SUPREME COURT OF NOVA SCOTIA

Citation: *Downey v. Nova Scotia (Attorney General),* 2023 NSSC 204

Date: 20230626
Docket: 523516
Registry: Halifax

Between:

Thomas Downey

Applicant

v.

The Attorney General of Nova Scotia representing His Majesty the King in the Right of the Province of Nova Scotia and Central Nova Scotia Correctional Facility

Respondents

Decision on Habeas Corpus

Judge:	The Honourable Justice Christa M. Brothers
Heard:	May 11, 24, June 1, 8, and 16, 22, 2023, in Halifax, Nova Scotia
Supplemental Evidence and Reasons:	June 7 and June 22, 2023
Counsel:	Thomas Downey, Self-Represented Duane Eddy, for the Respondent

By the Court:

Overview

[1] On May 8, 2023, Mr. Downey filed a Notice for *habeas corpus* ("the Notice"). He is currently serving a sentence at the Central Nova Scotia Correctional Facility ("CNSCF") in Dartmouth. From March 2, 2023, to May 29, 2023, Mr. Downey was housed in North 3. He was moved on May 31, 2023, to West 1.

[2] In his Notice, Mr. Downey alleges that the deprivation of his residual liberties began on April 20, 2023, when CNSCF began instituting rotational lockdowns. He states that the only reason he was given for the lockdowns was staff shortages at the facility. Additionally, Mr. Downey says in the Notice that he is not being offered time in the airing court during rotational lockdowns, nor is he given daily access to phone calls or showers. Mr. Downey further states that he is having difficulty placing calls to his lawyers.

[3] On May 30, 2023, Mr. Downey filed additional materials in which he indicated, "I'd like to show the court and have on record the conditions I suffered started mostly in April and continuing until today and that it smacks of punishment and is no different than lockdown units reserved for high risk, and violent inmates."

[4] On May 10, 2023, the Attorney General of Nova Scotia ("AGNS") filed a Notice of Contest. Initially, the AGNS identified Assistant Deputy Superintendent Darren Pettipas as the document manager and primary witness identified for the purpose of the hearing. In actuality, Deputy Superintendent Brad Ross (D/S Ross) filed two sworn affidavits and testified at the hearing. In the Notice of Contest, the AGNS concedes that Mr. Downey's liberty had been deprived. The AGNS acknowledges that rotation schedules were being implemented on the North 3 range where Mr. Downey resided. The Notice of Contest indicates that the decision on whether to use rotational lockdowns, which is made on a daily basis, is an operational decision made to ensure safety and security of the facility. It is based upon the ratio of available staff to the number of persons in custody at any point in time. The AGNS maintains that when rotational lockdowns are needed, the decision is communicated verbally to the affected persons in custody. The AGNS also states:

> The facility is constantly striving to ensure inmates receive maximum time out of cell and frequently re-deploy staff within the facility each day, including senior management, to meet this goal. As a result, the situation within the facility at large and within North 3 is always changing depending on staff numbers and inmate numbers during each shift.
>
> Where possible North 3 is open, but if the required staff to inmate ratio to permit full unlock is not met, staff try to still provide a maximum time out of cells for every individual using a cell rotation schedule. The rotation system allows smaller groups of inmates on North 3 out of cell at a time, usually on at least two occasions

> each day.
>
> …
>
> Staff to inmate ratio sometimes necessitates rotational lockdowns to ensure safety and security of the facility, its staff and inmates.

[5] In the Notice of Contest, the AGNS says the rotational schedule for North 3 is reassessed daily. The AGNS also refers to a security breach in April 2023 which impacted the need for rotational lockdowns:

> In early April, 2023, a significant security breach forced reallocation of staff away from the North 3 unit. This issue is resolved. Between April 21 and April 28, 2023, staff availability was reduced due to mandatory recertification training which has now been completed.

Background

[6] Mr. Downey was admitted to the CNSCF on February 17, 2023. He is being held on a Warrant of Committal upon conviction issued March 13, 2023. He was sentenced to 165 days in custody. His custody term will end August 24, 2023, and his earliest release date is June 30, 2023. Throughout, Mr. Downey has been housed in the North 3 dayroom which, at the time, was an open, protective custody dayroom. In the Department of Justice admissions form appended to the Notice of Contest, Mr. Downey is listed as 5 foot 4.5 inches tall, weighs 135 pounds and is 36 years old. These facts will become relevant later in these reasons.

[7] Importantly, at the time Mr. Downey filed his *habeas corpus* application and throughout this proceeding, Mr. Downey was not under any disciplinary sanctions. He was never subjected to a rotation for disciplinary purposes. Nor was he ever placed in close confinement as per Correctional Services policy 43.00.00.

[8] Stage one of this *habeas corpus* application was heard by the Honourable Justice Arnold, who scheduled it for a stage two hearing. The Crown filed a brief on May 23, 2023, relying heavily on the recent decision of Justice Campbell in *Jennings v. Nova Scotia (Attorney General)*, 2023 NSSC 148. Like Mr. Downey, Mr. Jennings filed an application for *habeas corpus* challenging the lawfulness of rotational lockdowns on North 3 unit at the CNSCF. Justice Campbell held that the lockdowns, implemented due to staffing shortages, were both reasonably required and reasonably implemented. The Crown further relies on *Ewanchuk v. Canada (Attorney General)*, 2017 ABQB 237, which held that lockdowns, even those caused by staffing numbers, are not "substantial" deprivations of liberty, and therefore do not engage a *habeas corpus* remedy.

[9] CNSCF and the AGNS emphasize that the rotational lockdowns challenged by Mr. Downey are implemented facility-wide. They note that Mr. Downey consistently receives equal time out of his cell as his peers in protective custody and those housed in the general population units. He is not being treated differently or

more harshly than anyone else in custody at CNSCF.

Filed and *Viva Voce* Evidence

[10] D/S Ross filed three affidavits in this matter – one sworn to on May 15, 2023, a supplemental affidavit sworn on June 7, 2023 and a second supplemental affidavit filed on June 22 but received by the court and Mr. Downey on June 20. The supplemental affidavit was filed after the court adjourned the hearing and requested additional information to understand the difference if any between North 3 and West 1 and the conditions of confinement in those dayrooms. Mr. Downey was able to cross-examine D/S Ross on those two affidavits. However, after the hearing, the court sought additional explanation (which was not given at the hearing but needed by the court) concerning the logs entered into evidence. This was done at a recorded appearance with Mr. Downey present. After receiving the second supplemental affidavit describing how the logs are kept and what they are intended to convey, Mr. Downey was asked, at a further appearance, if he wished to cross examine D/S Ross further on the explanations concerning how documents are maintained and created. Mr. Downey said he did not want to.

[11] D/S Ross is currently employed at CNSCF. He testified that he oversees the North unit. He oversees operations of the facility, training, reviews, attendance, and performance management. D/S Ross described the North unit as being divided into four dayrooms, two large and two small.

[12] The evidence provided by D/S Ross is his initial affidavit included the following:

- Mr. Downey is held at CNSCF on a warrant of committal upon conviction issued March 13, 2023.
- He was sentenced to 165 days in custody which will end August 24, 2023, and his earliest release date is June 30, 2023.
- Upon admission to CNSCF on February 17, 2023, Mr. Downey was placed into protective custody.
- He has been housed in the North 3 dayroom which is an open dayroom with full privileges.
- There are 32 cell in North 3, 14 of which have a two-person capacity. The dayroom has a maximum capacity of 46. At the time that D/S Ross swore his initial affidavit on May 15, 2023, North 3 was at full capacity, housing 46 persons.

- D/S Ross swore that Mr. Downey had daily access to phones, shower and airing court when his cell was unlocked.

- D/S Ross reviewed the protocol adopted by CNSCF during the Covid 19 pandemic to ensure that persons in custody were given access to the phone.

- D/S Ross explained that lawyers can contact CNSCF and provide a list of individuals they wish to speak with. If a person in custody is locked-in when a call is scheduled, staff arrange for the individual to have access to a phone.

- Persons in custody can also access the phones to call lawyers when they are out of their cells.

[13] D/S Ross spoke to the staffing-related rotational lockdowns at para. 16 of his original affidavit as follows:

> In April 2023 and continuing into May 2023, CNSCF has had daily issues with providing a sufficient staff to inmate ratio to permit full unlocks. Personnel vacancies arise each day for a variety of reasons which mostly cannot be predicted in advance. They are attributable to multiple factors, including employee sick leave, short and long-term employee leaves of absence, unprecedented employee retention issues, the redeployment of available corrections officers in response to medical and security emergencies across the facility, as well as mandatory training.

[14] In addition to the staffing issues, on two occasions in March and April of 2023, a prolonged security breach occurred on West 1 (then the general population unit) at the CNSCF. These incidents required the reallocation of staff away from North 3. The first incident took place between February 26 and March 13. The second began on April 4 and, as of May 15 when D/S Ross swore his initial affidavit, the situation was still being monitored. D/S Ross described this security breaches on West 1 at para. 18 of his initial affidavit:

> On both occasions, the West 1 breach involved unit-wide refusal to comply with directions from corrections officers, as well as multiple assaults being perpetrated by the inmates, against other inmates, housed on West 1. Staff members were redeployed from across CNSCF to assist in the investigation of these assaults, in escorting assault victims to the hospital, and in escorting some inmates to alternative correctional facilities to remove them from the volatile dynamic which has continued to develop on West 1.

[15] D/S Ross spoke about what a typical day at CNSCF looks like, in terms of periods unlocked, at para. 19:

> On a typical day at the CNSCF where the appropriate staff to inmate ratio is in place, North 3 would be unlocked from 7:00 a.m. to 12:00 p.m. from 1:30 p.m. to 5:30 p.m., and from 7:00 p.m. to 10:00 p.m. – a total of 12 hours per day. To facilitate a fully unlocked day on North 3 there must be six correctional officers available to staff the unit, comprising 1 control officer and five unit staff.

[16] In paragraphs 20-22 of his affidavit, D/S Ross addressed the accommodation of staff vacancies on North 3, and the communication of information to the individuals housed in that dayroom:

> The number of staff vacancies on North 3 must be accommodated on an *ad hoc* basis. This staffing shortage has therefore put significant stress on facility managers to ensure the safe and secure operation of the CNSCF. Facility managers have therefore found it necessary to implement rolling rotational lockdowns on North 3 if fewer than six staff are available to attend the unit. Rotational lockdowns are designed to ensure that all inmates get equal time out of cells on any given day.
>
> Individuals housed on North 3, including Mr. Downey, are verbally informed each day of any rotation scheduled applicable to them. This information is conveyed each morning either by the unit captain or frontline officers on duty.
>
> Individuals housed in North 3, including Mr. Downey, have also been informed each day of the reason for rotations: specifically, ensuring appropriate staff to inmate ratios are consistently maintained. CNSCF staff has endeavored to update the North 3 population of changes to the rotation schedule as frequently as possible. Thus, when a rotation schedule changes, a new announcement will be made informing the unit population, including Mr. Downey, of any change.

[17] D/S Ross stated that persons housed in the protective custody units like North 3 are supposed to experience full privileges. The North 3 protective custody unit was described as being no different than general population, other than the inmate status. Individuals are placed in protective custody based on the nature of their charges, evidence they may have given in court, or for other reasons that it may be unsafe for them to be placed in general population. Persons housed in general population or in protective custody have access to the same privileges. Importantly, D/S Ross testified that rotational lockdowns or "unlocks", as he described them, apply to the entire facility and are applied as fairly as possible. From April 2023 until May 31, 2023, West 1 was the general population range. Effective May 31, 2023, general population became North 4.

[18] He testified that the main priority of the North 3 dayroom is to ensure the people housed there are out of their cells for equal rotations, and they get as much time out of their cells as possible, while maintaining an operationally safe number of staff. The goal is to ensure that people housed are not in their cells any more than is operationally necessary. In paras. 25 – 26 of his initial affidavit, D/S Ross spoke to the steps taken to ensure that persons in custody are given the statutory minimum amount of time out of cells:

> As of the date of this affidavit, the CNSCF staff have made it a priority to ensure

> that the facility population, in every living unit, receives the statutory minimum time out of cell each day. This includes my own efforts as Deputy Superintendent and manager of the North Living Unit and, specifically, North 3. I have assisted in re-deploying staff and myself and other managers have completed correctional officer duties daily to ensure this happened.
>
> Currently, the times when Mr. Downey has had to remain in his cell have been in accordance with the North 3 rotation schedule, which has been implemented to maintain the staff to inmate ratio necessary to ensure safety and security of the facility, staff, and inmates.

