Mr. Pratt's Disciplinary Sanctions ended on February 9, 2023.

[35] The next day, February 10, 2023, Mr. Pratt was served with:

1. A new BMP ("BMP #2") confirming certain continuing restrictions on Mr. Pratt's residual liberties; and
2. A corresponding "letter of expectation" written by Deputy Superintendent Critchley.

[36] BMP#2 contained essentially the same directions to staff as in BMP#1 in terms of interacting with Mr. Pratt. However, it is added restrictions on Mr. Pratt's

residual liberties. For example, Mr. Pratt now was given a maximum of four hours outside his cell with peers daily. In her February 10, 2023, letter of expectation, Deputy Superintendent Critchley provided a detailed explanation:

When placed on your BMP, you will be provided access to the dayroom for a minimum of two hours daily. During this time out you will have access to exercise equipment, showers, phones, television, games including video games as well as a minimum of ½ hour in the airing court. You will have access to these amenities daily with at least one other peer for socialization whenever possible. Based on your history of detrimental behaviour (06 February 2023) and Disobeying a Direct Order (06 February 2023), you will remain on a 4-hour rotation at this time. This is due to your heightened level of security and risk. This will be reassessed daily at the same time your behaviour is reviewed.

While on the BMP, your behaviour will be documented for staff's reference. It is hoped that you will be able to be transitioned and reintegrated with your peers and removed off the BMP once you have demonstrated compliance with facility rules and expectations.

[37] As mentioned, Deputy Superintendent Critchley justified BMP#2 by citing the events of February 6, 2023, specifically. She referred to Mr. Pratt's "detrimental behaviour" and disobedience on that day. She further stated:

Due to your interactions with staff, your behaviour displayed while on the unit and while being escorted to Admitting for court, your behaviour has escalated to the point it is no longer manageable without hour limitations implemented on your BMP. As a result of your Adjudication hearing, you received a combination of four (04) days confinement to be served in your dayroom.

[38] In her affidavit filed in response to this application for *habeas corpus*, Deputy Superintendent Critchley repeated these same concerns but added that: "Alternative arrangements were considered, but it was determined that the BMP was the least restrictive option afforded to us." (paragraph 42)

[39] BMP#2 stated that, among other things:

1. A review of his "rotational hours" was planned for February 13, 2023;
2. BMP#2 was otherwise stated to be for seven days or until February 17, 2023. At that time, it was to be "updated after review of Mr. Pratt's behaviour with his peers and correctional staff."

[40] On February 13, 2023, "The staff met and determined that Mr. Pratt's four (4) hour maximum time out of cells restriction would continue" (Deputy Superintendent Critchley's affidavit, paragraph 42).

[41] On February 17, 2023, just before the *habeas corpus* hearing was scheduled to begin, CNSCF staff determined that Mr. Pratt's behaviour improved to the point that BMP#2 was terminated. Thus, at the time of the hearing, there were no restrictions on Mr. Pratt's residual liberties.

DECISION

Mootness and the Court's Residual Discretion

[42] All parties agree that Mr. Pratt was released from any restrictions on his residual liberty before the hearing. Strictly speaking, the remedy for *habeas corpus* is limited to release. Mr. Pratt has already been released as at the time of the hearing. From that perspective, the primary remedial scope of *habeas corpus* is exhausted.

[43] However, a discretion remains. In exceptional cases, the court retains the jurisdiction and residual discretion to adjudicate upon questions of law and grant ancillary relief. Thus, generally speaking, the court may "decide, in the exercise of their discretion, that it is nevertheless in the interest of justice that the appeal be heard". (*Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62, at paragraph 17)

[44] In *C.S.J.L.M. v. Nova Scotia (Community Services)*, 2019 NSCA 59, Chief Justice Wood reviewed the Supreme Court of Canada's seminal decision *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, and offered the following distillation of the rationale behind this residual discretion. He wrote at paragraph 10:

... when considering its discretion to decide a matter which is moot, a court should consider the rationales behind the doctrine of mootness which are:

1. Necessity for an adversarial context which is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome.
2. The importance of conserving scarce judicial resources and considering whether the circumstances of the dispute justify applying those resources to its resolution.

3. Sensitivity to the courts' adjudicative role and ensuring that it will not intrude into the role of the legislative branch by pronouncing judgments in the absence of a dispute affecting the rights of litigants.

