

CANADA / JUDGMENT

Anderson v. Pacific Institute

2015 BCSC 1789

COURT

Supreme Court of British Columbia

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2015 BCSC 1789 Anderson v. Pacific Institute

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Anderson v. Pacific Institute,

2015 BCSC 1789

Date: 20150717

Docket: 26962

Registry: Vancouver

Between:

Justin Anderson

Applicant

And

Terry Hackett, Warden of Pacific Institute

and Carol Ann Reynen, Warden of Matsqui Institute

and the Correctional Service of Canada

and the Attorney General of Canada

Respondents

Before: The Honourable Mr. Justice Schultes

Reasons for Judgment

Counsel for the Applicant:

B.D. Vaze

Counsel for the Respondents:

S.P.C. Stynes

Place and Date of Hearing:

Vancouver, B.C.

June 25, 2015

Place and Date of Judgment:

Vancouver, B.C.

July 17, 2015

1. Introduction

- [1] In this application for habeas corpus, Justin Anderson is challenging the lawfulness of a decision by officials of the Pacific Institution, a medium-security facility in the federal correctional system located in this province, to transfer him to a maximum-security institution in Quebec.
- [2] Mr. Anderson is prepared to accept the aspect of that decision that involves him being transferred to Quebec, but opposes being reclassified to a higher level of security. In overview, his counsel has submitted that the decision was procedurally unfair and unreasonable, and involved the improper use of a security assessment tool in order to reach it.

2. Evidence

- [3] The basic chronology of facts is not in dispute.
- [4] Mr. Anderson is serving a life sentence for first degree murder. He was at Pacific Institution from October of 2014 until March 30th of this year, when he was removed and placed into segregation, first at Kent Institution and then at Matsqui Institution.
- [5] The concern motivating these actions, according to the affidavit of the Manager of Assessment and Interventions, was information obtained by correctional officials that Mr. Anderson "was involved in a conflict between the UN gang and a second group of offenders of which he was the leader." I take notice that the "UN" is the name of a well-known criminal group based in the Lower Mainland.
- [6] On May 12, a document known as an Assessment for Decision, often referred to by the acronym "A4D", was completed and a copy of it was provided to Mr. Anderson. It recommended the increase in the security classification with which we are presently concerned.

- [7] Among other steps, the completion of this assessment had involved the use of a Security Reclassification Scale, an actuarial tool that is used to assist in the overall assessment. It is explicitly described by Corrections officials as not being definitive on that question. In fact, there are said to be frequent cases in which the score on this tool and the inmate's actual classification do not end up being the same. Mr. Anderson's computed security classification according to it was medium, but maximum security was also found to be within the "discretionary range".
- [8] With the assistance of counsel, Mr. Anderson disputed the reclassification decision through the internal institutional processes but (after various additional procedural steps were followed that are not the focus of the current application, including disclosure to him of additional documents such as his actual Security Reclassification Scale results) his transfer to a maximum security institution in Quebec was finally approved on June 10.
- [9] The core information supporting Mr. Anderson's transfer was a series of observations by correctional officials and information provided to them by sources of varying degrees of previous reliability concerning his activities at Pacific Institution. This information is set out in the Assessment for Decision, which I must quote from at some length, beginning on page 5 with the second full paragraph:

Mr. ANDERSON's institutional behaviour/security incidences/observations since arriving at PI are as follows:

2014-10-04 arrives into PI to participate in the Aboriginal Multi-target High Program.

2014-11-04 Mr. ANDERSON attempted to pursue mediation with an incompatible incarcerated at Mountain institution. This was denied by the SIO department stating it was a listed administrative incompatible that will never be mediated.

2014-11-06 a UN gang member was seen associating with ANDERSON and then returning to speak to other UN gang member

2014-11-07 ANDERSON (without a shirt on during count showing his gang tattoo) was directed to put a shirt on by a correctional officer, he responded with, "I can't believe the fucking goof rules at this institution, I can wear what I want." He continued to incite other inmates by making derogatory comments about correctional officers. Three correctional officers attended his cell, ANDERSON further aggravated this issue and made a comment to the female correctional remarking she 'works in a male jail' and should 'tolerate' shirtless inmates. He was again reminded to follow the rules.

Later in the same day, ANDERSON is seen associating with 2 high profile members of the UN gang believed by the SIO department to be a rival gang to his group.

2015-01- Inmate Source A indicated he was told he needed to assault another inmate by ANDERSON and two other inmates as this other inmate had been spreading rumours about Inmate A. This source is rated as unknown reliable as he has not previously provided information to the Security Intelligence Office. This information is believed reliable as it is substantiated by other reliable sources; as well, other information provided by this source on this date was tested and proven as credible.