[19] The evidence indicates that when the appropriate staff to inmate ratio is in place at CNSCF and there are no other issues that may threaten the safety and security of the unit, daily rotational schedules on North 3 are not necessary. It is also clear that any rotational schedule implemented on North 3 has not been implemented for disciplinary purposes. The only reason given for the rotational schedules is to ensure the safety and security of all individuals – both staff and persons in custody within the facility – when staffing ratios are not met.

[20] D/S Ross testified about the rotations as follows:

> When necessary, rotations on North 3 and throughout the CNSCF are implemented to ensure the safety and security of the entire correctional facility and its occupants. The rotation schedule changes daily and, where operationally feasible, it is lifted to allow full unlock days for unit populations.

[21] On direct examination, D/S Ross gave the following evidence about the use and necessity of rotational lockdowns.

> Q.: Why would North 3 be placed on rotation schedule?
>
> A.: Well, there's several reasons the main reason being for safety of the inmates and for staff of... We don't have enough staff to respond to any kind of incident or occurrence or dayroom if we are fully open with 46 inmates. Then it's not safe for both staff and both inmates and you know we we try open up a dayroom with less than the required amount of staff we we would have a mass work refusal from our staff in the building.
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> …
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> A.: I mean like well our facility the Burnside facility, you know there's multiple incidents throughout the year. Very high amount of assaults on staff, assaults on inmates of damage to property, you know and medical emergencies as well within the facility. We have a lot of people that come off the or come in straight off the street into the facility that are you know they're they're still coming down from alcohol abuse, drug abuse that kind of stuff so we we have a lot medical emergencies as well. You know seizures that type of thing. We have to have enough staff to respond to that kind of thing and we definitely have to have enough staff to respond to any type of assaults especially on staff or inmate on inmate. And you know we had 46 inmates out in the dayroom and we have very limited amount of staff we're not gonna to be able to safely respond to that.

[22] If rotational unlocks are required, the inmates are not informed of the rotational schedule until early in the morning when staff shifts begin. Once a decision is made concerning whether lockdowns are necessary that day, inmates are told by staff or a unit captain during morning cell visits.

[23] D/S Ross testified that if rotational lockdowns are required, all individuals across the facility are placed on the fairest possible schedule so that everyone has the same, or close to the same, amount of time out of cell:

> Well basically, we open, if on a rotational, the cells in the dayroom are open an equal amount of time, so if Mr. Downey's cell was open for two hours and, along with some other cells, when they lock in, the next group of cells is open for two hours. And it goes that way throughout the day and throughout the night, until the evening shift. So we keep it as consistent and as fair as possible. Not only in North 3 or in that dayroom, consistently across the building, we've actually taken staff from the West unit over to the North unit to be able to open up those cells and get them on a rotation. And then once they're open, we'll take the staff from the North and bring them to the West unit. They'll open cells on that unit. So we try to keep it as fair and equitable as possible.

[24] Additionally, D/S Ross testified about the unpredictability of staff absences and the multitude of staffing challenges CNSCF is experiencing:

> For the most part we … I don't know how exactly how to put this but it's … there's a lot of times we think we're fully staffed let's say tomorrow, Friday and then before our the shift starts in the morning, we could have five, six, seven, ten sick calls before our shift starts and then all of a sudden we're short staffed so it's really hard to predict. You know, there's a lot of attendance issues in the facility right now. And, you know, a lot of retainment issues with staff as well, so it is hard to predict on a day to day basis.

[25] While D/S Ross is not in charge of scheduling staff, he oversees the re-deployment of staff if there are staffing issues. The priority is to ensure that individuals in custody have as much unlocked time as possible throughout the facility, and attend court when required. D/S Ross was involved in recruitment in the past but is not any longer. He is now a training contact and does in-house training. In terms of addressing staffing issues, he said he must work with what he has on any given day. He said the new intakes or new hires into correctional roles are limited. He said there is a staffing shortage in law enforcement jobs across the entire country:

> Q: And in terms of recruitment of new staff are you involved in that process?
>
> A: I used to be not so much anymore. I'm the training contact at the facility and basically I take care of any new recruits, any of the in-house training they would receive when they come to us in the facility, but as far as recruitment, no.

Q: Do you have any involvement with respect to addressing the staffing issues at the facility? In term of trying to … remedy that.

A: That's at a much higher level than where I'm at. And, you know, we.. we.. we look at what we have. There has been a lot recruitment drives but basically the.. the intakes that we're getting are very limited amount of staff that are applying for these types of jobs right now. There's a shortage, from what I understand, across, not only Nova Scotia, but across the country in a lot of law enforcement jobs.

[26] After hearing direct evidence from D/S Ross, the court questioned the ability to make a determination without a more fulsome understanding the frequency of the rotational lockdowns and how they are being implemented within the facility. The hearing was adjourned to allow the AGNS to provide the additional information requested by the court.

[27] On June 7, 2023, D/S Ross swore a supplemental affidavit attaching the airing court logs for the North 3 unit from April 1, 2023, to May 31, 2023; the location history document; rotation schedules for North 3; rotation summaries for North 3; West unit rotations schedules for April and May 2023; and airing court logs for West unit from April 1, 2023, to May 31, 2023.

[28] On June 8, 2023, the court reconvened to hear further testimony from D/S Ross. At that time, he addressed the additional materials filed in the supplemental affidavit. The first was the North unit airing court logs. D/S Ross testified that they were prepared daily by unit control officers. Officers note whether airing court is offered and the times it was utilized by persons in custody. In each dayroom, an announcement is made over an intercom when airing court is offered. Once offered, people in custody can advise staff if they wish to go out. If anyone does, the times the airing court is used are entered in the airing court logs. If no times are listed, that means no one took advantage of the opportunity to use the airing court. The names of the individuals who used the airing court are not included in the log. It was simply provided to show the times it was offered and used. If airing court was not offered, then the log indicates the reasons why.

[29] D/S Ross testified about the rotational schedules of the North 3 dayroom. These schedules are prepared by the North unit control officer and other staff members in charge on the relevant day. The rotational schedule logs are completed throughout the day as the rotations occur.

[30] D/S Ross also spoke to the daily handover documents which were appended to the supplemental affidavit. These documents are uploaded by the captains at the end of a shift into a shared Captain drive, and provide details of operations in the unit that day. The daily handover briefing documents include some rotational summaries, which are prepared by a Captain.

[31] D/S Ross testified about confinements. He spoke about the responsibility for confinement notations in the daily handover and briefing document, including 24-hour reviews and five-day reviews. Confinements are situations where a person is confined to their cell for 23 hours a day. Normally, a person in confinement is by themselves with no peers and not out of the cell. They are segregated in the cell by themselves. The facility does not treat rotational lockdowns as close confinement, given the amount of time that people are let out of their cells.

[32] In addition to the materials related to North 3, D/S Ross provided rotational schedules for the general population dayroom on West 1. These were provided for the month of May. The West 1 rotational schedule documents included BMP tracking sheets. These tracking sheets are for people in custody who have ongoing discipline problems, such as incidents of assaultive behaviour towards staff or other persons in custody. Persons on BMPs are not given as much time out of their cells. The court was also provided with the West unit airing court log. These materials were all presented as evidence that Mr. Downey was not being treated differently than anyone else housed in protective custody or general population at CNSCF.

[33] Mr. Downey had an opportunity to cross-examine D/S Ross. Mr. Downey made it clear throughout his cross-examination that he disagreed with much of the information provided by D/S Ross, including that he had been given sufficient time out of his cell for showers, airing court and phone calls.

[34] D/S Ross explained in his evidence that when the facility is dealing with sick leaves and other staff absences, there is a requirement to redeploy the remaining staff. This creates the need for rotational lockdowns. D/S Ross acknowledged that the facility has had lots of staff vacancies and attendance issues. Since Covid, many staff have left to go to other positions. He acknowledged that there was an incident on West 1 between February 26 and March 13, 2023, that required reallocation of guards from North 3 to West 1 during that time. Lockdowns were required on several days throughout that period due to large scale disturbances which sent five staff members to hospital due to assaults.

[35] D/S Ross noted that the standard is for people in custody to have 12 hours of unlocked cell time. However, a full unlock in North 3 requires six staff. Throughout his testimony, he emphasized the difficulties at CNSCF with retention and recruitment, and with having sufficient staff for general duties on a daily basis. It was clear from his evidence that the facility is doing the best it can with the people they currently have. There are simply not enough staff members to ensure the persons in custody who are not subject to discipline have the 12 hours of unlock time outside their cell. He testified that the rotations implemented in North 3 are comparable to every dayroom in the facility. On cross-examination, Mr. Downey attempted to have Deputy Superintendent Ross agree that the only time that a full range on North 3 is unlocked is on a holiday. D/S Ross said he could not speak to that and was not sure.

[36] The rotation schedules attached to D/S Ross's supplemental affidavit demonstrates the number of lockdowns or lock-ins. When lockdowns occur, a notation is placed on the rotational schedule indicating that the lockdown is due to operational reasons and an indication of when the cells were unlocked. D/S Ross swore affidavit evidence that prior to June 2023 if there was nothing written on the rotation log, or if no rotational log was submitted, then the dayroom was fully open.

DATES	TYPES OF UNLOCK	TIMES OUT	TOTAL TIME OUT
April 19/23	M: A: E:	15:30 -	Appears to be a full unlock for afternoon and evening.
April 20/23	M: Full unlock A: Full unlock E:		Full unlock beginning at 11:15 am
April 21/23	M: Open from 7:00- 10:30 then half side rotation A: Half side E: Half side	07:00 – 10:30	3.5 hours plus an additional approximately 4 hours Approximately 7.5 hours
April 22/23	M: Full unlock A: Full unlock E: Full Unlock		12 hours
April 23/23	M: Left side/Right side A: Left side/Right side E:	09:15 – 12:30 13:30 – 15:40 15:40 - 17:40	3 hours and 15 minutes + 2 hours and 10 minutes + 2 hours = 7 hrs and 25 minutes
April 24/23	M: Full unlock A: Full unlock E: Full unlock		12 hours
April 25/23	M: Full unlock A: Full unlock E: Full unlock		12 hours
April 26/23	M: Full unlock A: Full unlock E: Full unlock,		12 hours
April 27/23	M: A: E: full unlock	09:30 – 12:00 13:50 – 15:30	4 hours and 10 minutes plus 3 hours = 7 hours and 10 minutes
April 28/23	M: Unlock A: Unlock E: Left side/Right side	20:35 – 22:00	10 hours 25 minutes
April 29/23	M: Left side/Right side A: E: Full Unlock	09:30 – 12:00 15:30 – 17:30	4.5 hours plus 3 hours = 7.5 hours
April 30/23	M: Four cell A: Full unlock E: Full unlcok	09:11 – 12:00 4 hours 3 hours	2 hours, 49 minutes plus 7 hours 9 hours and 49 minutes in total
May 1/23	M: Left side/Right side	07:15 – 09:45	2.5 hours

DATES	TYPES OF UNLOCK	TIMES OUT	TOTAL TIME OUT
	A: not unlocked E: Full Unlcok		Plus 3 hours = 5.5 hours
May 2/23	M: Four cell A: Full Unlock E: Full Unlock	None in am	7 hours of unlock
May 3/23	M: Left side/Right side A: Full open E: Full open	10:45 – 12:00 13:30 – 17:30 19:00 – 22:00	8 hours, 15 minutes
May 4/23	M: Left side/Right side A: E: Locked down	09:15 – 10:38 13:45 – 14:45	1 hour and 23 minutes I hour Total 2 hours and 23 minutes
May 5/23	M: Full open A: Full open E: Four cell	07:00 – 12:00 13:30 – 17:30 20:32 – 22:00	9 hours 1 hour 28 minutes = 10 hours and 28 minutes
May 6/23	M: Four cell A: Left side/Right side E: Lockdown	09:26 – 12:00 13:39 – 17:30	2 hours, 24 minutes 3 hours and 51 minutes Total = 6 hours and 15 minutes
May 7/23	M: Full unlock A: Full unlock E: Full unlock		12 hours
May 8/23	M: Left side/Right side A: Left side/Right side E: Left side/Right side	09:30 – 12:00 13:30 – 14:30	3.5 hours 1 hour Total = 4/5 hours
May 9/23	M: Left side/Right side A: Left side/Right side E: Four cell	09:35 – 12:00 15:49 – 17:00	Total = 3 hours 36 minutes
May 10/23	M: Full unlock A: Ful unlock E: Full unlock		12 hours
May 11/23	M: Left side/Right side A: Left side/Right side E: Left side/Right side	No more than 2.5 No more than 1.5 19:37 – 20:45	Total 5 hours and 8 minutes
May 12/23	M: Left side/Right side A: Left side/Right side E: Left side/Right side	10:26 – 12:00 15:34 – 17:30 Nothing listed	3 hours, 30 minutes
May 13/23	M: Lockdown A: Lockdown E: Unlocked	 19:00 - 20:35	1 hour, 35 minutes
May 14/23	M: Four cell A: Left side/Right side E: Left side/Right side	Illegible 14:15 – 17:36 19:00 – 20:30	5 hours, 11 minutes
May 15/23	M: A: Left side/Right side E: Left side/Right side	08:23 – 10:45 No times but no more than 3.5 hours	2 hours, 22 minutes plus 3.5 Total 5 hours and 52 minutes
May 16/23	M: Four cell A: Left side/Right side E: Left side/Right side	07:10 – 09:35 No more than 2 No more than 1.5	2 hours, 25 minutes Total: 5 hours and 55 minutes
May 17/23	M: Left side/Right side A: Left side/Right side E: Unlocked	09:30 – 12:00 16:00 – 17:40 3 hours	4 hours, 10 minutes Total 7 hours 10 minutes

