SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Cumberland*, 2025 NSSC 173

Date: 20250603
Docket: CRH 518599
Registry: Halifax

Between:

His Majesty the King

v.

Aaron Byron Cumberland

APPLICATIONS DECISION
(AFFIDAVIT ADMISSIBILITY)

Judge: The Honourable Justice Jamie Campbell

Heard: May 20, 2025, in Dartmouth, Nova Scotia

Counsel: Peter Dostal, for the Crown
Robert Tibbo, for the Defence

By the Court:

[1] Aaron Byron Cumberland has been charged, on a 19 count indictment, with possession of child pornography, luring of children, possession of child pornography for the purpose of sale or distribution, breaches of probation orders, breach of a release order, and obstruction of a peace officer. The child pornography and luring charges as alleged relate to several different people under the age of 18.

[2] I will refer to Aaron Byron Cumberland as Mr. Cumberland. In the filed documents there are indications that Mr. Cumberland identifies as a transgender person and had sought placement in a women's correctional facility during his period of remand. I asked how he wished to be addressed, and he said as "Aaron". I found that suggested a level of familiarity that was not appropriate. He said that he was satisfied to be addressed as Mr. Cumberland.

[3] Mr. Cumberland, through his counsel Mr. Robert Tibbo, has filed an application to have the charges against him permanently stayed. He asserts that he has been denied the possibility of a fair trial, that the integrity of the justice system would be brought into disrepute if the charges against him were allowed to go to trial and he has experienced unreasonable delay in having his matters brought to trial. In support of those applications Mr. Tibbo has filed Mr. Cumberland's affidavit, then filed an amended affidavit of Mr. Cumberland and then filed a second affidavit. It is the first amended document to which I will refer throughout unless otherwise noted.

The *Waverley* Process

[4] The Crown has applied to have struck very significant portions of the affidavit filed by Mr. Tibbo on behalf of Mr. Cumberland. Mr. Peter Dostal for the Crown says that there are portions that are inadmissible as evidence and should not be included in an affidavit. It is important to note that this is not a *Vukelich* motion, in which the court is asked to decline to hear a *Charter* motion because it is evident even if the facts as alleged are proven that the motion cannot succeed. *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.). This motion is about the proper contents of an affidavit.

[5] Justice Davison in *Waverley (Village) v. Nova Scotia (Minister of Municipal Affairs)*, 1993 NSSC 71, expressed concerns about the contents of affidavits that were then regularly filed in the courts in Nova Scotia. He said at paragraph 13:

> Great care should be exercised in drafting affidavits. Both pleadings and affidavits should contain facts but there are marked differences between the two types of documents. Affidavits, unlike pleadings, form the evidence which go before the court and are subject to the rules of evidence to permit the court to find facts from that evidence. They should be drafted with the same respect for accuracy and the rules of evidence as is exercised in the giving of viva voce testimony.

[6] He said that all too often affidavits were filed that consisted of "rambling narratives". Some were opinions and inadmissible as evidence. After 32 years, some rambling narratives are still filed, containing opinion and other inadmissible evidence. As the process has evolved, courts routinely deal with applications made to strike significant portions of affidavits on the basis they contain material that is not admissible. That process is less frequently seen in applications on criminal matters where affidavits tend to address incidents defined by time and location.

[7] The affidavit in this case is, by the standards of most affidavits, and certainly those in support of motions in criminal matters, is a ponderous document. It is 332 pages in length and contains 1,174 paragraphs. It attaches five volumes of exhibits containing about 1,200 pages of documents, some of which are hand printed notes made by Mr. Cumberland, dealing with many of the same issues addressed in the body of the affidavit itself. The document reads like a diary or running notes of Mr. Cumberland's experiences, perceptions, feelings, concerns, grievances, fears, speculations, opinions, and reports of what others said to him, while in custody in correctional facilities in Nova Scotia. It's extraordinary length and the way in which it is broadly chronologically organized, make it challenging to review.

[8] Given the immense scope of the material and the breadth of Mr. Cumberland's claims, there is a requirement for some focus. It is the focus that perhaps should have been brought to bear by counsel responsible for the drafting of it, before the document was filed. The Crown has objected to significant portions of the affidavit on several grounds. The Crown says that much, in fact most of the material, is irrelevant. The Crown has also argued that portions contain opinion, argument, oath helping, double hearsay, unsourced hearsay and unsourced assertions of facts.

[9] Mr. Dostal has provided a summary of the affidavit, to assist in "navigating the structure of this lengthy document". The summary itself is 58 pages long. He has also provided a colour coded version of the affidavit, noting the portions to which objections are made. Mr. Dostal summarizes the grievances raised by Mr. Cumberland in the affidavit as fitting into several categories:

- Failure to Prevent or Respond to Sexual Assault
- Inappropriate Use of Solitary Confinement
- Failure to Provide Vegan Diet & Nutrition
- Harassment & Discrimination based on LGBTQ+ identity
- Restricted Access to Legal Counsel and Legal Resources
- Seizure of Personal Documents (including reading and copying personal records)
- Restricted Access to Inmate Complaints and Inadequate Replies
- Retaliatory Use of Inmate Transfers and "Level" Punishments
- Unsafe Housing (i.e. use of double bunking and failing infrastructure)
- Gender Identity & Placement
- Neglect to Health and Wellness Issues

[10] Mr. Tibbo has asserted that the characterization of these issues by Mr. Dostal is a “perverse if not outrageous submission”. He says that it is an attempt to minimalize or underplay the significance of the rights violations. It is neither “perverse” nor “outrageous”. It is an attempt to bring some sense of organization to the scattered and sometimes apparently random recitation of information. How Mr. Cumberland’s allegations are properly characterized will be a matter for the stay application itself.