[45] There are other, more specific factors which may bear upon the analysis. For example, with respect to the second rationale (judicial economy), Chief Justice Wood reinforced the need for restraint before engaging the residual discretion, in *Nova Scotia (Community Services) v. Nova Scotia (Attorney General)*, 2017 NSCA 73, at paragraph 67:

The lack of an adversarial context informs the second rationale. The courts are full of live controversies, with real issues impacting upon the lives of real litigants. It is hardly a secret that the administration of justice is often criticized for backlogs and delay. Before adding a time consuming constitutional reference to the docket, it is "preferable to wait and determine the point in a genuine adversarial context".

[46] Furthermore, when considering whether to exercise the residual discretion in the specific context of an application for *habeas corpus* involving inmates, the Court assesses the need for judicial intervention having regard to:

1. The severity of the alleged restrictions on residual liberties; and
2. The broader implications including the prospect that serious identifiable problems including breach of procedural fairness might continue without any meaningful opportunity for judicial intervention.

[47] Thus, in *Wilcox v. Alberta*, 2020 ABCA 104, the Alberta Court of Appeal was dealing with the issue of solitary confinement. Greckol, J.A. wrote at paragraph 27:

We conclude that despite its mootness, this appeal should be decided. The gathering evidence and judicial consideration of placement in solitary confinement confirm that the issues raised in this appeal are of sufficient importance that they ought to be decided. The rationale articulated in *Khela* for deciding that case applies: the placement of prisoners directly into solitary confinement at the ERC is a circumstance that can arise time and again, yet be beyond the reach of appellate review because the challenge to the placement never reaches appeal as a live issue. The law needs to be clarified in the instant case.

[48] Similarly, in *Pratt v. Nova Scotia (Attorney General)*, 2020 NSCA 39 ("Pratt"), the Nova Scotia Court of Appeal said at paragraph 8:

The issues raised are important. They are subject to repetition yet evasive of review because individual circumstances in prisons can quickly change before appellate review of the challenged decision. These issues have a broader application.

Furthermore, the respondents raised no objection to this Court hearing Mr. Pratt's appeal. Having reviewed the principles in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.), I am satisfied this Court should hear Mr. Pratt's appeal regardless of the mootness of his original release remedy.

[49] See, also, *Adams v. Nova Institution*, 2021 NSSC 313 regarding the use of dry cells to retrieve contraband suspected to be secreted in a female inmate's vagina.

The Parties' Positions

Mr. Pratt

[50] Mr. Pratt's application focusses initially and primarily on BMP#1. He contends that the manner in which he became subject to BMP#1 is a live controversy and creates a continuing adversarial context with connections to the past, the present and the future. More specifically, Mr. Pratt says that BMP#1 exposes an ongoing threat to his residual liberties and is fundamentally unfair. More specifically, he maintains that:

1. His past actions are being unfairly exploited in a manner that Mr. Pratt describes as provocative and retaliatory. He says that he was last in CNSCF 3 ½ years ago and yet his experiences from that time are being used to improperly haunt him and unlawfully expose him to disciplinary sanctions;
2. As to the present, Mr. Pratt says that unilaterally creating BMP#1 without his knowledge was illegal and unlawfully restricted his residual liberties in at least four ways:
 - (a) It restricted "his ability to make clear and sound decision [*sic.*] due to the fact that he does not know what sanctions are already imposed on him." (Applicant's written submissions dated February 23, 2023, at paragraph 16);
 - (b) Not being advised of BMP#1 and then facing disciplinary consequences because he reacted to it with justifiable alarm was especially prejudicial in the circumstances because it occurred while his jury trial was ongoing. He contends that he was "denied access to a lawyer in the middle of a jury trial, along with the mental distraction created which disrupted [his] concentration and ability to focus due to the BMP/SMP status he was on" (Applicant's written submissions dated February 23, 2023, at paragraph 11);

