

CANADA / JUDGMENT

Bevan v. Fraser Regional Correctional Centre (Warden)

2024 BCSC 2192

COURT

Supreme Court of British Columbia

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2024 BCSC 2192 Bevan v. Fraser Regional Correctional Centre (Warden)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bevan v. Fraser Regional Correctional Centre (Warden),

2024 BCSC 2192

Date: 20241129

Docket: S245916

Registry: Vancouver

Between:

Dayton Bevan

Petitioner

And

Warden of Fraser Regional Correctional Centre and

Minister of Public Safety and Solicitor General

Respondents

Before: The Honourable Mr. Justice Brongers

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:

T. Rauch-Davis

Counsel for the Respondents:

D.K. Wong

F. Zaltz

Place and Dates of Hearing:

Vancouver, B.C.

November 4 and 7, 2024

Place and Date of Ruling with Reasons for Judgment to follow:

Vancouver, B.C.

November 22, 2024

Place and Date of Judgment:

Vancouver, B.C.

November 29, 2024

Overview

- [1] THE COURT: This is a habeas corpus application brought by way of petition.
- [2] The applicant is Dayton Bevan. He is an inmate serving a custodial sentence in the provincial correctional system. Mr. Bevan is represented by counsel.
- [3] The respondents are styled as "Warden of Fraser Regional Correctional Centre and Minister of Public Safety and Solicitor General". Since they are both represented by counsel with the British Columbia Ministry of Attorney General Legal Services Branch, the respondents will be collectively referenced as "the Province" in these reasons.
- [4] Mr. Bevan was incarcerated at Ford Mountain Correctional Centre, which is now known as Xàws Schó:lha Correctional Centre ("XSCC"). At the time his security classification was "medium" custody.
- [5] In early May 2024, Mr. Bevan was transferred from XSCC to Fraser Regional Correctional Centre ("FRCC"). After his arrival at FRCC, Mr. Bevan's security classification was increased from medium to "secure" custody.
- [6] In late August 2024, Mr. Bevan filed the present habeas corpus application. Mr. Bevan submits that his transfer from XSCC to FRCC was procedurally unfair and therefore unlawful. He seeks an order that he be returned to a provincial medium security institution like XSCC.

- [7] The application was scheduled for hearing in early November 2024. In the interim, Mr. Bevan's security classification was decreased back to medium custody in early October 2024. However, Mr. Bevan still remains at FRCC.
- [8] The Province submits that Mr. Bevan's application should be dismissed. The Province does not accept that Mr. Bevan has been deprived of his residual liberty, and denies that Mr. Bevan was afforded insufficient procedural fairness.
- [9] Having reviewed the petition record and the parties' submissions, I agree generally with Mr. Bevan's position. His application for habeas corpus is therefore granted for the reasons set out below.

Factual and Procedural Background

- [10] On September 18th, 2023, Mr. Bevan was sentenced to two years less a day in prison.
- [11] After having been first held at Prince George Regional Correctional Centre and then at Kamloops Regional Correctional Centre, Mr. Bevan was transferred to XSCC on November 15, 2023. XSCC is described by provincial corrections officials as a "camp" style correctional centre that holds inmates classified to "open" and medium custody only. It does not hold inmates classified to secure custody.
- [12] On April 29, 2024, another inmate successfully escaped from XSCC and was later recaptured.
- [13] On May 3, 2024, Mr. Bevan was transferred involuntarily from XSCC to FRCC. Provincial corrections officials described FRCC as a "regional correctional centre" whose construction and security procedures enable a higher level of supervision of inmates of any security level - open, medium, and secure custody - when compared to XSCC.
- [14] The May 3, 2024 transfer decision was made by a provincial corrections official based on information provided by an informant that Mr. Bevan was involved in the other inmate's escape from XSCC and that Mr. Bevan had prior knowledge of the escapee's plan. That same day, an intake assessment was conducted of Mr. Bevan upon his arrival at FRCC. It resulted in an increase of Mr. Bevan's security classification from medium to secure custody.
- [15] Mr. Bevan was not provided advance warning of his transfer to FRCC, or any contemporaneous opportunity to make oral or written submissions in respect of this transfer or his security reclassification. Mr. Bevan also did not receive written reasons for either decision at the time they were made.
- [16] Mr. Bevan acknowledges that he was subsequently provided with a verbal explanation of why his security classification was changed after he was transferred, in or around the second week of May 2024. It was given by a FRCC corrections official, Justin Dalton. Mr. Bevan's account of the explanation he was provided is that the decision was made because XSCC staff thought that Mr. Bevan may have had something to do with an escape attempt at XSCC in late April 2024. According to client log records made by corrections officials, the specific date this explanation was given was May 7, 2024.