Relevancy

[11] The material contained in an affidavit must be admissible. An affidavit is not a bunch of information, personal notes and other materials pulled together in one document and filed with the view to leaving it to the court and the other side of the dispute to sort it all out and separate the important information from the rest. An affidavit is not an exercise in creative reality based narrative. It does not contain asides by way of colour commentary, opinion or speculation to maintain the reader’s interest. It is not the legal argument as expressed by the affiant. An affidavit is a legal document filed for a specific purpose and ideally organized in a way that relates the evidence to the issues in dispute.

[12] Mr. Tibbo has argued that all the material should be admitted and at the hearing of the motion, in oral argument, he would go through "the relevant evidence" and relate it to the arguments that he is making on behalf of Mr. Cumberland. That points directly to the reason why only relevant information should be contained in an affidavit. Allowing everything in evidence, all 1,174 paragraphs with 1,200 pages of exhibits, would require that the opposing party, the Crown, prepare to meet every allegation contained in the document. The Crown would be required to make the judgement call on what is, or is not, relevant. That is neither fair nor efficient.

[13] As Justice Davison noted 32 years ago, "great care" should be taken in the drafting of affidavits. They should not be rambling narratives containing mixture of admissible and inadmissible evidence to be sorted out later. The affidavit must be drafted with its purpose in mind. That is to provide evidence in proof of the matters at issue. The affidavit is filed in support of the pleading. It is not the long form narrative from which the claims set out in the pleadings can be extracted in due course.

[14] Evidence, to be admissible, must be relevant and material, and its probative value must outweigh its prejudicial effect. Relevant evidence is evidence that tends to make a proposition more or less likely to be true. And that proposition must relate to something that is important to the case being decided. The evidence must assist the trier of fact. A list of random assertions that are on a person's mind or are even deeply and personally important to them, are not evidence unless they meet that standard of relevance and materiality. Evidence must be about the dispute.

[15] There are no degrees of relevancy in Canadian law. Relevancy of evidence must be distinguished from the weight to be given that evidence. *R. v. Morris*, [1983] 2 S.C.R. 190, [1983] S.C.J. No 72 (S.C.C.). Evidence that is relevant and material may nevertheless not be admitted after consideration of the degree or extent to which that evidence will prove the fact in issue for which the evidence is offered. That requires an assessment of the inferential link between the evidence and that fact in issue. It does not justify an inquiry at this stage into the reliability of the evidence. It does require a consideration of whether the evidence proposed if true, makes a proposition only minimally more or less likely to be true. If evidence advances the case in only a *de minimis* way, its admission works as a distraction from the matter in issue. The evidence may be both material and relevant, but its relevance is so marginal that its admission is not appropriate.

[16] The Crown has argued that "evidence with merely a topical or thematic connection to the issue in dispute is not enough". I agree with that statement. Information sought to be admitted as evidence must be considered in its legal context. It must potentially contribute to overcoming the legal burden the applicant is trying to address.

The Legal Test for Abuse of Process

[17] Relevancy and *de minimis* relevancy can only be assessed based on the legal test to be met. The issue is whether the proposed evidence advances the argument on the legal test.

[18] The abuse of process doctrine allows the court to stay criminal charges where state misconduct compromises trial fairness or where state conduct "impinges on the integrity of the justice system." *R. v. Babos*, 2014 SCC 16. There must be no alternative remedy capable of redressing the prejudice and where uncertainty remains after identifying the prejudice and considering whether there are other remedies, the court balances the need to denounce the conduct and preserve the integrity of the system against society's interest in adjudicating the case on its merits.

[19] The purpose is not to provide redress to an accused for wrongs done to them, but to disassociate the justice system from the state misconduct. The remedy is reserved for the "clearest of cases". *R. v. O'Connor*, [1995] 4 SCR 411, para. 82. As Justice Moldaver described it in *Babos*, the question at the first stage of the test is whether the state has engaged in conduct "that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system" (para. 35).

[20] In this case, evidence that does not address conduct that compromises trial fairness or conduct that is otherwise offensive to societal norms of fair play or decency, should not be admitted because it is not relevant.

Cumulative Evidence

[21] The breadth of the allegations is immense. They cover matters that took place over the period of two years. At times it is a day by day accounting and at times it is hour by hour. What is alleged ranges from very minor complaints or inconveniences to more serious matters. About 50 corrections officers have been named and a dozen or so inmates. Three weeks in November 2025 have been set

aside to hear the motion though if the Crown is required to respond to each allegation, by cross-examination of Mr. Cumberland and by leading evidence, more time could be required.

