SUPREME COURT OF NOVA SCOTIA
Citation: *Sempie v. Nova Scotia (Attorney General)*, 2023 NSSC 218

Date: 20230714
Docket: Hfx. No. 524428
Registry: Halifax

Between:

William John Sempie

v.

The Attorney General of Nova Scotia

DECISION ON *HABEAS CORPUS* APPLICATION

Judge:	The Honourable Justice Joshua Arnold
Heard:	June 26, 2023, in Halifax, Nova Scotia
Counsel:	William Sempie, self-represented Applicant Caitlin Menczel, counsel for the Respondent

Overview

[1] There is a significant problem at the Central Nova Scotia Correctional Facility. It is seriously understaffed. As a result, the inmates have been subject, off and on, to rotational lockdowns for months. Whether on a general population range or on a protective custody range, because of the chronic staffing shortages, all inmates are subject to close confinement for significant periods of time. The rotational lockdowns create havoc with the daily schedule. Inmates do not know if or when they will be released from their cells. Programming has been impacted, but not cancelled completely. Calls to lawyers have been impacted. Visitation has been impacted. Meals have been impacted. Tensions are high. Inmate-on-inmate intimidation and violence, as well as inmate-on-staff intimidation, abuse and violence, leads to more lockdowns and more staffing shortages.

[2] The facts related to this application are very similar to the facts in *Richards v. Nova Scotia (Attorney General)*, 2023 NSSC 220, and *Keenan v, Nova Scotia (Attorney General)*, 2023 NSSC 217, since the events occurred either at the same time or very close in time in the CNSCF.

[3] An inmate's mental health can be negatively impacted by close confinement (*Winters v. Legal Services Society*, [1999] 3 S.C.R. 160, per Cory. J., in dissent but not on this point, at paras. 65-67; *Canadian Civil Liberties Association v. Canada (Attorney General)*, 2019 ONCA 243, at paras. 72-77. See also: *British Columbia Civil Liberties Assn. v. Canada (Attorney General)*, 2019 BCCA 228).

[4] The applicant, William Sempie, says that he is regularly locked in his cell for more than 22 hours per day. His main complaint is that although the AGNS says that inmates are getting equal time unlocked, in reality the inmates who make the most noise, are the most disruptive, or perhaps the most intimidating, end up getting much more unlocked time. He has asked the court for relief or help of some sort by way of *habeas corpus* to make things more equitable. However, he does not want to be released from his cell for longer than the majority of the other inmates at CNSCF, he merely wants equal time out of his cell.

[5] For the reasons that follow, there is no remedy available under the writ of *habeas corpus*, and Mr. Sempie's application is dismissed.

Facts

[6] Mr. Sempie filed his application for *habeas corpus* on June 8, 2023. In his application he complains of being locked in his cell for too long, especially in comparison with other inmates on his range, and requests some sort of remedy.

[7] Two witnesses testified on this application. Assistant Deputy Superintendent John Landry testified on behalf of the AGNS. William Sempie testified on his own behalf.

[8] The affidavit of ADS Landry, sworn June 19, 2023, was tendered and he also gave *viva voce* evidence. He said that generally all units at the CNSCF are subject to the rotational lockdowns and all inmates are basically receiving the same amount of time out of their cells.

[9] ADS Landry said that the lockdowns are the result of chronic understaffing. Almost every day management has to juggle labour disruptions including work refusals, vacation and sick days, and unexplained last-minute absences. Management have tried to fill in for the missing staff. Some days the cells are not unlocked at all, some days they are unlocked for a couple of hours or less and some days more than a few hours. Rarely is the unwritten target of 12 hours unlocked per day achieved. As a result, tensions are high. Tension can lead to inmate-on-inmate violence which leads to more lockdowns, resentment by the uninvolved inmates toward the involved inmates, more violence and then even less staff at the jail if some are required to transport injured inmates to hospital. Inmate-on-staff violence results in staff either unable to, or refusing to, come to work and even more lockdowns.