2015-01-24 - Source information - unknown reliability - states 'ANDERSON is moving money around between inmates as he has exhausted all financial transfers allowed.'

2015-01-27 Mr. ANDERSON was observed not wearing institutional dress at 1400 hours. He was directed by correctional officers to change. He responded by calling the correctional officer a "fucking goof, fucking clown." He further accused the correctional officer of 'picking on' him. A few hours later he approached the correctional officer and accused the officer of 'singling' him out and that [Pacific Institution] is a "preschool jail." He then stated he has always treated the correctional officer with 'respect.' The officer reminded him of his earlier comments; "goof, clown." He responded with, 'whatever,' and walked away.

2015-01-21 Mr. ANDERSON wrote a letter to SIO department accusing the office of 'having a problem' with him.

2015-03-12 ANDERSON is observed giving another inmate (inmate B) details of a third inmate's (inmate C's) institutional history. Another inmate (inmate D) arrives and joins in the conversation with ANDERSON and Inmate B. ANDERSON is overheard saying he is going to gain more information from his visitor tomorrow and will take things from there.

2015-03-12 Inmate B is observed in a heated conversation with inmate C. Inmate B leaves the area and is joined by ANDERSON and inmate D. ANDERSON is heard saying, "If there is a problem we'll deal with it . she'll be visiting on Friday or Saturday, then we'll find out." Inmate D says, "I want in on this."

2015-03- Inmate Source E stated guys from Matsqui or Unit 1 Kent guys (who got run out) all go to PI. Source F indicated they are starting their own crews. Given the context in which the information is received, "crews" is believed to be referring to UN members/associates as well as other [security threat groups] who have been transferred to Pacific from Kent and Matsqui. The source of this information is assessed as completely reliable by the SIO office. Given the source's intimate knowledge of the activities of STG's within the institutional setting the information is assessed as reliable. In accordance with s. 27(3) of the CCRA, information is being withheld as its disclosure will jeopardize the safety and security of the safety of any person.

2015-03 Inmate Source G indicated there is a dispute between two rival groups which is escalating. Source indicated the "gang war" will be disguised by stabbing/assaulting sex offenders as well. Source indicated another inmate is to maintain Pacific as a UN jail but the inmates have had it with the UN inmates. Source indicated tensions in the unit are high and another inmate (known to be muscle for UN) was recently assaulted. Source indicated it is well known inmates in

the unit are sharpening metal on their floors and walls. This source is unknown reliable as he has not previously provided information to the Security Intelligence Office. This information was assessed as reliable as multiple weapons were located in the unit; 3 weapons were found prior to a section 53 search being authorized and 2 additional weapons were found during the search. One weapon was found on a close associate of the UN. As well, staff have observed the power struggle between two groups of inmates and believe the UN is losing power in the unit. In accordance with s. 27(3) of the CCRA, information is being withheld as its disclosure will jeopardize the safety and security of the safety of any person.

2015-03- An unsigned note is received stating ANDERSON and another inmate are selling speed and heroin with was brought in through visits. The source of this information is unknown reliable and at this time there is no information to substantiate this claims [and the same security warning is provided] . . .

2005-03-18 Mr. ANDERSON was overheard by correctional officers on the telephone yelling "I don't fucking care, then leave your kid out of it". The correctional officer on duty contacted V&C and confirmed he was speaking to his current spouse who participates in the PFV programs.

2015-03-25, The institution entered a full lock down after 3 homemade poking style weapons had been found in the common area of the upper range of U building. Emergency searches of cells then commenced under section 53 of the CCRR. During the search four more weapons were recovered.

Staff report that Mr. ANDERSON has been seen "running" the card table which historically was "run" by the opposing gang. It is also observed that he has been giving direction to other inmates (unspecified). While it is not officially stated typically the card table is a place where inmates conduct business. Occasionally a group that is considered in power in the unit will decide who can sit at the table and participate in card games or business.

2015-03-25 A staff member indicated there is a suspicion that there is a power struggle going on in the unit between two high profile STG affiliated inmates. Staff indicate it appears that the inmate who was previously known to be running the unit is "losing power." This report was written after a third home-made weapon was found in the unit. It was noted the inmates on the unit were exhibiting unusual behaviour such as asking to stay in the unit because they were sick, very little interaction between inmates not attending programs and lots of inmate groups standing six for no apparent reason and overly friendly mannerisms towards staff.