[22] Certainly, cases take the time that they take. Some cases can take a very long time. And evidence is not struck just because there is a great deal of it. The decision regarding what constitutes admissible evidence is not about convenience. But it does engage common sense and reason. Many of the observations or allegations contained in the affidavit, even if proven, would not matter in any way beyond minimal to the outcome of the application. If the allegations are made and before the court, the Crown cannot properly be expected to ignore them on the assumption that the court will not consider them as having more than minimal significance in the context of a claim of abuse of process.

[23] Mr. Tibbo argues that the large scope of the allegations is a reflection of "the state's horrendous acts" against Mr. Cumberland. He argues that is the cumulative effect that has caused Mr. Cumberland pain and suffering, as well as violations of his rights. He argues that the lengthy affidavit and exhibits are a record of the state's acts and "in no way is the Defendant to be blamed for the state's unbridled abuses". He argues that the costs to the state are due to the state's own conduct and should not be used as an excuse to deny Mr. Cumberland the right to adduce full evidence and exercise his other due process rights in this matter.

[24] Mr. Tibbo argues that alleged multitude of abuses by the state on Mr. Cumberland had a "crushing and defeating effect on him and his will to exercise his charter rights, including him considering suicide". He notes that was in context of physical and sexual acts and threats being committed against Mr. Cumberland over years under the control of the state, while incarcerated.

> Identifying a rat in a room and having it exterminated saying it is irrelevant when there are 1,000 rats infesting that same room is not just disingenuous, but asks the court to turn a blind eye to what amounts to be an elephant in the room.

[25] In oral argument on this motion, Mr. Tibbo used the metaphor of the straw that broke the camel's back. Each seemingly small thing, when considered in the context of all the other things, are evidence of the malign conspiracy on the part of actors within the justice system to break Mr. Cumberland's spirit and destroy him

as a person. That is an argument aimed at salvaging everything in an affidavit that has not focused on anything.

[26] The affidavit should not be taken apart, piece by piece, on the basis that not one of the allegations on its own would have the potential to meet the test. A cumulative approach may be used. *Babos*, para. 73. As Professor Archie Kaiser has argued, the "atomized study" of the three instances of misconduct in *Babos* seems out of place when the final obligation is to render a qualitative judgment on the effects on the integrity of the justice system and whether those will continue to "plague the judicial process" or cause a taint of the justice system. H. Archibald Kaiser, "*Babos*; Further narrowing Access to a Stay of Proceedings Where the Integrity of the Judicial Process is Implicated.", (2014) 8 CR (7th) 59(WL). Cumulative prejudice to the accused person's right to a fair trial and the integrity of the justice system has been argued by Professor Kent Roach to justify a stay of proceedings. Kent Roach, "The Evolving Test for Stays of Proceedings", (1997-1998) 40 Crim LQ 400.

[27] A cumulative approach to prejudice means that several things may be considered to act together to potentially justify a stay of proceedings. It does not mean that everything then becomes relevant.

[28] Some things, no matter what they are added to, just will not make a difference to the outcome. The conscience of the public will not be more shocked by their inclusion. The integrity of the justice system will not be more implicated by their inclusion. In Mr. Cumberland's affidavit he refers to the late pick up of laundry in the facility. That may have been inconvenient, but it does not in any way add to the argument that there has been a conspiracy within the justice and corrections systems in Nova Scotia to break Mr. Cumberland's will. Mr. Cumberland refers to a conversation with an officer who asked him what it might take to get him to stop filing complaints. Mr. Cumberland said that he jokingly replied, Vegetable Mr. Noodles in the canteen. The officer responded with words to the effect of he would see what could be done. Mr. Cumberland took that as evidence of a "bribe" which was all part of the conspiracy reaching the highest levels to silence him. If an inferential link can be made between Vegetable Mr. Noodles being offered and ongoing effort to break Mr. Cumberland's spirit and will to resist, it is at most minimal. Mr. Cumberland was denied a drink box one day. That cannot realistically be considered as evidence of a sustained effort to break him. Lockdowns happen in correctional facilities. They are not evidence of a plan to crush and abuse Mr. Cumberland. There are allegations of unprofessional

or discriminatory conduct on the part of corrections staff. Those could well be the subjects of human rights complaints and could be addressed in that way. They do not address the test for abuse of process in any meaningful way. Alleged interference with the inmate complaint process may be the subject of a judicial review. But it is not evidence that relates to a claim for abuse of process. Those issues may be relevant in other contexts, but not in the context of an abuse of process motion.

[29] An abuse of process claim is not an alternative remedy for administrative claims, civil litigation or the application of enhanced remand credit for those found guilty of an offence. State conduct must be serious when contemplating a remedy that results in criminal charges being stayed and a series of lower level grievances cannot rise to that standard.

[30] Allegations relating to breach of solicitor-client privilege directly relate to Mr. Cumberland's fair trial rights. Mr. Cumberland says that privileged materials were taken from him, read by corrections officers and potentially passed on to the Crown. Those serious allegations must be heard on their merits. They directly address his fair trial rights. They are an example of the kinds of things at which abuse of process is directed.