- [17] Over the next few weeks, Mr. Bevan attempted to challenge his new security classification with the hope that he would be transferred back to XSCC. In particular, he submitted a special request for a review of the classification on May 12, 2024. He also submitted two inmate complaint forms to the same effect on May 23 and 30, 2024. These attempts were not successful. Mr. Bevan's classification stayed the same and he was kept at FRCC.
- [18] However, Mr. Bevan's complaints did result in the provision of formal written reasons for his transfer from XSCC to FRCC. They were prepared by another corrections official, Jarrett Winn, in a letter dated July 3, 2024. It states:

During our investigation following a critical incident at [XSCC], information came forward that you had knowledge of a planned security breach and further information suggested that you were made aware of the circumstances related to the breach. Considering this information, you were reclassified to FRCC.

- [19] On August 24, 2024, Mr. Bevan filed the present petition with the court. It seeks an order in the nature of habeas corpus with certiorari in aid that would return him to a provincial medium security institution.
- [20] On September 17, 2024, another corrections official, FRCC Warden Rick Lacroix, initiated a review of Mr. Bevan's security classification. This resulted in the issuance of a notice of reclassification dated October 1st, 2024. It states that Mr. Bevan's security classification is now reduced to medium custody once again. Of particular note is the commentary in the notice regarding the escape from XSCC effected by the other inmate and the risk that Mr. Bevan might do the same:

Additionally, Bevan was provincially transferred from XSCC (FMCC) to FRCC on May 3, 2024, after Corrections intelligence implicated Bevan's involvement in the successful escape of a peer at XSCC. FRCC Classification requested the investigation report from XSCC regarding the escape and after all information provided was gathered a classification interview was conducted with Bevan on September 24, 2024. Based on the living unit investigation report and the interview response with Bevan, there was no information to suggest that Bevan himself was a potential escape risk at XSCC.

- [21] In spite of the reclassification, however, Mr. Bevan nevertheless still remains in custody at FRCC.
- [22] On November 4, 2024, this habeas corpus application came on for hearing before me. It was scheduled for a half day. After hearing from counsel, I concluded that the petition was not yet ready to be heard within the time allotted. I therefore adjourned it to November 7, 2024, and set the matter for a full day hearing.
- [23] The petition was then fully argued on November 7, 2024. The record consists of three affidavits from Mr. Bevan, three affidavits from provincial corrections officials, and two affidavits from a paralegal on behalf of the Province.

- [24] After the parties had finished their submissions, I took the matter under reserve and adjourned the hearing to November 22, 2024. On that day, I issued an oral judgment allowing Mr. Bevan's petition, with reasons for judgment to follow.
- [25] I had initially intended to provide these reasons in writing. However, as a result of two subsequent developments, I have decided instead to provide oral reasons for judgment today, November 29, 2024. The first is an assertion made by counsel for Mr. Bevan on November 26, 2024 that provincial corrections officials are refusing to transfer Mr. Bevan notwithstanding the fact that his petition for habeas corpus was granted, a situation which he seeks to address by means of an application for contempt. The second is the rapid filing by the Province of a notice of appeal in respect of the habeas corpus judgment, which was also done on November 26, 2024. In my view, these developments have made it imperative that I issue these reasons for judgment now, prior to hearing Mr. Bevan's contempt application against the Province, a hearing that is scheduled to take place immediately following the reading of these reasons.

