SUPREME COURT OF NOVA SCOTIA

Citation: *Diggs v. Nova Scotia (Attorney General)*, 2024 NSSC 11

Date: 20240112
Docket: 527613
Registry: Halifax

Between:

Durrell Diggs

Applicant

v.

Attorney General of Nova Scotia and The Nova Scotia Health Authority

Respondents

Decision on Habeas Corpus Application

Judge:	The Honourable Justice Peter Rosinski
Heard:	November 27, 2023, in Halifax, Nova Scotia
Counsel:	Hanna Garson and Emma Arnold, for the Applicant Adam Norton, for the Respondent (AGNS) Scott Campbell and Erin McSorley, for the Respondent (NSHA)

By the Court:

1-Introduction 1

[1] This Court has the broadest jurisdiction of any trial court in Nova Scotia.

[2] As a non-statutory court, it has "inherent jurisdiction".

[3] However, as Justice Bateman stated *Ocean v. Economical Mutual Insurance Co.*, 2009 NSCA 81, at para. 77:

> Inherent jurisdiction does not bestow an unfettered right to do what, in the judge's opinion, is fair as between the parties. A court's resort to its inherent jurisdiction must be employed within a framework of principles relevant to the matter in issue. …2

[4] Sometimes, in spite of a legal problem that cries out for a solution, there is simply no way, even for this Court, to respond in a way that remedies that problem.

[5] As Justice Malcolm Rowe, the 2022 W.R. Lederman Visitor at Queen's Law, indicated in his remarks in presenting the Lederman Lecture to faculty and

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1 I wish to acknowledge the very helpful assistance I have received from our Chief Law Clerk, John Andrew Cousins, and Assistant Law Clerk, Sophia Trinacty, in relation to this case, but also on an ongoing basis with others. As of writing, the most recent written decision from this Court on *habeas corpus* is Justice Gabriel's decision in *Monteith v. Nova Scotia (Attorney General),* 2023 NSSC 378, dated November 22, 2023. Mr. Montieth's circumstances are distinguishable because his circumstances were long moot since May 2023, and he was in confinement as a result of disciplinary sanctions and being placed on a Behavioural Management Plan after the second sanction ended on May 3, 2023 (until May 17, 2023) - para. 30. Justice Gabriel went on to consider the merits. As a consequence of the mootness, Justice Gabriel concluded (paras. 89-90): "… the Applicant is entitled to the only remedy which this Court is able to provide: a declaration that his residual liberties were unlawfully restricted from April 22, 2023 until May 17, 2023, when the two sets of sanctions and the BMP (which were consecutively imposed) ended. The usual result would require each side to bear their own costs. Due to the egregious nature of the violation of virtually all of the applicant's most fundamental and basic rights in the circumstances, I will award him cost in the amount of $300. It will be payable by the Respondent to Mr. Monteith's counsel in trust." [My underlining added]

2 That concept is comprehensively described by William H Charles in his article "Inherent Jurisdiction and its Application by Nova Scotia Courts: Physical, Historical or Pragmatic?" 33 Dalhousie Law Journal, (2010). Courts have also had their say: *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, at paras. 43-44: "The oft repeated incantation of the common law is that 'nothing shall be intended to be out of the jurisdiction of a superior court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged'… The term 'jurisdiction' simply is shorthand for the collection of attributes that enables a court or tribunal to issue an enforceable order or judgment. A court has jurisdiction if its authority extends to 'the person and the subject matter in question and, in addition, has authority to make the order sought' [citations omitted] …". [My underlining added]

students of the Law Department on October 17, 2023 (the following being, in part, the author, Ken Cuthbertson's summary of Justice Rowe's words):[3]

> [Justice] Rowe noted that because the courts apply and interpret the laws made by our elected officials, the legal and legislative processes are inextricably linked. However, that doesn't mean judicial decisions are inherently political. Rather, they are based on "coherent and rigorously analytical methodology," and this is what gives them legitimacy. Rowe said that while it's essential that the courts stay within their defined role, judges must also be aware of the need for the law to evolve in line with societal change, all the while maintaining tolerance, and fairness.

[6] Mr. Diggs was incarcerated on remand at the Central Nova Scotia Correctional Facility ["CNSCF"], for 51 days from September 13- November 3, 2023, while pending his trials in December 2023.[4]

[7] The very real problem in the present case, is that **Mr. Diggs,** who has been a ("low security risk") general population inmate with full privileges, and has had no disciplinary violations during his time there, **was confined to his cell for 22 hours per day for 38 days - and confined to his cell for 21 hours per day for 8 days of his 51 days as a result of daily staffing shortages.**

[8] When Mr. Diggs was out of his cell only for two hours or less per day, that is the equivalent of being in "close confinement" or administrative segregation.[5]

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3 See also the Court's reasons in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, at paras. 31-36.

4 Mr. Diggs filed his *habeas corpus* application on **October 19, 2023.** As directed by this Court, given the novel nature of the arguments presented, the Attorney General filed Deputy Superintendent Hill's affidavit which included Mr. Diggs' time out of his cell from **September 11 to November 3, 2023** (paras. 72-3). On reflection, **I wish to confirm my opinion that documentation for such lengthy periods of time preceding the filing of the application should not be directed to be produced. Henceforth, documentation regarding the relevant dates in a *habeas corpus* hearing provided by the Attorney General normally should only include any relevant period of time starting shortly before the application is filed - regardless of the claim by the inmate in the application when the alleged deprivation of liberty started.** *Habeas corpus* is a remedy for the "here and now" in the words of Justice Thomas in *Ewanchuk v Canada (Attorney General)*, 2017 ABQB 237, at para. 23; as cited with approval by the Alberta Court of Appeal in *Heiser v. Bowden Institution*, 2022 ABCA 300, at para. 25: "… *Habeas corpus* is only available to deal with existing "here and now" deprivations of liberty, not historical deprivations of liberty that have ended…".

5 As Justice Perell aptly pointed out, in a class action by inmates regarding their claims of institutional negligence and breaches of their Charter of Rights and Freedoms entitlements in Francis v. Ontario, 2020 ONSC 1644 (affirmed 2021 ONCA 197): "People are imprisoned for years without trial, …: this is called elimination of unreliable elements. Such phraseology is needed if one wants to name things without calling up mental pictures of them. G.W. Orwell, Politics and the English Language. [1]. If one wants to

[9] The daily process is that, with advance notice, a number of qualified Correctional Officers are instructed and expected to attend each morning – if they all attended, absent unforeseeable exceptional circumstances otherwise, the inmates should be safely out of their cells for up to 10 to 12 hours that day.6

[10] However, the previously "extraordinary" recourse to lockdowns has become the presently "ordinary".

[11] Mr. Diggs made his *habeas corpus* application on October 19, 2023 in order to be released from the ongoing lockdowns.7

[12] I conclude that he was unlawfully detained by those lockdowns.

[13] However, because he was moved to North Nova Correctional Facility on November 3, 2023, I can no longer release him from the lockdowns at CNSCF.

[14] Nevertheless, as a remedy, I will issue a declaration that he was unlawfully detained by the lockdowns during those days at CNSCF.

[15] Let me go on to explain these conclusions in more detail.

2-The background to this *habeas corpus* Application

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name things without calling up mental pictures of them, call a prison a correctional institution. Pursuant to the Ministry of Correctional Services Act and Ont. Reg. 778, the Defendant Her Majesty the Queen in Right of Ontario ("Ontario") operates correctional institutions across the province. Ontario's civil servants who operate the prisons use administrative segregation. If one wants to name things without calling up mental pictures of them administrative segregation is solitary confinement. It is a dungeon inside a prison."

6 Although I understand that there are a number of Casual, Temporary and Full-Time relief Correctional Officers, this backfill group has also been reduced in numbers. Importantly, in Mr. Diggs' case, **I was the first Justice of this Court to hear in-depth evidence from Chief Superintendent Jeffrey Awalt, (appointed in July 2023) regarding the origins, duration, extent of, and causes the staffing shortages now creating these problems**. He supervises each of the 4 Provincial Correctional Facilities in Nova Scotia: Central Nova Scotia, "North Nova", Cape Breton and "Southwest" Correctional Facilities. His credible evidence gives reason for some hope of a longer term solution. He has been very diligent and using innovative practical solutions that, in his opinion, should see the CNSCF with a robust full complement of Correctional Officers staff by July 2024. Deputy Superintendent Hill also credibly testified to the sincere efforts which he and the staff who are present on a daily basis are making to effect greater time out of cells for the inmates at CNSCF.

7 On October 30, 2023, the Court wrote to the PATH Legal Group to advise them of Mr. Diggs' (and similarly later of Mr. Ryan Wilband's - Hfx No 528024) *habeas corpus* application for hearing, and requested they consider representing Mr. Diggs on a *pro bono* basis. PATH counsels agreed to do so for both inmates' hearings (November 27, 2023 - Diggs and November 28, 2023 - Wilband). The Court is very appreciative that PATH did so, as it immeasurably elevated the legal discourse and materially advanced the positions of both Applicants far beyond what they would have been able to have achieved as self-represented Applicants.

[16] Durell Diggs is a 25-year-old African Nova Scotian.

[17] He was detained in custody ["on remand" in common court parlance] at the CNSCF - located in the Burnside Industrial Park, which is commonly referred to as the "Burnside" Jail (e.g. see *R. v. Lilly*, 2023 NSCA 80) from **September 13 to November 3, 2023**, pending his trial in December 2023, on *Criminal Code* charges.[8]

[18] While I recognize that a substantial Correctional Services staff effort must have gone into assembling the materials for, and in association with Counsel, the preparing of affidavits of Deputy Superintendent Ryan Hill and Chief Superintendent Jeffrey Awalt, some of the Burnside Jail's administrative records placed in evidence before me were not complete, and in some respects not reliable enough for me to draw conclusions therefrom, particularly: the Rotation Schedules (Exhibit 8 to D/S Hill's affidavit) for the dates: October 15, and October 27 – November 3, 2023 (9 days); and the "North Unit Airing Court Logs" for September 11 to November 3, 2023 – Exhibit 9 to D/S Hill's affidavit. In relation to those dates, because the records were not provided at all for some dates, or that the Court could not rely on them as a result of omissions thereon or uncertainties created by their incompleteness, and the burden to show the detention was lawful/reasonable is upon the Attorney General, I will consider these records as having <u>not</u> been proven to show that Mr. Diggs' was <u>not deprived</u> of his residual liberty on those dates where his evidence is to the effect that he was so deprived.

[19] On October 19, 2023, as a self-represented litigant, he filed an Application, entitled Notice for *Habeas Corpus*, seeking release from the segregation-like conditions of his detention while on remand.[9]

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8 Mr. Diggs was charged with "various weapons offences" under the *Criminal Code of Canada* which were alleged to have been committed in Dartmouth, Nova Scotia on October 23, 2022. In March 2023, he was arrested and remanded in Ontario. He was transferred to Nova Scotia on September 11, 2023. He was continuously detained at CNSCF between September 13 and November 3, 2023. Mr. Diggs filed his *habeas corpus* application on Thursday, October 19 alleging that deprivations of his liberty started on September 13, 2023; on Friday, October 20, 2023, the Attorney General filed its Notice of Contest (an amended Notice of Contest was filed on November 24, 2023); on Monday, October 23, 2023, a stage I recorded telephone conference was held with Mr. Diggs and the Respondent, and the matter set over for Motion for Directions on November 1, 2023; at that time, a stage 2 hearing was set for November 27-28, 2023, with deadlines for filing briefs and affidavits: AGNS (November 17, 2023) NSHA (November 21, 2023) Mr. Diggs (November 23-24, 2023).

9 His Application does <u>not</u> make any further *habeas corpus* claims after he was transferred to the Northeast Nova Correctional Facility ["North Nova"] on November 3, 2023.