[31] Potentially, the consistent use of close confinement over the 6 months before Mr. Cumberland's being released on bail could implicate the integrity of the justice system. Mr. Cumberland's evidence suggests that he was placed in solitary confinement because there were no placements that respected his gender identity as a transgender person. That issue must be heard on its merits.

[32] The evidence that relates to other complaints, concerns, allegations, and observations is not admissible because it is not relevant, in the sense that it is no more than minimally relevant to the abuse of process claim. Issues that relate to the internal management of correctional facilities that do not rise beyond complaints that could be dealt with through the internal complaints process, a Human Rights complaint, a civil suit, or an application for enhanced remand credit in the event of conviction, do not form the grounds for an abuse of process claim.

Caselaw

[33] There is no question that the treatment of a person while on remand potentially can lead to a finding of an abuse of process. That can arise not only from one serious incident or issue, but from the accumulation of several of them.

[34] Mr. Tibbo has argued that this is a unique case. It is potentially groundbreaking. He has not cited any cases in Canada in which an abuse of process claim has been upheld when it related to treatment within correctional facilities for an accused person on remand awaiting trial. Mr. Dostal has identified one case, *R. v. Ugbaja*, 2019 ONSC 96.

[35] In *Ugbaja* the grounds upon which the accused based his claim for a stay on the ground of abuse of process was precisely focused. He had been in custody for about 3 months. Much of that was in segregation. He had a broken heel that required urgent medical treatment. The judge concluded that there had been a serious lack of attention by the staff in the correctional facility to ensure that Mr. Ugbaja was promptly assessed. That led to a lengthy delay which resulted in his essentially being denied required medical treatment. The result was that he was left with a foot deformity that would likely develop into arthritis. That would in turn likely require major reconstructive surgery within the next 10 years.

[36] The court concluded that there had been a serious Section 7 *Charter* breach based on the failure to provide proper medical care. The court further held that the facility failed to follow its own policies in several ways with regard to imposing segregation on Mr. Ugbaja. Those were additional Section 7 *Charter* breaches.

> Having said that, in this case, correctional staff showed a callous disregard for Mr. Ugbaja's welfare by failing to arrange for a medical referral, which they knew was urgent, and by failing to allow crutches in his cell. He has been left with a permanent injury as a result. Further, correctional staff placed Mr. Ugbaja in segregation which was not required and prepared documentation which was in critical respects false and misleading and which *prima facie* gave the impression that the administrative segregation was fully justified in the circumstances. The evidence in this case points to serious systemic issues relating to both medical care and the imposition of administrative segregation at this facility. The person responsible for reviewing the accused's detention in the facility occupied the 3rd highest level of seniority at the Centre; Mr. Howes reported to the Deputy Superintendent of the Centre who in turn reported to the Superintendent.
>
> Society's understanding of the harm associated with administrative segregation has increased significantly over the last few years together with a recognition of the need to have sufficient procedural protections to ensure that it is not imposed in a manner inconsistent with the principles of fundamental justice. The accused's confinement in this case was lengthy, without justification and carried out with total disregard for the principles of fundamental justice.
>
> In my view, after considering the s. 7 breaches in relation to the failure to provide adequate medical care and then considering the s. 7 breaches in relation to Mr.

> Ugbaja's detention in administrative segregation, the balance in this case favors a stay of proceedings. The court must distance itself from this kind of egregious conduct. I have therefore concluded that this falls within one of the "clearest of cases" where the granting of a stay is justified. The treatment of Mr. Ugbaja while in custody is so offensive to a sense of fair play and decency that society's interest in a full trial on the merits must give way to a stay. (*Ugbaja*, paras. 67-69)

[37] The *Ugbaja* case raised serious concerns about two discrete issues, medical treatment and segregation. Mr. Ugbaja's treatment by the correctional authorities was so egregious as to justify the granting of a stay. It did not involve a review of every aspect of Mr. Ugbaja's time on remand.

[38] There have been cases in which stays have been granting based on mistreatment by police following an arrest. For example, in *R. v. Walcott*, [2008] O.J. No. 1050, a stay was entered because police tasered the accused when he was handcuffed and under control. Treatment while in a correctional facility is no different. *R. v. Blanchard*, 2017 ABQB 369, *R. v. Byron*, 2021 ABQB 883. It can give rise to an abuse of process claim.

Focus

[39] The abuse of process claim is not a judicial inquiry. It must remain focused on the legal test.

[40] Much of the material contained in Mr. Cumberland's affidavit amounts to a detailed description of his time on remand. It is an unfocused data dump. There are complaints about verbal abuse by other people in custody and by correctional officers. Mr. Cumberland complains about being placed in different units and about the ill effects of lockdowns. He says that correctional officers made inappropriate sexual jokes. The vents in the jail were not clean and dust made his asthma symptoms worse. Materials fell into his food. He is a vegan because of his Crohn's disease, and he says that he received nutritionally inadequate meals. His vegan meals were prepared by removing items from regular trays. His juice box was withheld. His requests for milk alternatives were dismissed. No soy/oat alternatives were provided. He was not able to get complaint forms when he wanted them. There were religious materials contained in holiday gift bags. Mr. Cumberland says that there was poor masking and hygiene during COVID, and there were unsafe practices related to COVID. A boil water advisory was ignored. He said that he felt targeted by staff. He was denied due process in adjudication hearings. He complained that the "offender" terminology was incorrect for