- (c) BMP#1 instructed that additional staff be used when interacting with Mr. Pratt. Mr. Pratt suggests that he might not be able to move if those additional staff members were not available whenever Mr. Pratt wanted to move. (Applicant's written submissions dated February 23, 2023, at paragraph 18); and
 - (d) Mr. Pratt did receive disciplinary sanctions related to BMP#1. Mr. Pratt's being told about BMP#1 on February 6, 2023 set into motion a number of cascading events which began with the disciplinary levels and related sanctions imposed by the adjudicator and then, after these sanctions were concluded, continued with BMP#2. He says that all of these collateral consequences were part of a cumulative and unlawful restriction of his residual liberty because they arose out of, and were contaminated by, the serious problems associated with BMP#1.
3. In the future, BMP#1 will unjustly cast a shadow over him. He asserts that "There are the residual effects of the BMP/SMP that continue to affect Mr. Pratt going forward." (Applicant's written submissions dated February 23, 2023, paragraph 2);

[51] As to concerns around judicial economy, Mr. Pratt further says that, absent judicial intervention, the Respondent would be effectively rendered immune from being subject to meaningful accountability for unlawful actions regarding its use of the BMP process. He insists that addressing these issues now also serves the interest of judicial economy because it would "avoid having the issue return time and time again without a remedy that could prevent the issue from returning" (Applicant's written submissions dated February 23, 2023, at paragraph 13).

[52] Finally, as a sub-issue of the BMP process and setting aside BMP#1, Mr. Pratt contends that there was a separate problem of procedural fairness related to the disciplinary sanctions imposed by the adjudicator because the decision was made *in absentia*. Mr. Pratt appears to argue that this issue, by itself, renders those sanctions an unlawful restriction of his residual liberties and, despite having served the punishment imposed, engages the court's residual discretion.

The Attorney General (Nova Scotia)

[53] The Respondent Attorney General (Nova Scotia) states that there were clearly no residual restrictions being imposed upon Mr. Pratt at the time of the hearing. Because the remedy available through *habeas corpus* is release from any unlawful restrictions on liberty and because no such unlawful restrictions existed as at the time

of the hearing, nothing can be achieved through *habeas corpus*. The remedial scope of that legal doctrine is spent and the matter is, technically speaking, moot.

[54] Moreover, there is no basis to engage the court's residual discretion. In particular, the factors that might engage the court's residual discretion are not present. The Attorney General (Nova Scotia) says that there is no ongoing adversarial context. Among other things:

1. There is no legal or factual basis upon which the court might conclude that any of the concerns raised by Mr. Pratt in respect of BMP#1 or the disciplinary levels imposed upon Mr. Pratt following the events of February 6, 2023, or BMP#2 create a legitimate dispute;
2. There is no lingering controversy or, at best, it is dormant and certainly not live. With respect to Mr. Pratt's prior disciplinary history or prior BMP, the Respondent states that "[t]he actual use of that information was not clear and there is no evidence before the court that previously expired BMPs are used in the facility to generate any future BMPs or other security classifications" (Respondent's written submissions dated February 22, 2023 at page 5). The notion that this case (or prior disciplinary issues) will have any ongoing impact upon Mr. Pratt is a matter of complete speculation and, in any event, would only be engaged if there is an intervening, future dispute regarding Mr. Pratt's behaviour. In other words, there is no current, proper factual matrix which might spark a live dispute and engage the court's residual discretion.

[55] Exercising the court's residual discretion will not engage the interests of judicial economy because:

- (a) Again, there is no evidence before this court that previous BMPs are used in to create future BMPs (Respondent's written submissions dated February 22, 2023, at page 6);
- (b) BMP#1 was solely intended for the purpose of internal communication and had no impact on Mr. Pratt's residual liberty in any event. There is no helpful precedent that would engage the needs of judicial economy. Moreover, BMPs are specifically tailored to meet the specific, unique needs of a particular inmate, judicial economy would only be served if a BMP is actually in place at the time of the hearing. Again, the factual context required to engage the residual discretion does not exist; and

- (c) The matter is not of significant public importance, bearing in mind that:
 - (i) BMP#1 did not affect Mr. Pratt's residual liberty in any event;
 - (ii) The disciplinary sanctions imposed, and the subsequent creation of BMP#2, were justifiable responses to his conduct on February 6, 2023 and made in accordance with CNSCF policies.

DECISION

BMP#1

[56] In my view, BMP#1 did not unlawfully deprive Mr. Pratt's residual liberties and, as such, the doctrine of *habeas corpus* is not engaged.

