SUPREME COURT OF NOVA SCOTIA
Citation: *Richards v. Nova Scotia (Attorney General)*, 2023 NSSC 220

Date: 20230714
Docket: Hfx. No. 524158
Registry: Halifax

Between:

Ronald Richards

v.

The Attorney General of Nova Scotia

DECISION ON *HABEAS CORPUS* APPLICATION

Judge:	The Honourable Justice Joshua Arnold
Heard:	June 15 and 16, 2023, in Halifax, Nova Scotia
Counsel:	Ronald Richards, self-represented Applicant Timothy Leatch, 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 – are increasing, leading to more lockdowns and more staffing shortages.

[2] The facts related to this application are very similar to the facts in *Keenan v. Nova Scotia (Attorney General)*, 2023 NSSC 217, and *Sempie v. Nova Scotia (Attorney General)*, 2023 NSSC 218, as 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, Ronald Richards, says he has been in and out of jail for almost ten years, in both federal and provincial institutions, and that the situation at CNSCF is the worst he has ever encountered in custody. He said he is double bunked with another inmate; they are regularly locked up together for 22 hours (sometimes more and sometimes less) per day in a room about the size of a bathroom. Mr. Richards says that certain inmates are given preferential treatment by staff and get more time unlocked than he does. He has suicidal ideations because of the situation and has asked the court for relief by way of *habeas corpus*.

[5] However, because Mr. Richards is not subject to "prison within a prison" in comparison with the rest of the inmates at the CNSCF, *habeas corpus* does not provide a remedy. For the reasons below, his application is dismissed.

Facts

[6] Ronald Richards filed his application for *habeas corpus* on May 30, 2023. In it, he complains of being locked in his cell for too long and denied programming. He is looking for some sort of remedy and, in his written application, he suggested increased credit for remand time or monetary compensation. I advised Mr. Richards during the hearing that neither of those remedies are available on a *habeas corpus* application, although he can pursue them by way of other applications. Nonetheless, he asked to pursue the application and was open to any remedy that might address his ongoing rotational lockdown time.

[7] Two witnesses testified on this application. Deputy Superintendent Rachel Critchley testified on behalf of the AGNS. Ronald Richards testified on his own behalf.

[8] D/S Critchley adopted her affidavit sworn June 8, 2023, and gave *viva voce* evidence. She said that aside from the mental health unit and the women's unit, inmates in all units at the CNSCF are basically receiving the same amount of time out of their cells.

[9] She explained that during COVID, the CNSCF was housing about 100 prisoners. The facility is now housing almost 340 prisoners, which is near capacity. They are very understaffed. According to D/S Critchley, several factors are contributing to the staffing shortages. She said law enforcement is not currently a desirable career. Working in corrections is very challenging, and some staff members take time off under the workers' compensation process. In addition, the staff shortages mean that shifts are often extended with minimal notice to the employee. D/S Critchley stated that an employee scheduled for an eight- or twelve-hour shift might quickly find themselves having to work for sixteen or twenty hours. She said this takes a toll on individuals, especially if they have a family. More generally, working in a jail is just not appealing to everyone. Almost every day, management must juggle work refusals, vacation and sick days, unexplained last-minute absences, as well as the general chronic understaffing.

[10] Additionally, D/S Critchley testified that several post-COVID changes to the jail have made much of the guards' work more labour-intensive, including video court requirements and the related increase in lawyers' calls. This is due to the reduction in the frequency of in-court appearances, where lawyers and inmates can speak to each other in-person.

[11] Work refusals by staff, occupational health and safety complaints, and unexpected absences are common now, both caused by and resulting in, poor morale.

Management have tried to fill in for the missing staff. However, the chronic understaffing situation has led the jail to resort to rotational lockdowns. There are days where the cells are not unlocked at all. Some days, they are unlocked for a couple of hours or less. Other days, the cells are unlocked for more than a few hours. Rarely does the facility achieve the unwritten target of 12 hours unlocked per day. As a result, tensions are high. Increased tension can lead to inmate-on-inmate violence, which leads to more lockdowns, and resentment by the uninvolved inmates toward those involved. More violence results in even fewer staff at the jail if some are required to transport injured inmates to hospital. Inmate-on-staff violence results in staff either refusing or being unable to come to work, resulting in even more lockdowns.