[20] He claims that during the entirety of his 51 days there, ongoing staffing shortages, caused either complete (him being confined to his cell 22 or more hours per day) or rotational lockdowns (him being typically released from his cell for more than 2 hours - but less than the "normal operations" 10-12 hours out of cells that would exist but for staffing shortages every day (see para. 54 of D/S Hill's affidavit). He says these lockdowns caused him to suffer an ongoing material deprivation of his residual liberty within the prison, which deprivations also interfered with his opportunity to be in the fresh air of the Airing Court, and timely access to healthcare (including provision of his medications by staff of the Nova Scotia Health Authority).[10]

[21] There are a number of notable legal issues to be resolved in this case.[11]

[22] In summary, in relation to each of them, the Attorney General argues the following grounds for dismissing Mr. Diggs' Application:

> 1 - the application is moot because Mr. Diggs has been transferred to the North Nova Jail on November 3, 2023;

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10 Based on his circumstances Mr. Diggs claimed in his initial Application, the Court by Order added the Nova Scotia Health Authority ["NSHA"] as a Respondent because it has self-contained premises within the Burnside Jail [the so-called "Health Care Unit"] over which NSHA has exclusive authority, yet its staff must interact with Correctional Services staff to effect the provision healthcare and medications that inmates require. The Court wished to ensure by joining NSHA that its inquiry was fulsome enough to conclude whether, if there was a denial of the timely provision of medications to Mr. Diggs, it was caused by Correctional Services, the NSHA staff, or a combination thereof. In his original Application document, he claimed under "Grounds for review" – "Why do you say that the deprivation of liberty is unlawful? The decision did not conform with the current requirements of the governing legislation or regulations. (The foregoing all being preprinted on the form) Mr. Diggs wrote: "I am being denied meds [medications – the evidence would reveal he was prescribed the following: Naproxen; Pantoprazole; Trazodone; and Salbutamol]… sometimes they get "cancelled" because there is no staff." He elaborated in his evidence that the timing of the provision of medication(s) can also affect their efficacy, and sometimes the timing of the provision of his medications was not in accordance with the recommended window of time for them to be taken. While there were instances of his medications not being provided at the recommended times, or at all, which is very disconcerting, this was an incidental aspect of my required examination into whether he suffered a deprivation of residual liberty in all the circumstances, and thus I make no further express comment thereon. Nevertheless, I note here the cases relied on by the NSHA herein: *R. v. Haco*, 2017 NSSC 346; *R. v. Farrell*, 2011 ONSC 2160 – and in the context of inmates who are subject to the Review Board scheme in Part XX.1 of the *Criminal Code* see Justice Ann Smith's decision in *Williams v. East Coast Forensic Hospital*, 2019 NSSC 214; see also Justice Farrar's decision in Chambers, 2021 NSCA 27. Regarding the provision of non-emergency dental healthcare, it was not found to fall within the term "deprivation of liberty" as contemplated by the *habeas corpus* context: see Justice Jamie Campbell's decision in *Brewer v. Her Majesty the Queen*, 2020 NSSC 308.

11 These are based in part on para. 55 of the Court's reasons in *Pratt v Nova Scotia (Attorney General)*, 2020 NSCA 39, per Van den Eynden, JA.

> 2 - Mr. Diggs has not suffered any deprivation of residual liberty, because "Mr. Diggs was in the same conditions of confinement as other inmates, and therefore there was no deprivation of his residual liberty.";
>
> 3 - even if there was a deprivation of residual liberty, the decisions that led to that deprivation were lawful and reasonable; and
>
> 4 - even if the decisions that led to that deprivation were not lawful and reasonable, there is no remedy available to Mr. Diggs because "Mr. Diggs is already assigned to an open day room as a 'general population' inmate in another facility, [North Nova].… There is no authority for a declaration affecting Mr. Diggs future rights in the event he returned to [the Burnside Jail]. There is no other open living unit at the [Burnside Jail] currently where Mr. Diggs may be 'released" to avoid the implications of the [Burnside Jail's] rolling rotational schedule… a declaration is an inappropriate remedy with no potential effect, and this Honourable Court should not grant an unenforceable order under a *habeas corpus* application." (November 17, 2023, Brief)

[23] In summary, I respond as follows:

> 1 - Is this matter legally "moot"?

[24] I conclude that it is not.

[25] The applicable legal principles are not in dispute, (see for example, Justice Beveridge's reasons in *Springhill Institution v. Richards*, 2015 NSCA 40). The application is not moot because: the issues raised are subject to repetition yet evasive of review otherwise; the circumstances herein raise novel and broader issues: *Pratt v. Nova Scotia (Attorney General)*, 2020 NSCA 39. I referenced those principles in my decision in *Coaker v. Nova Scotia (Attorney General)*, 2018 NSSC 291, which is based on distinguishable facts, but was also the first to recognize that a Superintendent of a Provincial Correctional Facility in Nova Scotia could impose rotational lockdowns in order to ensure the safety and security of inmates and staff pursuant to section 79 of the *Correctional Services Act Regulations.* In the case at Bar, I am satisfied that: there is a proper adversarial context; that the resolution will have some practical consequences on the rights of the parties (the Court's decision is based on more recent circumstances including an argument that staffing shortages' impact on inmates receiving their medications which involves the NSHA which was joined as a Respondent here, in a situation which has persisted to the detriment of inmates since at least 2022); I have more fulsome evidence than previously garnered regarding what has been done to remedy staffing shortages at CNSCF; as well

as I have had the benefit of able counsel for Mr. Diggs to fulsomely advocate for him and incidentally other inmates, including his counsel having brought new and challenging perspectives to issues addressed by other Justices of this Court, including directly challenging their conclusions that the Attorney General is correct, that there is NO material deprivation of his residual liberty in Mr. Diggs' circumstances. In my view, it is in the interests of justice to revisit this issue, in spite of the importance of judicial comity- as reflected in the concept of horizontal *stare decisis* described in the reasons from *R. v. Sullivan*, 2022 SCC 19); and that this is an example of a case that sparks a controversy of a recurring but brief (daily) duration, and it is in the interests of justice to expend judicial resources thereon, bearing in mind that the proposed adjudication must not intrude into the role of the legislative branch. Lastly, I observe that my decision may be of assistance by virtue of its being published to self represented inmates, counsels, and other members of this Court or beyond. I will say no more about mootness in my reasons.

2 - Has Mr. Diggs proved that there been a material deprivation of his residual liberty, and raised a legitimate ground to question the legality thereof?

[26] I conclude that he has, and there was an ongoing material deprivation of his residual liberty between September 13- November 3, 2023.

3 - Has the Respondent Attorney General demonstrated that its decisions were made lawfully (i.e. within its legislative jurisdiction, and that the process by which it came to those daily decisions and the outcomes themselves were both reasonable (*Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 2019 SCC 65)?

[27] It has not.[12]

[28] The Attorney General has not shown that the daily decisions regarding Mr. Diggs' confinement under total or partial lockdowns at Burnside Jail were "reasonable" over the 51 days he was confined there.

4. - What remedy is appropriate?

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12 Mr. Diggs made no suggestion that he was not afforded procedural fairness in the course of decision-making by the Respondent's staff, or that they did not have a legislative basis for those decisions. His arguments are focused on the substantive aspect of their decisions, and the Respondent not having established that they were "reasonable" outcomes.

[29] Because Mr. Diggs is no longer in custody at CNSCF, the possibilities are limited to a declaration that Mr. Diggs has suffered an ongoing material deprivation of his residual liberty, (and incidentally interferences with him receiving his medications on a timely basis), as a result of staffing shortages at the CNSCF.

[30] This Court has a broad jurisdiction pursuant to the common law. It is thereby entitled to make a declaration that Mr. Diggs was, to a material degree, unlawfully deprived of his residual liberty.

[31] It has been argued that the Court should make a declaration that Mr. Diggs' s. 10(c) *Charter* rights have been violated, pursuant to section 24(1) of the *Charter of Rights*. In my opinion, doing so is inappropriate because the summary procedure of *habeas corpus* would there be hijacked to import a substantive Charter remedy - such as a breach of ss. 7, 12 or 15 (which may require that the Respondent have the opportunity to call evidence to justify such circumstances under s. 1 Charter - e.g. *Canadian Civil Liberties Association v. Canada*, 2019 ONCA 243; and Dorsey v. Canada (Attorney General), 2023 ONCA 843, at para. 45).

[32] In order to avoid the latter controversy, I will render a declaration here only pursuant to the common law.

[33] To the extent that there remain ongoing daily staff shortages which cause material deprivations of residual liberty to other CNSCF inmates experiencing similar circumstances, there is utility by inclusion in these written reasons that the Court is suggesting that the Superintendent should consider preventing these in future, by:[13]

> **i)** "Over staffing"- requiring more staff to muster each morning than the minimum that would otherwise be required, given the foreseeable potential absences each day, such that the chances of there being a less than full complement of staff are dramatically reduced.

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13 I am very satisfied that both D/S Hill and Chief Superintendent Awalt are sincerely interested in the welfare of inmates at Provincial Correctional Facilities, and they have been conscientious and working diligently, to the extent they are authorized to do so, to alleviate the large number of instances of either full or rotational lockdowns at the CNSCF. However, bearing in mind my disadvantaged position in the circumstances, I conclude that, based on the evidence presented, that the following suggestions may be feasible at times.

ii) Transferring inmates from out of the Correctional Centre which is suffering from acute staffing shortages on an ongoing daily basis, to those that are not as locked down and have residual capacity to accept new inmates.
Transferring inmates from CNSCF to one or more of the other three Provincial Correctional Facilities has recently been tried.[14]

iii) Directly requesting that the Provincial and Federal Prosecution Services consider revisiting with Correctional Services, and counsel **for inmates on remand**, permitting some inmates to be placed on **bail pending their trials; or for those serving sentences** permitting **Temporary Absences**, which were all used during Covid 19 to make the CNSCF Public Health Protocol compliant.[15]

[34] It also remains open to this Court upon *habeas corpus* applications to remedy such ongoing deprivations of residual liberty by the use of bail hearings

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14 I had mused on November 1, 2023 at the Motion for Directions that if, because of ongoing continual inadequate staffing levels, inmates were placed in circumstances that deprived them of their residual liberty in a disproportionate manner, it may be that the Court could take the position that the Correctional Facility shall only house there that number of inmates that can be unlocked for a reasonable amount of time each day, bearing in mind the normal "full unlock" 10-12 hours per day. Chief Superintendent Awalt stated in his affidavit: 48 "On November 3, 2023, following the telephone conference on November 1, 2023, and after hearing Justice Rosinski's comments regarding decreasing the number of persons at the Central Nova Scotia Correctional Facility, I requested staff at that facility to transfer 40 inmates to other facilities in the Province, where those individuals were more likely be housed in open day rooms. One of those individuals was Mr. Durrell Diggs due to his expressed concerns in CNSCF. 49 Northeast Nova Scotia Correctional Facility (NNSCF)… has a count of approximately 150-170 [inmates].… normally operates at 80% capacity for inmates, and following the transfers, this has resulted in [it] being at 90% capacity.… 51 After Mr. Diggs transfer, I have been advised by management staff [at North Nova]… that there has been an increase in violent incidents in the other facilities due to the rapid influx of new prisoners without relationships in those facilities. I have ongoing concerns that transporting inmates from CNSCF to other facilities may create further safety concerns for staff and inmates at those facilities."

15 Only that subset of remanded inmates who are pending sentence, can arguably claim a further remand "credit" (*R. v. Duncan*, 2016 ONCA 754; *R. v. Rajmoolie*, 2020 ONCA 791; R. v. A.T., 2022 ONCA 650; *R. v. Mathiesen*, 2023 NSSC 314, at para. 58) or some reduction in the sentence itself, by claiming unduly harsh conditions, as a result of these deprivations of residual liberty, and so have a potential "remedy". I take judicial notice of the fact of the foregoing generalized processes, but I note a CBC report thereon is also publicly accessible as posted April 22, 2020, under Reporter Haley Ryan's name [entitled "Nova Scotia jail population almost cut in half under Covid 19 measures". Similar information is available in Schulich Law Scholar, Adelina Iftene's 2020 article "Covid 19-Provincially Incarcerated Individuals – A Policy Report", (8-2020) Schulich School of Law, Dalhousie University (https://digitalcommons.schulichlaw.dal.ca/scholarly_works)- see p. 8: "The Decarceration Effort".

contemplated by the *Liberty of the Subject Act*, RSNS 1989, c. 253, as complemented by Nova Scotia Civil Procedure Rules:[16]

> ***Liberty of the Subject Act***
>
> Order for Discharge or Bail
>
> s. 6(2) The Court by order, or the judge by order in writing signed as aforesaid, may require the immediate discharge of the prisoner or may direct his bailment in such manner, and for such purpose, and with the like effect in proceeding, as is allowed upon *habeas corpus*.
>
> Bail
>
> s. 6(3) Such bail, when ordered, may be entered into before any justice of the peace specially named in such order, or any justice of the county or place if no such justice is named.
>
> ***Civil Procedure Rule* 7**
>
> Interim Release on *Habeas Corpus*
>
> 7.15 "A judge may order bail for an applicant.";
>
> Final Determination Following *Habeas Corpus*
>
> 7.16 "A judge may release or remand the applicant on determining whether or not the deprivation of liberty is legal."

[35] Justice Kevin Coady of this Court relied upon this provision in *Downey and Gray v. Attorney General (Nova Scotia)*, 2020 NSSC 213, wherein at para. 21, he ordered:

> Leaving Mr. Downey and Mr. Gray in the HCU indefinitely offends the principles of *habeas corpus* and the *Charter of Rights and Freedoms*. The Institution must find a resolution. Consequently, I order that if a solution is not found within 14 days of this

16 Inmates themselves may also make applications for review of their bail denial/consented-to remands based on material changes in circumstances or other grounds under ss. **520**, (*R. v. St. Cloud*, [2015] 2 SCR 328) **522**, and **525** of the *Criminal Code* (*R. v. Myers*, 2019 SCC 18; see also reference to my decision in *R. v. Saulnier*, 2012 NSSC 45, at para. 29 cited in *Myers* at paras. 43-4; and recently *R v Aylward*, 2023 NSSC 68.