individuals on remand. Mr. Cumberland said that he described extensive homophobic abuse and safety concerns and proposed a dedicated LGBTQ+ unit. His idea was rejected. His canteen privileges were revoked. He was falsely accused of various things and after a hearing was found not to have done them. Temperatures in cells were at times in excess of 30C and staff privately acknowledged that it was unsafe. He made FOIPOP requests that were mishandled. Documents were stolen from Mr. Cumberland's cell. *Habeas corpus* applications were repeatedly mooted by transfers. Laundry was delayed. Mr. Cumberland's food tray contained peanut butter despite his known allergy. Despite identifying as nonbinary Mr. Cumberland was strip searched by a female correctional officer and placed in a male unit. He was assigned to the smallest cell, with poor air quality and excessive heat.

[41] That kind of information does not advance the legal argument or relate to the legal test. It is not a matter of several or even many instances of abuse or mistreatment or neglect or negligence being considered together. It is information that is not more than minimally relevant to the matter at issue because it does not add in any way beyond minimal to the impact of the experience of incarceration upon Mr. Cumberland.

[42] Those parts of the affidavit that relate to the reading or interception of solicitor-client privileged material within provincial facilities during his time on remand with respect to these charges, are relevant. The portions of the affidavits that relate to his allegations of being improperly subjected to solitary confinement are relevant. The other lengthy lists of concerns are not and should be removed. That will result in a somewhat more coherent and focused hearing on the merits of the application.

Jordan **Motion**

[43] Mr. Tibbo has filed a motion for a stay based on unreasonable delay. The evidence to establish unreasonable delay is usually found in the transcripts that are filed with the motion. In this case counsel is relying on same 332 page affidavit that was filed to support the abuse of process motions.

[44] On May 26, 2025, a hearing on the *Jordan* motion was started. After providing oral argument Mr. Tibbo, in response to my question, agreed that in order to accept some of his arguments, findings relating to the abuse of process motions would have to be made. The abuse of process motions are scheduled to be heard in November 2025. Mr. Tibbo and Mr. Dostal agreed that it would be

appropriate to have the *Jordan* delay motion heard after the abuse of process motions are decided.

[45] That raises another issue. It arises from the filing of one large affidavit intended to address both abuse of process and delay. This motion is with respect to the admissibility of portions of the affidavits with a focus on how they relate to the legal issues that are part of the abuse of process motions and the test to establish abuse of process. If portions of the affidavit are struck because they do not advance the abuse of process argument in a way that is beyond minimal, they may still relate in some way beyond minimal to the arguments put forward regarding delay. With respect to those portions that have been struck from the affidavit for use in the abuse of process motion counsel may argue in advance of the *Jordan* motion that those portions do relate to the issue of delay and should be considered as evidence in the *Jordan* motion.

Portions of the Affidavit to be Struck (Abuse of Process Motions)

[46] Paragraphs 1-4 remain.

[47] Paragraphs 5-16 are struck. The abuse of process claim relates to the 19 count indictment on which Mr. Cumberland has his release and is now awaiting trial. The circumstances set out in paragraphs 5 through 16 relate to his time in custody on other matters. They are not related in any way to the proceedings in respect of which the abuse of process application has been made. There is then no connection between any alleged state misconduct at that time and the subject matter of the application. They are struck from the affidavit because they are not relevant.

[48] Paragraphs 17-93 are struck. They deal with condition within facilities during lockdowns, punishment for non-involvement in a disturbance, complaints about vegan meals, discrimination based on sexual orientation, denial of complaints, a human rights complaint, media coverage of Mr. Cumberland's anonymous complaints about COVID outbreaks and water quality issues, and disciplinary issues.

[49] Paragraphs 94-96 remain. They outline Mr. Cumberland's allegations that legal papers, including privileged materials were seized.

[50] Paragraphs 97-179 are struck. They relate to the denial of single cell assignment, staff misconduct and harassment, cell searches, religious

discrimination by having religious materials placed in gift bags, issues about access to complaint forms, denial of due process at adjudication hearings, and improper document handling. None of those issues are evidence that could be interpreted as bearing on an abuse of process claim.

[51] Paragraphs 180-187 remain. They deal with Mr. Cumberland's evidence about having privileged and confidential legal information seized.

[52] Paragraphs 188-193 are struck. They deal with copying of documents and complaint forms.

[53] Paragraphs 194-203 remain. This section of the affidavit addresses the opening by corrections staff of correspondence between Mr. Cumberland and his legal counsel. That could be evidence of an action that could impact upon Mr. Cumberland's fair trial rights.

[54] Paragraphs 204-222 are struck. These paragraphs deal with access to the telephone to contact a lawyer during lockdown, withholding complaint forms, refusal to lock down in protest of denials, threats of discipline for "frivolous" complaints, the improper use of the term "offender" when referring to people on remand, the allegation that one of the correctional officers told Mr. Cumberland that mail from the Ombudsman is read and the denial by officials in the facility, a hunger strike, and use of force retaliation complaints.