[10] During the course of the hearing on June 26, 2023, Mr. Sempie said:

> Mr. Sempie: Your Honour, I…I'm just…during the phone part of this court case, I'm not sure if it was you or another judge that I was talking to on the phone, but he said back to the Crown that my liberties were being no more affected than anybody else's, and that's why I brought up the point about other individuals being out longer than myself. If it was a fair rotation, then I would be…I would be okay with that, but yesterday is a good example. I was out for an hour in the morning and didn't get out again until 7:30 at night and then locked up again at quarter to nine. Meanwhile, as I'm looking out my door, I see individuals out all afternoon for hours and hours. It's…I don't…I don't u…I shouldn't say I don't understand, I understand that there's a shortage of staff. On the outside, I work as an Operations and Production Manager. I've done it for over 20 years. I understand Human Resources. I understand scheduling. I've worked for some pretty impressive companies and done some pretty

impressive things, so I get the Human Resource side of scheduling but, what I don't understand is…is when there is trying to be fair and equal and it's not happening – and it's not just one or two days, it's happening every day. And I understand what you're saying when…when, sorry, when Mr. Landry says that individuals coming back from programming or whatever. But it's…it's on top of that as well. It's when the staff comes in and says, "You guys gotta lock up," and it doesn't happen, and it's not everybody, but it's about four or five of the same individuals and the staff has many, from my understanding, many Joint Occupational Health and Safety concerns with regards to their own safety and maybe they just don't want to push the…to push it and say, "Okay, you know what? Maybe if these five guys stay out, they'll lock up when everybody else does and things will be okay." And I'm just…I'm not saying that is happening, I'm just suggesting that is a possibility. I've never had any…any provincial or federal charges laid against me for anything with the staff, I'm nothing but respective in both federal and provincial. I…I understand that the men and women have a job to do when they come in and they want to go home to their family, and that's why I…when I'm told to lock up, I go and lock up and never give anybody any issues. But it's the equality that's bothering me the most and it's that statement that was said during, like I said, during the phone part of this…of this court case that, it's untrue –my rights are being infringed upon more than other individuals. I'm not saying every individual, but there are, like I've said, half a dozen individuals and, again, the dates that stick out in mind for me were back in June – June 11th, 12th, 13th, 14th, 15th, and 16th, and then we get into the security lockdown. Those are the days that stick out, but it happened when I was on the unit in North 3, it happens on West 1, and it's just – because also of the mental health issues I suffer from, which were diagnosed when I was a CSC Dorchester (Medium) – it adds onto that as well and it sometimes just gets to be too much. I'm not a guy to lash out, so I just keep my head down and, as Mr. Landry said, I'm…I'm going back to the federal system and I'm hoping it will be better there and will be able to move forward from this, but for the last four months that I was incarcerated in this provincial facility, the first month was fine and then it just went downhill from there and those are my reasons why.

The Court: Okay, thank you. Cross-examination?

Ms. Menczel: Mr. Sempie, have you submitted, or have you raised your concerns that you've just explained through Corrections Services Offender Complaints?

Mr. Sempie: I've actually submitted three complaint forms: one to Health Care, with regards to seeking help with my mental health, and I submitted two but I never…two for the complaint forms for the other side, which would be the correctional staff and I never heard anything back from them. Again, I was…when I handed it into the corrections officer, she turned to

me, laughed sarcastically, and said, "good luck" and that is on camera I would presume. I can't give you the day of that because, to be honest, I…I was in my head. I was thinking about how things are handled in the federal system where within four days, you get a response back and…but no, I never heard back from the two that I submitted…

Q. Okay.

A. …and it was to do with these…with these reasons, about the rotational lockdown and the non-equality of my time out.

Q. So, those offender complaints were submitted in June, this month, of June 2023?

A. No, they were submitted back in May, and maybe they were lost when we got transferred over to another unit or, again, I…I've worked in Operations for a very long time and know that sometimes paperwork gets lost and I'm not charging anybody or saying anybody did it on purpose, I…I just don't know what happened to those two complaint forms, but I did fill them out and the only one I heard back from was the health care one. It just said that they'd received it, but I've never heard anything. No answer on that one.