Legal Framework

- [26] The legal principles that apply to habeas corpus applications are well settled and not in dispute. They were clearly set out by the Supreme Court of Canada in *Mission Institution v. Khela*, 2014 SCC 24 [Khela].
- [27] Paragraphs 30 and 52 of Khela explain that habeas corpus applications are adjudicated in two stages. At the first stage, the applicant must establish that they have been deprived of their liberty. Once a deprivation of liberty is proven, the applicant must raise a legitimate ground upon which to question the legality of the deprivation. There are three generally recognized grounds: (1) a lack of legal authority; (2) procedural unfairness; and (3) substantive unreasonableness. If the applicant has raised one or more of these grounds, the analysis then moves to the second stage. At that point, the onus shifts to the respondent to show that the deprivation of liberty was lawful.
- [28] While habeas corpus is obviously available to persons who were at large immediately prior to being detained, a person who is already incarcerated is also entitled to employ habeas corpus to challenge a deprivation of their "residual liberty": Khela at para. 34. Decisions which might affect an offender's residual liberty include administrative segregation, confinement in a special handling unit, or a transfer to a higher security institution.
- [29] However, there are also limits upon the availability of habeas corpus. A comprehensive discussion of them is found in *Ewanchuk v. Canada*, 2017 ABQB 237 [Ewanchuk] at paras. 22 to 31, which was set out with approval by Justice Ross of this court in *Alam v. Matsqui Institution (Warden)*, 2022 BCSC 1115 at para. 24. These limits can be summarized as follows:

1. The deprivation of liberty being challenged must be current. Habeas corpus cannot be sought in relation to past or hypothetical future detentions: Ewanchuk at para. 23.
 2. Habeas corpus cannot be used to challenge denials of requests for release or for a reduced form of detention. It also does not apply if the detention is voluntary, caused by the detained person, or is sought by a person under judicial interim release: Ewanchuk at para. 24.
 3. The deprivation of liberty must be substantial and habeas corpus is not available to address trivial limitations on rights: Ewanchuk at paras. 26 and 27.
 4. Habeas corpus cannot be employed to challenge the loss of privileges, access to programming, or opportunities for education, training, and treatment: Ewanchuk at paras. 25 and 28.
 5. Habeas corpus is a remedy that operates only within the geographic jurisdiction of the superior court from which it is sought: Ewanchuk at para. 29.
 6. Superior courts must decline their habeas corpus jurisdiction if: (1) an offender is trying to use habeas corpus to attack the legality of their conviction or sentence when such alleged errors can be corrected by an appellate court; or (2) there is already a complete, comprehensive, and expert procedure for review of the underlying administrative decision being challenged. An example of the latter is the one administered by the Parole Board of Canada in relation to suspensions and denials of parole: Ewanchuk at paras. 30 and 31.
- [30] Finally, it must be noted that habeas corpus is not a discretionary remedy. When an applicant successfully challenges the legality of their detention, relief from that detention must be issued as of right: *May v. Ferndale Institution*, 2005 SCC 82, [May] at para. 33.

Analytical Framework

[31] Adjudication of this application requires the following issues to be addressed:

1. Has Mr. Bevan shown that he is subject to an ongoing deprivation of liberty that may be challenged by means of habeas corpus?
2. If so, has Mr. Bevan raised a legitimate ground to challenge this ongoing deprivation of liberty?
3. If so, has the Province shown that this ongoing deprivation of Mr. Bevan's liberty is lawful?

Issue #1: Ongoing Deprivation of Liberty

Mr. Bevan's Position

- [32] Mr. Bevan submits that his May 3, 2024 involuntary transfer from XSCC to FRCC constitutes a deprivation of his residual liberty interest, both in terms of form and substance.
- [33] With respect to form, Mr. Bevan says that XSCC is a "medium" security institution, while FRCC is a more restrictive "secure" institution.