DATES	TYPES OF UNLOCK	TIMES OUT	TOTAL TIME OUT
May 18/23	M: Left side/Right side A: Left side/Right side Left side/Right side	10:30 – 12:00 15:37 – 17:30 20:30 – 22:00	4 hours, 53 minutes
May 19/23	M: Four cell – Right side A: Four cell E: Left side/Right side	10:12 – 11:10 20:40 – 22:00	2 hours, 18 minutes
May 20/23	M: Left side/Right side A: Left side/Right side E: Four cell	08:38 – 10:32 13:30 – 15:36 No times	3 hours, 48 minutes
May 21/23	M: Full unlock A: rotation E: Four cell	07:00 – 12:00 15:30 – 17:30 No times	7 hours
May 22/23	M: Full unlock A: Full unlock E: Full unlock	08:12 – 12:00 13:30 – 17:30 19:00 – 22:00	10 hours, 48 minutes
May 23/23	M: Left side/Right side A: E: Left side/Right side	07:04 – 09:40 14:03 – 15:50 No times – no more than 1.5	1 hour, 47 minutes Total 3 hours and 17 minutes
May 24/23	M: Left side/Right side A: Left side/Right side E: Four cell	09:53 – 12:00 16:30 – 17:30 20:18 – 20:45	3 hours, 34 minutes
May 25/23	M: Right side A: Left side E: Lockdown	07:05 – 9:37	2 hours, 32 minutes
May 26/23	M: Lockdown A: Four cell E: Left side/Right side	 Less than 2 hours No more than 1.5	 Total = Less than 3 hours
May 27/23	M: Four cell A: Four cell E:	07:05 – 09:30 16:00 – 17:30	2 hours, 25 minutes 1.5 Total: 3 hours and 55 minutes
May 28/23	M: Left side/Right side A: Left side/Right side E: Lockdown	No more than 2.5 no more than 2 No more than 1.5	 Total: 6 hours
May 29/23	M: Left side/Right side A: Left side/Right side E: Lockdown	No more than 2.5 No more than 2	 Total: 4.5
May 30/23	M: Lockdown A: Rotation E: Eight cell	 16:40 – 17:30 20:30 – 22:00	 50 minutes 30 minutes Total 1 hour and 10 minutes
May 31/23	M: Lockdown A: Full unlock from 15:50 E: Left side/Right side	 15:50 – 17:30 No more than 1.5	 1 hour, 40 minutes 1 hour 30 minutes Total: 3 hours 10 minutes

*M – Morning
*A – Afternoon
*E – Evening

[37] There is additional documentation referred to in D/S Ross' supplemental affidavit as "Rotation Summaries for North 3". The following table captures the information in that document which is also entitled "Daily Handover & Briefing Document, North Unit".

DATE	DAYROOM	TYPES OF ROTATIONS
April 1/23	N1 N2 N3 N4	One cell and group rotations Full unlock Full unlock One cell rotation
April 2/23	N1 N2 N3 N4	One cell and group rotation Full unlock Full unlock One cell rotation
April 3/23	N1 N2 N3 N4	One cell rotation/group rotation Full unlock Full unlock One cell rotation/group rotation
April 4/23	N1 N2 N3 N4	One cell rotation/group rotation Full unlock Full unlock One cell rotation/group rotation
April 5/23	N1 N2 N3 N4	Once cell rotation/group rotation Lockdown Lockdown One cell rotation *Unit short-staffed – Three officers on North units*
April 6/23	N1 N2 N3 N4	One cell rotation/group rotation Right/left side rotation Right/left side rotation One cell rotation
April 7/23	N1 N2 N3 N4	One cell rotation/group rotation Full unlock Full unlock One cell rotation
April 8/23	N1 N2 N3 N4	 Full unlock Full unlock
April 9/23	N1 N2 N3 N4	 Full unlock Full unlock
April 10/23	N1 N2 N3 N4	 Full unlock Full unlock
April 12/23	N1 N2 N3 N4`	 Half and half open until 09:30 then four cell rotations Half and half open until 09:30 then four cell rotations

DATE	DAYROOM	TYPES OF ROTATIONS
		Short-staffed all day
April 15/23	N1 N2 N3 N4	 Full unlock Full unlock
April 16/23	N1 N2 N3 N4	 Half and half rotations until 09:30 then four cell rotations Half and half rotations until 09:30 then four cell rotations *Due to staff shortages*
April 21/23	N1 N2 N3 N4	 Full unlock until 10:30 then half and half until 12:00 then four cell rotations Full unlock until 10:30 then half and half until 12:00 then four cell rotations *Several moves made from North 4 xxx and North 1 throughout the facility*
April 22/23	N1 N2 N3 N4	 Full unlock until 09:00 then half and half for the remainder of the day Full unlock until 09:00 then half and half for the remainder of the day
April 23/23	N1 N2 N3 N4	 Full unlock until 09:00 then half and half for the remainder of the day Full unlock until 09:00 then half and half for the remainder of the day
April 24/23	N1 N2 N3 N4	 Half and half until 08:00 to 12:00 and then four cell rotations from 13:30 to 17:30 Half and half until 08:00 to 12:00 and then four cell rotations from 13:30 to 17:30
April 27/23	N1 N2 N3 N4	 Left side/right side rotations in the morning and afternoon. Lockdown 19:00 – 22:00 Left side/right side rotations in the morning and afternoon. Lockdown 19:00 – 22:00
April 28/23	N1 N2 N3 N4	 Full unlock until evening and then left side/right side from 19:00 – 22:00 Full unlock until evening and then left side/right side from 19:00 – 22:00
April 29/23	N1 N2 N3 N4	 Left side/right side rotations and then lockdown from 19:00 – 22:00 Left side/right side rotations and then lockdown from 19:00 – 22:00
April 30/23	N1 N2 N3 N4	 Four cell rotations Four cell rotations

[38] Rotational schedules for the general population dayroom in West 1 were also provided.

DATE	DAYROOM	TYPES OF ROTATIONS
April 6/23	W1	8 cell rotations
April 7/23	W1	Fully Unlocked
April 8/23	W1	2 cell and 4 cell rotation in the morning Left side/right side in the afternoon Full unlock in evening
April 9/23	W1	4 cell until 10:00 then left side/right side rotation Full unlock at 13:30

April 10/23	W1	Full Unlock
April 11/23	W1	Full Unlock
April 12/23	W1	4 cell rotation
April 13/23	W1	Left side/right side rotation
April 14/23	W1	4 cell rotation from 19:40
April 15/23	W1	Rotations – out a little over 4 hours
April 16/23	W1	Inmates out for 2 hours or less
April 17/23	W1	Inmates out for approximately 2 hours
April 18/23	W1	Rotations in morning and afternoon. Evening fully unlocked
April 19/23	W1	Left side/right side rotations
April 20/23	W1	Morning rotation Full unlock from 14:00 – 17:30
April 21/23	W1	Morning and evening rotation
April 22/23	W1	Rotations in afternoon and evening
April 23/23	W1	Missing – Based on D/S Ross affidavit assume Fully Unlocked
April 24/23	W1	Missing - Based on D/S Ross affidavit assume Fully Unlocked
April 25/23	W1	Missing-Based on D/S Ross affidavit assume Fully Unlocked
April 26/23	W1	Missing - Based on D/S Ross affidavit assume Fully Unlocked
April 27/23	W1	Missing - Based on D/S Ross affidavit assume Fully Unlocked
April 28/23	W1	Missing - Based on D/S Ross affidavit assume Fully Unlocked
April 29/23	W1	Missing - Based on D/S Ross affidavit assume Fully Unlocked
April 30/23	W1	Missing - Based on D/S Ross affidavit assume Fully Unlocked
May 1/23	W1	Left side/right side rotation
May 2/23	W1	Morning rotation Full lockdown from 13:30 – 17:30
May 3/23	W1	16 cell rotation = 6 hours of unlock
May 4/23	W1	16 cell rotations = 6 hours of unlock
May 5/23	W1	Missing - Unlock
May 6/23	W1	Left side/right side rotation = 16 cell = 6 hours
May 7/23	W1	Full unlock from 09:05 to lunch Full unlock from 13:30 on
May 8/23	W1	Approximately 4 hours unlock
May 9/23	W1	Approximately 4 hours of unlock
May 10/23	W1	Approximately 2.5 hours of unlock
May 11/23	W1	Approximately 3.5 hours of unlock
May 12/23	W1	1 hour unlock in the morning Full unlock for some 13:40 Full unlock for some 15:45
May 13/23	W1	Lockdown 07:00 – 15:30 Approximately 2 hours unlock in the evening
May 14/23	W1	Approximately 4 hours of unlock
May 15/23	W1	2 hours unlock in the morning 3 hours unlock in the afternoon

DATE	DAYROOM	TYPES OF ROTATIONS
May 16/23	W1	1 – 2 hours of unlock in the morning 2 hours lockdown in the afternoon
May 17/23	W1	Approximately 4 hours unlock
May 18/23	W1	Approximately 2 hours unlock
May 19/23	W1	Range of unlock depending upon the cell From less than 1 hour to almost 3 hours
May 20/23	W1	4 cell rotation – Most have 3 hours of unlock
May 21/23	W1	Full unlock 07:00 – 12:00 Left side/right side in the afternoon 4 cell rotation in the evening
May 22/23	W1	Full Unlock since missing
May 23/23	W1	4 cell rotation in the morning = 1.5 hours unlock Left side/right side = 4 hours unlock
May 24/23	W1	Left side/right side rotation in the morning 4 cell rotations in the afternoon Left side/right side rotation in the evening = 6 hours unlock
May 25/23	W1	Left side/right side rotation = 6 hours unlock
May 26/23	W1	2 hours unlock in the morning Full unlock from 13:30 on
May 27/23	W1	Full Unlock
May 28/23	W1	Left side/right side rotation 4 cell rotation = 4 hours of unlock
May 29/23	W1	Left side/right side rotation Full unlock 15:00 – 17:30 = 6 hours unlock

[39] These rotation schedules do show that North 3 was comparable to West 1 in terms of times out. Day by day, the times are not identical but, overall, the lockdown periods on each unit are similar.

[40] During cross-examination, D/S Ross maintained that airing court is offered daily despite the rotations and that announcements are made to the range when airing court is open. From the court's review of the North unit airing court log from April 1, 2023, to May 31, 2023, it appears that airing court was not offered on several occasions. On April 22, 2023, airing court was not offered and there was no reason provided as to why outdoor recreation was not being offered. This is despite there being a section of the log designated for the captain to provide the reasons why airing court was not offered. On April 25, 2023, airing court was not offered. The log notes indicate that no airing court was offered due to operational restraints and security issues inside the correctional facility. On April 22, 2023, airing court was offered on North 1 but not North 2 or 3. On April 28, 2023, airing court was not offered on North 2 and 3 because "airing court camera will not work stating 'not connected'". Airing court was offered on North 4. On May 11, 2023, airing court was not offered on North 2 or 3. The reason given was "facility operations restricted the unit to be able to facilitate airing court in a safe manner". On May 19, 2023, airing court was not offered for a period of time for North 1 and was not offered on North 3. The reason given was "short-staffed". On May 30, 2023, there was a mandatory lockdown until 16:30 p.m. Persons in custody were offered airing court at 16:30 but

refused due to supper time. On May 31, 2023, North unit was locked until 15:50 for operational reasons and unlocked again around meal tray time. North 4 was the only dayroom that showed no airing court.