2015-03-25 A staff member wrote a report regarding the current mood of the unit. The report discusses a number of inmates being run off the upper floors to different ranges. It was noted by the staff member there appears to be a shift in power in the unit. Staff indicated three new transfers to Pacific (which includes ANDERSON) are believed to be involved in of having inmates moved off their ranges. The staff reported that these three new inmates appear to be taking over the unit from the previous inmate who was seen as "being in charge." This report was written by a staff member who was posted daily in the U building and is familiar with the inmates in the upper ranges.

[10] The Assessment for Decision also included information about Mr. Anderson's background in support of its conclusions, such as:

- The offence for which he is serving his sentence involved the contract killing of a person who was opposed to the criminal organization of which he was then a member. His criminal history before that offence also included offences of violence within a gang context.
- He has been placed in segregation on several previous occasions since beginning his sentence in 2009. These moves to segregation had been made both for his own safety and involuntarily. The reasons for them had included coming into contact with members of other Security Threat Groups ("STGs" in correctional parlance) as they are often called, as well as information received by correctional officials that there were plans in place to assault him. He was also segregated previously because of information that he was involved in or had planned to assault other inmates.
- He had been involuntarily transferred from Mission Institution to Kent for "compromising" a correctional officer by beginning a relationship with her. She later became his spouse.

[11] In order to understand the reasoning that led to the recommendation, it is useful to look at a point in the assessment at which these various concerns and observations are brought together. I am quoting now from page 12, the first full paragraph:

Based on the current body of intelligence, staff observations, and a review of ANDERSON's history, it is believed ANDERSON (very shortly after arriving at PI) very quickly asserted himself into the inmate politics and aligned himself with inmate's whom he knew carried weight within the institutional history. It is well documented in the past 5 years ANDERSON has a tendency to be associated to high profile inmates, this includes both STG affiliated inmates as well as inmate's who are well known to be near the top or at the top of the inmate hierarchy in the particular institution [where] ANDERSON is residing. At Pacific Institution it is noted he was seen speaking to a high ranking STG member within days of his arrival. This other inmate is a UN gang member. The UN STG would be considered rival to ANDERSON's listed STG affiliations. Although throughout his time at Pacific Institution he did not maintain an association with the aforementioned inmates, it is noteworthy ANDERSON would be observed so quickly conversing with these particular inmates. Given ANDERSON's clear level of intelligence and the well known knowledge throughout the Region of which inmates would be "running" Pacific; it is reasonable to form the opinion ANDERSON would be well versed on which inmates he needs to speak to upon his arrival at Pacific Institution to make sure he would not have any concerns at Pacific. Supporting this theory is ANDERSON's actions prior to transfer to and after he transferred to Matsqui Institution. Prior to transferring to Matsqui Institution ANDERSON was deemed to have written letters to other inmate's regarding the inmate he believed was "in charge of" Matsqui Institution. In these letter's Anderson attempted to discredit this inmate by calling him a "rat" and "goof" and a check in from another institution. As it would appear this strategy did not work, as soon as ANDERSON arrived at Matsqui he admitted to almost immediately speak with this inmate to make sure things would be "all good" with their STG affiliation. ANDERSON and this

inmate would be noted to have conflicting STG affiliations.

Throughout his time at Pacific Institution, ANDERSON is noted to have exhibited behaviours which are not conducive of a medium security inmate. ANDERSON has been verbally disrespectful to staff and noted to be bordering on inciting behaviour when staff have directed that he needs to follow institutional policies (i.e. wearing institutional clothing). These disrespectful behaviours were noted to have occurred on more than one occasion and with a staff member whom ANDERSON perceived as "picking on him." Further ANDERSON was overheard by staff speaking about gathering information on another inmate to determine whether or not they were going to have a problem with this other inmate. ANDERSON was stating he would talk to "her" when she came for a visit and they (him and 2 other inmates he frequently associated with) would take it from there. As ANDERSON's only visitor to Pacific Institution is his spouse who is a former CSC employee who would have knowledge of this inmate's institutional history; it is reasonable to believe ANDERSON was going to attempt to garner information regarding this inmate's history in order to determine whether this inmate would be to continue residing in the same range/floor as ANDERSON. Throughout his time at Pacific there was 9 other inmates who were "run off" the upper floor to the lower floor. When ANDERSON was questioned regarding this information (on 2015-04-16) he indicated 5 of them have moved over debt concerns. When ANDERSON was challenged on this explanation, as inmates in debt and have safety concerns normally check-in to segregation [and] not move to a lower floor (as this would not solve their safety concerns) ANDERSON could not provide an explanation. ANDERSON's role in controlling who was allowed to reside on his range is an excellent example of his increasing power at Pacific Institution.