- [34] With respect to substance, Mr. Bevan points to eight examples of conditions he is subject to at FRCC which he alleges are more restrictive than those he was subject to at XSCC:
1. FRCC affords inmates less time to roam within the facility's yard (one hour per day vs. four hours per day) and to socialize with other inmates than does XSCC;
 2. FRCC offers less voluminous and robust programs for inmates than does XSCC;
 3. FRCC inflicts increased exposure to violent individuals than does XSCC;
 4. FRCC has more frequent lockdowns than does XSCC;
 5. FRCC allows for fewer and less intimate visits from friends and loved ones than does XSCC;
 6. FRCC offers fewer employment opportunities than does XSCC;
 7. FRCC provides less support for Indigenous cultural development than does XSCC; and
 8. FRCC offers less access to fitness equipment than does XSCC.
- [35] Finally, Mr. Bevan says that the deprivation of liberty is ongoing, since he remains in FRCC today.

The Province's Position

- [36] The Province submits that effective October 1, 2024, Mr. Bevan's continued detention at FRCC does not constitute a deprivation of his residual liberty since Mr. Bevan once again has a medium custody security classification, as he did when he was at XSCC.
- [37] In the Province's view, it does not matter that Mr. Bevan is now at FRCC rather than at XSCC. While XSCC is a "medium and open custody" correctional centre, FRCC is a "regional correctional centre" that holds inmates of all security classifications. Therefore, an inmate like Mr. Bevan who has a medium custody security classification will necessarily be subject to the same detention conditions regardless of whether they are housed at XSCC or FRCC. This is because, in the provincial correctional system, the level of control exercised over an inmate and the extent of their residual liberty is determined by their security classification, not their placement at a particular correctional centre.
- [38] Furthermore, the Province does not accept that the examples provided by Mr. Bevan of differences between the conditions at FRCC and XSCC constitute substantial deprivations of liberty, as opposed to mere denials of privileges and programming. Indeed, the only ones that the Province concedes could arguably touch upon Mr. Bevan's liberty interests are the additional lockdowns and reduced yard time at FRCC as compared to XSCC. However, the Province notes that complaints of this nature were found to be beyond the scope of what may be challenged by habeas corpus in *Ewanchuk* at paras. 39 to 41.

- [39] Accordingly, the Province submits that Mr. Bevan's application should be dismissed at its first stage because he does not continue to be deprived of his residual liberty since his medium custody security classification was restored on October 1, 2024.

Discussion

- [40] As a preliminary comment, I am of the view that an assessment of whether a transfer from one correctional institution to another constitutes a deprivation of residual liberty must be done by reference to substance, not form. I therefore place little weight on the security classification labels that the Province has placed upon XSCC, FRCC, and Mr. Bevan. Ultimately, the real question before me is whether the extent of residual liberty Mr. Bevan now enjoys at FRCC is substantially reduced as compared to the residual liberty which he used to enjoy at XSCC prior to his transfer on May 3, 2024.
- [41] On my appreciation of the evidence tendered before me, I find that the answer to this question is yes.
- [42] In particular, it is apparent from a review of the affidavit of Kenneth Kay, deputy warden of XSCC, that the conditions under which inmates are housed at that institution are considerably less restrictive than those under which inmates are housed at FRCC. The following paragraphs of this affidavit are noteworthy:
7. FRCC is a multi-level regional correctional centre with capability to house "secure", "medium", and "open" custody inmates. The construction and security procedures at FRCC enables a higher level of supervision of inmates of any security level, compared to XSCC, which is described in more detail below.
- ...
10. XSCC is a medium and open custody "camp" style correctional centre located in a very remote setting in the Chilliwack River valley.
11. XSCC is not a regional correctional centre and cannot hold inmates classified to "secure" custody.
- ...
13. XSCC has been in operation since the 1960s and is an older facility compared to other operating correctional centres. As a result, XSCC employs significantly less secure construction in our buildings, such as wood and drywall units, conventional non-shatter proof glass, etc. Around the facility is a single secure fence to provide perimeter security.