[57] *Habeas corpus* is an ancient and vital doctrine historically reserved for situations involving unlawful physical restraint. In the prison setting, where an inmate's liberty is already restricted, there must be a substantial change in conditions amounting to a further deprivation beyond the mere fact of imprisonment. (*Dumas v. Centre de detention Leclerc de Laval*, [1986] 2 S.C.R. 459, at page 464) The doctrine is acutely sensitive to serious incremental deprivations such as close (or solitary) confinement or a security reclassification resulting in an inmate being transferred to a maximum-security penitentiary (see, for example, *Pratt v. Nova Scotia*, 2020 NSCA 39 and *Springhill Institution v. Richards*, 2015 NSCA 40).

[58] In *Brewer v. Her Majesty the Queen*, 2020 NSSC 308, Campbell, J. acknowledged the possibility that "[t]he denial of the most basic services or the necessities of life as opposed to loss of privileges may rise or descend to become issues of liberty and attract *habeas corpus* scrutiny" (at paragraph 33). However, that broader understanding is still underpinned with some serious physical restraint. Obviously, if a person is being denied the necessities of life, their ability to move freely would be profoundly affected.

[59] That said, *habeas corpus* does not protect every possible expression of "freedom" in the human experience. Insignificant or trivial infringements do not qualify for *habeas corpus* or justify urgent judicial intervention. The courts have repeatedly attempted to establish reasonable boundaries to avoid the doctrine of *habeas corpus* clogging the court's docket (and displacing other matters) or otherwise damaging the proper administration of justice with insignificant complaints (see *R. v. Miller*, [1985] 2 S.C.R. 613 at paragraph 36; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, at paragraph 57; *Haug v. Warden of Dorchester*

Institution et al., 2020 NBCA 32, at paragraph 22; *Brewer v. Her Majesty the Queen*, 2020 NSSC 308, at paragraph 32; *R. v. Latham*, 2018 ABCA 308, at paragraph 7; *Larente v. Bonnefogel*, 2018 ABQB 82, at paragraph 15; *Lee v. Canada (Attorney General)*, 2018 ABQB 40, at paragraph 211; and *Ewanchuk v. Canada (Attorney General)*, 2017 ABQB 237, at paragraph 51).

[60] Finally, and because the requisite unlawful deprivation of liberty must necessarily be serious (and not insignificant), applications for *habeas corpus* automatically qualify as urgent and jump to the front of the line. Nova Scotia Civil Procedure Rule 7.13(1) states: "*Habeas corpus* takes priority over all other business of the court."

[61] As a preliminary comment, Behavioural Management Plans are permitted under section 79 of the *Correctional Services Regulations*, N.S. Reg 99/2006.

[62] In this case, BMP#1 did not cause Mr. Pratt to be restrained or subject him to additional, unlawful physical constraints which might engage the doctrine of *habeas corpus*. Respectfully, Mr. Pratt's arguments fail to address this basic fact. For example:

1. The mental distress that Mr. Pratt alleges he suffered upon learning about BMP#1 does not fall within the scope of protected liberty under the doctrine of *habeas corpus*.
2. The allegation that the staffing requirements mandated under BMP#1 necessarily created at least the risk of restricting Mr. Pratt's liberty is hypothetical, speculative and, in any event, does not accord with the evidence. There is no evidence that Mr. Pratt even noticed any changes to staffing prior to February 6, 2023, when he was actually told about BMP#1; and
3. The fact that BMP#1 was created immediately upon Mr. Pratt being transferred to CNSCF even though he had not actually been at this institution for about 3 ½ years does not mean that it was an unlawful deprivation of his residual liberties. Again, it is necessary to look at the effect of BMP#1 on Mr. Pratt's residual liberty.

[63] In sum, BMP#1 did not restrict Mr. Pratt's residual liberties and is not the proper subject matter for a *habeas corpus* application. This conclusion represents a complete answer to Mr. Pratt's concerns regarding BMP#1.

[64] That said, I am compelled to observe that the decision to use the same BMP form for distinctly different purposes is problematic. A BMP might be created for

"staff notification" only and yet be misunderstood as placing the inmate under a heightened risk of discipline. Equally, an inmate upon learning a BMP has been put in place may not understand that it was for "staff notification" only - particularly where it is used by staff as a tool to demand compliance with a command. That is what happened here.