> decision, Mr. Downey and Mr. Gray are to be brought before this Court for a *Criminal Code* review of their detention.17

[36] Therein, he also stated:

> [15] The inquiry into whether Mr. Downey's and Mr. Gray's placement in HCU is a reasonable decision is a fact driven inquiry involving the weighing of various factors and "possessing a negligible legal dimension". (*Khela*, para. 76)
>
> [16] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the Supreme Court of Canada recognized there was a need for better guidance on the proper application of the reasonableness standard. The Court commented on the issue at para. 11:
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> > 11 … The Court has heard concerns that reasonableness review is sometimes perceived as advancing a two-tiered justice system in which those subject to

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17 I bear in mind what the Court stated in *Turbide Labbé v. Minister of Public Security*, 2021 QCCA 1687, at paras. 148-158: "[148] The judge seems to have partially addressed the appellant's challenge as if he wanted to be transferred to the general population, whereas he rightly acknowledged that his behaviour warranted some form of confinement and he instead argued that his confinement must comply with the minimum requirements of the Nelson Mandela Rules and that, in this regard, the determination of restrictions to his residual liberty must take into account the state of his mental health. [149] Finally, with respect, the judgment's disposition is problematic. The judge granted in part the application for *habeas corpus* and ordered the Ministère de la Sécurité publique to [TRANSLATION] "to implement an alternative, within a reasonable time, at the Sorel facility or elsewhere, to Mr. Turbide-Labbé's detention conditions depriving him of meaningful human contact in person and by telephone". [150] A judgment must be capable of being executed. The disposition of a judgment "must state clearly and unequivocally what should and should not be done". This principle is all the more necessary in prison matters because the proceeding itself determines whether the detention is lawful and leads to the inmate's release if it is unlawful.[151] The judge's order to implement an alternative detention measure without specifying any conditions raises actual enforcement issues for the correctional authorities and makes any future proceeding by the appellant to force compliance difficult. [152] I acknowledge without hesitation that the appellant's proceeding was set out in a manner that is difficult to comprehend for a judge confronted with a vague normative environment in which the discretion of the correctional facility director does not appear to be governed by any criteria. [153] The judge was aware of the need to render an order that could be enforced, because he himself raised the possibility of providing a period of seven days before ordering the appellant's transfer. [154] Indeed, during a discussion with counsel for the correctional authorities he stated that he was [TRANSLATION] "seriously considering ordering that if it was not done within seven days, he should be transferred. They cannot continue to detain him like that indefinitely; they cannot return him to MS7, treat him like a yoyo, and then not transfer him to the general population. If they are unable to handle him, they should transfer him to a place where they will be able to handle him". [155] The scenario before the judge was not simple, but he should have taken into account the alleged cumulative effect of the various periods of solitary confinement on the appellant's mental health and formulated a conclusion the correctional authorities could have enforced, which was not the case. [156] If the appellant's appeal had not become moot due to his transfer, I would have suggested holding a new hearing to rule on the lawfulness of the appellant's detention in light of the foregoing analysis. [157] That being said, in the circumstances, I would instead allow the appellant's appeal without legal costs. [158] In addition, in light of the teachings of the Supreme Court with respect to appeals that are moot, I do not propose to render any other order even though this disposition provides "no practical remedy" for the appellant, other than to assert the principles set out in this judgment to the correctional authorities for the purpose of determining his detention conditions." [My underlining added]

> administrative decisions are entitled only to an outcome somewhere between "good enough" and "not quite wrong". …

[17] The Court directed that the analysis begins with a presumption that reasonableness is the applicable standard in all cases and that reviewing Courts "should derogate from this presumption only where required by a clear indication of legislative intent or by rule of law". (para. 10)

[18] The *Vavilov* Court discussed the reasonableness standard of review at paras. 12 – 15:

> 12 … Reasonableness review is methodologically distinct from correctness review. It is informed by the need to respect the legislature's choice to delegate decision-making authority to the administrative decision maker rather than to the reviewing court. In order to fulfill *Dunsmuir's* promise to protect "the legality, the reasonableness and the fairness of the administrative process and its outcomes", reasonableness review must entail a sensitive and respectful, but robust, evaluation of administrative decisions: para. 28.
>
> 13 Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.
>
> 14 On the one hand, courts must recognize the legitimacy and authority of administrative decision makers within their proper spheres and adopt an appropriate posture of respect. On the other hand, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be "justified to citizens in terms of rationality and fairness": the Rt. Hon. B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis deleted); see also M. Cohen-Eliya and I. Porat, "Proportionality and Justification" (2014), 64 *U.T.L.J.* 458, at pp. 467-70.
>
> 15 In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.

> These paragraphs provide the guidance the Court recognized was needed in judicial reviews.
>
> [19] **I have concluded that the ongoing placement of Mr. Downey and Mr. Gray in the HCU is not a reasonable outcome. If it were a temporary arrangement, I would find it reasonable. However, to leave them in segregation indefinitely is not acceptable.** I make this decision on the evidence recognizing the difficulty faced by the institution and affording it considerable deference."
>
> [My bolding added]

[37] Since Mr. Diggs was transferred from the CNSCF to North Nova on November 3, 2023, it is not possible to "release" him from lockdown confinement(s) at the CNSCF.

3-The difference between systemic problems and the relevant "decisions" regarding why, on any given day, Mr. Diggs was locked down in his cell

[38] While lockdowns have continually persisted for many months,[18] the underlying systemic staffing problem is one that ultimately only government can effectively address.[19]

[39] But in a *habeas corpus* application the Court is not permitted to look into these systemic issues. They are not "legal" issues in the present circumstances.[20]

[40] Nevertheless, in the case of Mr. Diggs, he has clearly experienced a substantial (or "material" as I also call it) daily deprivation of his residual liberty, and the responses of Correctional Services have not remedied that problem.

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18 Written decisions reveal this pattern: e.g. those referenced by Justice Brothers in *Haynes v. Attorney General of Nova Scotia*, 2023 NSSC 311, at para. 14.

19 In consultation with the Union representing staff.

20 In Mark Mancini's article "The Promise of *Habeas Corpus* post-Vavilov: The Principle of Legality" 2022, 100 Can Bar Rev 223, the abstract reads in part: "This paper evaluates the status of *habeas corpus* after the Supreme Court of Canada's decision in *Vavilov* from the perspective of the principle of legality. It suggests that while *Vavilov* should change how *habeas corpus* applications are reviewed, some courts post *Vavilov* are not exploring these options. Instead, some courts are simply referring to the pre-*Vavilov* state of the law, which focuses on the presumed expertise of prison decision-makers. Renewing the promise of *habeas corpus*, post-*Vavilov*, will ask courts to re-evaluate the model of carceral expertise they have constructed."

[41] The direct factual cause responsible for daily lockdowns, is that Correctional Officer staffing levels have been insufficient to allow a safe environment for both staff and inmates alike. At a minimum, 19 Correctional Officers are required to be available each day "on the floor" of the inmate cell areas, to safely permit inmates out of cell times in the order of 9 + hours per day. The less Correctional Officers that show up for work, the more severe the lockdowns will become each day.

[42] Correctional Services staff's responses (i.e. the daily staffing decisions which determine whether a partial / total lockdown will be imposed and are so inter-connected as to be virtually indistinguishable), individually assessed, but contextually seen cumulatively, in relation to Mr. Diggs, were arguably not always within a range of reasonable choices, given the duration over which, and at the times directly relevant to Mr. Diggs, staffing absences were continually occurring on a daily basis.

[43] This problem had persisted for so long, that an ongoing trend had emerged which made it markedly foreseeable to Correctional Services staff, that there would be continual daily staff shortages and therefore lockdowns in response at the relevant times that Mr. Diggs experienced the lockdowns herein.

[44] I emphasize that the "decision" by Nova Scotia that is directly in issue here, is the daily decision to order total or partial lockdowns on any given day.

[45] Pursuant to Civil Procedure Rule 7 "Judicial Review and Appeal", in Rule 7.01, we find:

> "decision" includes all of the following:
>
> (i) an action taken, or purportedly taken, under legislation,
>
> (ii) an omission to take action required, or purportedly required, by legislation,
>
> (iii) a failure to make a decision;
>
> "decision-making authority" includes anyone who makes, neglects to make, takes, or neglects to take a decision.

[46] The lockdowns caused Mr. Diggs to have experienced a material deprivation of his residual liberty.

[47] Other inmates like Mr. Diggs - who would otherwise be entitled to be out of their cells for up to 10 to 12 daytime-hours every day when a full complement of Correctional Officer staff are present that day - have also remained "locked down" in their cells for 10 to 12 daytime-hours for a substantial number of days, as a result of insufficient staff being present on a given day to safely unlock inmates for a reasonable amount of time per day.

[48] Once a material deprivation of residual liberty has been established by the inmate (Mr. Diggs), the burden is upon Nova Scotia to present evidence upon which the Court can conclude that Nova Scotia's daily responses were within a reasonable range of choices available to them.

[49] The evidence regarding the reasonableness of daily staffing decisions in Mr. Diggs case, is limited to generalized statements by Nova Scotia's witnesses to the effect that the process was that:

> each day the number of Correctional Officers required for the day (19 "on the floor" of the jail) had been previously given notice that they are to muster on the morning of the assigned workday. If for some reason they did not appear for work as scheduled, there was insufficient time to have a replacement called out, and so there would be one or more of the minimum number of required staff "not present" for that day- and this would materially affect how much time inmates would receive out of their cells that day.

[50] The evidence suggests that Nova Scotia could have taken more robust steps to avoid such lockdowns, such as:

1. "over staffing" i.e., given the near certainty of staffing shortages during the time periods relevant to Mr. Diggs, calling out more staff to muster than the minimum number that are ordinarily required each day, could have reasonably avoided altogether or reduced significant numbers of days (and length of time the inmates were confined to their cells) when there were lockdowns as a result of staffing shortages;

2. transferring inmates to other Provincial Correctional Facilities so that even with the foreseeably reduced staff numbers, CNSCF Correctional Officers could have reduced the number of days and length of time that inmates were confined to their cells (as Chief Superintendent Awalt noted in his affidavit at para. 48, such transfers

of inmates to other Correctional Facilities were possible, but not used until November 3, 2023);

3. directly requesting that the Provincial and Federal Prosecution Services consider revisiting with Correctional Services, and Counsel for inmates on remand, permitting some inmates to be placed on bail pending their trials instead, or for those serving sentences permitting Temporary Absences, which were all used during Covid 19 to make CNSCF Public Health Protocol compliant.

[51] According to Chief Superintendent Awalt (paras. 7-11 affidavit):

> There is no formal policy on the number of officers necessary to do the work at CNSCF. This is a determination that must be made through the Department of Finance, Correctional Services, and the Public Service Commission.
>
> …
>
> Historically, Correctional Services determined that for the ordinary operation of the CNSCF, there needs to be at least 100 general staff members and approximately 80 relief staff members to relieve these general staff members in the event of short-term leave, vacation, illness, or exigent circumstances to ensure the safety and security of the facility by ensuring a full staffing complement.
>
> In 2021, the trend became that the general staff members began going off on short-term or long-term disability in relation to workplace injuries, mental health concerns, and other issues connected to the type of work performed in the correctional facilities. This trend resulted in the use of relief staff to fill in the general staff roles over longer periods of time.
>
> During these periods there have been issues with backfilling these already backfilled positions if our relief Central are unavailable due to illness or for various other reasons I became Chief Superintendent in July 2023. I was aware that there were two issues causing critical staff shortages, and that these are continuing issues I was seeking to address:
>
> a) attendance of General Staff and Relief Correctional Officers; and
> b) hiring practices resulting in gaps in the time it took to hire.
>
> …
>
> The number of leaves for long-term and short-term illness at CNSCF has increased significantly over the last several years… There is no effective means to terminate these employees if their absences are justified.
>
> …

> I have made all possible efforts to increase the attendance of our Correctional Officers in CNSCF and will continue to explore our options as outlined below to ensure we have as close to our full staffing complement as possible.
>
> …
>
> Prior to 2018, the average amount of applicants received by Correctional Services for Correctional Officer positions with 400 to 500 per year.
>
> In 2023, the number of applications that Correctional Services have received for Correctional Officer positions has been approximately 180. This amount is similar to the number of applications in the last few years. Of those recent applications 14 were accepted, have completed training, and chose to continue in their role as correctional officers at CNSCF.
>
> After receiving the judgement of this Honourable Court in *Downey v. Nova Scotia (Attorney General),* 2023 NSSC 204, in entering my new position as Chief Superintendent in July 2023, I turned my mind to hiring efforts to ensure we had the relief staff necessary to backfill for our General employees who were on leave as discussed above.21
>
> …I have determined that we will have an assessable positive effect on staffing for CNSCF by March 2024, with a full staffing complement estimated by July 2024. The goal once a full staffing complement is available, would be in phase 2 to move back to a direct supervision model which I am aware is better for both inmates and staff in terms of safety and service provision for inmates.