14. Considering the age of the facility with safety requirements, XSCC cannot secure inmates in ways available at other correctional centres. As such, XSCC inmates have higher mobility at the facility than inmates at other correctional centres. For example, XSCC inmates are not locked in their rooms because they need to be able to evacuate in the event of a fire or to use the common dormitory washrooms at night.

...

16. XSCC also has significantly fewer correctional staff relative to the size of the centre compared to other correctional centres, which makes the supervision of the entire area at XSCC more challenging than other correctional centres.
- [43] The notion that XSCC is a "camp style" correctional centre, while the FRCC is a more traditionally secure correctional centre, is also supported by the affidavit evidence of Mr. Bevan. And while I agree with the Province that some of Mr. Bevan's comparisons between the amenities offered at each institution amount to complaints about privileges that are beyond the scope of habeas corpus, I nevertheless accept and agree with Mr. Bevan's overall assertion that "FRCC is a far more restrictive correctional setting than [XSCC]" as it is consistent with the evidence tendered by the Province in this case.
- [44] I also find it disingenuous for the Province to suggest that there is no qualitative difference between XSCC and FRCC when Mr. Bevan was transferred from the former to the latter in order to address security concerns regarding Mr. Bevan that apparently could not be managed at XSCC. Similarly, I cannot accept the Province's assertion that the extent of an inmate's residual liberty is solely determined by their security classification when there is no clear evidence in the petition record that inmates at FRCC are actually treated differently depending on whether they are open, medium, or secure custody inmates. There is also no evidence that the extent of Mr. Bevan's residual liberty at FRCC has changed since his reclassification to medium custody on October 1, 2024.
- [45] In sum, I find that Mr. Bevan has met his burden to demonstrate that he has been deprived of his residual liberty as a result of his continued detention in FRCC following his transfer from XSCC on May 3, 2024.

Issue #2: Ground for Challenging the Ongoing Deprivation of Liberty

Mr. Bevan's Position

- [46] Mr. Bevan's sole ground for challenging his ongoing deprivation of residual liberty is his assertion that it was unlawful because the transfer decision was procedurally unfair.

- [47] In particular, Mr. Bevan asserts that he was denied procedural fairness in three respects. First, he says he was not given sufficient notice and disclosure of information about his transfer from XSCC to FRCC. Second, he says he was denied an opportunity to make submissions regarding the transfer decision. Third, he says he was not given adequate reasons for the decision.
- [48] Mr. Bevan therefore submits that this denial of procedural fairness is a legitimate ground for challenging his continued detention at FRCC.

The Province's Position

- [49] The Province does not take issue with the legitimacy of procedural fairness as a proper basis for seeking a habeas corpus remedy with respect to Mr. Bevan's transfer to FRCC.
- [50] However, the Province does urge the court to not entertain a procedural fairness challenge to the security classification decisions made by its correctional officials. The Province notes that since the issuance of the October 1, 2024 notice of reclassification which provides that Mr. Bevan is henceforth a medium custody inmate, there is no longer any live issue surrounding his classification. Furthermore, if there were any procedural fairness issues with respect to his earlier security classification decisions, the notice of reclassification has cured those deficiencies.

Discussion

- [51] I am satisfied that Mr. Bevan has raised a legitimate ground for challenging his ongoing deprivation of residual liberty, namely, an alleged denial of procedural fairness. As such, I will proceed to the second stage of the habeas corpus adjudication and assess whether this allegation is well founded.
- [52] Before doing so, however, I make two further observations.
- [53] First, as was emphasized by counsel for the Province, I note that procedural unfairness is the only allegation of illegality that Mr. Bevan is advancing. He has not suggested that the Province lacks the authority to transfer and to continue to detain him at FRCC, or that the decision to do so is substantively unreasonable. Accordingly, these issues cannot and will not be addressed in this proceeding.
- [54] Second, I also agree with the Province that Mr. Bevan cannot challenge the procedural fairness of past decisions made with respect to his security classification. As has already been noted, habeas corpus cannot be employed retrospectively to challenge historical decisions. Habeas corpus is only a remedy for the here and now: *Ewanchuk* at para. 23. Furthermore, I understand that Mr. Bevan accepts his present medium custody security classification that was decided on October 1, 2024. In fact, counsel for Mr. Bevan concedes, at para. 11 of his written submissions, that his client was afforded adequate procedural fairness in relation to that particular decision.