It is believed and supported through information ANDERSON initially co-existed peacefully with the group (UN) who arguably was running Pacific Institution. It is suspected this occurred due to the fact they had the numbers; however over time it is believed this peaceful co-existence started to disintegrate due to the other side's numbers being reduced through transfers and releases to the community. On 2015-03-24 a Section 53 search was authorized of Pacific Institution after three homemade weapons were found in the unit. During the search an additional four weapons were found in the unit. Based on an analysis of staff and source information it was the belief of the Security Intelligence Office there was a power struggle ensuing between two rival STG's vying over power of Pacific Institution.

Information supports ANDERSON was one of the main players on the side vying to take over from another inmate who had been previously identified as controlling the inmate population at Pacific. Due to the series of transfers and releases to the community it is believed this created a power vacuum in the unit and provided the perfect opportunity for another group to try and take over the unit. It was noted to be extremely unusual for weapons to be found at Pacific Institution; especially that number of weapons. It is also important to note that the weapons were located in common areas which would be to suggest their purpose was for offensive actions (such as a building power struggle between two groups) rather than defensive actions (such as fear for one's safety). Contrary to ANDERSON indicating the weapons were likely for inmates fearing for their

safety due to recent transfers; if an inmate fears for their safety it would [be] common practice to have it on their person or in their cell for quick access should they need to use it not taping it to a shower rod in the common area.

ANDERSON does have a documented history of calling other inmates derogatory terms (i.e., rat) which he is fully aware could cause safety concerns for the other inmate. These derogatory statements by ANDERSON are noted to have occurred at Mission, Matsqui and Pacific Institution. As well, he does have a history of threatening other inmates. In February 2013, a legally intercepted letter was seized from ANDERSON to another inmate. Previous to this letter being seized it was noted ANDERSON had been referring to this other inmate as a "rat" and there is information (with the help of a community contact) had fabricated documents to reflect this inmate being a "rat."

- [12] The Assessment concluded that although Mr. Anderson's risk for escape and risk to public safety remained at their previous moderate levels, his problems with "institutional adjustment", a term that refers to his requirement for supervision and control, should be seen as high.
- [13] In his interviews with correctional officials after being segregated, Mr. Anderson denied any ongoing gang involvement or participation in planning for violent activities. In essence, he professed that he wanted to serve his time at the Institution without such incidents.
- [14] The Assessment also notes that Mr. Anderson has so-called "incompatibles", which I infer means other inmates with whom he cannot safely be housed, at all the other federal institutions in British Columbia, as well as at several elsewhere in Canada.
- [15] In her first affidavit from June 22, Security Intelligence Officer Kristy Carlson has provided redacted copies of a significant number of "Statement/Observation" reports as well as other correctional documents, each of which corresponds to a reference in a briefer form within the Assessment for Decision.
- [16] As they are entitled to do, the respondents in this application have also provided a second confidential affidavit from Officer Carlson, which contains additional information that was relied on to reach the decision and summarized in the Assessment for Decision. This information consists of additional unredacted security intelligence and observation reports or related documents. The confidential affidavit also describes the security reasons for withholding these documents (in essence, the safety of the confidential informants quoted in them) and explains why the information derived from them is considered by the officials to have been reliable.

3. Discussion

- [17] The relevant portions of the Corrections and Conditional Release Act, S.C. 1992, c. 20, are:

- (1) Where an offender is entitled by this Part or the regulations to make representations in relation to a decision to be taken by the Service about the offender [this is s-s (1)] the person or body that is to take the decision shall, subject to subsection (3), give the offender, a reasonable period before the decision is to be taken, all the information to be considered in the taking of the decision or a summary of that information.
- (3) Except in relation to decisions on disciplinary offences, where the Commissioner has reasonable grounds to believe that disclosure of information under subsection (1) . . . would jeopardize
- (a) the safety of any person,
 - (b) the security of a penitentiary, or
 - (c) the conduct of any lawful investigation,

the Commissioner may authorize the withholding from the offender of as much information as is strictly necessary in order to protect the interest identified in paragraph (a), (b) or (c).