[55] Paragraphs 223-250 remain. These paragraphs outline what Mr. Cumberland says he was told was an unofficial policy of opening inmate legal documents sent to them by the Crown and missing legal notes. Those issues may be argued to relate to Mr. Cumberland's fair trial rights.

[56] Paragraphs 251-253 are struck. These speak about witnessing the beating of another person in custody by correctional officers, and the mishandling of FOIPOP requests.

[57] Paragraph 254 remains because it refers to the monitoring of communications with counsel.

[58] Paragraphs 255 and 256 are struck. They relate to an allegation that staff tried to bribe Mr. Cumberland to stop complaining by saying they would honour his request to have Vegetable Mr. Noodles in the canteen.

[59] Paragraphs 257 and 258 remain. They relate to monitoring of legal communications.

[60] Paragraphs 259-269 are struck. These paragraphs deal with Mr. Cumberland being found not guilty for having rubber insoles in his shoes, being placed in solitary confinement following false allegations about a disturbance, an appeal, and a letter about COVID protocols.

[61] Paragraphs 270-272 remain. They deal with legal communications.

[62] Paragraphs 273-414 are struck. These relate to Mr. Cumberland's allegations that he was placed in unsafe units as punishment, his letter about homophobic abuse and safety concerns, lack of complaint forms, denial of *habeas corpus*, risk classification, threats to transfer him, punching by another person in custody, intimidation by others including threats, door banging and slurs, feces bombing, loss of canteen privileges, and a false accusation about sending legal mail under another person's name.

[63] Paragraphs 415-420 remain. These include allegations by Mr. Cumberland that legal calls were being monitored and recorded and that he was falsely accused of subverting the mail censoring process.

[64] Paragraphs 421-422 are struck. These relate to concerns about the complaints process.

[65] Paragraphs 423-434 remain. They deal with the destruction of legal mail, withholding Crown disclosure and monitoring of legal phone calls.

[66] Paragraphs 435-454 are struck. They address short staffing, lockdowns, transfers, and air quality and heating issues.

[67] Paragraphs 455-471 remain. They relate generally to the manner in which Crown disclosure was handled by the facility, denial of legal resources and monitoring of ombudsman calls.

[68] Paragraphs 472-481 are struck. They address issues like FOIPOP mismanagement, and air quality issues.

[69] Paragraphs 482-490 remain. They address issues of the breach of solicitor-client privilege.

[70] Paragraphs 491-656 are struck. They deal again with transfers, air quality, FOIPOP matters, program requests, homophobic harassment within a living unit, transfers after the harassment, cell reassignment based on what was called a "gay thing", discriminatory remarks by staff, allegations that staff were spreading rumours about sexual activity, interactions with a staff member making extreme anti-LGBTQ+ statements and threats, Mr. Cumberland's mental stress, allegedly unfounded accusations of several acts of misconduct against Mr. Cumberland, threats of transfer, continued harassment, solitary confinement that Mr. Cumberland says was without cause, and various internal complaints based on harassment.

[71] Paragraphs 657-678 remain. They deal with allegations involving the seizure of legal documents.

[72] Paragraphs 679-697 are struck. They deal with the lack of vegan food and lockdown issues.

[73] Paragraphs 698-735 remain. This section addresses generally the theft of legal documents and confidentiality of legal materials.

[74] Paragraphs 736-756 are struck. They deal with safety concern allegations, the vegan diet, and transfer requests.

[75] Paragraphs 757-760 remain. They deal with missing legal documents.

[76] Paragraphs 761-782 are struck. They deal with FOIPOP matters, transfers, complaints regarding staff conduct, and disproportionate responses, and unit searches.

[77] Paragraphs 783-789 remain. They deal with unit searches related to legal materials.

[78] Paragraphs 790-793(4) are struck. They deal with transfers, denial of cleaning supplies and multiple complaints forms, and transphobic and sexualized comments from a correctional officer.

[79] Paragraphs 793(5) and 793(6) remain. They address missing disclosure materials.

[80] Paragraphs 793(7)-819 are struck. These outline various complains that were filed.

[81] Paragraph 820-903 remain. These deal with the transfer to Cape Breton and Mr. Cumberland's placement in CCU.

[82] Paragraphs 904-982 are struck. These deal with environmental complaints, issues with food, misgendering, denial of complaint forms, lack of sleep, humiliation during medical appointment, loss of water access, and Mr. Cumberland's perception of his mental state.

[83] Paragraphs 983 and 984 remain. These outline Mr. Cumberland's fear that a legal call was being recorded because the usual message that the call was subject to being recorded or monitored did not play.

[84] Paragraphs 985-1,016 are struck. These relate to complaints about unsafe conditions, placement issues, and vegan food repeatedly containing chicken triangles.

[85] Paragraphs 1,017-1,153 remain. These paragraphs deal with a letter to David Mills regarding fears of surveillance, placement in CCU for non-disciplinary reasons, and a situation in which during a transfer disclosure documents were placed in clear plastic bags and remained out of Mr. Cumberland's sight for several minutes.

[86] Paragraphs 1,154-1,174 are struck. These relate to issues arising after bail was granted and retraumatization of Mr. Cumberland in having to prepare an affidavit.