[55] In sum, the only remaining issue I will consider on this habeas corpus application is whether Mr. Bevan was denied procedural fairness when he was transferred to FRCC on May 3, 2024.

Issue #3: Procedural Fairness of the Ongoing Deprivation of Liberty

Mr. Bevan's Position

- [56] Mr. Bevan's fundamental position is that the Province has not provided any evidence that would allow the court to conclude that there was notice, disclosure, reasons, or an opportunity to be heard in relation to the decision to transfer him to a more restrictive correctional centre. While Mr. Bevan acknowledges that there is no statutory requirement that he be provided procedural fairness, he submits that he is so entitled pursuant to the common law.
- [57] With regard to the actual content of this procedural fairness, counsel for Mr. Bevan has not put forward a specific proposal as to what it is or should be. However, he urges the court to delineate this content by drawing inspiration from two sources.
- [58] The first is the set of procedural guarantees afforded to provincial inmates who are: (1) alleged to have breached the rules governing conduct of inmates; and (2) subjected to separate confinement. These guarantees are set out at ss. 17, 18, and 22 to 26 of the Correction Act Regulation, B.C. Reg. 58/2005.
- [59] The second is the set of procedural guarantees afforded to federal inmates who are transferred between institutions. These guarantees are set out at ss. 12 and 13 of the Correctional and Conditional Release Regulations (SOR/92-960).
- [60] However, no matter what its actual content is, Mr. Bevan says that his right to procedural fairness was breached in any case given the total absence of notice, disclosure, opportunity to make submissions, and reasons that he was given by provincial correctional authorities at the time of his transfer from XSCC to FRCC.
- [61] Accordingly, Mr. Bevan says that the court should find that there was a denial of procedural fairness in this case that renders his continued detention at FRCC unlawful.

The Province's Position

- [62] The Province does not agree that Mr. Bevan was not afforded any procedural fairness at all in relation to the transfer decision. The Province also submits that the extent of Mr. Bevan's entitlement to procedural fairness does not and should not equate to what is afforded to provincial inmates who are disciplined or placed in separate confinement, or to what is afforded to federal inmates who are transferred between institutions.

- [63] In particular, the Province says that Mr. Bevan was given basic information about the reason for his transfer by corrections officials Dalton and Winn on May 7 and July 3, 2024, respectively, and that this information was sufficient for Mr. Bevan to know the case he had to meet. Mr. Bevan could not be given any further details because of concerns that to do so could be prejudicial to an informer and could jeopardize the security of the correctional centre. Furthermore, as this was an "on the spot" transfer decision, there was no requirement that Mr. Bevan be given an opportunity to make submissions prior to its implementation. Rather, it was sufficient that Mr. Bevan was later given an opportunity to make submissions requesting a security reclassification, an opportunity that he availed himself of.
- [64] Furthermore, the Province urges the court not to find that the common law requires provincial inmates who are transferred between institutions are to be afforded the same procedural fairness guarantees as are set out in the federal Corrections and Conditional Release Regulations for federal penitentiary transfers. The Province says that the contexts are different because: (1) federal inmates generally serve longer sentences; (2) most federal institutions only hold inmates of a single security classification; and (3) the federal legislative scheme provides specific procedural fairness guarantees for inmates who are transferred, while the provincial legislative scheme does not.
- [65] Similarly, the Province says that the provincial Correction Act Regulation procedural fairness guarantees for inmates accused of breaching conduct rules and who are placed in separate confinement cover situations that are not analogous to correctional centre transfer decisions. Therefore, those guarantees should not be imported into the common law either.
- [66] Accordingly, the Province says that the decision to transfer Mr. Bevan from XSCC to FRCC was made in accordance with the extent of procedural fairness to which he was entitled, and is therefore lawful.