[52] It must be remembered that the "decision" that is the focus of the "reasonableness" analysis, is the daily response of Correctional Services to the ongoing pattern of daily staffing shortages.

[53] Ancillary thereto is the interconnected question of what reasonable steps were taken to avoid staff shortages each day, and thereby avoid altogether the need for lockdowns.

[54] Past (i.e. before the relevant dates alleged as material deprivations by the inmate) systemic decisions *per se* that lead to present staffing shortages are only to be *contextually* examined in a *habeas corpus* application.

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21 He ensured there was funding in place to hire 60 new relief staff by July 2024 and that positions were posted on an ongoing basis continually, as well that training requirements were dramatically changed to expedite the hiring process. A recruitment manager was hired in September 2023 for the entire Province and job fairs were dispersed throughout Nova Scotia.

[55] However, in Mr. Diggs' case, he has claimed that his deprivation of liberty started on Sept. 13, 2023. Therefore, I am examining 51 consecutive days, and I am therefore entitled to assess the reasonableness of the specific daily responses by Correctional Services for each day, keeping that context in mind.[22]

[56] Therefore, where there have been staffing shortages for a sufficient number of days that a reasonably foreseeable trend had emerged, from which one could conclude that in the next number of days there is a reasonable prospect that there will be further staffing shortages, then the Superintendent of CNSCF should reasonably expect there to be further shortages of staff and plan therefor - e.g. by always calling out sufficient extra persons to muster on a daily basis, so that even if some call in as unavailable, at least a full complement will still be in place. If more staff than are minimally required work on a particular day, there likely will be work for them that needs to be done.

[57] A potential practical solution would be to begin "over-staffing" in the future until there is no longer a reasonable prospect of the insufficient daily staffing situation.

[58] Henceforth, should this overstaffing be feasible; there being a reasonable prospect of insufficient numbers of staff in the ensuing days; and the Superintendent does not "overstaff", then it may be fair for a Court to conclude that the Superintendent's decision/management of that issue was not "reasonable", if there was a consequent decision to impose lockdowns, creating a material deprivation of inmates' residual liberty on a particular day.

[59] Importantly, I will add here that over-staffing is only a feasible solution, if there are in real terms sufficient relief or "backfill" Correctional Officers from which group the additional "overstaffed" personnel can be drawn on a particular day.

[60] I was not satisfied on the evidence presented that Nova Scotia had established that it had considered this option and others proactively during the

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22 I exceptionally do so, bearing in mind Justice Thomas's observations in *Ewanchuk v. Canada (Attorney General)*, 2017 ABQB 237: "[22] What is equally important for this application is to understand what *habeas corpus* is not. [23] *Habeas corpus* is only relevant to current and ongoing detention. It does not apply to hypothetical future detention, or historic detentions: *Cundell v. Bowden Institution*, 2016 ABQB 348 at para 37, *Dumas v. Leclerc Institute*, 1986 CanLII 38 (SCC), [1986] 2 SCR 459 at paras 12-14, 34 DLR (4th) 427; *R. v. Latham*, [2000] OJ No 3720 at paras 21-23 (QL), 2000 CarswellOnt 348 (Sup Ct J). *Habeas corpus* is only a remedy for the here and now." [My underlining added]

days relevant to Mr. Diggs incarceration - or that they were not feasible for other reasons.[23]

[61] I conclude that Correctional Services daily decisions regarding the use of lockdowns affecting Mr. Diggs, were not demonstrated by it to be within a range of reasonable outcomes in the continuing circumstances that prevailed at CNSCF between September 12 and November 3, 2023.

[62] Although he has been released from detention in CNSCF as of November 3, 2023, and consequently the matter is factually moot, nevertheless, I am of the view that a declaration should issue, to the effect that he was unlawfully detained for each of those days that I conclude his deprivation was "unlawful".

[63] Once there is a material deprivation of residual liberty established, the burden is on the Respondent (Nova Scotia) to satisfy the Court more likely than not that - in the sense referred to in V*avilov* - 2019 SCC 65 - the decisions made were "reasonable".

[64] Nova Scotia has the information and records that are relevant to this issue insofar as staffing at the CNSCF is concerned. Nova Scotia has the burden to establish that its daily decisions were "reasonable". It therefore also has the burden to provide evidence in support of its position.

[65] In present circumstances, the evidentiary record does not establish that Nova Scotia could not have over-staffed the usual standard Correctional Officer complement (19 per day "on the floor") required each day to permit full unlocks of all inmates. Therefore, it has not established that its daily decisions were "reasonable", in light of the continual and foreseeable trend of staff absences, at the relevant times.

[66] I appreciate that I must approach such a review on a deferential basis. As stated in *Vavilov*:

> 83 It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are,

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23 I am examining only the days when Mr. Diggs experienced material deprivations of his residual liberty – i.e. between September 13 – November 3, 2023. I note for example that from September 13 to October 18 the vast majority of days involved less than 2 hours out of his cell daily whereas on October 19 when he filed his *habeas corpus* application, he received 7 hours out of cell; October 20 – 9 hours out of cell; October 22 – 9 hours out of cell, but those were outliers up to including November 3, 2023

> at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. …Instead, the reviewing court must consider only whether the decision made by the administrative decision maker - including both the rationale for the decision and the outcome to which it led - was unreasonable.

[67] It is critical to recognize that the particular context here modifies the application of the above noted quotation in the circumstances of this case. That is because, this is not a traditional judicial review based on a "record" alone where a successful applicant (Mr. Diggs in this case) must demonstrate that the "decision made" is "unreasonable"/ not one that is within a range of reasonable outcomes. *Habeas corpus* has trial-like processes in addition to having a "record" that is produced by the Respondent to the Court.

[68] This is an important distinction between traditional judicial reviews and *habeas corpus* applications in relation to an assessment of the "reasonableness" of the Respondent's daily decision(s). Once a material deprivation of residual liberty has been established by Mr. Diggs, the evidentiary burden to show that the decision(s) made was lawful/ "reasonable" is then on the Respondent - as opposed to typically being in administrative law on the judicial review Applicant (in this case Mr. Diggs) to show that the decision made <u>was</u> <u>not</u> within a range of reasonable outcomes.

4-The circumstances of Mr. Diggs detention at the CNSCF - why I conclude that there is a material deprivation of his residual liberty

A - The evidence

[69] Mr. Diggs through his affidavit (it was prepared by counsel for him on or about November 24, 2023 in anticipation of him affirming and signing it on November 27, 2023 during his testimony), and *viva voce* testimony, gave evidence that:

> 1 - "During the entire time I was incarcerated at CNSCF , the facility was under lockdown conditions… I cannot remember a day when I was at CNSCF that we were not on a lockdown."24
>
> 2 - "On most days, I was let out of my cell for less than two hours"
>
> 3 - "I was only able to go outdoors and get fresh air three times during my time at CNSCF. One of those times was because of the Correctional staff wanted to search the Unit, so the whole Unit had to go outside."
>
> 4 - "Lockdowns have had a significant negative impact on my mental health… Lockdowns also impaired my ability to engage in activities that help me regulate my mental health… I was diagnosed with bipolar depression and clinical depression when I was a teenager. When not properly medicated, I am irritable, have a short fuse, and easily triggered, and can be aggressive or violent… I also informed the nurse that I had prescriptions for Naproxen due to lower back and joint pain and a stomach medication to alleviate side effects from the Naproxen. I told correctional staff about my mental health concerns almost every other day… On two occasions between September 11 and November 3, 2023 I was not unlocked to go to… receive the medication… I don't remember the specific days. Four or five times I was given my Trazodone at the wrong time… It is important that I take the Trazodone before going to bed because it helps me fall asleep and the effects start acting overnight so I wake up in a more stabilized mood. This stability is very important for the treatment of my bipolar disorder… missing a single dose, or taking it at the wrong time immediately aggravates the symptoms of my bipolar disorder."

[70] I am satisfied, more likely than not, that Mr. Diggs testified truthfully in his affidavit and *viva voce* testimony regarding these facts.25

[71] He argues that the decisions made by Correctional Services in response to these foreseeable ongoing staffing shortages have not been reasonable during those 51 days, and therefore the consequent deprivation of his residual liberty was unlawful.26

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24 I understand him to mean when he stated, "I cannot remember a day when… we were not on a lockdown", that he was not once while he was at Burnside Jail given a "full unlock" 10 to 12 hours out of cell on any day.

25 I note here that, where the Attorney General's business records are unreliable, incomplete, or not available to contradict Mr. Diggs, I accept Mr. Diggs testimony. I found him to be credible – that is, testifying truthfully and reliably, to the best of his recollection. I recognize that Mr. Diggs did not keep written records, so his recall may be, immaterially in my view, unreliable at times, but I am satisfied that on the whole his evidence is reliable.

26 In my opinion, the contextual focus of the Court in Mr. Diggs' case must be on the decisions made by Correctional Services' staff on or about the 51-day time interval - i.e. particularly those days when there is an arguable case made out of a deprivation of residual liberty. The *habeas corpus* provisions in our Nova Scotia Civil

[72] I am satisfied, more likely than not, that for **28 of those 51 days** Mr. Diggs was in segregation-like detention (2 hours or less out of his cell each day); and he was for 3 hours or less out of his cell for **8 further days**.[27]

Procedure Rules ["CPR"] are found in Rule 7. Notably for present purposes, "decision" and "decision-making authority" are both defined in CPR 7.01. **While contextual evidence relevant to the 51-day time interval may be helpful, going further and examining any systemic causes of why the required numbers of Correctional Services' staff were not present on specific days, thereby necessitating lockdowns, would require evidence about the systemic decisions made in advance of those days which is beyond the scope contemplated by a *habeas corpus* Application**. Evidence regarding systemic causes would be better suited to a more fulsome process, such as, for example: an Application seeking relief pursuant to the relevant sections of the *Canadian Charter of Rights and Freedoms.* **Although his Application is based on the traditional writ of *habeas corpus* and s. 10(c) of the *Charter*, it is not clear in the jurisprudence what, if any, further process and remedy would be available pursuant to s. 10(c) that is not available under the traditional writ, to Mr. Diggs in his circumstances**. In *DG v. Bowden Institution*, 2016 ABCA 52, each of the three members of the Court wrote separate reasons. The issue before the Court was: has the Supreme Court of Canada determined whether a Provincial Superior Court should hear a *habeas corpus* challenge to the legality of a decision of the [Parole Board/ Appeal Division] affirming the Parole Board's decision to suspend the applicant's parole? Justice Wakeling wrote: "[70] Section 10(c) of the [Charter] states that a detained person has the right 'to have the validity of the detention determined by way of *habeas corpus'*. [71] This status means that legislatures and courts must ensure, in the absence of compelling reasons defined by the values that shape s. 1 of the Charter, that *habeas corpus*' role as the champion of liberty is not undermined." … [Under the title Habeas Corpus is the Birthright of Free People and has Constitutional Status] Justice Wakeling continued: "[106] **Most recently, Justices Lebel and Fish declared that the '[Charter] guarantees the right to *habeas corpus'*. Prof. Hogg has commented on the significance of this constitutional guarantee: '[The] inclusion [of s. 10(c)] in the *Charter*… mean[s] that… [*habeas corpus*] could not be denied or suspended by legislation unless s. 1 (the limitation clause) … [was] held applicable, or unless s. 33 (the override clause) …[was] invoked'**. The *Canadian Bill of Rights* also recognized the primacy of *habeas corpus. …* [143] *Habeas corpus* is a constitutional remedy and should be issued unless it is beyond doubt that the applicant has access to another remedial procedure equally as efficacious as that provided by *habeas corpus*." In his dissenting reasons, Justice McDonald stated: [210] "A review of the history of *habeas corpus* and how it evolved over time, is beyond the scope of this judgement. Suffice it to say, in our era the gaoler equates to the warden of the penitentiary who is responsible for the decisions and actions of his staff including decisions to reclassify and transfer prisoners. However, the warden is in no way responsible for the decision of an arm's-length tribunal, specifically the Board, and its Appeal Division. In my view, the application for *habeas corpus* directed to the warden of a federal penitentiary is misdirected when it concerns a decision of the Board." Arguably these latter comments are germane by analogy to Mr. Diggs circumstances. If there are systemic reasons for the present consistent pattern of staff shortages at the CNSCF, (such as past inattention to an ongoing staff shortage trend since 2018 which has been greatly accelerated during and after the Covid 19 pandemic, and may now be responsible in part for, perhaps together with other factors beyond the control of the Province), the decision-making that is the underlying cause of present staff shortages is not that made at the Correctional Facility level, but rather by those who have made or are making policy decisions about what matters are pressing priorities, and which will be funded. Systemic decisions are not intended to be reviewable under the writ of *habeas corpus.* The writ is narrower in scope as it is focused on the specific inmate and their circumstances within a specific time interval during which they claim there has been a deprivation of their liberty or residual liberty. As the courts in Alberta have steadfastly maintained, *habeas corpus* is not available to address and remedy historic or hypothetical future/anticipated material deprivations of residual liberty, but rather is focussed on relevant recently current and ongoing detention- e.g., *Ewanchuk v Canada (Attorney General)*, 2017 ABQB 237. [My bolding and underlining added]

27 As Ms. Garson accurately put it in her Brief: "equivalent to what the *Correctional Services Act* defines as 'close confinement'" – that is less than 2 hours out of cell per day.

