

East Coast Prison Justice Society
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(with Elizabeth Fry Societies - NS Mainland and Cape Breton - NS Prisoners' Health Coalition, NS Criminal Lawyers' Association, Women's Wellness Within)

March 16, 2020

Chief Medical Officer of Health, Dr. Robert Strang
Chief Justice of Nova Scotia, Michael Wood
Chief Justice of the Nova Scotia Supreme Court, Deborah Smith
Chief Justice of the Nova Scotia Provincial Court, Pamela Williams
Minister of Justice Mark Furey
Deputy Minister of Justice Karen Hudson
Minister of Community Services, Kelly Regan
Deputy Minister of Community Services, Tracey Taweel
Director, Correctional Services, John Scoville
Executive Director, Correctional Services, Chris Collett
Director of Public Prosecutions, Martin E. Herschorn
Chair, Halifax Board of Police Commissioners, Natalie Gordon
Vice-President - Health Services, Quality and System Performance, Nova Scotia Health Authority [NSHA], Mr. Colin Stevenson
Director – Mental Health and Addictions, NSHA, Ms. Samantha Hodder
Former Justice Suzanne Hood, Chair, NS Criminal Code Review Board
President, Nova Scotia Chiefs of Police Association, Julia Checchetto
Executive Director, Nova Scotia Legal Aid, Megan Longley

Dear Dr. Strang, Chief Justices Wood, Smith, and Williams, Minister Furey, Deputy Minister Hudson, Minister Regan, Deputy Minister Taweel, Mr. Scoville, Mr. Collett, Mr. Herschorn, Ms Gordon, Mr. Stevenson, Ms. Hodder, Ms. Hood, Ms. Cecchetto, Ms. Longley:

RE: Immediate measures to ensure that ministerial, police, prosecutorial and judicial discretion is informed by the urgency of reducing incarceration during COVID-19 pandemic

We (East Coast Prison Justice Society, Elizabeth Fry Societies - NS Mainland and Cape Breton, NS Prisoners' Health Coalition, NS Criminal Lawyers' Association and Women's Wellness Within) are writing on an urgent basis. We recognize that these are highly pressured times and that you are committed to best efforts to contain the COVID-19 virus.

We propose below **a set of initiatives through which justice system actors should immediately begin to coordinate actions to prevent the spread of COVID-19 among provincially incarcerated persons.** The recommendations we make are oriented to

protecting the health of prisoners while respecting their human rights, and moreover preventing prisoners from becoming unwilling “vectors” of contagion threatening the health of their communities on reentry.

Yesterday we issued an open letter¹ calling for a public statement from the Minister of Justice, Director of Corrections, and Nova Scotia Health Authority concerning the measures to be taken by Justice, Corrections and Health Authority officials to avert the emergence of COVID-19 inside provincial jails. We await your response.

However, we are of the further firm view that at this time the only adequate defence to the spread of COVID-19 inside our jails, and consequent preventable deaths, is strategic decarceration -- i.e., ensuring that admissions and numbers of prisoners held in facilities are as low as possible, consistent with public safety.

If the province acts now, prevention or containment of risk is more likely. We therefore propose a set of mechanisms of preventive decarceration for your urgent consideration. These include: 1) temporary absences, 2) expedited bail hearings and review of remand orders, and 3) policies to inform the discretion of Crown counsel and police.

Preventive decarceration - background

As you know, about 60% of persons in Nova Scotia jails are in pre-trial detention (about 65% of the total count of provincial prisoners in 2017-18²). A significant majority of remanded prisoners are in custody for under a month, while the average sentence is about 70 days.³ At the same time, many patients at the East Coast Forensic Hospital who have received conditional discharges from the CCRB are still awaiting community placements many months or even years on.⁴

As COVID-19 hits, incarcerated persons are particularly vulnerable. They cannot practice social isolation in the same ways that people outside of prisons can. In provincial facilities in particular, people tend to pass in and out, placing those inside and those passing through at increased risk of infection. The risk is compounded by challenges accessing health care and preventative hygiene and health measures while inside. These problems are further exacerbated by the fact that many of the outside contacts that corrections may begin to exclude as intolerable risks are nonetheless critical to prisoners’ legal rights and psychological well being. The longer this situation continues, the more intolerable it gets, as prisoners’ health and human rights are paradoxically constructed as mutually inconsistent.

Compounding the heightened likelihood of infection is the fact that prisoners are disproportionately affected by chronic health conditions rendering them susceptible to the

¹ <https://nsadvocate.org/2020/03/15/urgent-open-letter-re-health-safety-and-human-rights-of-people-in-prison-during-covid-19-crisis/>

² <https://data.novascotia.ca/Crime-and-Justice/Average-Daily-Counts-at-Adult-and-Youth-Correction/xbcp-7w2t>

³ Corrections in Nova Scotia: Key Indicators (April 2019) (average length of stay- sentenced), p.7; Remand in Nova Scotia 2005-2016.