Ms. Menczel: Okay, okay. No further questions.

The Court: …So, Mr. Sempie, you've said the past three months everything went downhill, and I gather than means everything went downhill as far as the rotational lockdowns and the equal division of time out of cells. Is that right?

Mr. Sempie: Yes, Your Honour. When I…when I came in in February…early February of this year, I believe it was February 2nd or 3rd, while I was on…housed on North 3, we were getting the 12 hours out, we were getting airing court, again, we had access to everything that was there: books, games, TV, everything. And then, slowly, as the weather changed from winter into spring and now into summer, it just appears that things are getting tighter, they're getting…the whole time I've been on West 1, the only time we were out was on a stat holiday. Like, the whole unit was out, was on a stat holiday.

Q. Okay, but in relation to what you were describing as the inequitable time out of your cell, how often over the past month or so has that occurred? You gave us a four-day example when you were asking your questions…

A. Yes.

Q. …but, as far as your evidence goes, how often is that?

A. I would say, anywhere from 80-90% of the time, depending on what the rotation is and there's times when we…when there's even a four-cell

rotation that, because I'm not a loud inmate yelling out, I never even come out of my cell and…yeah.

Q. You don't come out because you choose not to come out?

A. No, I don't come out because I'm not yelling at people to let me out or, if somebody's out there, there's a call box within the unit that they can call up to the control bubble and say, "Hey, let out Cell 17," or "Hey, let out Cell…" and these are just numbers, I'm not…

Q. Right.

A. …"Let out Cell 32." I'm in Cell 21 and it's…my number's never called because I'm not one to yell out and say, "Hey, if you don't let me out, I'm going to do this," or "You better let me out," and then that…gets out and they're out for two, three hours at a time. I…I wish that there was more of a respect factor to say, "You know, what? John hasn't been out or Bob hasn't been out and we should…we should lock up for them." Unfortunately, it's not there.

[11] Mr. Sempie also said, in his closing arguments:

…When I filed the *habeas corpus,* I read the paragraph that was on the front page, it's in pretty well layman's terms. It says, "…is available to challenge unlawful depri…" um, "…deprivation of liberty." Liberty is when we have the ability to go out and enjoy our time in the day room and if one person's liberties are this amount and another person's liberties are this amount, to me it's a deprivation of…of that person's liberty. They're not getting the equal amount of time out. I'm…I'm not a law expert. Like I said, I do operations and production management on the outside, so I'm just…that's my understanding of it, is day-in and day-out this continues to happen. You add that up with the various rotational lockdowns that we go through, whether they're four-cell, half a unit, one cell, the lack of any planning for the future…it's just that I do a lot of planning in my position and I…and I see lack of it here. To say that, "oh, we've hired eight guys and…and they're in…" or "we've hired eight people," excuse me, "and they're in training," are those people not going to go through the same conditions that the…that the people that are already in the Joint Occupational Health and Safety have gone through? I have, unfortunately, done some incarceration time and, in my view, the Central Nova Scotia Correction Facility is very similar to a maximum-security prison, with the idea of a controlled movement. If I need to go anywhere, there is an officer that will take me there. If I'm going to health care, if I'm going to programs, if I'm coming to court, an officer will take me down there. While I was incarcerated at a medium facility, if I was told to go to a health care, I just go there on my own, or I'd go to programs on my own, or I'd go to work on my own. So, that underlining cause for the Joint Occupational Health and Safety concerns are always going to be there. The people that are coming in to work there, if they're not…if they're not, they should be informed of the situation that

> they're coming into – that these…that these issues are there. And, if that continues to happen, then myself…I've…I've already been sentenced to a federal term and, as Mr. Landry has said, I'm hopefully going to be expedited out of there, but it's the people that are coming in after me and the people that are still there. I'm not the only quiet guy that's there. I'm not the only one who looks out and sees many, many, many people – four, five, six people – out at a time, to say, "Hmm, I got out for an hour. Why is that fellow out for four?" It's…to me, it is…it is a deprivation of liberty. It's…it's the idea of saying, "It's okay, Mr. Sempie, if you come out for two hours, but it's okay if Mr. X. over here comes out for six." And that's all I have to say, Your Honour.