[41] These logs demonstrate that there were days when Mr. Downey would not have been offered airing court. There was no explanation offered for some of these days. This is unacceptable. I will say more about this later in these reasons.

[42] The airing court logs for the West units were provided for the period of April 1, 2023, to May 31, 2023. It appears that no airing court was offered in West 1, the then-general population range, on April 1, 6, May 16 and May 23, 2023. When compared to airing court logs for North 3, it appears that North 3 was denied airing court for one extra day during this period. On the face of the documents, access to the airing court for both units was comparable.

Evidence of T. Downey

[43] Mr. Downey testified that, from his perspective, he has been locked down for the majority of the time he's been incarcerated. Mr. Downey stated:

> I feel like since I've been incarcerated I have been locked down the majority of the time. And I'm, like, I haven't got out my cell enough to talk to lawyers for my criminal court as much. Everytime I'm out the cell, it's either close to lunch and lawyers on lunch, or it's after 4:30, lawyers are going home. I can't, like, get in touch with my family lawyers or talk to my family lawyer, like, seems like it's just too much. Like, I'm not getting access to yard everyday. Seems like when I get out my cell it's either a. go on the phone and try to contact my lawyers or go get in the shower. Like how's that supposed to work.
>
> …
>
> Well I'm on, like for instance yesterday or the day before yesterday, the guards, I've been asking them all day, can we get yard can we yard? The guards, they let us out, they're doing half and half. They let the side that I was on out on the range. This is what I'm asking for, yard. And I am repeatedly asking em and asking em, are we getting yard are we getting yard and he said he'll check on it. So then now it's time for me to lockup, for my side to lockup. I lockup and they, the other side is get let out. But then they call yard too as well. So I'm like, I asked the guard, can they crack my cell so I can go to yard. And then, like I'm in a cell wit a, like, you can push the intercom. So I pushed intercom and I'm like I want yard. And I heard him say, they're not letting no one else out for yard. Only two people went to yard. So I didn't get a chance for yard …
>
> …
>
> I still didn't get yard all day that day. Like, it's just an ongoing thing with yard and getting out my cell to use the phone. Some people out their cell can get out their cell for a lawyer call anytime that, just because you're cool with one guard, or some guard likes you, or you know one guard, you can get out for extra time and get to use the phone for as much as you want. When the guys that don't know the guards they can't. So basically … yeah that.

[44] Mr. Downey testified about the physical effects of the rotational lockdowns on him.

> Mr. Downey: Yeah, like.. like.. I'm 36 years old. I have never, ever in my life reached 200 pounds. Just sitting in the cell eating, laying down, eating, laying down, I weigh 210 pounds. That's because I'm not exercising. I have never ever weighed 200 pounds or more.

[45] Mr. Downey testified that he finds it difficult because he is not able to exercise. He said he is stressed because he cannot talk to his family, and he cannot contact or see a doctor. He has been attempting to see a healthcare professional but has never been seen. He testified that he feels that the lockdowns are almost every day, and the situation is very difficult on his mental health. He stated that as a result of his stress and anxiety, he has difficulty sleeping. Once he gets to sleep early in the morning, if there is an unlock between 07:30 and 09:30, he does not come out because he is still sleeping. The difficulty, then, is that there may be no more rotational unlocks that day, and he is confined to his cell for the entire day.

Court:	What kind of effect have the rotations had on you. Are you… do you want to talk about that?
Mr. Downey:	Like, it's like I'm scretched [sic stressed] all the time.
Court:	Say it again
Mr. Downey:	I'm always scretched, like you're just sitting in the cell
Court:	Okay, stressed, yeah.
Mr. Downey:	Scretched out.
Court:	Yep.
Mr. Downey:	Like, you cannot talk to your family, you cannot contact your lawyer when you want to like. Like, I put in to see the psychiatrist and the doctor, like, they say they can't control the request forms
…	
Mr. Downey:	… four cell rotations sometimes you get out your cell. Like just say like, like I'm a person that stays up all night cause I can't sleep.
Court:	Okay.
Mr. Downey:	So when I do get to sleep, I'm asleep, so if they crack my cell for say 7:30 in the morning to 9:30 in the morning, well, I'm sleeping. So then if I don't come out that time, I don't get out. Your lawyer's office don't even open until 9 o'clock. So how can I make a call. And you're locked

down for the rest of the day until maybe you get out for another hour, hour and a half after 7:30.

Court: At night?

Mr. Downey: Yeah, at night, but that's too late to make any calls, any important calls anyway.

…

Mr. Downey: I don't know what else to tell ya.

Court: Anything else you want to tell me about the effect it's had on you? If you want to share that. You know you don't have to.

Mr. Downey: Like it's really like, like I said, it's putting stress on me, like, you can't talk to your family when you want to talk to your family. You can't, like, I have six kids. I cannot talk to my kids if I'm not getting out. Like I'm doing family court. Like how can I do this if I'm not getting not time to talk to my family or even you can't even, you cannot I cannot talk to you if I'm scretched. Like I'm not gonna say the things I really want to say when I'm scretched. Not getting no sleep.

[Emphasis Added]

[46] Mr. Downey also testified that he is not getting clean clothes. He said he is being asked to shower and put the same dirty clothes back on.

[47] While I accept the evidence of D/S Ross and I understand that he and the facility managers are doing the best they can with what they have, I also accept Mr. Downey's evidence that the rotations are having a detrimental impact on his physical and mental health. Where Mr. Downey's evidence about time out of cells conflicts with that of the facility logs, I accept the logs which are made in the usual course of business and directed to be completed. I also note, Mr. Downey did not take notes of times himself so his evidence was more general in nature.

Position of the Parties

[48] The AGNS argues that, while unfortunate, these rotational lockdowns are necessary for the safety and security of everyone in the facility, including staff and persons in custody. The AGNS submits that comparing North 3 to the general population dayroom shows that all the ranges in the facility are being treated the same. The AGNS submits that the rotational schedules are unavoidable, given the staffing issues, and the threat to safety and security that would arise if complete 12-hour unlocks were allowed without the proper staffing complement. Furthermore, if unlocks occurred, the staff would have grounds to make occupational health and safety complaints, given the staffing ratios that are required to ensure that the facility is run safely and securely. The AGNS says the rotational lockdown situation at

CNSCF is a fluid, one that changes daily.

[49] The AGNS submits that the decision to establish a rotational schedule on North 3 is in response to ongoing staffing challenges, and that it is both lawful and reasonable in the circumstances. The respondent maintains that the decision falls within a range of reasonably accepted outcomes for correctional facility administrators in the circumstances. It is defensible and grounded on the basis of the superintendent's jurisdiction to confine people in custody under sections 57 and 79 of the *Correctional Services Regulations* and s. 74 of the *Correctional Services Act*. The respondent relies on *Jennings*, *supra*, and *Foeller v. Nova Scotia (Attorney General),* 2023 NSSC 149.

[50] The AGNS argues that there is no remedy available to Mr. Downey. He is already in an open dayroom, *albeit* one for protective custody inmates. There is no other open living unit at the CNSCF where Mr. Downey may be released to avoid the implications of the CNSCF's rolling rotational schedules.

[51] Mr. Downey says these lockdowns, which restrict his ability to access phones and showers, and to be outside his cell for the normal 12 hours per day, are causing him harm and are neither legal nor justified.

Habeas Corpus

[52] *Habeas corpus* is a remedy used to release a person from an unlawful detention. It is specifically protected under s. 10(c) of the Charter, which provides that everyone has the right on arrest or detention to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful. In *Pratt v. Nova Scotia (Attorney General),* 2020 NSCA 39, Justice Van den Eynden, writing for the court, affirmed that "*habeas corpus* is a fundamental remedy with historical and constitutional significance in our legal system" (para. 54). The courts have held that *habeas corpus* is available to challenge different deprivations of liberty, including the initial deprivation of liberty, substantial change in conditions amounting to a further deprivation of liberty, and a continuation of the deprivation of liberty (*Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459; *Gogan v. Canada (Attorney General),* 2017 NSCA 4).

[53] In *May v. Ferndale*, 2005 SCC 82, the Supreme Court of Canada, *per* Lebel and Fish J.J., reviewed the early history of *habeas corpus*:

> 19 The writ of *habeas corpus* is also known as the "Great Writ of Liberty". As early as 1215, the *Magna Carta* entrenched the principle that "[n]o free man shall be seized or imprisoned . . . except by the lawful judgement of his equals or by the law of the land." In the 14th century, the writ of habeas corpus was used to compel the production of a prisoner and the cause of his or her detention: W. F. Duker, *A Constitutional History of Habeas Corpus* (1980), at p. 25.

20 From the 17th to the 20th century, the writ was codified in various *habeas corpus* acts in order to bring clarity and uniformity to its principles and application. The first codification is found in the *Habeas Corpus Act*, 1679 (Engl.), 31 Cha. 2, c. 2. Essentially, the Act ensured that prisoners entitled to relief "would not be thwarted by procedural inadequacy": R. J. Sharpe, *The Law of Habeas Corpus* (2nd ed. 1989), at p. 19.

21 According to Black J. of the United States Supreme Court, *habeas corpus* is "not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose — the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty": *Jones v. Cunningham*, 371 U.S. 236 (1962), at p. 243. In his book, Sharpe, at p. 23, describes the traditional form of review available on *habeas corpus* as follows:

> The writ is directed to the gaoler or person having custody or control of the applicant. It requires that person to return to the court, on the day specified, the body of the applicant and the cause of his detention. The process focuses upon the cause returned. If the return discloses a lawful cause, the prisoner is remanded; if the cause returned is insufficient or unlawful, the prisoner is released. The matter directly at issue is simply the excuse or reason given by the party who is exercising restraint over the applicant. [Emphasis by Lebel and Fish J.J.]

[54] In *R. v. Miller*, [1985] S.C.J. No. 79, cited by the respondent, the Supreme Court of Canada expanded the scope of *habeas corpus* by making it available to free inmates from "a prison within a prison". The court elaborated on the notion of a "prison within a prison" as follows:

32 The British Columbia courts in *Cardinal* and the Ontario Court of Appeal in the case at bar applied the notion of a "prison within a prison" in holding that habeas corpus would lie to determine the validity of confinement in administrative segregation or a special handling unit, and if such confinement be found unlawful, to order the release of the inmate into the general population of the penitentiary. The concept of a "prison within a prison" is referred to by Sharpe, *The Law of Habeas Corpus* (1976), p. 149, where he speaks in favour of such an application of habeas corpus, and by Dickson J., as he then was, in *Martineau*, *supra*, where, with reference to the decision of the disciplinary board which sentenced the inmate for a disciplinary offence to 15 days in the penitentiary's special corrections unit, he said at p. 622:

> Moreover, the board's decision had the effect of depriving an individual of his liberty by committing him to a 'prison within a prison'. In these circumstances elementary justice requires some procedural protection. The rule of law must run within penitentiary walls.