⁴ <https://globalnews.ca/news/4254538/patients-stuck-at-forensic-hospital/>

worst of COVID-19 complications, including death. High rates of chronic conditions including respiratory problems and conditions compromising one's immune system are well documented in this population.⁵

At the same time, incarcerated people are overwhelmingly representative of marginalized populations, including Indigenous and racialized persons, and the poor. These are groups already at greater risk of virus transmission in the community, given challenges to social distancing presented to those with housing and income instability. They are, at the same time, highly vulnerable to discrimination, vilification, and exclusion.

The threat of virus spread in prisons and jails reaches beyond the critically important context of incarcerated persons who are at the mercy of the state. It also threatens to undermine efforts at public health management in the wider community. Jails are porous institutions with a constant flow of admission and release. In passing in and out of jail, prisoners become vectors for virus transmission, potentially prolonging the life of the epidemic and further corroding the health of the most marginalized and embattled communities, and the public as a whole.

Correctional responses to COVID-19 are likely to involve efforts to isolate and separate prisoners, for instance through increased time in lockdown (already a dangerously overused mechanism in facilities such as CNSCF); designation of certain dayrooms for those most susceptible; and isolation of suspected carriers. All of these options raise significant human rights, health and safety concerns.

For instance, it is broadly recognized that conditions of segregation comparable to lockdown are corrosive to mental and physical health, particularly for those with pre-existing mental health conditions. Where these measures are prolonged and indeterminate, they can have permanent significant impact on prisoners with or without a prior diagnosis. These dire effects have been recognized by Canadian appellate courts in cases deeming solitary confinement an infringement of human rights.

In pandemic conditions, government must balance a set of safety and health concerns. In particular, in the likely event of an outbreak of COVID-19 in one or more of the province's correctional facilities, correctional and health authorities are likely to face difficult questions about whether or when those suspected of or diagnosed with the virus will be transferred to hospital – and whether or when hospitals will accept those patients.

The prospect that prisoners may first be infected as a result of government reliance on incarceration despite clear threats presented by the pandemic to life and health, and then may be forced to endure solitary confinement in combination with other second-tier standards of care, inferior to those accessible in the wider community – and with this, the prospect that prisoners will die preventable deaths -- is something we urge you to take all measures to avert before it is too late.

⁵ Fiona Kouyoumdjian et al, "Health status of prisoners in Canada" (2016) 62(3)Can Fam Physician 215-222 [[Health status of prisoners in Canada: Narrative review](#)]

RECOMMENDATIONS

Sentenced prisoners

Yesterday, we wrote to Justice and Correctional Services officials on the importance of identifying provincial prisoners at high risk of complications from COVID-19, and immediately moving them to appropriate community placements, for instance by way of conditional release.⁶ Conditional release may be granted on the basis of “medical reasons,” “humanitarian reasons” or reasons of “reintegration or rehabilitation.” Our understanding is that this mechanism is available only to those under sentence.

We urge you to immediately devise a system for approving conditional release of sentenced provincial prisoners, including all prisoners currently serving intermittent sentences, and all those who are at elevated vulnerability to complications from COVID-19. While these two groups are the most obvious starting point, we emphasize the importance of including all sentenced prisoners in these measures given the immediate need to reduce the jail population to protect against the unprecedented COVID-19 threat.

We class within the category of non-intermittent prisoners who should be immediately granted conditional release (whether to private homes or other approved community-based spaces) given their heightened susceptibility in jail to complications of the illness, intensive liberty restrictions oriented to risk mitigation, or both:

- Persons aged 50+, who are at the highest risk of serious illness and death should they contract COVID-19,⁷
 - Persons with compromised immunity, respiratory conditions and other chronic health conditions rendering them more vulnerable to complications from COVID-19,
- and
- Persons who are pregnant (who are also likely to be immune-compromised).

We also take the position that

- Mothers and others who are primary support parents should be granted conditional release in light of the serious psychological stress of separation during a pandemic crisis, and to ensure safe supervision of dependent children who without a primary support parent may be in precarious living situations.

Remanded prisoners

⁶ Correctional Services Act, 2005, c. 37, s. 1, s.79

⁷ While Public Health locates the age of increased concern as 65, the health of prisoners is recognized to be equivalent to that of persons in the general population whose chronological age is 10-15 years younger. See Adelina Iftene, Punished for Aging: Vulnerability, Rights, and Access to Justice in Canadian Penitentiaries (Toronto: University of Toronto Press, 2019) at 24. And see Office of the Correctional Investigator, Aging and Dying in Prison: An Investigation into the Experiences of Older Individuals in Federal Custody (Feb 2019). <https://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20190228-eng.aspx>

Second, we urge authorities to explore informal mechanisms for granting temporary absences to remanded prisoners. Otherwise, timely decarceration of remanded prisoners -- as a further critical defence against the COVID-19 threat -- will require coordinating expedited court hearings for those awaiting bail as well as expedited review of pre-trial detention orders.

The high remand rates in the province signal that prosecution and judicial decision-making practices are likely already inconsistent with the clear requirement in *R. v. Antic*, 2017 SCC 27 that pre-trial custody (or even placing conditions on interim release) should in all but the most serious cases be a last-resort measure, only justified where the Crown demonstrates these measures to be necessary. Reasonable bail is a constitutional right.