[12] D/S Critchley advised that a recent hiring push for 35-45 new guards resulted in a dismal result of only nine being hired. The only solution to the problem she could propose is finding a way to hire more staff.

[13] Regarding the complaint of inequity, between inmates on the same range, D/S Critchley was aware of this issue and stated:

> D/S Critchley: …One of the solutions that we've been looking at recently…what we were finding especially in review of some of the rotational unlock logs, is that there were some individuals in the day room monopolizing time. So, you may have one individual that might get more time out of the day room, for the purposes of, sort of, jail language, you'd be referring to your "heavies," where they may have the ability to navigate to get way more time out than, say, Cell 1, who is quieter, doesn't know jail, doesn't really have any ties to anybody. So, what we're trying to commit to doing right now in the West, and I know the North management are doing the same thing, is really sticking to a rotational schedule, which will see the fair and equitable time out for all individuals in that…in that day room – unless there is an emergency code. So, for Mr. Richards specifically, if he was given…and, also, the rotation is posted, so that they would then be able to tell their families, "look, this is my time on this date, I'll be able to call you," or…legal calls are different because we do navigate those and we do…we do accommodate those. That's not something that we don't facilitate…especially, we're not trying to keep anyone in jail longer than need to be. So, usually, if they have facilitation of the call, they can address their legal matters…matters in an appropriate manner. But we're really trying to reinforce the expectations on the rotation schedule. That should, in some sense, assist in having fair and equitable time out and you're not looking at one individual getting an hour out, another maybe potentially getting six hours out. It will be a difficult

> transition, though, and I'm not naïve in that respect, because now there is going to be a very influential core group in the day rooms who are not going to be happy with a reduction in their hours. But that is something I need to manage and I'm committed to managing it, but it will be a transition period where we will have to reinforce and set clear expectations within that unit. I do think that that will be a solution in assisting with the inconsistency of individuals not knowing when they get out, as well as addressing the fact that you have more than…'cause what will…what happens on some of the units is an individual might only get out for thirty minutes a day because they don't want to upset somebody else, so they'll just get out thirty minutes a day. They have option for longer, but then they'll lock themselves in earlier and that's purely to…to dictate or to accommodate an individual that's attempting to run that day room. So, by addressing that issue, I am hopeful that that will pose a more immediate remedy while other things are at play and I…I really don't believe there is one approach. It's going to have to be multiple approaches taken in a consistent manner.

[14] In relation to Mr. Richards specifically, D/S Critchley undertook a video review of his time out of cells on selected dates and said in her affidavit:

> 28. Mr. Richards filed his current *habeas corpus* application on May 30, 2023. Because Mr. Richards was alleging, in his *habeas corpus* application, a prolonged period of time with less than two hours of cell per day, I conducted a video review to determine his unlock times. Those times were:
>
> **-May 30, 2023 – North 3**
>
> | | | |
> |---|---|---|
> | Out: | 1643-1741hrs | (0:58) |
> | Out: | 2035-2206hrs | (1:31) |
> | Total time out of cell: | | **(2:29)** |
>
> **-May 31, 2023 – West 1**
>
> | | | |
> |---|---|---|
> | Out: | 1618-1640hrs | (0:22) |
> | Out: | 1923-2038hrs | (1:15) |
> | Total time out of cell: | | **(1:37)** |
>
> **-June 1, 2023 – West 1**
>
> | | | |
> |---|---|---|
> | Out: | 1056-1211hrs | (1:15) |
> | Out: | 2040-2206hrs | (1:26) |
> | Total time out of cell: | | **(2:41)** |