[12] Mr. Sempie is open to any remedy that might address the inequitable time he is locked in his cell, in comparison with other inmates.

[13] The AGNS did not dispute that Mr. Sempie might be spending more time locked in because he is a cooperative inmate. In relation to the specific allegation made by Mr. Sempie, the AGNS stated:

> …Based in the law, there is no remedy in this application through the *habeas corpus* process. Perhaps there…there is a remedy through a number of other legal and administrative processes, but there is no remedy through *habeas* and even in context – legal context – where courts as high as the highest court in this country have discussed the evolution of the *habeas corpus* application and the remedy, those have been, upon my analysis, upon the analysis of the Attorney General, in the factual frame of constructively defining new deprivations of residual liberty. And that's the front-end of *habeas*, whereas the remedy side remains fixed: release from special handling into general population, and Mr. Sempie is within the general population at the Central Nova Scotia Correctional Facility on the West 1 Day Room, and so, it is our…I had prepared in my submissions that the old saying, "there is no right without a remedy" is applicable in these circumstances because in this genre of *habeas* application, there's…there is no right to the writ, although, perhaps, there is right to a remedy elsewhere, but this is a closed, expedited, administrative process with a specific test and remedy.

Legislation

Charter

[14] Section 10(c) of the *Charter of Rights and Freedoms* states:

> 10 Everyone has the right on arrest or detention
>
> …

(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Civil Procedure Rules

[15] Civil Procedure Rule 7 states, in part:

7.02 Scope of Rule 7

…

(2) This Rule applies to each of the following:

…

(c) *habeas corpus* for civil detention, and an application for *habeas corpus* to which the *Criminal Code* applies is started under Rule 64 - Prerogative Writ;

…

…

7.13 Order for *habeas corpus*

(1) *Habeas corpus* takes priority over all other business of the court.

(2) When a notice for *habeas corpus* is filed, a judge must immediately do all of the following:

(a) appoint the earliest practical time, date, place, and means for a judge to give directions on the course of the proceeding;

(b) order any person detaining the applicant to bring the applicant before the judge in person, by video, or by telephone, at the set time and date;

(c) order a respondent to produce all documents relating to the detention immediately to the court;

(d) cause the parties to be notified of the time, date, place, and means of the hearing for directions.

(3) An order to bring the applicant before a judge may include the statement, "Failure to obey this order may lead to contempt proceedings."

(4) The order may be in Form 7.13.

7.14 Directions to determine legality of deprivation of liberty

A judge may provide directions necessary for a quick and fair determination of the legality of the applicant's deprivation of liberty, including any of the following:

> (a) set a date for the court to determine the legality of the deprivation of liberty and whether the hearing shall be held in person, by video conference, by telephone or by some combination of these means;
>
> (b) order a person detaining the applicant to bring the applicant before the court for the hearing in person, by video conference or by telephone;
>
> (c) set dates for filing affidavits and briefs;
>
> (d) order production of a document not already produced;
>
> (e) order attendance of a witness for direct examination, if the evidence is not obtained by affidavit;
>
> (f) order attendance of a witness for cross-examination;
>
> (g) determine what documents will constitute the record;
>
> (h) start a proceeding, under Rule 89 - Contempt, against a person who receives an order to bring the applicant before the judge or produce a document and fails to make every reasonable effort to comply with the order;
>
> (i) adjourn the proceeding and make any order necessary to obtain the presence of the applicant.
>
> …
>
> **7.16 Final determination following *habeas corpus***
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> A judge may release or remand the applicant on determining whether or not the deprivation of liberty is legal.
>
> **7.17 Abuse of *habeas corpus***
>
> **(1)** A person who applies for *habeas corpus* commits an abuse of process if both of the following apply:
>
> (a) the deprivation of liberty has already been determined to be legal by the court;
>
> (b) no new ground has arisen since the determination.
>
> **(2)** The abuse may be dealt with under Rule 88 - Abuse of Process.