[87] In summary, the portions of the first amended affidavit that remain are:

Paragraphs 1-4
Paragraphs 94-96
Paragraphs 180-187
Paragraphs 194- 203
Paragraphs 223-250
Paragraph 254
Paragraphs 257 and 258
Paragraphs 270-272
Paragraphs 415-420
Paragraphs 423-434
Paragraphs 455-471
Paragraphs 482-490

Paragraphs 657-678
Paragraphs 698-735
Paragraphs 757-760
Paragraphs 783-789
Paragraphs 793(5) and 793(6)
Paragraphs 820-903
Paragraphs 983 and 984
Paragraphs 1,017-1,153

[88] That leaves an affidavit of about 380 paragraphs, which is still substantial by any measure. It focuses on the evidence related to issues of the interception of solicitor client privileged materials and the placement of Mr. Cumberland in closed custody for an extended period.

Inadmissible Hearsay

[89] The remaining objections will be addressed only to the extent that they pertain to those portions of the affidavit that have not been struck on the ground that they are minimally relevant.

[90] As with *viva voce* evidence, the rules regarding hearsay admissibility apply to affidavits. The remaining portions of this affidavit contain several examples of reported conversations. Mr. Tibbo says that they are not put forward for the truth of the contents of those statements but to establish Mr. Cumberland's state of mind.

[91] Paragraph 94: Mr. Cumberland states in the affidavit that he understood after being told by an admissions officer that his Crown disclosure was placed with his legal notes in the admissions area of NNSCF. That statement can be interpreted as going to what he understood to be the case and will be permitted to remain for that purpose.

[92] Paragraph 247: The affidavit states that Mr. Cumberland spoke with SRO Dale and told him that Paul Young had been ultimately responsible for certain issues and SRO Dale replied that be believed that Paul Young surely "cared the least" of the people involved. The statement of what SRO Dale told Mr. Cumberland was included to prove the truth of the statement. As hearsay it should be struck from the affidavit.

[93] Paragraph 433: Mr. Cumberland says that Chase Smith at the Ombudsman's office had informed him that his calls had been charged and recorded. That is hearsay and is struck from the affidavit.

[94] Paragraphs 434 and 435: Mr. Cumberland says that he received a written response from Director Mills that some calls were charged or recorded by accident during a system update. Mr. Cumberland goes on to state that the letter appeared to have been seized by corrections staff during a transfer and that he was told that by Chase Smith in a phone call. Those references are hearsay and should be struck from the affidavit.

[95] Paragraphs 784 and 785: The affidavit states that a person in custody who was present in the living unit told Mr. Cumberland that corrections officers had been in his cell for 10 minutes with the door closed. In his second affidavit in which Mr. Cumberland identifies the sources of hearsay he says that the person was Nick LeBlanc. The Crown does not strenuously object to that statement being permitted to remain. It will not be struck. Paragraph 785 is of more concern. Mr. Cumberland says that his lawyer, Mr. Tibbo told him that DOJ Corrections had a practice of seizing legal documentation from people in custody and in particular during any interfacility transfers, and "as he and I observed in my case directly that this *modus operandi* put me and my defence and fairness of proceedings in my criminal matters at continued real risk of or actual prejudice". The effect of this paragraph is to have Mr. Tibbo, as counsel in the case, give opinion and argument through the hearsay statement offered by his client in an affidavit that Mr. Tibbo filed on his behalf. That statement cannot be admissible and must be struck.

[96] The Crown did not object to overheard statements by a senior officers in-authority speaking to the position of management or the state of official policy.

Argument, Opinion and Speculation

[97] There are several examples of Mr. Cumberland clearly advocating or making argument in the affidavit. They are clearly inadmissible but because they do not open new areas of inquiry that would require the Crown to cross-examine on them or lead evidence to respond to them there is little utility in striking them and they will be given no weight. In several places Mr. Cumberland speculates on what could be and proposes a theory with no stated evidence to support it. Those portions must be struck.

[98] Paragraph 195: Mr. Cumberland recounted a discussion with Captain Brad Morris about access to documents copied for persons in custody. He says that Captain Morris told him that this was above his pay grade. Mr. Cumberland then goes on to say that he was shocked by the disclosure "as I knew that potentially my criminal trial was now compromised and I questioned whether or not I would be afforded a fair trial". Mr. Cumberland's opinion will be given no weight.

[99] Paragraph 234: Mr. Cumberland says that a person from Correctional Services handed him a signed letter from the Executive Director's office. It was not in a sealed envelope. He then goes on to express the conclusion that this apparently violated Correctional Services Regulations and was a breach of confidentiality. Again, that statement will be given no weight.

[100] Paragraph 235: Mr. Cumberland says that one officer said something that contradicted what another had said. Again, technically while it is argument, it is a statement that may also be classified as an observation.

[101] Paragraph 237: In this paragraph Mr. Cumberland comments on written responses that he had received and describes them as troubling. Again, that can go to the weight to be given to the statement.