[73] Once out of their cells during their "unlock" times, inmates are entitled at a minimum to at least 30 minutes per day of outdoor time per s. 57(1) of the *Correctional Services Act*, and supposed to be "offered" time in the "Airing Court" - which is the outside fenced-in yard and is the only opportunity for inmates to be in the fresh air outside of the building.

[74] The North Unit (Mr. Diggs was on North 4) Airing Court Logs (Exhibit 9 to D/S Hill's affidavit) are all in evidence except for September 16 and October 18, 2023. However, the handwritten details of what occurred on manifold days for which there are Logs available, are incomplete or unreliable insofar as determining whether Mr. Diggs North 4 Unit (and Mr. Diggs) was offered airing time and had the opportunity to attend in the Airing Court.[28]

[75] I am satisfied that it is more likely than not, that Mr. Diggs was not offered and given the opportunity to take advantage of Airing Court time for at least 14 days.[29]

[76] Mr. Diggs was categorized as a "low" security risk while he was an inmate at CNSCF, and he was a "general population" inmate (paras. 14 and 68, D/S Hill's affidavit).

[77] Within the entire inmate population, that group of inmates has the greatest freedom of movement within the jail. Moreover, as the Supreme Court of Canada made clear in *Canada v. Solosky*, [1980] 1 SCR 821: "A person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law" (p. 839).

[78] I note here that, in evidence and pleadings in the case before me and many others preceding it, the Attorney General has repeatedly conceded the following "starting-point" proposition:

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28 For example: see Logs for September 11, 12, 13, 14, 19, 20, 25, 28, 29; October 1, 2, 4, 7, 13, 14, 16, 19, 20, 22, 23, 24, 29, 30; November 2, 2023.

29 If for 28 days Mr. Diggs was out of cell not at all or less than 2 hours that day, and for 8 days he was out of his cell for less than or equal to 3 hours of those days, then it is more likely that for at least those 14 days he was either not offered or not given an opportunity to take Airing Court time, given unlock time must also be used to: shower, to contact legal counsel, friends or family, and socialize; and that not all inmates can have Airing Court time together given incompatibilities etc. I appreciate that on some days Mr. Diggs had the opportunity, but if the unlock times were closer to 2 hours in total, there is an increased likelihood that he might not have been able to take the 30 minutes Airing Court time offered.

> On an ideal day at CNSCF, **where the appropriate staff to inmate ratio is in place**, **all open day rooms, including North 4, would be unlocked from 7:30 AM to 12 noon; from 1:30 PM to 6 PM; and from 7 PM to 10 PM – a total of 12 hours.** A. This baseline unlock schedule is not mandated in law, regulations or policy. **It is the current normal operating schedule** arrived upon through emergency and operational management planning at times **when a full complement of staff is present at the facility**. (See for example D/S Hill's affidavit at para. 24 herein)30

[79] The Attorney General has been consistent in its position that, ordinarily, if a full staff complement (19 Correctional Officers) is present at the facility, Mr. Diggs would be expected to be unlocked for **10-12 hours** each day.31

B- The evidence establishes that there is in law, a material deprivation of Mr. Diggs' residual liberty

[80] The statutory authority for the lockdowns imposed upon Mr. Diggs arises from section 79(3) of the *Correctional Services Regulations*. It provides a very broad discretion.

[81] The Attorney General argues that as long as Mr. Diggs' lockdown conditions are no different from the other general population inmates at CNSCF on a given day (that is, when they collectively experience total lockdowns for 22 hours a day or rotational/partial lockdowns for lesser but still substantial periods of time per day) therefore, <u>there is no substantial deprivation of his residual liberty.</u>

[82] Let me bluntly state my own position regarding some of these legal issues.

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30 In the Attorney General's Notice of Contest filed October 20, 2023, at page 2, the question "Does the deprivation of liberty continue?" was answered "Yes – there are ongoing rotational lockdowns depend on how many staff are available on the unit.… <u>On days where CNSCF are fully staffed on the unit, the unit has a full unlock.</u>" <u>In its amended Notice of Contest filed November 24, 2023, the answer to the same question was "No",</u> and the ensuing explanation was deleted, but only because the Attorney General was arguing that there is no material deprivation of residual liberty where all general population inmates are treated the same under lockdowns caused by staffing shortages.

31 Albeit in *obiter dicta*, in a sentencing decision, Justice Woollcombe agreed in *R. v. Passera*, 2017 ONSC 2799 (affirmed 2019 ONCA 527 - File #38811 - leave to SCC denied December 12, 2019) : "[131] <u>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</u>. 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." [My underlining added]

> **1**-all general population inmates are *prima facie* entitled to as much time out of their cells per day as is reasonable in all the circumstances (suggested in the evidence here to be 10-12 hours when a full complement of staff are present at the jail) unless the Correctional Facility management can justify with reasons, a statutory and factual basis for proportionately reducing that *prima facie* standard.
>
> **2**-the lockdowns that Mr. Diggs endured were substantial/material deprivations of his residual liberty. That Mr. Diggs as a general population inmate, endured material deprivations of his residual liberty as a result of the lockdowns, which were also concurrently in effect in relation to and suffered by all other general population inmates at the Burnside Jail, does not, in law, preclude a court from concluding that he suffered a material deprivation of his residual liberty.

[83] As the evidence demonstrates (and I would say the law requires), Mr. Diggs would normally have been entitled to be out of his cell for 10 to 12 hours a day, but for months long, and most of his days at Burnside Jail (28 of 51), he was out of his cell 2 hours or less, and for 8 further days he was out of his cell 3 hours or less.

[84] It is not a "privilege" to be out of one's cell.[32]

[85] It is presumptively an entitlement.

[86] The starting point for assessing whether Mr. Diggs has suffered a material deprivation of his residual liberty, is to consider together, two separate components:

1. "the relative or residual liberty permitted to the general inmate population of an institution" (para. 32 in *Miller*); and

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32 Section 75 of the *Correctional Services Act* reads:" Close confinement 75 Where an offender has been placed in close confinement, the superintendent (a) may restrict an offender's privileges; and (b) shall, in accordance with the regulations, conduct a review of the close confinement. 2005, c. 37, s. 75." The wording suggests that there is a difference between the level of "privileges" granted to an inmate and the level of confinement imposed upon an inmate.

2. when a state of "normal association" exists between the inmates of the general population (para. 27 in *Miller*).

[87] The Supreme Court of Canada did not intend that the relevant comparator be:

> The actual residual liberty permitted to the general inmate population (at the relevant times the applicant inmate was claiming they were materially deprived of their residual liberty).

[88] The Supreme Court of Canada intended that the comparator - or starting point - when assessing any suggested material deprivation of residual liberty of an individual inmate, must be:

> The residual liberty permitted to the general inmate population when a state of normal association exists between the inmates.

[89] This is why the Attorney General's reference to the other "general population" inmates' concurrent lockdown circumstances as being the appropriate comparator to Mr. Diggs circumstances is a false premise.

[90] Special notice should be taken of how the Supreme Court of Canada characterized the issue it was deciding in *Miller*, because it was based upon factual circumstances that are distinguishable from those in Mr. Diggs' case.

[91] In *Miller*, the Applicant was materially deprived of his residual liberty, and he could be returned back "into normal association with the general population" -whereas Mr. Diggs could not be returned "into normal association with the general population" - because they too were on lockdown:[33]

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33 *Ewanchuk*, 2017 ABQB 237, is cited by the Attorney General at paras. 27 and 28 of its Brief as being in support of its argument that if all inmates are treated equally there can be no material deprivation of residual liberty argued by any individual inmate. That case is distinguishable on its facts, as the "lockdowns" described therein were much different in nature than those experienced by Mr. Diggs. Justice Thomas, concluded: **A** - "[**26**] **Deprivation of liberty also must be substantial. The Charter does not protect against insignificant or "trivial" limitations on rights": *Cunningham v Canada***, 1993 CanLII 139 (SCC), [1993] 2 SCR 143, 80 CR (4th) 57**; see also *Canada (Attorney General) v Whaling***, 2014 SCC 20 at para 57, [2014] 1 SCR 392; *Lord v Coulter*, 2007 BCSC 1758 at para 60, 72 Admin LR (4th) 264, affirmed 2009 BCCA 62 at para 5, 266 BCAC 122. [27] Instead, what is required is a "substantial change in conditions amounting to a further deprivation of liberty": *Dumas v Leclerc Institute*, at p 464; *Cunningham v. Canada*, at p 151; *Canada (Attorney General) v. Whaling*, at para 57"; and **B** - "[39] … **First, Ewanchuk complains about lock downs. These are allegedly intermittent periods of detention that occur through the day as guards count prisoners, rotating meal schedules, and when an inmate has no work assignment."** …[41] **Second, I conclude the kinds of detention identified in this category do not amount to**

> 27. I turn to the question whether *habeas corpus* will lie to determine the validity of the confinement of an inmate of a penitentiary in a special handling unit and to obtain his release from such confinement, if it is found to be unlawful, into normal association with the general population of the penitentiary.
>
> [My underlining added]

[92] The following references reinforce that *Miller* does not support the Attorney General's position:

> 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**.
>
> …
>
> 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**.'
>
> 35 …
>
> 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

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a "substantial deprivation" of liberty. At most, these periods in-cell are a loss of privileges, as discussed in *R. v. Miller*. Life in prison may necessarily involve periods where a prisoner is required to remain in a cell or other individual space. **That is a part of a normal prison setting.** Ewanchuk has no legal or *Charter* right to a certain schedule of activities. **Ewanchuk's complaint does not indicate he is being treated any differently than other prisoners at the Bowden Institution.** This application therefore is very different from the extended period of involuntary segregation that was challenged in ***Hamm v. Attorney General of Canada (Edmonton Institution)***, 2016 ABQB 440, 41 Alta LR (6th) 29." I note that both the *Cunningham* and Whaling cases dealt with the circumstances of an offender's parole – a much different and distinguishable factual circumstance than that of Mr. Diggs. In consideration of an offender's parole circumstances, the circumstances of the general population inmates are irrelevant, as no such comparator is required.

> 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.**
>
> [My underlining added]

[93] In its Brief, the Attorney General states, under the heading "No deprivation of residual liberty":

> 17 As this Honourable Court articulated in ***Downey* 2023,** there is no deprivation of residual liberty if Mr. Diggs was subject to the same conditions or of restrictions as the general population of the facility. Justice Brothers citing the Ontario Court of Appeal case *Ogiamien* held the following:
>
> > 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 placed 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.

[94] Let me briefly examine some cases which set out the background for the arguments.

[95] Justice Brothers's comprehensive decision in *Downey v. Nova Scotia (Attorney General)*, 2023 NSSC 204, reflects the jurisprudence to date regarding this issue:

> [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.**

…

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 CanLII 38 (SCC), [1986] 2 S.C.R. 459; *Gogan v. Canada (Attorney General),* 2017 NSCA 4).

…

[54] **In *R. v. Miller,* 1985 CanLII 22 (SCC), [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*, 1979 CanLII 9 (SCC), [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*, 1926 CanLII 278 (UK JCPC), [1927] A.C. 211, aff'g 1925 CanLII 51 (SCC), [1925] S.C.R. 532; *Dugal v. Lefebvre*, 1934 CanLII 47 (SCC), [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), 1983 CanLII 332 (BC SC), 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), 1976 CanLII 1434 (QC CA), 34 C.C.C. (2d) 203; *R. v. Frejd* (1910), 1910 CanLII 229 (ON CA), 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 CanLII 15 (SCC), [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.
>
> …

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**."

[My bolding added]

[96] In *Heiser v. Bowden Institution*, 2022 ABCA 300, the Court canvassed some of the considerations in *habeas corpus* applications regarding material deprivations of residual liberty:

Demonstrating An Invalid Deprivation of Liberty

[24] At the first stage, an applicant for *habeas corpus* contesting his detention must "raise a legitimate ground upon which to question its legality": *Khela* at para. 30. There are potentially three different deprivations of liberty (the initial deprivation of liberty, a substantial change in conditions amounting to a further deprivation of liberty, and a continuation of the deprivation of liberty): *Dumas v Leclerc Institute*, 1986 CanLII 38 (SCC), [1986] 2 SCR 459 at p. 464. If grounds are shown, "the onus shifts to the respondent authorities to show that the deprivation of liberty was lawful": *Khela* at paras. 40-41.