[65] The staff member who revealed the existence of BMP#1 to Mr. Pratt clearly did not realize that the BMP#1 had been designated for staff notification only, and that Mr. Pratt had no knowledge of it. This person also erred when suggesting to Mr. Pratt that BMP#1 required him to be on "good behaviour". BMP#1 neither referred to nor imposed any particular behavioural expectations for Mr. Pratt.

[66] In *obiter*, if CNSCF finds it necessary to use the BMP form as a method of staff notification only (i.e. without directly engaging the inmate or making the inmate aware of the BMP), the form should explicitly clarify:

- (a) its intended purpose;
- (b) that the inmate is not aware of the BMP; and
- (c) that the BMP neither imposes new behavioural expectations upon the inmate nor puts the inmate under any additional risk of discipline.

Disciplinary Sanctions and BMP#2

[67] This proceeding also raises the following additional concerns:

- (a) The Disciplinary Sanctions imposed by the adjudicator *in absentia*; and
- (b) CNSCF's decision to immediately place on a new BMP (BMP#2) after completing the two days' confinement in his cell. BMP#2 included limited access to equipment, showers, phones, television, games including video games, and, as well, the airing court. It also required him to remain on a four hour-rotation.

[68] Prior to the hearing, Mr. Pratt was released from both the Disciplinary Sanctions and BMP#2. Strictly speaking, that basic fact rendered Mr. Pratt's application moot because the primary remedy for *habeas corpus* is release from any unlawful deprivation of liberty. From that perspective and because Mr. Pratt was already released from any restrictions at the time of the hearing, the remedial scope of *habeas corpus* was exhausted.

[69] The analysis shifts to whether the court should exercise its residual discretion to grant ancillary relief in exceptional cases where the remedy of release is no longer applicable. (see paragraphs 42 – 48 above)

[70] I am not prepared to engage the court's residual discretion in this case.

[71] With respect to the Disciplinary Sanctions, I find that Mr. Pratt not has raised a legitimate ground to question the legality of any alleged deprivation of his residual liberties or demonstrated the necessary adversarial context.

[72] Mr. Pratt lost perspective on the morning of February 6, 2023, and succumbed to excessively aggressive and confrontational impulses. The adjudicator's decision to confine Mr. Pratt to his cell for two days was reasonable, intelligible and appropriate in the circumstances (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65). I note the following:

1. The entire sequence of events began because Mr. Pratt refused to accept that an institution-wide lockdown delayed normal routines, leading him to refuse to leave before having a shower before court. Respectfully, Mr. Pratt's demands were not justified in light of CNSCF's operational constraints and his pending jury trial; and
2. The standoff escalated when a prison officer attempted to secure Mr. Pratt's compliance by mistakenly saying that BMP#1 required that Mr. Pratt be "on good behaviour". On the one hand, BMP#1 did not contain a direction that Mr. Pratt be "on good behaviour". On the other hand, there is nothing overtly offensive about a request to be "on good behaviour" in the circumstances. In any event, Mr. Pratt reacted with disproportionate rage. He insulted staff and threatened to fight anyone who tried to move him. He was not satisfied by an offer to deliver a copy of the BMP immediately upon his return from court. Mr. Pratt explains that he has learned to mistrust the "power imbalance" (his words) between prisoners and prison staff and that he merely fights against injustice. Mr. Pratt also insists that any violent behaviour is simply answering "in kind", meaning that he only uses force when confronted with force. Respectfully, in my view, Mr. Pratt was not reacting "in kind". While prison staff misunderstood the purpose of the BMP, they were right to prioritize Mr. Pratt's timely appearance at his jury trial. They also offered a reasonable resolution. Mr. Pratt's reaction, including threats of violence, were unnecessarily hostile and intransigent.

[73] As to allegations of procedural unfairness, Mr. Pratt was immediately provided with a copy of the adjudicator's decision but he points out that the Disciplinary Sanctions were made *in absentia*. However, the adjudicator's decision expressly acknowledges this fact and provides the explanation that it was necessary based on existing COVID-19 protocols which applied to the prison generally. They did not target Mr. Pratt specifically. I have uncontroverted evidence confirming the basis for the adjudicator deciding the matter *in absentia*. I have neither the evidentiary basis nor the expertise to reject this evidence or otherwise critique existing public health protocols. The decision of *Seyforth v. Nova Scotia (Attorney General)*, 2022 NSSC 234, also speaks to this issue.