Correctional Services Act

[16] Section 74 of the *Correctional Services Act*, S.N.S. 2005, c. 37, states:

> **74** A superintendent may, in accordance with the regulations, place an offender in close confinement in a correctional facility, if

> (a) in the opinion of the superintendent, the offender is in need of protection;
>
> (b) in the opinion of the superintendent, the offender needs to be segregated to protect the security of the correctional facility or the safety of other offenders;
>
> (c) the offender is alleged to or has breached a rule of a serious nature; or
>
> (d) the offender requests.

Correctional Services Regulations

[17] Section 79 of the *Correctional Services Regulations*, N.S. Reg. 99/2006 states:

> **79 (1)** A superintendent may impose different conditions of confinement for different offenders within the correctional facility.
>
> **(2)** An offender held in a correctional facility may be restricted from associating with another offender held in the correctional facility.
>
> **(3)** For reasons of safety, security or order in the correctional facility, a superintendent may restrict access to the correctional facility or part of it by
>
> (a) confining the offenders held in the correctional facility or those of them who are normally held in that part, as the case may be, to their sleeping areas; and
>
> (b) restricting entry to the correctional facility or that part, as the case may be.

Correctional Services Policy 43.000

[18] Section 14 of Correctional Services Policy 43.000 sets out the *goal* of having inmates out of their cells for a minimum of two hours per day:

> **14. Housed with Privileges**
>
> 14.1 Individuals who are required to be housed in a close confinement unit but have been provided access to out of cell programs/privileges and to interact with other inmates in excess of two hours daily, do not meet the criteria of confinement and are "housed with privileges".

Law relating to *Habeas Corpus*

[19] Due to the rotational lockdowns, this court has been deluged with *habeas corpus* applications. The court has issued several recent decisions including Justice Campbell's decisions in *Foeller v. Nova Scotia (Attorney General)*, 2023 NSSC 149, and *Jennings v. Nova Scotia (Attorney General)*, 2023 NSSC 148; and Justice Brothers's recent decision in *Downey v. Nova Scotia (Attorney General)*, 2023 NSSC 204. Rotational lockdowns have been addressed in earlier decisions of this and other courts, including: *Wallace v. Nova Scotia (Attorney General)*, 2021 NSSC 101; *Cox v. Nova Scotia (Attorney General)*, 2020 NSSC 81; *Clarke-McNeil v. Nova Scotia (Attorney General)*, 2021 NSSC 266; *Coaker v. Nova Scotia (Attorney General)*, 2018 NSSC 291; *Ogiamien v. Ontario (Ministry of Community Safety and Correctional Services)*, 2017 ONCA 667.

[20] Additionally, as noted above, concurrent with the release of this decision, I have released two decisions in situations similar to Mr. Sempie's dealing with the rotational lockdowns (*Richards* and *Keenan*), that also involve complaints of inequitable time out of cell by inmates on similar ranges.

[21] I fully adopt the reasons of Brothers J. in her very recent decision in *Downey* wherein she undertook a thorough review of the relevant cases and, in applying the test for *habeas corpus* in the circumstances of a rotational lockdown, reluctantly dismissed the application:

> **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.

[22] Mr. Sempie's situation mirrors that in *Downey* on the issue of the rotational lockdowns and *habeas corpus*. His complaint of inequitable time out of his cell due to more demanding inmates taking more than their fair share of unlock time is similar to the complaints in *Richards* and *Keenan.* The issue regarding inmates bullying their way to more unlock time is an operational problem that is not the result of the government placing Mr. Sempie "in a prison within a prison". There is no remedy available to him under this writ on these facts. That said, there are some points of law, even if covered in the previously mentioned decisions, that bear repeating.