This statement reflects the perception that a prisoner is not without some rights or residual liberty (see also *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at p. 839) and that there may be significant degrees of deprivation of liberty within a penal institution. The same perception is reflected in the reasons for judgment of McEachern C.J.S.C. and Anderson J.A. in *Cardinal* and Cory J.A. in the case at bar on this issue. In effect, a prisoner has the right not to be deprived unlawfully of the

> relative or residual liberty permitted to the general inmate population of an institution. Any significant deprivation of that liberty, such as that effected by confinement in a special handling unit meets the first of the traditional requirements for *habeas corpus*, that it must be directed against a deprivation of liberty.
>
> 33 Moreover, the principle that *habeas corpus* will lie only to secure the complete liberty of the subject is not invariably reflected in its application. There are applications of *habeas corpus* in Canadian case law which illustrate its use to release a person from a particular form of detention although the person will lawfully remain under some other restraint of liberty. Examples are the use of habeas corpus to recover the custody of children (*Stevenson v. Florant*, [1927] A.C. 211, aff'g [1925] S.C.R. 532; *Dugal v. Lefebvre*, [1934] S.C.R. 501); to release a person on parole where the parole has been unlawfully revoked (*Re Caddedu* (1982), 4 C.C.C. (3d) 135; *Swan v. Attorney General of British Columbia* (1983), 35 C.R. (3d) 135); and to transfer an inmate from an institution in which he has been unlawfully confined to another institution (*Re Bell and Director of Springhill Medium Security Institution* (1977), 34 C.C.C. (2d) 203; *R. v. Frejd* (1910), 22 O.L.R. 566). In all of these cases the effect of *habeas corpus* is to release a person from an unlawful detention, which is the object of the remedy. The use of *habeas corpus* to release a prisoner from an unlawful form of detention within a penitentiary into normal association with the general inmate population of the penitentiary is consistent with these applications of the remedy.
>
> [Emphasis added]

[55] The court added at para. 36:

> Confinement in a special handling unit, or in administrative segregation as in *Cardinal*, is a form of detention that is distinct and separate from that imposed on the general inmate population. It involves a significant reduction in the residual liberty of the inmate. It is in fact a new detention of the inmate, purporting to rest on its own foundation of legal authority. It is that particular form of detention or deprivation of liberty which is the object of the challenge by *habeas corpus*. It is release from that form of detention that is sought. For the reasons indicated above, I can see no sound reason in principle, having to do with the nature and role of *habeas corpus,* why *habeas corpus* should not be available for that purpose. I do not say that *habeas corpus* should lie to challenge any and all conditions of confinement in a penitentiary or prison, including the loss of any privilege enjoyed by the general inmate population. But it should lie in my opinion to challenge the validity of a distinct form of confinement or detention in which the actual physical constraint or deprivation of liberty, as distinct from the mere loss of certain privileges, is more restrictive or severe than the normal one in an institution.
>
> [Emphasis added]

[56] In *R. v. Gamble*, [1988] 2 S.C.R. 595, the court made it clear that *habeas corpus* is not to be narrowly or technically applied. It can be invoked to redress all illegal deprivations of constitutionally protected liberty interests.

[57] The Supreme Court of Canada summarized the test on an application for *habeas corpus* in *Mission v. Khela,* 2014 SCC 24:

> [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 respondent authorities to show that the deprivation of liberty was lawful. …

[58] In *Khela*, the court held that the scope of review on *habeas corpus* includes a review for substantive reasonableness. After noting that reasonableness should be regarded as "one element of lawfulness" (para. 65), Lebel J. stated:

> [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.
>
> [75] A review to determine whether a decision was reasonable, and therefore lawful, necessarily requires deference (*Dunsmuir*, at para. 47; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59; *Newfoundland and Labrador Nurses' Union*, at paras. 11-12). An involuntary transfer decision is nonetheless an administrative decision made by a decision maker with expertise in the environment of a particular penitentiary. To apply any standard other than reasonableness in reviewing such a decision could well lead to the micromanagement of prisons by the courts.

[59] The court in *Khela* reiterated that *habeas corpus* is a non-discretionary writ:

> [78] … [T]he writ remains non-discretionary as far as the decision to review the case is concerned. If the applicant raises a legitimate doubt as to the reasonableness of the detention, the provincial superior court judge is required to examine the substance of the decision and determine whether the evidence presented by the detaining authorities is reliable and supports their decision. Unlike the Federal Court in the context of an application for judicial review, a provincial superior court hearing a *habeas corpus* application has no inherent discretion to refuse to review the case (see Farbey, Sharpe and Atrill, at pp. 52-56). However, a residual discretion will come into play at the second stage of the habeas corpus proceeding, at which the judge, after reviewing the record, must decide whether to discharge the applicant.
>
> [Emphasis added]

Lockdowns

[60] Before turning to the test for *habeas corpus*, I will review the legislative provisions relied on by the AGNS as authority for rotational lockdowns. I will also discuss several authorities where lockdowns of this nature have been considered.

[61] Neither the *Correctional Services Act*, S.N.S. 2005 c. 37, nor the *Correctional Services Regulations*, N.S. Reg. 99/2006 prescribe a specific amount of time that

each person in custody must be allowed out of their cell per day.

[62] Under s. 39 of the *Correctional Services Act*, the duties of the superintendent of the CNSCF include implementing policies and procedures to ensure the safe and secure operation, management, and administration of the CNSCF. The superintendent may delegate his duties and responsibilities with respect to the placement of inmates within the facility under section 38 of the *Act*. Sections 74 and 75 of the *Act* authorize the superintendent to place a person in "close confinement" if certain requirements are met.

[63] Section 79 of the *Correctional Services Regulations* authorizes a superintendent to impose different conditions of confinement on different offenders:

> 79 (1) A superintendent may impose different conditions 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.

[64] Correctional Services Policy 43.000 addresses the use of administrative and close confinement within Nova Scotia correctional facilities. Section 14 provides that inmates who are housed in a form of confinement but have been provided with access to out-of-cell programs and privileges and to interact with other inmates in excess of two hours daily do not meet the criteria of close confinement.

[65] In *Coaker v. Nova Scotia (Attorney General)*, 2018 NSSC 192, the court recognized that s. 79 of the Regulations provides the express statutory authority for implementing rotational lockdowns:

> [32] There is express statutory authority for so-called "lockdowns" in s. 79 of the *Correctional Services Regulations*. By their nature, lockdowns are a blunt instrument of prison administration. This may explain why section 79 is so broadly drafted. Nevertheless, they are necessary. The administrators of correctional facilities are responsible for the safety and security of staff and inmates alike. They must have the latitude to act quickly and decisively – at times they will have to act based on imperfect information. In my opinion, in such situations, courts should be particularly deferential to prison administrators, absent compelling evidence of bad faith, which could include capricious disregard for procedural and substantive constitutional guarantees accorded to inmates in similar situations.

[66] Likewise, in *Jennings*, *supra*, Campbell J. stated:

> [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.

[67] Courts have said that lockdowns, even those implemented due to staff shortages, should not be the norm for persons in custody. Most of these statements, however, have been made in the sentencing context, rather than on an application for *habeas corpus*. In *R. v. Passera*, 2017 ONSC 2799, aff'd 2019 ONCA 527, the court reviewed the case law and noted:

> 120 I accept that over the period of time that she has been in custody, Ms. Passera has been confined in her cell for significantly longer periods than the rules of the unit set out. I also accept that the reason for these additional periods of confinement in her cell have been due to staff shortages in the facility.
>
> …
>
> 131 I fully agree with those who have stated before that lock-downs should not be the norm while one is in custody. When a facility has rules about what time prisoners are permitted to be out of their cells, those rules should be the norm, and not the exception. Staff shortages cannot, in my view, justify prolonged periods of regular lock-down. When they do, I accept that the conditions of incarceration may become so harsh as to justify giving credit for these periods to an offender detained under those conditions.
>
> 132 I agree with Gilmore J. that it is not possible to simply take the number of lock-down hours and convert them to days to determine credit to an offender. There is, in my view, a qualitative difference between the harshness of regular periods of 24 hour lock-down and the effect of a deprivation of an hour or two out of one's cell, particularly if there is no evidence that this sort of short deprivation of time results in any loss of outside or exercise time, or any loss of visits or programming. However, I agree that regular deprivation of even a few hours of time out of a cell may, over a prolonged period, also become harsh.
>
> 133 I accept that in this case, Ms. Passera has suffered some harshness in her conditions of incarceration. She has certainly not had the hours out of her cell that the rules of her unit would suggest she should have had. She says that this has been difficult for her.
>
> 134 I accept the Crown's position that there should be credit to Ms. Passera of three months for the effects of the lock-down and will reduce her sentence accordingly.
>
> [Emphasis added]

[68] In *R. v. Charley*, 2019 ONSC 6490, the court stated:

> 54 In particular, the evidence establishes that Mr. Charley endured some 491 days of partial or total lockdowns at TSDC. Mr. MacLennan's testimony establishes that the vast majority of these days were due to staffing shortages, and were not attributable to anything in Mr. Charley's or any other inmate's control. It must be said that 491 days represents an extraordinarily high number of lockdowns by any measure. I appreciate that staffing shortages create security issues, and that correctional facilities are owed a margin of deference when addressing matters of institutional security: *Mission Institution v Khela*, [2014] 1 SCR 502, paras 76, 89. But being locked down for more than 1/3 of a 3 1/2-year long stay in detention is beyond any tolerable or humane limit.
>
> [Emphasis added]

[69] In *R. v. Ward-Jackson*, 2018 ONSC 178, the court reviewed Mr. Ward-Jackson's evidence concerning the impact of lockdowns he experienced while on remand at the Toronto South Detention Centre. Although Mr. Downey is not on remand, there are similarities between his evidence and that or Mr. Ward Jackson concerning the effects of the lockdowns on his well-being. Justice Kelly summarized Mr. Ward-Jackson's evidence as follows:

> 45 Mr. Ward-Jackson provided an affidavit to the Court that sets out the conditions in which he has served his presentence incarceration. He was cross-examined by Crown Counsel during the sentencing hearing.
>
> 46 Mr. Ward-Jackson states that between May 15, 2014 and November 19, 2017, he spent 488 days (of 1,248) in lockdown at the Toronto South Detention Centre. All were the result of staff shortages and were not the result of any misconduct on the part of Mr. Ward-Jackson. (Crown Counsel takes issue with the number proposed and suggests that the number of lockdowns is closer to 109, but I accept Mr. Ward-Jackson's submission).
>
> 47 Mr. Ward-Jackson described the impact of the lockdowns commencing at paragraph 19 of his affidavit. Despite the cross-examination, I accept that Mr. Ward-Jackson has experienced the stress he set out in his affidavit as follows:
>
> > 19. The lockdowns cause me a great deal of stress. When we are on lockdown we are confined to our cells with our cell mate. There is no privacy and bodily functions have to be done in front of each other. This causes a lot of stress and because of the frustration over all the lockdowns I have witnessed many violent occurrences between other inmates. This has caused me to be jumpy whenever there are loud noises or when someone is angry.
> >
> > 20. Lockdowns mean that I am locked in my cell 24 hours a day and am not allowed out of my cell. I am sometimes locked down for multiple days in a row. If we are locked down for 3 days in a row we will be let out for a twenty-minute period, in order to shower in accordance with by-laws that showers are required every 72 hours, TSDC calls this the shower program. However, the shower program is not guaranteed and sometimes we do not get showers within the 72 hours. The 20 minutes include shower, phone calls and yard time.
> >
> > 21. When the shower program is going on typically only one cell at a time

is let out on the range to shower. There are 20 cells per range and there are two tiers. They typically start from one end of the range and go down the line. This means if they do not finish within the day, some inmates do not get to shower. Further exacerbating this issue is the fact that the shower programs do not usually start right away, they must be authorized by a sergeant, and they will usually not go through the dinner hour. I understand that the TSDC simply does not have the staff to accommodate all the inmates. Some inmates also abuse the 20-minute time limit.

22. Basic hygiene is difficult. There are 2 showers and 4 phones on each range. On days where there is the shower program I am able to use the phone for a brief period of time. When this happens, there is a rush of approximately 40 people trying to use the limited number of showers and phones at the same time.

23. Lockdowns also affect my ability to be in touch with my lawyer, as we are not permitted to use the phones or attend visits when there is a lockdown. If we are not locked down, groups of inmates on my range will take over the phones and they will not let anyone else use them.

24. When I first arrived at the TSDC, I participated in numerous programs including Anti-Criminal Thinking, Anger Management, and Parenting classes. Over the last two years, because of the shortage of correctional staff, the programs have been fewer and farther in between. The programs do not take place every week as scheduled and sometimes we go a few weeks without access to any programs.

25. Visits are frequently being cancelled. I am only able to have six visitors on my visiting list and only permitted to have six pictures in my cell. I have a supportive network of friends and family members and I look forward to visits with them -- even if it is only via video link. I am devastated when these visits are cancelled.

26. I also have a very difficult time receiving mail. I feel disconnected from the outside world, and with visits being cancelled so frequently, I am left feeling isolated and alone.

[70] The court went on to state:

50 Although Crown Counsel does not accept Mr. Ward-Jackson's calculation that he has spent 488 days in lockdown, I do. Most, if not all of those days were in a locked down state because of staff shortages as opposed to inmate infractions.

51 I do find that Mr. Ward-Jackson was subject to harsh conditions and that the impact of such conditions was detrimental to Mr. Ward-Jackson's well-being. Neither Mr. Ward-Jackson nor any other inmate was responsible for the majority of the lockdowns. They were purely as a result of staff shortages, something that has yet to be rectified. That said, the number of lockdowns has decreased recently with the efforts of the staff at the centre including more hiring of staff and the implementation of new policies.