28 If a person is or is to be confined in a penitentiary, the Service shall take all reasonable steps to ensure that the penitentiary in which they are confined is one that provides them with an environment that contains only the necessary restrictions, taking into account

- (a) the degree and kind of custody and control necessary for
- (i) the safety of the public,
- (ii) the safety of that person and other persons in the penitentiary, and
- (iii) the security of the penitentiary;

29 The Commissioner may authorize the transfer of a person who is sentenced, transferred or committed to a penitentiary to

- (a) another penitentiary in accordance with the regulations made under paragraph 96(d), subject to section 28;

30(1) The Service shall assign a security classification of maximum, medium or minimum to each inmate in accordance with the regulations made under paragraph 96

- (2) The Service shall give each inmate reasons, in writing, for assigning a particular security classification or for changing that classification.

[18] The relevant portions of the Corrections and Conditional Release Regulations, S.O.R./92-620 made under this Act are:

11 An institutional head shall ensure that an inmate is informed in writing of the reasons for the placement of the inmate in a particular penitentiary and that the inmate is given an opportunity to make representations with respect thereto,

- (b) where the penitentiary placement process takes place in a penitentiary, before the transfer of the inmate to the assigned penitentiary but after the initial reception process.

12 Before the transfer of an inmate pursuant to section 29 of the Act, other than a transfer at the request of the inmate, an institutional head or a staff member designated by the institutional head shall

- (a) give the inmate written notice of the proposed transfer, including the reasons for the proposed transfer and the proposed destination;
- (b) after giving the inmate a reasonable opportunity to prepare representations with respect to the proposed transfer, meet with the inmate to explain the reasons for the proposed transfer and give the inmate an opportunity to make representations with respect to the proposed transfer in person or, if the inmate prefers, in writing;

17 The Service shall take the following factors into consideration in determining the security classification to be assigned to an inmate pursuant to section 30 of the Act:

- (a) the seriousness of the offence committed by the inmate;
- (b) any outstanding charges against the inmate;
- (c) the inmate's performance and behaviour while under sentence;
- (d) the inmate's social, criminal and, if available, young-offender history and any dangerous offender designation under the Criminal Code;
- (e) any physical or mental illness or disorder suffered by the inmate;
- (f) the inmate's potential for violent behaviour; and
- (g) the inmate's continued involvement in criminal activities.

18 For the purposes of section 30 of the Act, an inmate shall be classified as

- (a) maximum security where the inmate is assessed by the Service as
 - (i) presenting a high probability of escape and a high risk to the safety of the public in the event of escape, or
 - (ii) requiring a high degree of supervision and control within the penitentiary;

[19] First, Mr. Anderson submits that he was not provided with procedural fairness because all of the information that was considered in the taking of the decision was not provided to him, as required by s. 27(1). Most fundamentally, it is argued that the respondents' own affidavit -- the first affidavit of Officer Carlson containing the redacted reports -- shows clearly that there were numerous other documents generated in the investigation leading to the transfer decision that could readily have been disclosed to him in that redacted form without jeopardizing the safety of anyone involved.

- [20] Second, the decision to transfer Mr. Anderson is argued to have been an unreasonable one, in that the information underlying it could not reasonably support the conclusions about the threat to institutional safety that he was said to represent. His counsel argues that when examined carefully, there is very little actual evidence of gang or violent involvement presented. For example, most of the direct observations of his behaviour are innocuous or ambiguous in context and the intelligence that was obtained about a looming gang war did not actually name him as a potential participant. What seems more likely, it is submitted, is that Mr. Anderson's history of serious offending was used as a pretext for the decision.
- [21] Finally, while counsel concedes that it is not a freestanding basis for granting the habeas corpus remedy, the arbitrary manner in which the Security Reclassification Scale was scored (performing such actions as taking Mr. Anderson's placement in segregation pending the decision into account) and its vagueness about which particular past incidents are being relied on also cast doubt on the overall reasonableness of the decision process.
- [22] Counsel for the respondents has fairly conceded that the necessary deprivation of liberty as a threshold issue to engage the Court's consideration of the lawfulness of this decision had occurred here, in the form of the security reclassification.
- [23] With respect to the allegation of procedural unfairness, the respondents' counsel points out that s. 27(1) explicitly permits a summary of the information relied on to be given, which was certainly provided within the assessment here.
- [24] With respect to the alleged unreasonableness of the classification decision, counsel emphasizes the need for an appropriately high degree of deference to the very specialized expertise of correctional officials in any review of a classification decision. While certainly not irrelevant to my analysis, it is argued that Mr. Anderson's actual guilt of the various actions for which he was suspected is not as critical to the analysis as a determination of the level of necessary supervision and control of him to ensure institutional safety.
- [25] Finally, on the subsidiary issue of the alleged improper use of the Security Reclassification Scale, counsel reminds me that the scale is explicitly stated not to be determinative of a change in classification. Further, the points to which Mr. Anderson objects were justified by his past history and in any event were dealt with by the warden during Mr. Anderson's institutional challenge of the transfer decision.
- [26] Counsel agreed that a fundamental authority on both the issues of the amount of disclosure that is necessary in order to provide procedural fairness to an inmate and the assessment of the reasonableness of a classification decision is *Mission Institution v. Khela*, [2014] 1 S.C.R. 502 [Khela].
- [27] Dealing first with the issue of disclosure as an aspect of procedural fairness in correctional classification contexts, the Court made the following helpful comments:

- [81] . . . Section 27(1) of the CCRA provides that where an inmate is entitled by the regulations to make such representations, the decision maker must give him or her "all the information" to be considered in taking a final decision regarding the transfer, subject only to s. 27(3). Even inmates transferred on an emergency and involuntary basis are therefore entitled to all the information considered in the Warden's decision-making process, or a summary thereof, except where s. 27(3) applies. The requirement that the inmate be provided with "all the information" can be satisfied by providing him or her with a summary of the information.
- [82] As this Court put it in *Cardinal* . . . "there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual" Section 27 of the CCRA guides the decision maker and elaborates on the resulting procedural rights . . . In order to guarantee fairness in the process leading up to a transfer decision, s. 27(1) provides that the inmate should be given all the information that was considered in the taking of the decision, or a summary of that information. This disclosure must be made within a reasonable time before the final decision is made. The onus is on the decision maker to show that s. 27(1) was complied with.
- [83] This disclosure is not tantamount to the disclosure required by *R. v. Stinchcombe* . . . As the Court stated in *May*, "[t]he requirements of procedural fairness must be assessed contextually" . . . In this context, the inmate's residual liberty is at stake, but his or her innocence is not in issue. *Stinchcombe* requires that the Crown disclose all relevant information, including "not only that which the Crown intends to introduce into evidence, but also that which it does not" . . . Section 27 does not require the authorities to produce evidence in their possession that was not taken into account in the transfer decision; they are only required to disclose the evidence that was considered. Further, whereas *Stinchcombe* requires the Crown to disclose all relevant information, s. 27 of the CCRA provides that a summary of that information will suffice . . .
- [85] A decision to withhold information pursuant to s. 27(3) is necessarily reviewable by way of an application for habeas corpus. Such a decision is not independent of the transfer decision made under s. 29. Rather, s. 27 serves as a statutory guide to procedural protections that have been adopted to ensure that decisions under s. 29 and other provisions are taken fairly. When a transfer decision is made under s. 29 and an inmate is entitled to make representations pursuant to the CCRR, s. 27 is engaged and decisions made under it are reviewable. If the correctional authorities failed to comply with s. 27 as a whole, a reviewing court may find that the transfer decision was procedurally unfair, and the deprivation of the inmate's liberty will not be lawful. This is certainly a "legitimate ground" upon which an inmate may apply for habeas corpus . . .
- [87] Where, pursuant to s. 27(3), the correctional authorities do not disclose to the inmate all the information considered in their transfer decision or a summary thereof, they should generally, if challenged on an application for habeas corpus, submit to the judge of the reviewing court a sealed affidavit that contains both the information that has been withheld

from the inmate compared with the information that was disclosed and the reasons why disclosure of that information might jeopardize the security of the penitentiary, the safety of any person or the conduct of a lawful investigation.

- [88] When the prison authorities rely on kites or anonymous tips to justify a transfer, they should also explain in the sealed affidavit why those tips are considered to be reliable. When liberty interests are at stake, procedural fairness also includes measures to verify the evidence being relied upon. If an individual is to suffer a form of deprivation of liberty, "procedural fairness includes a procedure for verifying the evidence adduced against [them]" . . .
- [89] Section 27(3) authorizes the withholding of information when the Commissioner has "reasonable grounds to believe" that should the information be released, it might threaten the security of the prison, the safety of any person or the conduct of an investigation. The Commissioner, or his or her representative, is in the best position to determine whether such a risk could in fact materialize. As a result, the Commissioner, or the warden, is entitled to a margin of deference on this point. Similarly, the warden and the Commissioner are in the best position to determine whether a given source or informant is reliable. Some deference is accordingly owed on this point as well. If, however, certain information is withheld without invoking s. 27(3), deference will not be warranted, and the decision will be procedurally unfair and therefore unlawful.

[Citations omitted.]