[23] Because s. 10(c) of the *Charter* is a constitutionally entrenched right, it must be interpreted broadly. The Supreme Court of Canada has explained that *habeas corpus* is available to address an inmate's loss of residual liberty, where an inmate is invalidly or unreasonably placed in a "prison within a prison" (*R. v. Miller*, [1985] S.C.J. No. 79, [1985] 2 S.C.R. 613, at para. 32). The writ of *habeas corpus* is very important in a democratic society and must be considered in a purposive and expansive manner; it can be used to address a variety of restraints on individual liberty, not merely cases of illegal incarceration (*R. v. Gamble*, [1988] 2 S.C.R. 595, at paras. 63-81). In *May v. Ferndale Institution*, 2005 SCC 82, LeBel and Fish JJ. explained the purpose, nature and scope of the writ:

> **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 added.]
>
> **22** *Habeas corpus* is a crucial remedy in the pursuit of two fundamental rights protected by the *Canadian Charter of Rights and Freedoms*: (1) the right to liberty of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (s. 7 of the *Charter*); and (2) the right not to be arbitrarily detained or imprisoned (s. 9 of the *Charter*). Accordingly, the *Charter* guarantees the right to *habeas corpus*:
>
> > **10.** Everyone has the right on arrest or detention
> >
> > ...
> >
> > (*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.
>
> …
>
> **32** The same reasoning was also applied by this Court in *Cardinal* and *Morin*, the companion cases to *Miller*. In our view, the trilogy supports two distinct propositions. First and foremost, provincial superior courts have jurisdiction to issue certiorari in aid of *habeas corpus* in respect of detention in federal penitentiaries in order to protect residual liberty interests. This principle is crucial in these cases. In the prison context, the applicant is thus entitled to choose the forum in which to challenge an allegedly unlawful restriction of liberty. Under *Miller*, if the applicant chooses *habeas corpus*, his or her claim should be dealt with on its merits, without regard to other potential remedies in the Federal Court. The second proposition, which does not arise in these cases, is that *habeas corpus* will lie to determine the validity of the confinement of an inmate in administrative segregation, and if such confinement is found unlawful, to order his or her release into the general inmate population of the institution.

[24] The majority in *May v. Ferndale* also directed provincial superior courts, such as this court, to take a direct, hands-on approach by way of *habeas corpus* in providing oversight to inmate claims of unlawful deprivation of residual liberty in correctional institutions:

> **23** However, the right to seek relief in the nature of *habeas corpus* has not always been given to prisoners challenging internal disciplinary decisions. At common law, for a long time, a person convicted of a felony and sentenced to prison was regarded as being devoid of rights. Convicts lost all civil and proprietary rights. The law regarded them as dead. On that basis, courts had traditionally refused to review the internal decision-making process of prison officials: M. Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (2002), at pp. 47-50. By the end of the 19th century, although the concept of civil death had largely disappeared, the prisoner continued to be viewed in law as a person without rights: M. Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (1983), at p. 82.

24 It was this view that provided the original rationale for Canadian courts' refusal to review the internal decisions of prison officials. The "effect of this hands-off approach was to immunize the prison from public scrutiny through the judicial process and to place prison officials in a position of virtual invulnerability and absolute power over the persons committed to their institutions": Jackson, *Prisoners of Isolation*, at p. 82.

25 Shortly after certain serious incidents in federal penitentiaries occurred in the 1970s and reviews of their management took place, this Court abandoned the "hands-off" doctrine and extended judicial review to the decision-making process of prison officials by which prisoners were deprived of their residual liberty. In *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, Dickson J. (as he then was) laid the cornerstone for the modern theory and practice of judicial review of correctional decisions:

> In the case at bar, the disciplinary board was not under either an express or implied duty to follow a judicial type of procedure, but the board was obliged to find facts affecting a subject and to exercise a form of discretion in pronouncing judgment and penalty. 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. [Emphasis added; p. 622.]