52 There is no mathematical equation for the amount of time granted for the conditions. Based on the evidence before me, I am prepared to give Mr. Ward-Jackson a further credit of 16 months given his harsh experience in the Toronto South Detention Centre including the lockdowns, cancelled visits, etc.

> 53 I decline to give him further credit for medical issues such as mental stress, etc. I am not satisfied that such stress was caused by the lockdowns themselves, but perhaps the fact that he was incarcerated for these crimes -- serious offences affecting our community.
>
> [Emphasis added]

[71] Lockdowns due to staff shortages were also considered in *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667. In their original notice of application, Mr. Ogiamien and Mr. Nguyen sought *habeas corpus*. The application then became focused on whether their rights under ss. 7, 9, and 12 of the Charter had been violated because of the frequent lockdowns they experienced while on remand at Maplehurst Correctional Complex, a maximum-security facility. *Habeas corpus* was raised but not pressed before the application judge.

[72] The application judge concluded that the frequent lockdowns subjected Mr. Ogiamien and Mr. Nguyen to cruel and unusual treatment contrary to s. 12 of the Charter. He found that most of the lockdowns resulted from staff shortages and that the frequency and duration of these lockdowns alone violated s. 12. He made no finding on either s. 7 or s. 9. He awarded Charter damages of $60,000 for Ogiamien and $25,000 for Nguyen, even though neither had specifically sought damages and neither the Attorney General of Ontario nor the Attorney General of Canada was given the opportunity to make submissions on whether Charter damages were an appropriate and just remedy for the s. 12 violations. The Attorney General of Ontario and the Attorney General of Canada appealed on multiple grounds. The *amicus curiae* raised the following two additional issues:

1. If the lockdowns did not violate Mr. Ogiamien's and Mr. Nguyen's s. 12 rights, did they violate their s. 7 rights?
2. If no violation of s. 12 or s. 7 is found, is Mr. Nguyen (the only one still in custody) entitled to the remedy of *habeas corpus*?

[73] The Court of Appeal, per Laskin J.A., described the ordinary conditions at Maplehurst as follows:

> [18] Each of these four remand units is divided into six wings: A, B, C, D, E and F. Each wing houses 32 inmates and has 16 cells, so two inmates to a cell. Each wing in a unit has a dayroom where inmates may socialize, shower, watch television, read and make telephone calls. Each unit also has a doctor's office and a nurse's office, and a nurse is continuously on site.
>
> [19] Because the remand units constitute a maximum security facility, continuous restrictions are imposed on the movement and liberty of inmates. These restrictions are imposed by physical barriers, close staff supervision and limited access to the community.
>
> [20] The regular daily schedule for inmates, such as Ogiamien and Nguyen, in the remand units permits daily access to the dayroom six hours per day - two hours in

the morning, two hours in the mid-to-late afternoon and two hours in the early evening. In addition, the inmates have access to the exercise yard 20-30 minutes a day, and have available a wide range of programs, everything from religious programs to anger management, addiction awareness, peer mentoring, individual counselling and many others. Visits from lawyers, family and friends are permitted up to three times per day, which typically coincide with the times inmates are in the dayroom.

[21] Inmates in the remand units eat all their meals in their cells, not in the dayroom. They are required to eat in their cells to minimize the possibility of bullying while eating their food. Each cell is 15 feet long, 7 ½ feet wide and 9 feet high. It has a toilet, sink, table, stool and a bunk bed for two inmates. Each cell also has a window to allow in natural light.

[74] The court noted that there are two types of lockdowns at Maplehurst:

[22] Lockdowns at Maplehurst are of two types: a full lockdown, in which all remand units are locked down; and a partial lockdown, in which one or more but not all remand units are locked down. Full or partial lockdowns may last a full day or part of a day.

[75] Laskin J.A. described the superintendent's authority for lockdowns:

[23] Generally, lockdowns are imposed to ensure the security of the institution and the safety of inmates and staff. They are authorized under the provisions of the *Ministry of Correctional Services Act*, R.S.O. 1990, c. M.22 and the general regulations passed under that Act. The decision whether to order a lockdown rests with the superintendent responsible for the management of Maplehurst or with the superintendent's delegate. Standing Orders give the superintendent wide discretion on whether to order a lockdown and on the scope and duration of one if it is ordered "[s]ince no two situations are exactly alike".

[24] However, on my reading of the record, the superintendent exercises discretion to order a partial or full lockdown for one of four reasons:

- To conduct searches, for example for weapons or drugs;
- To deal with security related emergencies within the institution, for example when an inmate requires immediate medical help or has attempted suicide, or when inmates are engaged in serious assaults against each other;
- To get an unusually large number of remanded inmates to their various court appearances, which can be at the Toronto, Milton, Burlington or Kitchener courthouses; or
- To ensure the safety of inmates and staff where insufficient staff are available to maintain regular operations in a particular area of the institution.

[25] This last reason for lockdowns - insufficient staff - accounted for the vast majority of lockdowns at Maplehurst, led to Ogiamien's and Nguyen's application, and resulted in the application judge's finding of a s. 12 violation.

[26] Maplehurst may not have enough staff at any given time for several reasons: pre-authorized absences provided for by the collective agreement governing

> employees at Maplehurst; unscheduled absences also provided for by the collective agreement, for example a bereavement leave or emergency home care required for an ill child; the transfer of staff to another area of the institution for an emergency; not enough staff to backfill absences; a number of inmates requiring hospital escorts; and mandatory staff training.
>
> [Emphasis added]

[76] The court reviewed the evidence concerning the Ministry's efforts to reduce staff absences and increase the number of correctional officers:

> [27] When a correctional officer is absent without advance notice, the Ministry can call on fixed term employees (on contract) to backfill a vacant position. Or, the Ministry can offer overtime pay to fill a temporary vacancy. Working overtime, however, is voluntary, and especially during negotiations for a new collective agreement staff will not sign up for it.
>
> [28] In 2009, the Attendance Support Management Pilot Program was introduced into the collective agreement. The Program provides a financial incentive to encourage correctional officers to maintain good attendance. The Program helped reduce staff absences but they still remained high. In 2013, the parties to the collective agreement agreed to reduce compensation for sick days, a measure also aimed at reducing staff absences.
>
> [29] In addition to taking steps to reduce absences among existing staff, the Ontario government identified training new correctional officers as a priority over the next three years to increase staff levels in Ontario correctional institutions.
>
> [30] The recruitment and training of new correctional officers takes between six months and a year. And the capacity to train new officers depends on the availability of existing correctional officers to do the training. Most training by correctional officers is on a voluntary basis. At the beginning of collective bargaining in 2014 and into the first five months of 2015, correctional officers refused to do any training. Still, Ontario plans to recruit and train 600 to 700 new correctional officers per year between 2016 and 2020. Some have already completed their training and have been assigned to Maplehurst.

[77] Justice Laskin also described the general conditions at Maplehurst under lockdowns:

> [31] The general conditions under lockdowns at Maplehurst and their impact on the inmates in the remand units provide context for the impact of the lockdowns affecting Ogiamien and Nguyen.
>
> [32] Maplehurst contends that lockdowns are a measure of last resort. But it also concedes that lockdowns create a difficult environment for inmates and staff. They are unpredictable. They create stress, anxiety and tension because inmates are in conditions of close confinement during the period of the lockdown. Access to the dayroom and the exercise yard is curtailed. So is access to many of the programs otherwise available. Access to showers, clean clothes and bedding is restricted.
>
> [33] Still, although essential programs may be delayed during a lockdown, they are maintained. These programs include court attendances, lawyer visits, immigration detention reviews and importantly, health care services, such as daily

> medication rounds and visits to doctors. Other programs, such as showers, telephone access and personal visits, are maintained where possible.
>
> [34] Unit managers have discretion to try to minimize the disruption of normal operations caused by a lockdown. For example, they may be able to unlock the cells for small groups of inmates at a time, thus facilitating access to showers and the use of telephones. The application judge found that "the correctional authorities attempt, as best they can, to ameliorate the impact of lockdowns when they occur". He added, however, that in his view "those attempts, by and large, are ineffective".
>
> [35] The application judge found that the statistical evidence on the frequency of lockdowns yielded the following percentages:
>
> · 2014 - lockdowns occurred on 46% of the days
>
> · 2015 - lockdowns occurred on 55% of the days
>
> · January-March 2016 - lockdowns occurred on 40% of the days
>
> [36] And as I have said, staff shortages were responsible for the overwhelming percentage of these lockdowns. But these statistics reflect the overall percentages of lockdowns throughout all of the remand units. They do not reflect the frequency or even the duration of lockdowns specifically affecting Ogiamien and Nguyen. The frequency and duration of those lockdowns and their impact on Ogiamien and Nguyen give rise to the first issue on appeal, to which I now turn.
>
> [Emphasis added]

[78] The court found that the correct percentages of lockdowns affecting Mr. Ogiamien and Mr. Nguyen were as follows:

> [39] This litigation is about the s. 12 rights of Ogiamien and Nguyen, not the rights of all remanded inmates at Maplehurst. The correct percentages when Ogiamien's and Nguyen's units were under a lockdown that affected them are as follows:
>
> · Ogiamien - 2014: 22%
>
> · Ogiamien - 2015: 30%
>
> · Ogiamien - 2016: 22%
>
> · Nguyen - 2015: 33%
>
> · Nguyen - 2016: 22%
>
> These percentages are significantly less than the percentages the application judge relied on.

[79] Justice Laskin also held that the application judge erred when he found that during the times when units are locked down, inmates are locked in their cells for 24 hours. The record showed that some lockdowns were for only part of a day, and for the remainder of that day the remanded inmates had full access to services and programs, including the dayroom. As to the impact of the lockdowns on Mr. Ogiamien and Mr. Nguyen, the Court of Appeal rejected the application judge's finding that sharing a cell during a lockdown is "in some ways worse" than solitary

confinement, in the absence of expert evidence to support it.

[80] On the issue of whether the treatment of Ogiamien and Nguyen under the lockdowns was cruel and unusual contrary to s. 12, Laskin J.A. wrote, in part:

> [57] I accept that the effect of lockdowns in a correctional facility can give rise to cruel and unusual treatment. And I accept that though some lockdowns are inevitable in a maximum security facility, while Ogiamien and Nguyen were at Maplehurst lockdowns occurred more often than they should have. Had I agreed with the application judge's findings on frequency, duration and impact I might well have deferred to his conclusion. But it seems to me that the lockdowns that did affect Ogiamien and Nguyen did not occur with such frequency or last so long or have such an adverse impact to give rise to cruel and unusual treatment. The treatment of Ogiamien and Nguyen under lockdowns compared to their treatment under ordinary conditions may have been excessive or disproportionate, but it was not grossly disproportionate. Thus their treatment did not meet the high bar required to establish a s. 12 violation.
>
> [58] Further, while these lockdowns occurred Ogiamien and Nguyen were not entirely foreclosed from the services and programs they ordinarily had. They still received necessary medical attention, could meet with their lawyers, could on occasion use showers and telephones, and were transported to their court appearances.
>
> [59] The second consideration the application judge relied on was the reason for the vast majority of the lockdowns - staff shortages. Drawing on decisions such as this court's judgment in *R. v. Olson*, he commented at para. 234 of his reasons:
>
> > [T]he conditions of incarceration must be judged based, at least in part, on the reasons why they are imposed. In cases where they are imposed because of legitimate safety and security considerations, the imposed condition cannot be said to be cruel and unusual. However, in other circumstances, that might not be so.
>
> [60] The application judge then distinguished between lockdowns due to staff shortages and lockdowns due to safety and security concerns. In his view, lockdowns caused by staff shortages are not imposed for "legitimate safety and security concerns. Rather, they arise because the Ministry has been unwilling or unable to have sufficient staff available". He concluded, at para. 267, that the lockdowns caused by staff shortages violated Ogiamien's and Nguyen's s. 12 rights:
>
> > For the foregoing reasons, I conclude that the rights of Mr. Ogiamien and Mr. Nguyen under s. 12 of the Charter have been violated, by virtue of the lockdowns to which they have been subjected since their incarceration at Maplehurst, and the adverse conditions to which they have been subjected during those lockdowns. The actual lockdowns that give rise to the violations are those that occurred because of the staff shortages. However, those lockdowns were exacerbated by the additional lockdowns that occurred for safety and security reasons. In other words, if the only lockdowns that occurred were on account of staff shortages, they would have constituted a violation of s. 12 because of their frequency and duration. Because of the additional lockdowns that occurred, the impact of the staff shortage lockdowns was greater.