[74] With respect to BMP#2, it again originated in concerns surrounding Mr. Pratt's behaviours during the morning of February 6, 2023. However, the impact on Mr. Pratt's daily living was relaxed when compared to the Disciplinary Sanctions. BMP#2 allowed for at least two hours per day in the day room during which time Mr. Pratt would have access to various related privileges including television and video games. He was also required to remain on a four-hour rotation. It also included periodic review and it was eventually terminated on February 17, 2023.

[75] In my view, there is no appropriate adversarial context. Many of the restrictions contained in BMP#2 involve various privileges which do not constitute deprivations of residual liberties sufficiently serious to engage the doctrine of *habeas corpus*. I refer specifically to time limits on Mr. Pratt's access to the day room and such things as television or video games.

[76] To the extent BMP#2 does involve any deprivation of residual liberty, I am satisfied that it is not unlawful. As indicated, above, Behavioural Management Plans are permitted under the Regulations.

[77] In addition, BMP#2 was implemented in response to the events of February 6, 2023, but it was not simply an extension of existing Disciplinary Sanctions. Both BMP#2 and the attached letter of expectations clarify that the point is not discipline. Rather BMP#2 was a moderated and measured response to identified concerns so as to promote better behaviour and ensure institutional safety. They also provide a clear path forward towards having BMP#2 lifted altogether in terms of articulating explanations and scheduling regular reviews. The underlying reasoning is intelligible and logical.

[78] There are no identified procedural concerns with BMP#2. Mr. Pratt was immediately provided with a copy of the document.

[79] Finally, and with respect to both the Disciplinary Sanctions and BMP#2, the interests of judicial economy are not served by exercising the court's residual discretion in the circumstances of this case. The administration of justice demands that scarce judicial resources be properly allocated. I am not satisfied that this goal is achieved through the exercise of the court's residual discretion in this case.

[80] The origins of this dispute are located in a misunderstanding as to the content and purpose of BPM#1 – a problem made worse by Mr. Pratt's exceedingly suspicious, angry and unyielding reaction. The facts are unique and the confusion which arose is transient in nature. I commented on any lingering concerns in paragraph 64 above. Beyond that, there is no additional issue including, for example, procedural unfairness that is prone to repetitive abuse or otherwise justifies further judicial intervention.

Keith J.



Central Nova Scotia Correctional Facility

Behavior Management Plan

TO: All Staff

FROM: West Management Team

DATE ISSUED: 01 February 2023

SUBJECT: DOWNEY AKA PRATT, MAURICE EDWARD, [REDACTED]

Past offence history and facility behavior demonstrates a proven capability of violence which presents a significant risk to the correctional facility, or in the event of an escape, the community at large.

Staff must document any negative interactions with this Inmate in his facility case notes or via information reports. Inmate PRATT has a history of assaulting officers and other offenders, use caution.

The security precautions detailed in this BMP are the minimum security practices that must be followed. If at any time an officer senses a situation justifies increased security precautions, consult with shift captain.

ISA Score: 10 (Medium)

Sanctions: - Inmate is not currently serving disciplinary sanctions.

Staffing:

- A minimum of two (2) officers must always be present when interacting with this inmate and/or escorting this inmate.

- Rounds to be completed by the unit officer as normal. If the officer must enter the cell, there must be a minimum of two (2) officers present prior to the cell door being unlocked.

Housing: To be housed in West 1, until senior management determines otherwise.

- To be secured in his assigned cell during all facility lock down periods.
- Cell door and meal slot is to be secured when not in use.
- Inmate can have in his cell only items that are allowed in the cell. This is based on the inmate being free of sanctions and behavior.

Privileges: - Provided Inmate PRATT is not serving disciplinary sanctions, he will be provided regular privileges as provided to an inmate on any other unit.

Officer Precautions:

- History of staff assaults/ assault on inmates/ threatening staff; all officers must treat this inmate in a more heightened security measure.
- Inmate is unpredictable and has exhibited an explosive temper while incarcerated.
Inmate PRATT has a history of possessing edged weapons, use extra caution doing escorts/ pat searches.

***** Any revisions to this plan must be approved by the SRM and Senior Management teams.***