…

27 In 1985, in the trilogy of *Miller*, *Cardinal*, and *Morin*, **the Court expanded the scope of *habeas corpus* by making the writ available to free inmates from restrictive forms of custody within an institution, without releasing the inmate. *Habeas corpus* could thus free inmates from a "prison within a prison".** Each case involved challenges by prisoners of their confinement in administrative segregation and their transfer to a special handling unit. This unit was reserved for particularly dangerous inmates and was characterized by more restrictive confinement.

28 In *Miller*, Le Dain J., writing for the Court, recognized that confinement in a special handling unit or in administrative segregation is a form of detention that is distinct and separate from that imposed on the general inmate population because it involves a significant reduction in the residual liberty of the inmate. In his view, ***habeas corpus* should lie "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"** (p. 641). [Emphasis added]

[25] The writ of *habeas corpus* is not a stagnant remedy but has evolving purposes and principles (*Mission Institution v. Khela*, 2014 SCC 24, at paras. 29-30). Provincial superior courts generally have the authority to consider three different deprivations of liberty in the context of correctional law on a *habeas corpus* application: 1) the initial deprivation of liberty; 2) a substantial change in conditions amounting to a further deprivation of liberty; and 3) a continuation of the deprivation of liberty (*Gogan v. Canada (Attorney General)*, 2017 NSCA 40). That said, courts have traditionally limited *habeas corpus* remedies to current and ongoing detention, distinct from historical or future confinement or detention (*Ewanchuk v. Canada (Attorney General)*, 2017 ABQB 237 at paras. 23-25).

[26] No cases have been provided to me, nor could I find any through my own research, that specifically support the position that the court can provide any remedy on a *habeas corpus* application involving rotational lockdowns where all inmates are basically given equal time unlocked, even where that time unlocked is significantly less than optimal due to chronic understaffing. Nor could I find any involving inmates having less unlock time due to more demanding inmates taking more than their fair share of unlock time. However, as noted in *Downey*, there are decisions that denounce the protracted use of rotational lockdowns and *provide alternate remedial routes* where rotational lockdowns cause an inmate to spend too much time locked in a cell: *R. v. Passera*, 2017 ONSC 2799, aff'd 2019 ONCA 527, at paras 120-134; *R. v. Charley*, 2019 ONSC 6490, at paras. 58-68; *R. v. Ward-Jackson*, 2018 ONSC 178, at paras. 25, 50-53; and *Trang v. Alberta (Edmonton Remand Centre)*, 2010 ABQB 6, at paras. 174-178 and 1013-1027).

Analysis

[27] Mr. Sempie is not subject to administrative or disciplinary close confinement such that he is locked down more than other inmates in the institution. However, operational issues may be allowing certain inmates to get quantifiably more time out of cells than others, including Mr. Sempie. The AGNS did not dispute the possibility that Mr. Sempie might be getting less time unlocked than more demanding inmates on his range, but he was not being locked in for administrative or disciplinary reasons. ADS Landry testified that overall, the CNSCF simply does not have enough staff to let inmates out for longer periods of time when understaffed for the safety and security of the inmates and the staff. Until more staff are hired, and retained, nothing is likely to change. The entire prison is spending more time than optimal locked down for the safety and security of the inmates and staff.

[28] Currently Mr. Sempie is not supposed to be locked down more than the rest of the prison population. Until the chronic understaffing is addressed, the rotational lockdown problem will continue for the entire prison population. Inmates in this situation, subjected to more significant restrictions on their liberty than might be optimal, might have remedies other than those available through a *habeas corpus* application, as was noted above. And the operational issue regarding the inequity raised by Mr. Sempie regarding more demanding inmates is not captured by the writ of *habeas corpus*.

[29] I simply cannot provide a remedy to Mr. Sempie under the writ of *habeas corpus*. However, by way of *obiter dicta*, I can state that what Mr. Sempie describes, that pushier and more demanding inmates are getting more unlock time than cooperative inmates like Mr. Sempie, is problematic and should be addressed by staff at the CNSCF.

Conclusion

[30] William Sempie's *habeas corpus* application is (reluctantly) denied.

Arnold, J.