The need to mitigate against the spread of COVID-19 means it is even more imperative that all justice system actors remain mindful of the need to identify alternatives to incarceration at all stages of the criminal justice process. The special relevance of Gladue and s.718.2 of the Criminal Code must be central to the analysis.

Justice system authorities, including the Minister of Justice and Director of Public Prosecutions, must therefore act on an urgent basis to craft and implement policies to ensure that justice system actors are mindful of the impact of COVID-19 when exercising discretion relating to incarceration. To condemn people to await trial in an environment highly susceptible to rapid spread of a potentially life-threatening illness – and to expose their families and wider communities to enhanced risk on their return home – constitutes a grossly disproportionate intrusion on personal security, a discriminatory disproportionate burdening of the most marginalized communities, and a threat to public health.

Prisoners at East Coast Forensic Hospital

While not provincially incarcerated persons as such, patients at East Coast Forensic Hospital (which shares staff and infrastructure with CNSCF) are also subject to deprivation of liberty in conditions in which spread of COVID-19 is difficult to control. We urge NSHA officials, in cooperation with provincial community services authorities, to implement community release plans on an urgent basis. In particular, we urge Community Services authorities to ensure that ECFH patients who have received conditional discharges from the Criminal Code Review Board are provided the necessary supports and services to move into the community without delay, to protect their health and human rights, and to assist in reducing crowding and thereby relieving pressure on the correctional health care system during the pandemic.

Comprehensive Recommendations – Preventive Decarceration

Reflecting and building on the foregoing, we recommend the following urgent actions and ask that you publicly release your action plans, optimally within 48 hours:

- 1 – The Minister of Justice, acting in coordination with the appropriate correctional officials, should (as Ontario has done) immediately grant all prisoners given intermittent sentences conditional release / temporary absence from custody;

2 – For those sentenced to continuous custody, correctional authorities, acting in coordination with the Department of Justice, should use the power to grant conditional release (per s.79 of the Correctional Services Act) for medical and/or humanitarian reasons. A priority should be placed on identifying community-based options for those most vulnerable to COVID-19 including those of advanced age (in prison populations given comparative ill-health, 50+); those with chronic health conditions making them vulnerable to COVID’s most serious effects; and those who are pregnant. We would add those with significant mental health conditions, likely to be exacerbated by subjection to near-permanent lockdown conditions anticipated as the COVID-19 epidemic plays out;

3 - Similarly, correctional authorities should use their powers under s.79 of the Correctional Services Act to grant conditional release on health and/or humanitarian grounds to mothers and others who are primary support parents, who may suffer serious psychological stress when separated from children during the pandemic and whose children may be subject to heightened anxiety and other forms of instability in the absence of parental guidance;

4 - While prisoners may potentially be released to private homes with or without supervisory conditions, government (Justice, Community Services, or both) should provide resources to non-profits in the supported housing sector on an emergency basis to increase capacity to accommodate prisoners moving out of the jails (as Elizabeth Fry NS Mainland and Cape Breton are doing);

5 – The provincial government (Ministry of Community Services), in coordination with the NSHA and East Coast Forensic Hospital, must implement community release plans on an urgent basis, to provide ECFH patients who have received conditional discharges from the Criminal Code Review Board or who have been granted temporary absences the necessary supports and services to move into the community without delay, consistent with their human rights and the urgency of reducing hospital crowding and relieving pressures on the correctional health care system during the pandemic;

6 - Court officials, including the Chief Justices of the Provincial and Superior Courts, together with the Public Prosecution Service / Crowns and defense counsel / legal aid, should coordinate efforts to expedite bail hearings as well as review of orders denying interim release – this, in recognition that maintaining incarceration in the changed conditions of the COVID-19 epidemic threatens to erode public confidence in the administration of justice;

7 - The Director of Public Prosecutions should instruct Crowns not to oppose bail or seek onerous conditions in new matters coming before the court, or to do so only in cases raising the most serious public safety concerns. The special threat posed by the COVID-19 epidemic to incarcerated populations and the public provides a further strong counterweight to pre-trial custody;

8 – Finally, public authorities with oversight of policing, including chiefs of police and boards of police commissioners, should instruct officers to give serious weight to the individual and the public health risks presented by placing an arrested person in lockup post-arrest, rather than the default liberty-respecting option of releasing them on recognizance or a promise to appear in court.

We add to this list a reminder of two core imperatives raised in our letter of March 15, 2020, directed specifically to **practices inside jails** to guard against the threat of COVID-19 spread:

-- Justice, Corrections and NSHA officials should release to the public their action plans for monitoring, preventing and treating COVID-19 inside correctional facilities;

– Justice, Corrections and NSHA officials must ensure that measures taken to mitigate risk and promote public health inside provincial jails are evidence-based and least restrictive of liberty, and do not subject prisoners to an inferior standard of care. Any measures taken must reflect concern for the mental and physical health effects of prolonged and indeterminate lockdowns in shared cells, as well as isolation in "health segregation" -- conditions corrosive to psychological and physical health and contrary to fundamental rights under the Charter.

We look forward to your timely response.

Yours,



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