[61] I do not agree with the application judge's reasoning in these paragraphs. At bottom, even lockdowns imposed because of staff shortages are imposed to ensure the security of the institution and the safety of staff and inmates. Without sufficient staff Maplehurst cannot guarantee safety and security under ordinary living conditions in the remand units. So it imposes a lockdown.

[62] But as important, it is not the reason for the lockdowns but their effect on treatment that is the focus of the s. 12 inquiry - in this case the denial of privileges and programs Ogiamien and Nguyen ordinarily had when not locked down, and the stress that came with being confined with another person in close quarters for an extended period of time. In *Smith* at para 64, Lamer J. made the point that "a punishment is or is not cruel and unusual irrespective of why the violation has taken place". Applying his point to this case, the treatment of Ogiamien and Nguyen was or was not cruel and unusual regardless of the reason why the lockdowns were imposed.

[63] Still, I can appreciate why the application judge distinguished among the reasons for the lockdowns. It is one thing to impose a temporary lockdown because of widespread fighting among inmates or because of the need to search for weapons and drugs. It is quite another to impose frequent lockdowns because the institution has not enough correctional officers to supervise regular operations. I think it is at least fair to say that if frequent lockdowns due to staff shortages led to the treatment of an inmate that was grossly disproportionate to what was appropriate administrative expediency or convenience would not come to the rescue of the Charter violation. In other words, had the frequency, duration and impact of the lockdowns due to staff shortages resulted in treatment so excessive as to outrage standards of decency, the pre-authorized or unscheduled unavailability of correctional officers would have been no answer to Ogiamien's and Nguyen's Charter claims. I simply conclude that on the record before us, the treatment of Ogiamien and Nguyen caused by the lockdowns did not rise to the level of a s. 12 violation.

[64] The third consideration the application judge relied on was *R. v. Jordan*. In that case, as the application judge noted, Nordheimer J. identified the problem of lockdowns caused by staff shortages. Yet in conditions far worse than at Maplehurst, he found no violation of s. 12.

[65] In *Jordan*, the accused was detained at the Toronto East Detention Centre. He applied for bail pending his trial on charges that included attempted murder. He complained that his treatment at the Centre was cruel and unusual. Nordheimer J. found that the Toronto East Detention Centre was "overcrowded and understaffed". Three inmates were assigned to cells designed for two inmates. Lockdowns for security occurred frequently - 13 in one of the months for which there was evidence. Although Nordheimer J. said that he did not wish "to be seen as countenancing the state of affairs in the detention facilities", in his view the conditions in the Centre did not amount to cruel and unusual treatment of the accused. Jordan does not support the application judge's conclusion.

[66] Finally, I will address amicus' submission that in considering whether a s. 12 violation has been made out we must take as a starting point that ordinary conditions at Maplehurst, even without lockdowns, were already very onerous. One example of onerous conditions, cited by amicus and briefly discussed by the application judge, is double bunking, two inmates to a cell. Double bunking is contrary to the United Nations Standard Minimum Rules for the Treatment of

Prisoners (Nelson Mandela Rules), which call for untried prisoners to "sleep singly in separate rooms".

[67] I do not accept amicus' submission. As I stated in the introduction, this case was not litigated as an inquiry into ordinary conditions of detention at Maplehurst. It is a case about the effect of lockdowns on the treatment of Ogiamien and Nguyen. Still, I share Nordheimer J.'s concern not to be understood as countenancing the conditions in remand detention facilities. Indeed, courts have frequently recognized the onerous conditions inmates suffer in pre-trial detention. See *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575, at para. 2.

[68] But no evidence was led that conditions in the remand units at Maplehurst were any worse or more onerous than at any other maximum security institution. No evidence was led about the impact of double bunking or of any other conditions of detention at Maplehurst. What was before the application judge and before this court was whether the treatment of Ogiamien and Nguyen under lockdowns, compared to their treatment under ordinary living conditions, rose to the level of cruel and unusual treatment. I conclude that it did not.

[Emphasis added]

[81] The court likewise held that the lockdown conditions did not violate the s. 7 rights of Mr. Ogiamien and Mr. Nguyen:

[80] In the recent case of *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, at para. 57, Wagner J. quoted a passage from the earlier judgment of McLachlin J. in *Cunningham v. Canada*, [1993] 2 S.C.R. 143, in which she discussed the standard for showing that an inmate's conditions of confinement can amount to a further or residual deprivation of liberty under the first branch of s. 7:

> Generally speaking, offenders have constitutionally protected expectations as to the duration, but not the conditions, of their sentences. Various changes in the management of an offender's parole are not punitive, even though they may engage the offender's liberty interest by marginally increasing the likelihood of additional incarceration. McLachlin J. (as she then was) held as follows in *Cunningham*:
>
> > The Charter does not protect against insignificant or "trivial" limitations of rights …. It follows that qualification of a prisoner's expectation of liberty does not necessarily bring the matter within the purview of s. 7 of the Charter. The qualification must be significant enough to warrant constitutional protection. To require that all changes to the manner in which a sentence is served be in accordance with the principles of fundamental justice would trivialize the protections under the Charter. To quote Lamer J. in Dumas [v. Leclerc Institute, [1986] 2 S.C.R. 459], at p. 464, there must be a "substantial change in conditions amounting to a further deprivation of liberty". [p. 151] (my emphasis)

[81] In my view, the frequency, duration and impact of the lockdowns affecting Ogiamien and Nguyen caused a change in their conditions of incarceration at Maplehurst, but not a substantial change. During a lockdown neither was singled

> out or dealt with more harshly than any other inmate in the remand units. Neither was placed in administrative segregation. Neither was transferred to a different and higher risk or higher security correctional institution. These latter instances might have amounted to a substantial change sufficient to trigger a deprivation of Ogiamien's and Nguyen's residual liberty under s. 7. The lockdowns did not.
>
> [82] And even if the lockdowns deprived Ogiamien and Nguyen of their residual liberty under s. 7, the deprivations were nonetheless in accordance with the principles of fundamental justice. Law or policy will not be in accordance with the principles fundamental justice when it is arbitrary, that is when no rational connection exists between its purpose and its effects on liberty: *Canada (Attorney General) v Bedford*, 2013 SCC 71, at para.111.
>
> [83] Lockdowns at Maplehurst are unpredictable. Indeed lockdowns are a necessary response to unpredictable events, be they unscheduled staff absences, inmate altercations, or an urgent need to check for weapons. But lockdowns are not arbitrary. The primary purposes of a lockdown are to ensure the security of the institution and the safety of the staff, inmates and even the community. Even lockdowns imposed because of staff shortages have as their underlying purposes security and safety.
>
> [84] These purposes are rationally connected to their effects. Locking inmates in their cells during lockdowns, imposed for example because of staff shortages, enhances security and the safety of everyone at Maplehurst. And where possible unit managers at Maplehurst try to mitigate the adverse effects of lockdowns by, for example, permitting groups of inmates at a time to use the showers and the telephones.
>
> [85] The frequent lockdowns at Maplehurst did not violate the s. 7 rights of Ogiamien and Nguyen.
>
> [Emphasis added]

[82] Finally, the court considered whether Mr. Nguyen, as the only one still incarcerated, was entitled to the remedy of *habeas corpus*:

> [86] The ancient remedy of *habeas corpus* - literally "you have the body" - is enshrined in s. 10(c) of the Charter: "Everyone has the right on arrest or detention … to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful." Amicus submits that if we were to overturn the application judge's finding of a s. 12 violation and to reject her argument on s. 7 we should grant Nguyen the remedy of *habeas corpus* and order his release from Maplehurst. Amicus does not seek *habeas corpus* relief for Ogiamien as he was released from Maplehurst before this appeal was heard.
>
> [87] In their original notice of application, Ogiamien and Nguyen sought *habeas corpus*. The application, however, soon focused on whether their s. 12 rights had been violated. *Habeas corpus* was raised but not pressed before the application judge. He referred to it briefly in his reasons but made no finding on it. In this court it was again raised by amicus but not strongly argued. I would not grant Nguyen relief by *habeas corpus*. In my view this case turns solely on s. 12 of the Charter.
>
> [88] As I have said, Nguyen does not challenge his detention at Maplehurst. As with his other Charter claims he challenges the conditions of his detention. Although *habeas corpus* is an extraordinary remedy it is available not just for

> detention itself but for the conditions of an inmate's detention. See *R. v. Miller*, [1985] 2 S.C.R. 613. In the latter situation, however, *habeas corpus* may remedy living conditions in a prison where the inmate faces physical confinement or a deprivation of liberty that is **more restrictive than the confinement of other inmates**. Typically *habeas corpus* has been granted where a prisoner has been placed in administrative segregation, confined in a special handling unit or transferred to a higher security institution.
>
> [89] In the present case, Nguyen did not face conditions of confinement more restrictive than those faced by other remanded inmates. And I have already concluded that his conditions under lockdown did not rise to the level of cruel and unusual treatment. In my opinion Nguyen is therefore not entitled to the remedy of habeas corpus.
>
> [Emphasis added]

[83] Although no s. 12 breach was found in *Ogiamien, supra*, lockdown conditions implemented in a remand facility in response to gang violence were found to have breached the inmates' rights under s. 12 in *Trang v. Alberta (Edmonton Remand Centre)*, 2010 ABQB 6. That case involved an application by former inmates of a remand centre for declarations of infringement of Charter rights.

[84] The inmates were members of a gang who imported raw cocaine into Alberta, processed the cocaine into crack cocaine and distributed it throughout northern Alberta. They were incarcerated at the remand centre while awaiting charges of conspiracy to traffic in drugs. The inmates' time at the remand centre ranged from 134 days to over 1100 days. They made numerous allegations regarding their treatment at the remand centre including cruel and unusual treatment, racist conduct by the guards, arbitrary and unusual searches, unfair disciplinary hearings and punishment, arbitrary and unfair classification and placement decisions and discriminatory treatment. While at the remand centre, the individuals were confined to double-bunk cells, originally designed for single inmates, for 18 to 23 hours per day. The cells provided inadequate privacy for washroom facilities, inadequate space for two persons and only one table and chair. Inmates took their meals in their cells and many of them were on units with rotating lockdowns, so that they infrequently had time outside of their cells. In addition, the inmates were provided with inadequate recreational time outdoors or in the gym, in some cases only having access to such facilities a few times per month.

[85] The court dealt with numerous issues in its 240-page decision. Lockdowns were described starting at para. 174:

> [174] The period per day which a prisoners are restricted to their cells is a further issue. Authorities indicate prisoners should not be detained in cells if possible (Human Rights Approach, Making Standards Work, Human Rights Watch), as prolonged confinement is harmful. The ACA Standards recommend larger cells and additional facilities where prisoners spend over 10 hours a day in cells.
>
> [175] When the ERC first opened and through the early 1980's, lockup was

apparently restricted to sleeping hours. However, Professor Jackson understood that recently detainees at ERC had daily lock-ups of over 10 hours, and typically often over 21 hours. Release periods had no regular schedule. Professor Jackson observed that in light of the absence of in-cell televisions, privacy screens, desks, limited opportunity to exercise, and the extended duration of these lock-up conditions, the ERC lock down regime is harsher and more restrictive than that encountered in federal prison segregation units, which the federal prison Ombudsman had described as "hell" and "inhumane." In Professor Jackson's view, the present ERC conditions are "more oppressive" than the pre-Charter federal penitentiary conditions critiqued by the Archambault Report and Swackhamer Inquiry.

[176] The ERC evidence on this point makes it clear that as gang violence became more of an issue, it became necessary to keep more and more inmates separated from each other, both to keep incompatible inmates apart, and to ensure that there were not large numbers of allied inmates together at the same time who could organize some form of violent disturbance. In fact, the evidence was replete with examples of both, even with the implementation of the rotation schedule that endeavoured to minimize those possibilities.

[177] Rotation of cell lock down periods and open periods was the method chosen by ERC. Many of these inmates were locked down 20-23 hours a day without access to televisions and other distractions. They were, as previously noted, in cells so small that only one roommate could walk around or do push-ups or sit-ups at a time and there was only room for one person at the table, leaving the bunks for the other. This raises enough evidence that I will address whether the situation breached the Charter rights of the Applicants who were so confined.

[178] The chart in Appendix 4 lists the Applicants' time on the units and the relevant lock-up periods they endured (units where Applicants spent relatively short periods of time are not included; where the rotation schedule changed on a particular unit, the most predominant rotation is used).