- [28] When considered as a whole, I conclude that Mr. Anderson was given the necessary amount of disclosure of the information taken into account in reaching the classification decision to meet the requirements of procedural fairness.
- [29] In this case, the authors of the Assessment for Decision elected to summarize the contents of the various reports of Mr. Anderson's behaviour within the institution and the source information about his unobserved activities. As Khela indicates, this is an acceptable practice, as long as the specific information emanating from those documents that led to this decision was effectively provided to him by means of the summary.
- [30] The withholding of information for safety or security purposes pursuant to s. 27(3) is a separate issue from whether a proper summary of information has been provided. It is not engaged until information is actually withheld, as in the case of the contents of the confidential affidavit, as opposed to having been summarized. Consequently, the concern raised on Mr. Anderson's behalf about why the reports attached to Officer Carlson's first affidavit could not have been provided to him does not raise concerns about procedural fairness unless those summaries are deficient in some respect. The fact that some of those reports are themselves redacted is somewhat of a red herring in that regard.

- [31] Looking first at the redacted documents attached to Officer Carlson's first affidavit and comparing them to the portions of the Assessment for Decision to which they refer, I would say that, on the whole, the documents were sufficiently summarized to give Mr. Anderson an accurate indication of the nature of the information and the extent to which it implicated him in any of the behaviour alleged. Of course, they are briefer and distilled to the inculpatory elements, but that is the very nature of a summary.
- [32] I note that the information in the assessment from Inmate Source A about having been told by Mr. Anderson and two others than he needed to assault someone who had been saying bad things about him does not correspond to any of the reports that have been attached to the affidavit, but since this reference in the assessment summarizes the incident it purports to describe sufficiently to allow Mr. Anderson to respond to it, nothing particularly turns on that.
- [33] Looking then at the confidential documents in Officer Carlson's second affidavit, it seems to me once again that each report contains information that is summarized accurately within the body of the Assessment for Decision. Information capable of identifying the sources of the information (and in the case of several of the reports, a great deal of information that has nothing at all to do with Mr. Anderson or his situation) has been omitted. I would say that on the whole these sources of information have been quite fairly summarized.
- [34] The confidential affidavit gives a succinct explanation of why these reports need to be withheld from disclosure to protect the lives of those who provided the information and also refers to Officer Carlson's first affidavit, which discussed confidentiality concerns at much greater length, on this point.
- [35] The reasons underlying the believed reliability of the information provided by the informants are also given in the confidential affidavit, albeit within a general description of the various objective means of confirming the reliability of that information that were resorted to before it was accepted. I think it would have been preferable to indicate how each particular piece of information was specifically confirmed, but because it is readily possible, by referring to the Assessment for Decision, to identify each of the sources of confirmation that Officer Carlson has summarized, I do not consider her compendious list of confirmation methods to be fatal to an acceptance of her assertions of the reliability of the source information.
- [36] As a result, I would not give effect to this first argument.
- [37] As to the reasonableness of the decision, Khela also provides helpful guidance, setting the general principles of administrative review specifically within a correctional transfer context:

- [73] A transfer decision that does not fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" will be unlawful . . . Similarly, a decision that lacks "justification, transparency and intelligibility" will be unlawful . . . For it to be lawful, the reasons for and record of the decision must "in fact or in principle support the conclusion reached" ...
- [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 . . . 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.
- [76] Like the decision at issue in *Lake*, a transfer decision requires a "fact-driven inquiry involving the weighing of various factors and possessing a 'negligible legal dimension'" . . . The statute outlines a number of factors to which a warden must adhere when transferring an inmate: the inmate must be placed in the least restrictive environment that will still assure the safety of the public, penitentiary staff and other inmates, should have access to his or her home community, and should be transferred to a compatible cultural and linguistic environment . . . Determining whether an inmate poses a threat to the security of the penitentiary or of the individuals who live and work in it requires intimate knowledge of that penitentiary's culture and of the behaviour of the individuals inside its walls. Wardens and the Commissioner possess this knowledge, and related practical experience, to a greater degree than a provincial superior court judge.
- [38] With respect to reasonableness, I agree with the authorities that it is essential to show appropriate deference to the unique experience and knowledge of the Warden and other officials when addressing institutional security concerns. I should approach the analysis with a realization of the difficult responsibilities that are being discharged when managing a group of potentially violent offenders in a confined setting and should recognize the need of such officials to exercise caution and take proactive steps to prevent violence.
- [39] That said, I must not conflate the legitimacy of the institutional concerns about a pending violent confrontation with the conclusion that Mr. Anderson himself specifically posed that threat and needed not only to be transferred, but reclassified.
- [40] Reduced to its essence, the information available to the decision-makers here was capable of showing the following:

