

SUPREME COURT OF NOVA SCOTIA

Citation: *Clarke-McNeil v. Nova Scotia (Attorney General)*, 2021 NSSC 266

Date: 20210907

Docket: Hfx No. 508549

Registry: Halifax

Between:

Kevin Edward Clarke-McNeil

Applicant

v.

The Attorney General of Nova Scotia, Representing Her Majesty the Queen in
Right of the Province of Nova Scotia and Central Nova Scotia Correctional
Facility

Respondents

Oral Decision

Judge: The Honourable Justice Peter P. Rosinski

Heard: September 7, 2021, in Halifax, Nova Scotia

Counsel: Kevin Clarke-McNeil, Self-Representative for the Applicant
Drew Hampden, for the Respondents

By the Court (oral):

[1] Mr. Clarke-McNeil filed his application, it is dated August 24, 2021, and was filed August 25, 2021, and he basically he put in it that he is held in cell for more than 23 hours a day; not getting to go out for the yard, to the yard for weeks at a time; can't get to the phones to make important calls related to his court cases

and preparation for court appearances. In his remedies, he would wish, access to the phones during business hours during the weekdays, and a letter from the Justice System acknowledging mistreatment and saying his rights are not being given to him on an ongoing basis (by way of explanation) because of staff issues with the facilities.

[2] And then, he also, of course, provided a letter which he, in some respects, testified to as well, filed September 1st. Again, particularly in relation to days of being locked up more than 22 hours a day. And he referenced a number of dates. As indicated, the application here is limited, in some respects, by time between August 20th and I would say the 31st of August roughly, in order to put a start and finish date on the timeframe we are looking at.

[3] In relation to this, I have the evidence of Mr. Clarke-McNeil, which he gave today, and from the Attorney General, the evidence of Deputy Superintendent Brad Ross, which was presented by way of his comprehensive affidavit. And I say that because it is extremely thorough in its materials, it has a number of tabs and accumulates to a thick folio. But that is not necessarily the test of what can I take from it, just to say that a lot of information was gathered by the Deputy Superintendent in response to Mr. Clarke-McNeil's application, which suggests that the Attorney General and Deputy Superintendent Ross, took Mr. Clarke-

McNeil's application seriously and did his best in Deputy Superintendent Ross' case, to answer as clearly as possible the questions or complaints, if you will, that Mr. Clarke-McNeil was putting to the Court.

[4] I find Deputy Superintendent Ross to be credible as a witness. As I say, his affidavit is thorough and documented. His evidence on the witness stand, the extra things he said today, were communicated in a straight forward manner, with, corroboration, if you will, insofar as pointing out information that was the source of his information, if it was about the Institution. He indicated that there was, what I would call an extraordinary set of circumstances between about August, I think it was 16th or thereabouts, may be it was the 20th, when this construction, I think it was the 16th when this construction started. It was clearly, absolutely essential to have this done so that the security systems in the Burnside jail did not fail unexpectedly all at once potentially. And so the management was left to find ways to allow this construction to go forward, while at the same time facing staff shortages which were gone into in great detail by Deputy Superintendent Ross. I will say, I find that the efforts of the Institution here were genuinely responsible and responsive to the circumstances.

[5] The Deputy Superintendent noted that it is difficult to recruit new persons. In fact, the qualifications prerequisites have been dropped in some respects to

allow for a quicker turnaround and a greater breadth of persons who might be eligible to become correctional officers. However, the training, which is really key here, also has to be put in place before they can function as correctional officers and that again, like so many of the things in these circumstances, was impacted by Covid: couldn't train all those people they had available all at once, there were limits placed by Public Health that slowed the process down; the construction involved; people being in the building - civilians who needed escorts because the nature of a correctional facility. Really it was in some respects, what one could refer to as a kind of perfect storm of bad circumstances. It seemed every avenue to make things go better was shut down leaving very little decision making room for the Institution as a result of Covid, and in conjunction with this construction that was necessary and needed to be done urgently.

[6] I found the Deputy Superintendent's evidence precise, to the extent he could be, and he for example, referenced in his affidavit that he personally sat down and viewed the video of the days, at the least the majority of the days, that Mr. Clarke-McNeil identified as him having had less time than 2 hours out of his cell; and he said, in paragraph 32 for example, "I have reviewed the video footage from West 1 dayroom" where Mr. Clarke-McNeil was the entire time, "between August 20th, 2021, and August 30th, 2021. I took note of all of the times Mr. Clarke-McNeil

was out in the dayroom with other inmates and not confined to his cell.” Then he also indicated in paragraph 33 some further commentary and showed on the dates of August 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30 that Mr. Clarke-McNeil was, according to his viewing of video footage, actually out for more than 2, at least 2 hours, let me put it that way, each of the days Mr. Clarke-McNeil was complaining about.