Discussion

- [67] I state at the outset that, since we are now at the second stage of the habeas corpus analysis, the burden is on the Province to show that Mr. Bevan was afforded adequate procedural fairness when he was denied his residual liberty as a result of his involuntary transfer to FRCC from XSCC. It is not up to Mr. Bevan to demonstrate the contrary.
- [68] I turn next to an assessment of the evidentiary record for the purpose of determining, as a question of fact, the extent of procedural fairness Mr. Bevan was given at the time of the transfer. I do so by examining what notice he was afforded, what information was disclosed to him, what opportunity he was given to make submissions, and what reasons were given to explain the transfer.
- [69] This assessment reveals that Mr. Bevan is generally correct to say that none of these aspects of procedural fairness were afforded to him prior to, during, or immediately after the transfer. Specifically, the Province's evidence does not contradict the assertions contained in

Mr. Bevan's affidavit made August 26, 2024 that on or around the May 3, 2024 date of the transfer he: (1) was not given any advance warning prior to his transfer to FRCC; (2) was not given any opportunity to make oral or written submissions to state his case in respect of his transfer to FRCC or his security reclassification; and (3) was not given written reasons for the transfer to FRCC or his security classification.

- [70] On the other hand, I accept the Province's evidence that there was a meeting between Mr. Bevan and a corrections official, Mr. Dalton, four days after the transfer, on May 7, 2024. This meeting was documented in Mr. Bevan's client log which I find to be admissible as a business record pursuant to s. 42 of the Evidence Act [RSBC 1996], c. 124. It also accords with Mr. Bevan's acknowledgment in his affidavit that such a meeting took place "in or around the second week of May 2024". However, I also note that the client log simply contains a bald statement that the reasons for the transfer and Mr. Bevan's current security rating were explained to him, without providing any further details of what was said. As such, I conclude that this explanation was limited to what Mr. Bevan reports he was told in his August 27, 2024, affidavit at para. 8:
8. After I got to FRCC, in or around the second week of May 2024, I had a conversation with Corrections Supervisor Dalton ("CS Dalton") who told me that staff at [XSCC] had told him that I had been reclassified from medium to secure because [XSCC] staff thought that I may have had something to do with an escape attempt at [XSCC] in or around late April 2024.
- [71] In sum, I find as fact that Mr. Bevan was not given: (1) notice; (2) disclosure of information; (3) an opportunity to make representations; or (4) reasons in respect of his transfer from XSCC to FRCC prior to, during, or immediately after it took place on May 3, 2024. That said, I also find as fact that Mr. Bevan was given reasons for the transfer on May 7, 2024, and that he had an effective opportunity to make representations about the transfer as of that date. Indeed, Mr. Bevan did make such representations on May 12, 2024, and there is no suggestion that he could not have done so at or immediately following his May 7, 2024 meeting with Mr. Dalton.
- [72] I turn now to the legal question of what is the extent of procedural fairness that must be afforded by provincial authorities to an inmate like Mr. Bevan who is transferred to a higher security correctional facility from a lower security correctional facility.
- [73] I note first that there is no dispute that a duty of procedural fairness does lie on the Province, since it is a public authority making an administrative decision that affects the rights, privileges, and interests of an individual: *Khela* at para. 82. This is imposed by the common law, and applies even in the absence of a statutory regime that prescribes the content of that duty, as is the case here. Indeed, while s. 10 of the Correction Act [SBC 2004] c. 46 authorizes provincial corrections officials to transfer inmates between correctional centres, there are no legislative provisions that prescribe how such transfers must be effected. As such, the common law duty of fairness "fills the gap" since no procedure has been provided for explicitly in legislation: *Green v. Law Society of Manitoba*, 2017 SCC 20 at

para. 53. However, I have not been made aware of any binding jurisprudential authorities that have set out the precise contours of that duty in a context wholly analogous to the one in the case at bar.