- a) The offence for which Mr. Anderson is serving his life sentence was a gang-related killing and he has run afoul of gang-related inmates at the other institutions since he has been incarcerated;
 - b) He was seen speaking to UN members, who were understood to be the incumbent ruling group of his particular unit, after arriving at Pacific Institution. This was consistent with his past practice of confronting potential security threats from rival organizations;
 - c) He was seen running the card table, which was previously understood to be the domain of the UN, as the group in power;
 - d) Officers suspected or theorized that Mr. Anderson was now a major player in the unit and had been involved in the running of certain inmates off of it, and that his group was engaged in a power struggle with the UN for control. However, an officer who made some of these observations said "none of these theories have been confirmed or denied it is simply working theories of the writer who is a full time officer in the Upper Programs Unit." A second officer who contributed to this information described his contribution as: "My thoughts, I cannot substantiate any of it, just a hunch." That officer also said in relation to the successful weapons search: "The shanks we found upstairs could be from either side";
 - e) There was source information about gang members from other institutions setting up at the Pacific Institution and about a looming war between the gangs on the unit. However, as I have said previously, none of this information referred specifically to Mr. Anderson;
 - f) Mr. Anderson engaged in two separate incidents of belligerent or uncooperative behaviour towards officers, including while he was not wearing a shirt, which had the effect of revealing a gang tattoo that he bears;
 - g) He appeared to be seeking out information about other inmates, potentially involving his spouse, a former correctional officer, in that process and was overheard speaking angrily to her on the phone about an apparent domestic matter;
 - h) When his unit was searched pursuant to the effort to locate weapons, he was found in possession of some contraband items.
- [41] In making their decisions, correctional officials are entitled to rely on their experience and common sense to draw inferences and to "put two and two together" when safety and security are concerned. Source information and the impressions of experienced officers are vital to this process and must be resorted to when required. But when I read the section of the Assessment in which all of the institutional concerns were drawn together in a summary form, it still comes across as more of a working theory than as a series of reliable inferences drawn from evidence.
- [42] Put simply, the gang connection appears tenuous here and the intelligence about a conflict between rivals is not attributable to Mr. Anderson, even inferentially. It seems unlikely that two incidents of yelling, swearing, and defying officers, which were resolved by verbal

approaches by the officers, could support an increase in security level in themselves, and Mr. Anderson's track record of institutional conflict with other gang members is as consistent in its history with having been targeted by them as with targeting them himself, particularly given his own past requests for protection and segregation. Finally, while it is explicitly not determinative, either for him or against him, it is worth noting that the Security Reclassification Scale placed him in no worse than the discretionary zone, so that even the most recent concerns the officials were able to bring to bear could not lead to a decisive score in the maximum range.

- [43] I conclude that, even extending the greatest permissible level of deference to the officials here, the actual evidence considered in support of the transfer, taken at its highest, could not on any reasonable interpretation justify a conclusion that in light of the factors in s. 28 of the Act or s. 17 of the Regulations "a high degree of supervision and control within the penitentiary" was needed for Mr. Anderson, thus requiring a maximum security classification. Put in the language of *Dunsmuir v. New Brunswick*, 2008 SCC 9, the reasons for this decision are not reasonably capable of supporting the decision that was reached.
- [44] What seems to have occurred here is that the legitimate need of institutional officials to defuse a violent conflict that source information suggested was in the offing was also enlisted to support a decision to move out and reclassify an offender whose behaviour, while certainly far less than praiseworthy, could not yet be proven to justify those actions.
- [45] In light of this conclusion, it is not necessary to consider the argument with respect to Mr. Anderson's security classification score. Had it been required, I would have concluded that the scale was completed in a fair and reasonable way, without holding Mr. Anderson responsible for matters outside of his control or that had not yet been determined against him, and was ultimately given the degree of weight in the decision process that it deserved. In any event, he was permitted to challenge it later in the review on the basis of fuller disclosure and the concerns he raised through counsel were taken into account in reaching the final transfer decision.
- [46] If Corrections officials wish to transfer Mr. Anderson to maximum security in the future, they must demonstrate a reasonable fact-based case for doing so. No reasonable case was made out on the present record. As a result, the writ is granted, I find that the classification to maximum security was unlawful, and Mr. Anderson must be returned to medium security, albeit in the new province to which he has accepted a transfer.

The Honourable Mr. Justice T.A. Schultes

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