[25] *Habeas corpus* cannot, for example, be used to challenge the correctness of the underlying conviction that caused the applicant to be incarcerated in the first place, or to reduce the sentence imposed: *R. v Gamble*, 1988 CanLII 15 (SCC), [1988] 2 SCR 595 at pp. 636-38. *Habeas corpus* is only available to deal with existing "here and now" deprivations of liberty, not historical deprivations of liberty that have ended: *R. v Charley*, 2018 ONSC 1163 at paras. 32-33, 405 CRR (2d) 57; *Ewanchuk v Canada (Attorney General)*, 2017 ABQB 237 at para. 23, 54 Alta LR (6th) 135; J. Farbey & R.J. Sharpe, The Law of Habeas Corpus, 3rd ed (Oxford: Oxford University Press, 2011) at pp. 198-99. **Since the onus shifts once the applicant has raised a legitimate ground to question his detention, the onus will generally be on the state authority to identify the order or authority that justifies his present detention. The basis of the applicant's present deprivation of liberty is a question of fact in every case.**

[26] ***Habeas corpus* is available to review detentions, and also to review "a significant reduction in the residual liberty of the inmate**": *May v Ferndale Institution*, 2005 SCC 82 at para. 28, [2005] 3 SCR 809. However, as the Court noted in *Canada (Attorney General) v Whaling*, 2014 SCC 20 at para. 59, [2014] 1 SCR 392: ". . . not all expectations of liberty in the parole context are constitutionally protected".

[27] **There is a line to be drawn between what are "significant reductions" in liberty, and other less serious changes in the status of the applicant that he regards as being undesirable. The remedy provided by *habeas corpus* is not to be trivialized.** The point was made in ***Dumas v Leclerc Institute***, 1986 CanLII 38 (SCC), [1986] 2 SCR 459 at para. 10:

> . . . **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. . . .**

Mapara v Ferndale Institution (Warden), 2012 BCCA 127 at paras. 15-16, 22, 318 BCAC 139, leave to appeal refused [2012] 3 SCR x, as summarized in the headnote, confirmed:

> The appellants' complaints did not engage a superior court's *habeas corpus* jurisdiction. The writ was not available to challenge all administrative decisions made by corrections officials but to challenge only those decisions that resulted in a substantial change in the conditions of an inmate's confinement that adversely affected his or her residual liberty interests. The denial of an escorted temporary absence, like the denial of parole, did not change an inmate's liberty status and was, therefore, not subject to challenge by way of *habeas corpus*.

The boundary between "loss of privileges" and "a significant reduction in residual liberty" justifying review by *habeas corpus* is not capable of precise definition.

[28] Examples of the attempted inappropriate use of *habeas corpus* can be found. For example, in *R. v Latham*, 2018 ABCA 267 one asserted ground for review by *habeas corpus* was "sufficient access to the library, to his legal papers, and to other resources such as photocopying and facsimile transmissions". The Court confirmed at para. 9:

> The writ of *habeas corpus* is a fundamental constitutional remedy designed to review the legality of detentions. It is not intended to be used as an all-purpose remedy to allow serving prisoners to raise any and all complaints and grievances they have about the condition of their detention, or their parole status. There are specialized procedures in place to deal with those complaints.

As was confirmed in *R. v Latham*, 2018 ABCA 308 at para. 7:

> **The applicant erroneously regards the great writ of *habeas corpus* as being some sort of legal Swiss Army knife** that can be used to engage any grievance

> he has. ***Habeas corpus* is a limited remedy designed to address wrongful detentions and loss of liberty only.** It is not available as of right for any type of dispute that a person chooses to raise, just because that person is detained. It is not a method of automatically bypassing specialized procedures in place to address grievances about detention and parole. While the superior courts always retain a discretion to grant *habeas corpus* notwithstanding the availability of other remedies, it is a discretion that is judiciously exercised. The applicant's attempt to use *habeas corpus* to invite the superior courts to review the management of the corrections and parole systems is inappropriate.

To illustrate, the revocation or denial of parole would often involve a restrain on liberty sufficient to engage *habeas corpus*, whereas a challenge to minor conditions on parole (e.g. as to residence, no-contact, employment, etc.) generally would not.

[29] Decisions like *Latham* dismiss applications for *habeas corpus* because the grounds for issuance of the writ have not been made out, not because of any lack of jurisdiction. They do not stand for the proposition that nothing relating to parole can amount to a residual loss of liberty justifying an application for *habeas corpus*. In fact, these decisions confirm the discretionary jurisdiction of the superior court to review by *habeas corpus* parole and other decisions that significantly restrain the liberty of the subject.

[30] **Wherever the line may be between "loss of privileges" and "a significant reduction in residual liberty" the revocation of the appellant's parole, and his resulting return to custody, clearly involved a sufficiently significant restriction in his liberty to justify review by *habeas corpus*.**

[My bolding added]

[97] To the extent that courts have concluded that a lockdown equally affecting all general population inmates does not effect a "substantial deprivation of residual liberty", I respectfully, yet strongly, disagree.

[98] The only authority that expressly supports the Attorney General's position is Justice Laskin's reasons in *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667:

> [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.
>
> …

[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 CanLII 139 (SCC), [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 CanLII 38 (SCC), [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.

….

[86]… **(6) If no violation of s. 12 or s. 7 is found, is Nguyen entitled to the remedy of habeas corpus?** …

[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 CanLII 22 (SCC), [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***.
>
> [My bolding added]

[99] There is no jurisprudence binding me in circumstances similar to that of Mr. Diggs, that states, as Justice Laskin put it in *Nguyen*:[34]

> In the latter situation, [regarding the "conditions of an inmate's detention"]….***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.**

[100] Justice Laskin's reference to "more restrictive than the confinement of other inmates" is clearly a reference to the actual conditions of restriction of the notional "general population inmate" group in that case- who were found to be under the restraint of the same lockdowns as was Mr. Nguyen.

[101] In my respectful opinion, this is an unwarranted extension and misreading of the reasoning of the Supreme Court of Canada jurisprudence.

[102] As the Court in *Miller* (para. 35) put the threshold test of deprivation of residual liberty (regarding confinement in a special handling unit, or in administrative segregation):

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34 I reference below why I consider myself not bound by the potential restraint that the concept of horizontal *stare decisis* would require as a result of my departure from Justice Brothers's reasons in *Downey* at para. 88.

> It is in fact a new detention of the inmate, purporting to rest on its own foundation of legal authority;

[103] The lockdowns imposed on Mr. Diggs rested on "their own foundation of legal authority": s. 79(3) of the *Correctional Services Regs* per *Coaker*, 2018 NSSC 291; and were "a new detention of the inmate".

[104] The proper comparator for whether Mr. Diggs has suffered a material deprivation of residual liberty is not the actual conditions of restriction of the notional "general population inmate" group, but rather the conditions that would prevail in relation to the "general population inmate" group in the normal course of operations of the correctional facility –the starting point being the maximum presumptive liberty within the correctional facility that must be accorded to those inmates, unless the State can justify some lesser liberty or residual liberty.

[105] Moreover, my position is also consistent with a purposive approach to the procedural scheme of *habeas corpus* which the Supreme Court of Canada has endorsed.

[106] Would the Supreme Court of Canada really have intended that, simply because all general population inmates are locked down, partially or fully, for several months without interruption, that not one of them (or more) could even claim that they had suffered a material deprivation of their residual liberty?

[107] The further and very disconcerting consequence of the Attorney General's reasoning and conclusion, is that as long as all general population inmates suffer a similar level of deprivation of residual liberty (no matter how severe), the Attorney General would never have to answer the question whether such (partial or total) lockdowns were "lawful" (i.e. that there was legislative authority therefor, and that the decisions made were "reasonable"), because the *habeas corpus* analysis would end with the answer that there is no material deprivation of residual liberty established.

[108] In my opinion, it is only if the effects of these lockdowns are considered in relation to the "general population inmates" standard in normal operating circumstances of a correctional facility, which on the evidence here suggests a presumptive maximum time out of cell (i.e. 10-12 hours per day) is the norm, that the *habeas corpus* procedure can fulfil its supervening purpose, as it was

intended by the Supreme Court of Canada, and given its inclusion in s. 10(c) of the *Charter*.

[109] Only if Mr. Diggs' detention is compared to what level of liberty a general population inmate would experience at CNSCF under normal operations, can one meaningfully assess whether there has been any material deprivation of his residual liberty.

[110] *Habeas corpus* was described by Justice Van den Eynden in *Pratt*, 2020 NSCA 39, at para. 54 as:

> A fundamental remedy with historical and constitutional significance in our legal system. The oversight obligation of reviewing provincial superior courts is a very important function. This obligation cannot be given short shrift even if it may be, by times, challenging, cumbersome and inconvenient.

[111] Moreover, numerous courts have cautioned against the "erosion" of *habeas corpus* protections.

[112] The Attorney General's position amounts to an "obliteration" of *habeas corpus* protections, without any underlying persuasive rationale therefor.

5-No violation of Horizontal *Stare Decisis*

[113] I reject the Attorney General's argument that I am bound by horizontal *stare decisis* to accept the decisions of my colleagues that, in law, Mr. Diggs could not have suffered "a material deprivation of his residual liberty" if all the other general population inmates were suffering the same purported deprivation of residual liberty, by way of partial or total lockdowns.[35]

[114] In *R. v. Sullivan*, 2022 SCC 19, the Court spoke authoritatively about horizontal *stare decisis*.

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35 The argument from the Attorney General that if the entire general inmate population is locked down there can be no significant or material deprivation of residual liberty argued by any of them, is a relatively recent phenomenon. The following decisions of our Court include such argument being accepted by the Court unless I indicate otherwise: *Jennings*, 2023 NSSC 148 (self represented inmate); *Downey*, 2023 NSSC 204 (self represented inmate); *Keenan*, 2023 NSSC 217 at para. 21 (self represented inmate); *Richards*, 2023 NSSC 220 (self represented inmate); *Sempie*, 2023 NSSC 218 (self represented inmate) *Foeller*, 2023 NSSC 149 (self represented inmate - the argument was not expressly noted as made); *Haynes*, 2023 NSSC 311 (effectively self-represented, although the assistance of counsel was later partially rendered).

[115] My colleague Justice Patrick Murray recently set out a helpful summary thereof in *Roach v. Nordic Insurance Co. of Canada*, 2023 NSSC 342:

> [36] The rule of "horizontal *stare decisis*" was recently addressed in *R v. Sullivan*, 2022 SCC 19 (see paras 73-77). Kasirer J. said, for the Court:
>
> > [73] Horizontal *stare decisis* applies to decisions of the same level of court. The framework that guides the application of horizontal stare decisis for superior courts at first instance is found in [*Re Hansard Spruce Mills*, 1954 CanLII 253 (BC SC), [1954] 4 DLR 590 (BCSC)], described by Wilson J. as follows (at p. 592):
> >
> > > . . . I will only go against a judgment of another Judge of this Court if:
> > >
> > > (a) Subsequent decisions have affected the validity of the impugned judgment;
> > >
> > > (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
> > >
> > > (c) the judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.
> >
> > ....
> >
> > [75] The principle of judicial comity — that judges treat fellow judges' decisions with courtesy and consideration — as well as the rule of law principles supporting stare decisis mean that prior decisions should be followed unless the *Spruce Mills* criteria are met. Correctly stated and applied, the *Spruce Mills* criteria strike the appropriate balance between the competing demands of certainty, correctness and the even-handed development of the law. Trial courts should only depart from binding decisions issued by a court of coordinate jurisdiction in three narrow circumstances:
> >
> > 1. The rationale of an earlier decision has been undermined by subsequent appellate decisions;
> >
> > 2. The earlier decision was reached *per incuriam* ("through carelessness" or "by inadvertence"); or
> >
> > 3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.

> [37] As the defendant points out, the court made clear that exceptions to *stare decisis* are narrow: "mere personal disagreement between two judges is not a sufficient basis to depart from binding precedent" (para 74).
>
> [38] As to decisions taken *per incuriam*, the court said:
>
> > [77] ... [A] judge can depart from a decision where it was reached without considering a relevant statute or binding authority. In other words, the decision was made *per incuriam*, or by inadvertence, a circumstance generally understood to be "rare"... The standard to find a decision *per incuriam* is well-known: the court failed to consider some authority such that, had it done so, it would have come to a different decision because the inadvertence is shown to have struck at the essence of the decision. It cannot merely be an instance in which an authority was not mentioned in the reasons; it must be shown that the missing authority affected the judgment...
> >
> > [Emphasis added.]