[Emphasis added]

[86] Justice Marceau's reasons for finding a breach of s. 12 were as follows:

[1013] The evidence shows that the cells are all double-bunked (except medical and segregation), that the cells were originally designed for one person, that there is not enough room for both roommates to walk around or exercise in the cell at the same time, and that there was only room for one person to sit at the table, leaving the bunk bed for the other. There is no toilet privacy. By itself double bunking is not a Charter breach. But many of the Applicants were on strict rotation schedules, which meant that they were only out of the cells for a half hour at a time, and that depending on the rotation, their total time out of cells ranged from 3 hours to 6 hours. Assuming an 8 hour sleep period, this means that they were awake and in the cells for 10 to 13 hours a day.

[1014] They had limited access to recreation. Initially they only had gym or yard in the time period that they were out of lock-up, and then only if there were enough willing participants. Later, an arrangement was worked out that permitted those in lock-up to have their gym or yard rather than remaining in the cell. Professor Jackson noted that the exercise regime provided at the ERC was "a drastic departure from generally accepted standards as to what constitutes appropriate and humane

treatment for prisoners" and that "lack of exercise is detrimental to an inmate's physical and mental health." The predominance of the evidence was that gym was offered every 2 to 3 days, and outdoor yard less often than that. That was not contradicted by the Respondents, who noted the problems associated with trying to schedule enough recreation time.

[1015] There were no televisions in the cells, there was poor lighting making it difficult for some of the inmates to read, and there were restrictions on what items could be kept in the cells; all this meant that time in cells was boring and depressing. While the Respondents point to the amount of time these Applicants spent out of the ERC attending Court, that time is not particularly significant for any of them.

[1016] Even these conditions might not outrage standards of decency if the Applicants were at the ERC for a few days or even weeks. But many of them endured these conditions for months, and some for years. (See Veit J. in *R. v. A.D.*, 2001 ABQB 905, 321 A.R. 1.) In my view, these conditions are, as Southin J.A. noted in *Gwynne*, "appalling". In my view they shock the conscience and are "grossly disproportionate."

[1017] In considering whether this treatment breaches s. 12, I may look at the factors listed in *Smith*, as adapted for the purpose of determining whether the treatment, as opposed to punishment, is disproportionate. Those factors include whether the treatment:

a. goes beyond what is necessary to achieve a legitimate aim;

b. has adequate alternatives;

c. is unacceptable to a large segment of population;

d. can be applied upon a rational basis in accordance with ascertained or ascertainable standards;

e. is arbitrary;

f. has no value or social purpose, like reformation, rehabilitation, deterrence or retribution;

g. accords with public standards of decency or propriety;

h. shocks the general conscience or is intolerable in fundamental fairness; and

i. is unusually severe and hence degrading to human dignity and worth.

[1018] These factors cannot be applied in a vacuum. As Nation J. in ***Munoz*** noted at para. 78:

> The test is whether the treatment would shock the community conscience. That consideration cannot be divorced from the inmate's background and the institutional situation.

[1019] Further, it is the particular circumstances of the individual in question that is the determining factor, not the general societal purpose underlying the government action. Lamer J. in *Smith* indicated at p. 1073:

> ...The other purposes which may be pursued by the imposition of punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry. This does not mean that the judge or the legislator can no longer consider general deterrence or other pedological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves. If a grossly disproportionate sentence is "prescribed by law", then the purpose which it seeks to attain will fall to be assessed under s. 1. ***Section 12 ensures that individual offenders receive punishments that are appropriate, or at least not grossly disproportionate, to their particular circumstances***, while s. 1 permits this right to be overridden to achieve some important societal objective.

(Emphasis added)

[1020] The Respondents have argued that these conditions have a legitimate purpose. There is only so much room at the Centre and therefore double bunking is necessary; the problems of incompatible inmates and increasing violence make rotations and longer lock-ups necessary; security issues and practicality limit how often gym and yard can be offered; dining hall meals have raised security issues and so lock-up for meals in cells is necessary. They also point to changes they have made to address the concerns, such as permitting inmates on lock-up to access gym and yard.

[1021] In my view, while the Respondents' submissions address some of the factors listed in Smith, they do not address the individual circumstances of each Applicant. I find that on balance these conditions, for the very lengthy periods experienced by some of the Applicants, are intolerable and degrading to human dignity and worth. The six, seven and nine cell rotations meant that many of the Applicants were spending 18 to 21 hours a day in their cells. The s. 12 rights of those Applicants who endured those conditions for months at a time were breached.

[1022] These conditions had an adverse effect on the Applicants. For example, I note that Cuong Trang suffered from a serious depression, at least in part, because of these conditions, and that Joe Kochan described feelings of hopelessness, fatigue, boredom and anger, as a result of these conditions. All described boredom and frustration.

[1023] The data on inmates who spent lengthy periods in restrictive lock-up units reveals that:

(a) Alex Chan was in a unit with top/bottom rotation for 278 days;

(b) Man Kit Chan spent 413 days in 6 or 9 cell rotation units;

(c) Donald Cheung spent 177 days in a unit with top/bottom rotation, and 76 days in a 6/7 cell rotation, for a total of 253 days;

(d) Thao Dao's entire stay of 409 days was in lock-up for 18 to 23 hours a day;

(e) Joe Kochan was locked up 18 to 23 hours a day for all but 90 days of the over 1100 days in the ERC; I note here that Kochan asked for a different placement, but in my view, given the exceptionally lengthy incarceration in these conditions, that request does not mitigate the degradation of the experience;

(f) Tien Lam spent almost twice as long (267 days) on a top/bottom rotation as in a unit with no restrictive lock-up routine (193 days);

(g) Thi Le spent his entire 413 day stay locked up 18 to 23 hours a day;

(h) James Mah spent 370 days in a unit with a 6/7 cell rotation and 88 days in a top/bottom rotation;

(i) Long Nguyen spent the entire 371 days in units with rotation schedules ranging from 18 to 21 hours lock-up;

(j) Rocky Simmons spent the entire 367 days in units with rotation schedules ranging from 18 to 21 hour lock-up;

(k) Vi Tang spent 226 days on a 6 cell rotation unit;

(l) Anh Tran spent all 610 days locked up 18 to 23 hours a day;

(m) Binh Trang spent virtually his entire 706 day stay on either a 6 cell rotation or a top/bottom rotation;

(n) Tuan Trang spent virtually all 869 days on units with rotation with 18 to 21 hour lock-up;

(o) Vu Trinh was in a 6 cell rotation unit for 427 days out of 495; and

(p) Adrian Vergara spent 456 days in a 6 cell rotation unit.

[1024] All of these inmates spent over seven months, most more than a year, and some spent two or more years, on units with restrictive lock-up. The Respondents point out that some of that time was spent in court and out reviewing disclosure. Further, changes in the access to recreation meant that some of the inmates had access to recreation when they would otherwise have been in lock-up, but I note that the ERC led no evidence as to who among these inmates actually accessed this recreation. In my view, the amount of time spent reviewing disclosure, out at court, or for that matter, attending medical or dental parade, does not mitigate the fact that these Applicants spent a very significant amount of time in a very small cell, with little access to recreation or other activity. They could not even watch television, since the TVs were in the common area. I conclude that the s. 12 rights of these inmates were breached.

[1025] Obviously, it is the combination of double-bunking in small cells for 18-21 hours a day, with limited access to recreation and other activities that leads to this

> conclusion. The creation of the Long Term Remand Unit is a partial solution to the problem.
>
> [Emphasis added]

[87] The court held that inmates who were subjected to less onerous lockdown conditions had failed to establish a breach of their rights under s. 12:

> 1026 Willy Lau spent 103 days in a 6 cell rotation and 229 days in a top/bottom rotation (total 332), after having initially been placed in a unit with no restrictive lock-up because he requested a move to a unit with inmates who spoke his language. He was later placed in the LTRU. Hiep Le spent 238 days out of 413 days on units with 6/7 cell rotation or 9 cell rotation, but he asked for the transfer. Similarly, Bao Tran sought movement from a unit with no restrictions to a unit with a 6 cell rotation. He spent 125 days in the unit with the 6 cell rotation. Phong Tran spent 66 days in a unit with a top/bottom rotation, and De Trang was usually in a unit with no restrictions, except for occasional periods when 4D had a top/bottom rotation.
>
> 1027 In my view, the circumstances of these five inmates does not rise to a breach of s. 12. While I have some concerns about how long Lau spent in restrictive lock-up, the fact that he requested the move off the less restrictive unit combined with the fact that he was offered, and later accepted, a placement on the LTRU favours a finding that in his particular circumstances, there was no breach.
>
> [Emphasis added]

[88] I will say more about these authorities later in my reasons.

Applying the Test for *Habeas Corpus*

[89] For Mr. Downey's application to be successful, he must establish that he has been deprived of liberty. Once a deprivation of liberty is proven, Mr. Downey must raise a legitimate ground upon which to question its legality. If he raises such a ground, the onus shifts to the AGNS to show that the deprivation of liberty was lawful.

[90] The difficulty faced by Mr. Downey, and other individuals housed in CNCSF who seek to challenge the facility-wide rotational lockdowns, is that "deprivation of liberty" in this context means a form of detention "that is distinct and separate from that imposed on the general population" (*Miller*, *supra*, at para. 36). This is the "particular form of detention or deprivation of liberty which is the object of the challenge by *habeas corpus*" (*Miller*, *supra*, at para. 36). It is this comparatively more restrictive form of confinement that creates the "prison within a prison" described in the case law.

[91] In *Ogiamien*, the Ontario Court of Appeal noted that *habeas corpus* "may remedy living conditions in a prison where the inmate faces physical confinement or a deprivation of liberty that is more restrictive than the confinement of other inmates" including where an inmate has been place in administrative segregation, confined in

a special handling unit, or transferred to a higher security institution (para. 88). The court held that Mr. Nguyen was not entitled to the remedy of *habeas corpus* because he did not face conditions of confinement more restrictive than those faced by the other inmates. The same is true for Mr. Downey.

[92] According to the evidence from D/S Ross, which Mr. Downey did not dispute, when a decision is made to implement rotational lockdowns due to staffing shortages, those lockdowns are implemented across the entire facility. The general population dayrooms and the protective custody dayrooms are all given as close as possible to equal time outside their cells. As such, the remedy of *habeas corpus* is not available.

[93] Although Mr. Downey's application cannot succeed, it has given the court the opportunity to express its deep concern about the routine use of rotational lockdowns to respond to staffing challenges at CNSCF. I accept that these lockdowns are having a detrimental impact on the health and wellbeing of the people in custody. These individuals are being confined to their cells for reasons that are outside their control. They never know from one day to the next how much time they will get outside of their cells, as the decision is made each morning when the unit captains arrive for their shifts. There is nothing that a person in custody can do to earn more time outside of their cell. This situation adds an extra layer of stress and anxiety to the day-to-day experience of persons in custody and staff, and can increase tensions in the dayrooms, as reported by D/S Ross.

[94] When courts sentence offenders to prison, they do so with the hope that those individuals can rehabilitate themselves and successfully reintegrate into the community. That is the premise of our criminal justice system. Confining persons in custody – many of whom may have pre-existing mental health issues – to their cells for exorbitant periods of time does nothing to assist and support their rehabilitation. Mr. Downey provided persuasive evidence of the toll this is taking on his mental and physical health. Even a person with robust mental health would find it challenging to be regularly confined to a cell, often for more than 20 hours per day, with little notice and no ability to earn more time out. This practice is dehumanizing, and it is setting these individuals up to fail. They deserve better.

[95] Staffing issues at CNSCF have been ongoing for over three years. I was provided with very limited information on this application concerning concrete steps being taken to alleviate the staffing shortage. While I accept that administrators like D/S Ross are doing the best they can with the available staff, this is cold comfort to Mr. Downey and others who have recently filed *habeas corpus* applications in relation to the rotational lockdowns at CNSCF. Nor will they find comfort in the fact that their onerous conditions of confinement are no more restrictive than those faced by their peers in protective custody and general population.

[96] The court has no power on this application to order the government to increase

its efforts to hire and retain more staff. That said, there are striking similarities between the conditions of confinement at CNSCF during rotational lockdowns and those that were held to constitute cruel and unusual treatment in *Trang*, *supra*. If creative and effective measures to hire and retain staff are not pursued, there may come a day when, in a suitable procedural context, the court can provide some form of remedy.

Conclusion

[97] Reluctantly, I have no choice but to dismiss Mr. Downey's application.

Brothers, J.