[7] Now, Mr. Clarke-McNeil was relying on a list, well memory, of these dates, which I will say is a poor substitute for someone, in comparison to what the Deputy Superintendent Ross did, which is actually look at the videotapes. But more importantly, he relied on, that is Mr. Clarke-McNeil, notes kept by Jacob Lilly, another inmate. So, strictly speaking, hearsay, that is *his* recollection recorded of these times they were in or out of their cells, and not even the list is before the court, so it makes it furtherly imprecise and reduces the reliability consequently of Mr. Clarke-McNeil’s evidence on this point further.

[8] I am satisfied more likely than not that Mr. Clarke-McNeil was out of his cell for more than 2 hours per day as required based on Deputy Superintendent Ross’ evidence.

[9] In relation to the other point about the use of the telephone, Deputy Superintendent Ross indicated this is particularly tricky situation with the construction and the staff shortages that that impacted the access to the telephones too. Now, in fairness, I understand Mr. Clarke-McNeil may have had pre-arranged phone calls and unfortunately those, at least some of them, may have been had to be prevented from taking place because of the construction, staffing shortages which really are extraordinary circumstances, I would say in the life of the Institution generally. So while there may have been some deprivation of his access to the phones, there are two things perhaps to be said about that: there were extraordinary circumstances, and as Mr. Hampden pointed out, Mr. Clarke-McNeil is aware, there are forms apparently that can be filed which could see prisoners, inmates, like Mr. Clarke-McNeil actually get pre-arranged times and to be able to be out during those times, so perhaps that would be a more reliable manner for Mr. Clarke-McNeil to communicate his phone appointments, [to the Institution], especially if they are at fixed times. But in these circumstances, it was, I find reasonable for the Institution to continue on with, not permitting, which I assume or infer there was, opportunities when Mr. Clarke-McNeil wanted to make phone calls to do so.

[10] In relation to the matter of the getting out to the yard, again, Deputy Superintendent Ross' evidence is credible and provides an explanation for why perhaps, the time and the airing court was not as substantial as it might normally have been otherwise in the Institution. I think he did accept that there may be problems in trying to maintain the normal, the pre-construction [routine], if you will, and staff shortage situation, as to time in airing court for each of the ranges and specifically, Mr. Clarke-McNeil's. It was just not possible in the circumstances. Mr. Clarke-McNeil says that they should have had better arrangements made for this and so on. As I say, I find that the Institution on the evidence before me, was as diligent as possibly could be. It went so far as to have managers, who usually do not do correctional officer work to do those jobs to try to keep the place functioning as smoothly as possible. And I accept Deputy Superintendent Ross' statement that, look, we want the inmates to get as much free time as they, you know, as they can or airing time and so on; we don't want to restrain them because we know that makes it more difficult for the interactions between the inmates and our staff, and that reflects as well back to the managers as well.

[11] So, I find as well here, that the efforts made in relation to the phone calls were reasonable. I noted that Mr. Clarke-McNeil was, he said, aware that there would be construction, and so there was a memo posted and people were told.

[12] In relation to these decisions made by the Institution, significant deference, and in this case, very significant deference, must be given to the persons who are charged with the management of the Institution, unless there is some inkling that the decisions are not made in good faith, and I do not see any reason to suspect that these decisions were not made in good faith. I say quite the contrary, I find they are made in good faith.

Conclusion

[13] In conclusion, I find the decisions made here were lawful, and given the supervening and extraordinary circumstances, they were within a range of certainly, within a range of reasonable outcomes during the entire period in issue here. The decisions taken were lawful, justified and reasonable in all the circumstances. I should say that I note this case, in some respects, because it is between August 20 and 30, 2021, is also moot. In other words, there is nothing [since] that, the construction is past, and so on. But, and I would normally have found that the there were insufficient reasons, I am thinking of the Queen in Pratt,

2020 NSCA decision, where they talk about when things should be considered moot, and the key is whether the conduct, is evasive of review but capable of repetition. Well, this construction was a bit of a one-time thing. I am sure at least for Mr. Clarke-McNeil's, and perhaps my own stay here on this court, and so I don't see there would have been any value in actually dealing with the merits of the case *per se* because it might not likely come up further, but even if it were a situation where it was not just the construction and other issues such as this, I mean, there are many inmates over there; they have the ability to make Habeas Corpus applications [which is] well known and, commonly acted upon by inmates, so these concerns that have been presented here about the phones, for example, and in relation to, you know, not getting out of the yard, into the yard, and not getting out of the cells for more than certain time period, are certainly not evasive of review because they can come up on a weekly basis.

[14] Nevertheless, as I say on the merits, I am satisfied that the Attorney General here has to the extent that there were deprivations, what might be called deprivations of residual liberty here, they were certainly justifiable, lawful and appropriately within a realm of a reasonable outcome given the potentialities. And what I would reference again, was the somewhat extraordinary and supervening circumstances during this time period.

[15] So the application is dismissed.

Rosinski, J.