[116] Ms. Garson has argued in her Brief:

> 115 This Court is not bound in its decision by prior cases relating to lockdowns because the facts are distinguishable, and the earlier decisions were made in exigent circumstances that could not enable a thorough consideration.

[117] She highlights Mr. Diggs diagnosed mental illnesses and the delays in his medication being provided as a basis to argue that the impact on him is much more significant, that a reasonable expectation exists that similar offenders will reside at CNSCF in future who will find themselves under these lockdowns, and in light of the serious constitutional issues involved, and the fact that there have not been fully engaged legal counsel on any of the earlier cases dealing with this issue, that it is appropriate for this Court to revisit the issue.

[118] She argues that the cases from this Court to date, have misinterpreted the Supreme Court of Canada's reasons in *Miller* and related cases, and this should be a good basis for revisiting the issue.

[119] Ms. Garson as counsel for Mr. Diggs has vigorously argued that:

> 39 **Residual liberty is that which is above and beyond the liberty necessarily lost when an individual is imprisoned**. As a baseline upon which to frame the assessment of the legal limits of on deprivation of rights of prisoners, it should be considered that, as stated by the Supreme Court of Canada in *Canada v Solosky* [1980] 1 SCR 821 and page 839, "**a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law**"…. meaning, **that the general**

population has submitted to harsh deprivations of liberty above and beyond the normal 12 hours a day outside of their cell does not make it lawful to also deprive Mr. Diggs of this liberty – instead, the base comparator of liberty against which to measure Mr. Diggs deprivation is that which is necessarily lost upon incarceration… **[Mr Diggs]** experienced a deprivation of his residual liberty when he was subjected to lockdown conditions. **His liberties were eroded over and above what is necessary upon being remanded. He experienced a prison within a prison – literally confined to his cell for significant periods of time.**

…

The Respondent AGNS cites paragraph 32 – 36 of *R v Miller*, [1985] 2 SCR 613 to support the assertion that Mr. Diggs' deprivation of liberty resulting from lockdowns is not residual as it is not unique to him but experienced by the entire population at CNSCF. The assertion is that, as there is no general population as a comparator against which to measure the deprivation of Mr. Diggs liberty – the writ cannot be accessed, and thus, the deprivation is lawful.

Firstly, this interpretation of *Miller* is erroneous. If read in greater context, ***Miller*** **stands for the proposition that Mr. Diggs deprivations of liberty, as it is above and beyond 'trifling in nature' raise a legitimate issue to be heard in the form of habeas corpus.**

The habeas corpus application in *Miller* addressed the applicant's confinement in a special handling unit, and thus the liberty of the applicant in this particular matter was **juxtaposed with that of the general inmate population,** who maintained their liberty other than that which is necessarily lost upon imprisonment… However, **the decision does not hold that simply because it is the comparator in this case, it must be the comparator in every case to access the writ.…**

… The court in *Miller* at paragraph 34 reviews American jurisprudence on habeas corpus and discusses the division reflected in this jurisprudence between a more restrictive view and a more expansive view of the writ. *Miller* accepts the more expansive understanding of habeas corpus pursuant to *Coffin v. Reichard* 143 F.2d 443 (6th Cir. 1944) which states that habeas corpus was designed to protect individuals from a wrongful restraint of their liberty.

[from *Miller* at paragraph 34]:

> … The note to which Stuart J referred approved the approach adopted in the leading case of [*Coffin*] where it was said at page 445: 'a prisoner is entitled to the writ of *habeas corpus* when, although lawfully in custody, he is deprived of some right to which he is a lawfully entitled even in his confinement, the deprivation of which serves to make his imprisonment more burdensome than the law allows or curtails his liberty to a greater extent than the law permits'.

[My bolding added]

[120] Lastly, she argues by analogy, that given the serious constitutional rights in issue in Mr. Diggs case, the Court should be permitted "a more flexible approach to horizontal *stare decisis* per *Sullivan*: "an incorrect constitutional decision by a court is more difficult to repair and may require legislative intervention… It is better to revisit precedent than to allow it to perpetuate an injustice…". (para. 121)

[121] To the extent that some decisions of this Court have cited the *Ogiamien*, 2017 ONCA 667, case as authority, and with all due respect, I note Justice Laskin's reasons regarding *habeas corpus* were made as *obiter dicta*, were only marginally argued and considered, and are not persuasive insofar as they purport to correctly rely on and interpret the Supreme Court of Canada's jurisprudence.

[122] Earlier decisions of this Court, did not have what I have in the present case: very thorough written and oral arguments by Ms. Garson on behalf of Mr. Diggs, wherein she has put arguments to this Court directly that had not previously been identified or examined with the assistance of inmate's counsel.

[123] Those earlier decisions were rendered where inmates did not have the benefit of counsel, which is an especially helpful, and can be a determinative, means of assistance.

[124] As Justice Van den Eynden stated in *Pratt*, 2020 NSCA 39:

> [58] There is a role for lower court judges to manage *habeas corpus* applications with particular regard to facilitating access to justice for self-represented applicants. Bourgeois, J. (as she then was) noted in *Blais v. Correction Service Canada,* 2011 NSSC 508:
>
> > [9] ... [P]rovincial superior courts do have a role, in fact an obligation to diligently guard against the erosion of the *habeas corpus* remedy and in particular its continuing application in the prison context.

[125] In none of those earlier decisions did the issue appear to have been seriously argued, if it was raised at all.

[126] Moreover, only recently has counsel for the Attorney General argued that if the same level of deprivation of residual liberty is experienced by all the other

inmates, it cannot be claimed as a "substantial" deprivation of residual liberty by an individual inmate.

[127] Similarly, I note that the Attorney General in its pleadings, and its counsels, have not consistently taken this same position (that if all inmates are locked down none can be experiencing a material deprivation of residual liberty) - even somewhat recently.

[128] For example, in *Downey* 2023 NSSC 204, at para. 4, the Court states:

> On May 10, 2023, the Attorney General of Nova Scotia filed a Notice of Contest.… In the Notice of Contest, the [Attorney General] concedes that Mr. Downey's liberty had been deprived. The [Attorney General] acknowledges that rotation schedules were being implemented on the North 3 range where Mr. Downey resided…

[129] It is contrary to the interests of justice to dismiss out of hand my ability to analyse the arguments put forward by the only Counsel to have represented an inmate to date regarding this issue.

[130] Respectfully, I am satisfied that I am not bound by the reasoning in previous cases *viz.*: if all inmates are locked down - no single inmate can claim to have suffered a material deprivation of residual liberty.

[131] I agree with Ms. Garson on this point.

[132] For at least 36 days Mr. Diggs was under these lockdowns, and suffered a material deprivation of his residual liberty.

6-The decisions of Correctional Services staff were not always "reasonable" in all the circumstances

[133] The reasonableness of Correctional Services' decisions in response should be calibrated to the seriousness of the level of material deprivation of residual liberty.

[134] The minimum acceptable staffing numbers required to be on the prison "floor" if inmates are to be completely or partially unlocked, is referenced in

Directive # 02-14 signed by Paulette MacKinnon as Superintendent of CNSCF February 14, 2014:[36]

Staffing in the institution has been reallocated to better support operations and the needs of staff. This Directive replaces Directive 10 – 13 dated March 6, 2013. At a minimum the following staffing members will be present on each unit:

North and West Unit: 0-161

0800 hours (unlock) to 2200 (lockup)

5 Unit Officers plus one Control Officer

2200- 0645

2 Unit Officers

The N/W Officer will float between the North and West Units

East Unit

0800 hours (unlock) to 2200 (lockup)

2 Unit Officers plus Control [Officer]

2200-0645

2 Unit Officers

The current schedule reflects this minimum staffing requirement as well as additional staff coverage that has been assigned during identified peak unlock hours. Offenders will be notified in the change in (lock up time from 2230 to 2200 beginning Friday, February 28th)
Between Friday February 28th and Wednesday, March 12 minor changes in the current staff schedule will be implemented. This will result in some redeployment through the facility in order to achieve minimum staffing requirements.

Please be advised that should the North or West Unit count surpass 161 (reaches 162) an additional correctional officer will be hired and each time the Unit count

36 See D/S Hill's affidavit paras. 51-52 "Historically the Correctional Officers union and management have reached agreements regarding the number of staff required to unlock the unit. These [Joint Occupational Health and Safey Committees] (JOHSC) committees reached an agreement in 2014 regarding the minimum number of staff required for a unit to unlock in different capacities. A true copy of the Unlock Directive issued by the Superintendent of CNSCF from February 25, 2014, is attached as Exhibit 7."

> substantially increases by 20 offenders an additional correctional officer will be hired (e.g. Increase from 162 to 183).
>
> [My underlining added]

[135] Regardless of the number of Correctional Officers that are requested to attend for work on any given morning, if the number of Correctional Officers that actually show up for work are less than these requirements (in *viva voce* testimony D/S Hill confirmed that at a minimum, a complete complement of Correctional Officer staff requires 19 people each shift)- then for safety reasons staff can refuse to fully unlock inmates.[37]

[136] D/S Hill testified that the minimum 19 people required to be "on the floor", maintaining order in areas where inmates are housed, are distributed as follows:[38]

> 6 for the North Unit;
>
> 6 for the West Unit;
>
> 3 for Admitting and Discharges;
>
> 2 for CCU [Close Confinement Unit]
>
> 2 for the Healthcare Unit [HCU- dayshift][39]

[137] Chief Superintendent Jeffrey Awalt (since July 23, 2023)[40] confirmed that the maximum capacity of the Burnside Jail is as follows:

> the North Units – 116 inmates (29 per each of the four sub-Units)
>
> the West Units – 116 inmates (29 per each of the four sub-Units)

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37 At paras 53-54 of D/S Hill's affidavit he sets out in more detail the number of Correctional Officers required for full unlocks and partial unlocks: "Left / Right"; and 3 cell rotation.

38 Deputy Superintendent Hill has worked with Correctional Services since 2008 at CNSCF when he began a Correctional Officer through to becoming a Captain in 2016, Assistant Deputy Superintendent thereafter and Deputy Superintendent as of August 29, 2023.

39 He added that these 19 staff typically do 4 shifts per week: 2 night-shifts and 2 day-shifts.

40 He started in 2007 as a Correctional Officer at CNSCF and continued on to becoming Deputy Superintendent at CNSCF in December 2022, and then Manager of Training until July 2023 when he became Chief Superintendent of all 4 Correctional Facilities in Nova Scotia: North Nova; Central Nova; Cape Breton ; and Southwest.

> [this approach would result in 232 inmates in total; if permissible double-bunking is taken into account, the capacity would be increased to a maximum of 322 inmates in those two Units]
>
> between CCU and HCU there are 21 cells-21 inmates41

[138] In his affidavit he stated that:

> 8. There is no formal policy on the number of officers necessary to do the work at CNSCF. This is a determination that must be made through the Department of Finance, Correctional Services, and the Public Service Commission.
>
> 9. Historically, Correctional Services determined that for the ordinary operation of the CNSCF, there needs to be at least 100 general staff members and approximately 80 relief staff members to relieve these general staff members in the event of short-term leave, vacation, illness, or exigent circumstances, to ensure the safety and security of the facility by ensuring a full staffing complement.
>
> 10. In 2021, the trend became that the general staff members began going off on short-term or long-term disability in relation to workplace injuries, mental health concerns, and other issues connected to the type of work performed in the correctional facilities. This trend resulted in the use of relief staff to fill in the general staff roles over longer periods of time. During these periods there have been issues with backfilling these already backfilled positions if our relief Central are unavailable due to illness or for various other reasons.42
>
> [My underlining added]

[139] D/S Hill stated in his affidavit at para. 21:43

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41 There is a separate women's Unit with a maximum capacity of 48 inmates.

42 In cross-examination D/S Hill agreed that: staffing shortages had begun to become an issue during the Covid 19 pandemic and that the CNSCF hadn't fully recovered since then; and that: "the trend" [of staff unexpectedly not showing up for work on the morning they are to work for various reasons] has been there "for quite some time". He also noted that Correctional Officers are responsible to take prisoners to hospital which requires two officers with each inmate all the time until they are brought back to the institution; staff also have their own scheduled appointments that they are permitted to attend such as medical appointments etc., or other unscheduled issues, which affect staff availability, sometimes on short notice (e.g. Family or General Illness). He also made brief reference to there being a group of "backfill" qualified Correctional Officers, but my sense of the evidence was that they were not always a reliable backstop because of their insufficient numbers and availability, to be able to replace employees who do not show up for work on short notice.

43 In *Pratt v Nova Scotia (Att. Gen.)* 2020 NSCA 39, the Court clearly stated that: "[94] I agree with the Appellant's assertion that **the correctional policies at issue in this case do not have the force of law**. This was made clear by my colleague Justice Fichaud in *Jivalian v. Nova Scotia (Department of Community Service)*, 2013

> The legal authority to place [Mr. Diggs] and others on North 4, on rotations as identified by the Correctional Services Policy and Procedure Number 43.00.00, and in sections 74 and 75 of the *Correctional Services Act*, and sections 79, 80, and 81 of the *Correctional Services Act Regulations*.