-June 2, 2023 – West 1

Out:	0943-1038hrs	(0:55)
Out:	1445-1553hrs	(1:08)
Out:	2035-2203hrs	(1:28)
Total time out of cell:		**(3:36)**

-June 3, 2023 – West 1

Out:	0713-0934hrs	(2:21)
Out:	1608-1706hrs	(0:58)
Total time out of cell:		**(3:19)**

-June 4, 2023 – West 1

Out:	0712-0936hrs	(2:24)
Out:	1332-1532hrs	(2:00)
Out:	1910-2036hrs	(1:26)
Total time out of cell:		**(5:50)**

-June 5, 2023 – West 1

Out:	0705-0940hrs	(2:35)
Out:	1340-1535hrs	(1:55)
Out:	1938-2212hrs	(2:34)
Total time out of cell:		**(7:04)**

-June 6, 2023 – West 1

Out:	0950-1214hrs	(2:24)
Out:	1538-1742hrs	(2:04)
Out:	2138-2211hrs	(0:33)
Total time out of cell:		**(5:01)**

-June 7, 2023 – West 1

Out:	0800-1209hrs	(4:09)
Out:	1349-1742hrs	(3:53)
Out:	1908-2034hrs	(1:26)
Total time out of cell:		**(9:28)**

[As appears in original]

[15] D/S Critchley agreed that the time out of cells as reported by her is only a snapshot of Mr. Richards's actual situation. For example, she said that on June 15, 2023, there were more workplace disputes and refusals to work that resulted in additional lockdowns with less time out of cells. She believes that the rotational lockdowns will continue until the staffing issues are sorted out.

[16] Mr. Richards agreed with D/S Critchley's summary of his time out of his cell. He said that some days he is not out of his cell for more than 1.5 hours, while other days it is longer. The inconsistency and brevity sometimes make it difficult to do simple things like shower, eat and stay in touch with family. At one point, he was left with a single set of clothes for nine days in a row, when he should have had three sets. He said that it is disheartening that the jail is understaffed until there is a holiday where staff get paid extra for overtime, and then they have a full complement. Mr. Richards also said that the guards play favourites with the inmates and allow more demanding inmates to monopolize the unlock time. He finds the lockdown situation hard overall; the unpredictability is stressful and psychologically impactful, and he feels suicidal at times.

Legislation

Charter

[17] 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

[18] 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*

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

[19] 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

[20] 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

[21] 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*

[22] 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.

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

[24] I fully adopt the reasons of Brothers J.'s 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.

[25] Mr. Richards's situation mirrors that on *Downey* on the issue of 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 *Sempie* and *Keenan.* The issue regarding the more demanding inmates having more time unlocked is an operational problem that is not the result of the government placing Mr. Richards "in a prison within a prison". There is no remedy available to him under this writ. That said, there are some points of law, even if covered in the previously mentioned decisions, that bear repeating.

[26] 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.

[27] 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).

[28] 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).

[29] 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

[30] Mr. Richards is not subject to more restrictive conditions of confinement than other inmates at the CNSCF. D/S Critchley acknowledged that the inmates are locked down more than management would like. But they simply do not have enough staff to let inmates out longer, while still maintaining the safety and security of the inmates and the staff. Until more staff are hired, and retained, nothing is likely to change. The inequitable time out of his cell due to the "heavies" monopolizing unlock time is an operational issue that has been identified by the CNSCF and is being addressed, as noted in D/S Critchley's testimony detailed above. Currently Mr. Richards is not locked down more than the rest of the prison population because of the direct actions of staff.

[31] While I accept that the rotational lockdowns are having a significant impact on Mr. Richards's wellbeing, I simply cannot provide a remedy to him under the writ of *habeas corpus*. There is no way to give Mr. Richards more time out of his

cell without impacting the entire prison. He is not in a prison within a prison. The entire prison is spending more time than locked down than is optimal. 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 noted above.

Conclusion

[32] Ronald Richards's *habeas corpus* application is (reluctantly) denied.

Arnold, J.