[102] Paragraph 250: Mr. Cumberland refers to documents as privileged and confidential. That is a legal conclusion or an expression of opinion. He also says that there were "obvious adverse privacy implications" given the contents of documents that were seized. There are so many manifest errors in the legal drafting of the affidavit that it is best to maintain the focus on those rather than begin identifying those concerns that likely have no practical significance.

[103] Paragraph 258: Mr. Cumberland says in this paragraph that materials seized from him were privileged and confidential. It is a legal conclusion but again is simply his own perception of the status of those materials. It is not an argument intended to persuade the court about anything.

[104] Paragraphs 660 and 663: Mr. Cumberland refers to documents as being privileged. That is his opinion but is not such that it should be struck from the affidavit. He concludes the paragraph with a sentence saying that he was "shocked" that corrections officers refused to allow him to be immediately present during the search. Once again, this is not an issue on which anything will rise or fall. The paragraph will remain as it is.

[105] Paragraph 673: In speaking about disclosure materials being seized Mr. Cumberland says, “I believe this was not a coincidence and was either [sic] I believe it was an intentional act at a minimum and possibly [sic] malicious act by CNSCE management”. That is argument based on speculation. It has no place in an affidavit and that portion is struck.

[106] Paragraph 700: Mr. Cumberland says that he has no idea why people stole his documents but, “I speculate someone asked them to do this”. Lawyers know that affidavits are not the vehicles in which to advance arguments or speculate as to what evidence there might be. All lawyers know that. That reference is struck.

[107] Paragraph 720: Mr. Cumberland says that constant transfers appeared to be being used to keep seizing and going though his legal documents and to keep him in a state of panic and paranoia. Yet again, that is speculation or at best argument based on inference. It has no place in an affidavit and it is struck.

[108] Paragraph 723: In this paragraph Mr. Cumberland recounts a conversation with Ms. Emma Arnold a lawyer with PATH Legal in which she reiterated that he should be in another facility and that the theft of his legal documents jeopardized his right to a fair trial. It is Ms. Arnold’s argument advanced by way of hearsay in an affidavit. Once again that reference must be struck.

[109] Paragraph 731: Mr. Cumberland says that Alpha-2 is a notoriously dangerous living unit as told to him by multiple correctional officers and common knowledge throughout the facility. Mr. Cumberland filed a second affidavit and in it identified CO Ethan Green and CO Jamal Stewart as having told him directly and verbally. That reference will remain with appropriate weight being given to it.

[110] Paragraph 734: Mr. Cumberland says, “The fact that several unknown PIC’s at NNSCF knew the contents of that file that DSI Hawkins had possessed, was proof enough for me that there were copies of it or that information had been leaked and disseminated by CNCSF and NNSCE staff.” That is argument and should be struck.

[111] Paragraph 758: Mr. Cumberland says that he felt that he had no hope of getting a fair trial. He goes on to state that he believed that information had already been disseminated, “given what certain unknown PIC’s on Alpha-2 living unit at NNSCF had said out loud about specific incidents, names of people, etc. related to one of my cases that were never revealed publicly.” Mr. Cumberland’s lack of hope can be admitted to address his state of mind. He can say what he heard other

people say, not to prove the truth of what they said, but to prove the fact that they said it, as evidence to support the inference that they had obtained that information from someone or somewhere.

[112] Paragraph 789(17): Mr. Cumberland says, "CO Justin Deveau who works at the Admissions area of SNSCF told me he is very disappointed that I am being shipped, that this is unfair and wrong in his opinion." That is the opinion of Mr. Deveau as reported by hearsay through Mr. Cumberland. It is struck.

Prior Consistent Statements

[113] Prior consistent statements generally are not admissible as evidence because they have no probative value. Just because a person has said something before does not make it more likely to be true when they say it again, under oath. The exception is when there is a suggestion of recent fabrication. It often arises on cross-examination of the witness but may also be raised in a pleading or through another witness. That does not apply in this case. The Crown has not suggested that Mr. Cumberland has contrived a false story at some time after the events took place.

[114] Mr. Cumberland has attached to his affidavit extensive tightly hand printed notes that he says were made at the time the events took place. Putting them forward as evidence to bolster or support what he says in the affidavit is an improper use of those notes. It is oath helping or "bootstrapping" of evidence. The notes also contain many pages with references to matters that are not relevant, interspersed with commentary about matters that have been found to be relevant.

[115] Mr. Tibbo argues that the notes essentially supplement the affidavit in that while they contain much of the material covered in the body of the affidavit, they may also contain information that was left out. Mr. Dostal refers to that as the information left "on the cutting room floor".

[116] Mr. Cumberland's contemporaneous notes are analogous to a police officer's notes. His evidence is what he has sworn of affirmed, not what he has written and attached as an appendix. Like a police officer's notes, they can be used to refresh Mr. Cumberland's memory if he gives oral testimony on the application. They do not become evidence and should not be included in the affidavit as exhibits.

Next Steps

[117] The matter is now scheduled to return for a pre-trial conference on June 19, 2025 at 11:30am. The purpose is to determine whether the 3 weeks set for hearing on the abuse of process motions will be sufficient, to set dates for a *Jordan* motion, and to set dates for 9 day trial in the event that the abuse of process motions and *Jordan* motion are not successful.

Campbell, J.