[140] "Close confinement" is purposefully imposed on inmates for either administrative or disciplinary reasons. In *Coaker v Nova Scotia (Attorney General)* 2018 NSSC 291, I said:

> [5] The inmates argue that lockdowns and close confinement are two forms of deprivation of residual liberty which are not synonymous. They note that although Corrections Nova Scotia has jurisdiction to "closely confine" individuals and has the jurisdiction to "lockdown" ranges of correctional institutions pursuant to Section 79 of the *Correctional Services Act Regulations*, Section 79 is the only statutory authority to lockdown a full range or entire correctional institution, and there being no Nova Scotian case law applying the common-law principles of natural justice and duties of substantive and procedural fairness,[3] the court should make a declaration in relation to such administrative decision-makers' unrestricted reliance upon Section 79 of the *Regulations*.
>
> [6] While, when considered as an abstract matter, it may seem that perhaps there should be some articulated limits on correctional services staff reliance upon Section 79 of the Regulations in the form of a declaration from the Court, however when examined through the lens of contextual realities, and the jurisprudence, the persuasiveness of that reasoning falters.
>
> [7] Section 79 of the *Correctional Services Act Regulations* reads:
>
> [4] Conditions for confinement of offenders in custody
>
> (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.

NSCA 2 where he explained that in order for a policy to have the force of law, the governing legislation must explicitly authorize departmental employees to create policies that have the effect of law. There is no enabling provision in the *Correctional Services Act* or *Regulations* authorizing the Executive Director to create policies that have the force of law. **Absent explicit authority, Nova Scotia correctional services policies do not have the force of law**. That said, this is not an issue upon which the appeal turns." [My bolding added] Therefore the policy referenced by D/S Hill is not strictly speaking "legal authority" to place Mr. Diggs on rotations, causing a material deprivation of residual liberty.

> (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.
>
> …
>
> [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.
>
> [33] Legislatures are the hands of governance, which create legislation (including regulations), whereas courts are the eyes and ears that review their work. Generally, if there are publicly perceived or identified problems with legislation, the Legislature will be expected to address those."

[141] I add here as well the contents of footnote 4 from *Coaker*:

> As noted by counsel [for the Attorney General] in his September 7, 2018 brief**: "A rotational schedule may also be classified under the *Correctional Services Act and Regulations* as 'close confinement'**. Close confinement is confinement in a close space (i.e. confined to one cell) or otherwise under close supervision. "Close confinement" is defined in Policy and Procedure Subject Number [43.00.00, attached to this decision as Appendix "A", which I appreciate is not "legislation."
> The *Correctional Services Act* allows for regulations to be made, but does not expressly contemplate legally effectual "policies" and therefore these are of "no legal effect" per Fichaud J.A. in *Jivalian v. Nova Scotia (Dept. of Community Services*), 2013 NSCA 2 of para. 31], as follows: '4.1 – **For the purpose of this policy, close confinement is defined as a restriction imposed on an offender to a cell or isolated area** (e.g. unoccupied day room, temporary housing unit) **that limits interaction with other offenders.**' Close confinement is authorized pursuant to Section 74 of the *Correctional Services Act*."

[142] The legislation contemplates, at an absolute minimum, that general population inmates receive each day at least more liberty than those in close confinement. That requires:

1. 2 hours per day out of cells [otherwise they would be effectively in close confinement without a legislative basis therefor]
2. 30 minutes per inmate of Airing Court time.

[143] The Attorney General argued in its brief:[44]

> There is no required amount of time out of one's cell prescribed by the [*Correctional Services Act*, SNS 2005. c. 37]. Pursuant to s. 79 of the [*Correctional Services Regulations*, NS. Reg. 99/2006], the Superintendent [of the CNSCF] has the lawful authority to impose different conditions of confinement on different offenders and to confine an offender in custody… .

[144] The following statement by D/S Ryan Hill regarding "normal operations" at the jail, was applicable to Mr. Diggs throughout his detention:

> 24-On an ideal day at CNSCF, where the appropriate staff to inmate ratio is in place, all open day rooms, including North 4 would be unlocked from 7:30 AM to 12 PM, from 1:30 PM to 6 PM, and from 7 PM to 10 PM – a total of 12 hours per day. The

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44 Section 12 of the Canadian Charter of Rights and Freedoms states: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." I note that confinement of an inmate in administrative or protective segregation at a federal penitentiary is not *per se* cruel and unusual treatment; on the other hand, it may become so if it is so excessive as to outrage standards of decency: *R v Olsen*, [1989] 1 SCR 296. The summary of the Ontario Court of Appeal decision in *Olsen* reads: "The appellant, an inmate of Kingston Penitentiary, had brought an application for *habeas corpus* so as to effect his release from administrative segregation where he had been held since his conviction on 11 counts of first degree murder. He had now been in administrative segregation for five years. Section 40 of the Penitentiary Service Regulations, C.R.C. 1978, c. 1251, provides that where the head of the institution is satisfied that such segregation is necessary for the maintenance of good order and discipline in the institution or in the best interests of the inmate, then he may order that the inmate be placed in administrative segregation. As a result of such segregation the appellant is required to spend in his 23 hours of each day in his cell, but he enjoys all the other privileges enjoyed by prisoners except those which follow from the nature of his confinement. The appellant had applied for *habeas corpus* in order to effect his release into the general population." The Supreme Court of Canada stated: "Brooke J.A., speaking for the Court of Appeal, held that the written material filed by the appellant disclosed an arguable case and that Maloney J. ought to either have issued the writ or, in some other manner, afforded the appellant an opportunity to appear and make submissions. He stated (at pp. 329-30):"However, in my respectful opinion, in view of the material filed, there were serious matters to consider being whether the appellant is lawfully detained in segregation, if he is held there on the order of the previous Solicitor-General and further whether his detention in segregation for the past five years, with a prospect of further detention for many years, was cruel and unusual treatment. In the circumstances, Maloney J. should either have directed that the appellant be brought before him to argue the case as though the writ had been issued or, alternatively, to issue the writ and afford the applicant the opportunity to appear and respond to the submissions of his jailer on the hearing upon the return of the writ. It was not good enough to leave this matter by denying the applicant an opportunity to be heard."

> baseline unlock schedule is not mandated in law, regulations or policy. It is the current normal operating schedule arrived upon through emergency and operational management planning at times when a full complement of staff is present at the facility.

[145] I agree with Mr. Diggs that he has suffered substantial ongoing deprivations of his residual liberty.

[146] In the present circumstances Mr. Diggs' treatment by Correctional Services as a low risk general population inmate at the Central Nova Scotia Correctional Facility over those 51 days, mirrored the experience of an inmate in "close confinement", without the procedural safeguards as described in the *Correctional Services Act*, including:

> Close confinement
>
> 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.
>
> Close confinement or "segregation"
>
> 75 Where an offender has been placed in close confinement, the superintendent (a) may restrict an offender's privileges; and (b) shall, in accordance with the regulations, conduct a review of the close confinement. 2005, c. 37, s. 75.

[147] Mr. Diggs stated in his affidavit:

> When [CNSCF] is on a lockdown, all prisoners including myself, get less time out of our cells.
>
> Additionally, when we are allowed out of our cells, it's often with smaller groups of prisoners than the whole unit or range. I cannot remember a day when I was at [CNSCF] that we were not on a lockdown.
>
> On most days, I was let out of my cell for less than two hours.
>
> … I never knew the amount of time I would be let out of my cell. There was no forewarning or schedule given. The uncertainty contributed to a feeling of the

> confinement being never ending.… The only reason staff ever gave us for the lockdowns was short staffing, and there was not enough staff to unlock us.
>
> I was only able to go outdoors and get fresh air three times during my time at [CNSCF]. One of those times was because the correctional staff wanted to search the unit, so the whole unit had to go outside [on or about November 3, 2023, when staff was searching for contraband as a result of a death at the jail]".

[148] It is not necessary for me to expressly decide whether in fact the treatment Mr. Diggs would "outrage standards of decency", and was therefore "cruel and unusual", however *habeas corpus* is inherently an examination of the treatment of an inmate within a prison.

[149] I will say that, I expect a reasonable observer would likely consider the frequency and duration of the continual daily lockdowns experienced by Mr. Diggs as certainly too far down the path towards these descriptors.

[150] I have earlier herein described, and will not repeat here, the basis for my conclusion that the relevant decisions made on a daily basis respecting Mr. Diggs were not "reasonable" when seen in context:

> The Attorney General has not shown that the daily decisions regarding Mr. Diggs' confinement under total or partial lockdowns at CNSCF were "reasonable" over the 51 days he was confined there.

7-The appropriate remedy[45]

[151] The facts of Mr. Diggs' circumstances properly inform my assessment of the extent to which he has been deprived of his residual liberty, and what remedy/remedies can see him "released" from, or in some form, vindicated in relation to that deprivation of residual liberty/treatment.

[152] In my opinion, the traditional remedy of "release" from the inmate's state of a deprivation of residual liberty, can be supplemented by, or supplanted with,

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45 Albeit speculative at this juncture, Mr. Diggs could receive some recognition or "remedy" for having endured these material deprivations of his residual liberty later in the criminal trial process. Mr. Diggs is presumed to be innocent of those charges until they have been proven beyond a reasonable doubt. His trial is set for December 2023. If he is ultimately found guilty/pleads guilty to some or all those charges, he is entitled to receive a reduction from any sentence of imprisonment imposed, for the time he has already spent incarcerated on remand regarding those charges (per s. 719 *Criminal Code*, as interpreted in *R. v. Carvery*, 2014 SCC 27), and may also receive enhanced credit for "harsh" conditions while on remand – *R. v. Duncan*, 2016 ONCA 754. But, if he is ultimately found not guilty of all those charges, he will not receive any recognition or remedy for having remained in prison on those charges in advance of his trial ending.

where appropriate, a different remedy, if it is consistent with a purposive perspective of the original *raison d'etre* of *habeas corpus* and its justifiable evolution.

[153] On November 16, 2023, his recently retained Counsel, Ms. Hanna Garson of the PATH [People's Advocacy and Transformational Hub] legal group, filed an Amended Notice for *Habeas Corpus* on his behalf.

[154] Mr. Diggs seeks therein as a remedy:

> The Applicant seeks the following relief pursuant both to the writ of *habeas corpus* and [section] 24(1) of the *Charter*:
>
> > 1 - A declaration that the lockdowns at CNSCF have unlawfully deprived the Applicant of his liberty, in contravention of [section] 10(c) of the *Charter;*
> >
> > 2 - Such further and other relief as this Honourable Court deems just.

[155] In summary, I am satisfied that:

1. there has been a substantial deprivation of Mr. Diggs' residual liberty during the 51-day time interval;
2. the decisions that led to that deprivation were not always lawful/reasonable.

[156] I further note also that CPR 7.15 permits as a remedy that: "a judge may order bail for an applicant" and CPR 7.16 permits "a judge may release or remand the applicant on determining whether or not the deprivation of liberty is legal".

[157] These provisions would appear to reference the *Liberty of the Subject Act*, RSNS 1989, c. 253, which itself speaks to the authority and power of this Court, that *habeas corpus* is preserved in statute as in common law, and that pursuant to s. 6(2) thereof, the Court:

> may require the immediate discharge of the prisoner or may direct his bailment in such manner, and for such purpose, and with the like effect in proceeding, as is allowed upon *habeas corpus*.

[158] However, Mr. Diggs is no longer at CNSCF, and his circumstances have changed otherwise, rendering obsolete this Court's basis for considering a "bail" hearing in relation to Mr. Diggs.

[159] There is a remedy available to Mr. Diggs insofar as he seeks a declaration, because a declaration regarding his circumstances between September 13 and November 3, 2023, shines a light on the circumstances of his material deprivation of residual liberty, but also has implications for other inmates at the CNSCF, and elsewhere given that the lockdowns are still continuing.[46]

[160] Moreover, pursuant to the doctrine of horizontal *stare decisis*, my decision herein ought to be respected and considered binding, so long as the circumstances at the CNSCF remain comparable to those of Mr. Diggs, and that it is not otherwise incorrect in law per *R. v. Sullivan*, 2022 SCC 19.

Conclusion

[161] I will sign an Order that confirms by declaration that while an inmate at the Central Nova Scotia Correctional Facility, Mr. Diggs was unlawfully and materially deprived of his residual liberty for a significant number of days (likely up to 36 of these days) between September 13 - November 3, 2023.

[162] No costs were sought, and thus none are granted.

Rosinski, J.

46 As I reiterate in *Wilband*, 2024 NSSC 12, I provisionally incline to the view that Mr. Diggs cannot rely on a purported breach of s.10(c) *Charter* or the traditional writ to claim relief through s. 24(1) of the *Charter*.