- [74] Accordingly, the starting point for determining those contours is the Supreme Court of Canada's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. At para. 22 of *Baker*, the following general comments are made regarding how those contours must be shaped:
- [22] Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.
- [75] Paragraphs 23 to 27 of *Baker* then set out a list of five factors that can inform the content of the duty of procedural fairness in a particular case. I will consider each one in turn.
- [76] The first factor is the nature of the decision being made and the process followed in making it; the more closely these resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness: *Baker* at para. 23. As correctional transfer decisions bear no real resemblance to the adversarial trial process, I find that this factor militates for a lower level of procedural fairness.
- [77] The second factor is the nature of the statutory scheme; greater procedural protections will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and no further request can be submitted: *Baker* at para. 24. I note that while the *Correction Act* does not provide for appeals of transfer decisions, s. 37 of the *Correction Act Regulation* does provide for the possibility of inmate complaints, a mechanism that Mr. Bevan availed himself of without success on May 23 and 30, 2024. I find that this factor militates for a moderate level of procedure fairness.
- [78] The third factor is the importance of the decision to the affected individual: *Baker* at para. 25. I have already found that Mr. Bevan's transfer from XSCC to FRCC constitutes a substantial denial of his residual liberty because of the increased restrictive conditions under which he is housed in FRCC as compared to XSCC. The transfer decision obviously has a very significant impact on Mr. Bevan's life and is of great importance to him. This factor strongly militates for a higher level of procedural fairness.

- [79] The fourth factor is the legitimate expectations of the person challenging the decision: Baker at para. 26. There is no evidence that Mr. Bevan was promised or otherwise understood that a particular procedure would be followed in making the transfer decision. This factor militates for a lower level of procedural fairness.
- [80] The fifth factor requires the court to take into account and respect the procedural choices made by the decision-maker: Baker at para. 27. In this case, neither the Legislature nor the correctional authority has set out specific procedural protections to inmates who are transferred between institutions beyond the possibility of making complaints under s. 37 of the Correction Act Regulation. As noted by counsel for the Province, this is indicative of the Legislature's intent to leave to provincial correctional authorities the ability to choose their own procedures for inmate transfers. This choice is entitled to respect, so long as it does not negate the duty of fairness. This consideration militates for a lower level of procedural fairness.
- [81] Weighing all of the Baker factors, I conclude that a provincial inmate who is transferred to a more secure and restrictive correctional centre is entitled to procedural fairness at the low to moderate end of the spectrum. This means that while the extent of procedural protections they must be afforded at the time of the transfer need not be extensive, they cannot be dispensed with entirely.
- [82] In practical terms, I find that this means that when provincial correctional officials decide to effect a transfer to a more secure and restrictive institution, the inmate must be provided contemporaneously with: (1) notice and disclosure of basic information about the reason for the transfer; (2) an opportunity of some kind to make representations about the transfer; and (3) meaningful reasons for the transfer.
- [83] I will now elaborate on what each of these elements entail, and assess whether the Province has demonstrated that, on the facts of this case, they were afforded to Mr. Bevan in respect of his transfer from XSCC to FRCC.

(1) Notice and disclosure

- [84] With respect to the requirement to provide notice and disclosure of information, a helpful explanation of its purpose in the context of inmate transfer decisions can be found in the Federal Court of Appeal's decision in *Demaria v. Regional Classification Board*, [1987] 1 FC 74 (C.A.), where Justice Hugessen wrote at page 77:

The purpose of requiring that notice be given to a person against whose interests it is proposed to act is to allow him to respond to it intelligently. If the matter is contested, such response will normally consist of either or both of a denial of what is alleged and an allegation of other facts to complete the picture. Where, as here, it is not intended to hold a hearing or otherwise give the person concerned a right to confront the evidence against him directly, it is particularly important that the notice contain as much detail as possible, else the right to answer becomes wholly illusory.

[85] In other words, corrections officials must, at the time of the transfer, provide the inmate with sufficient information to enable the inmate to understand why the transfer is being effected. Such disclosure obviously does not need to extend to the level of what is required in a criminal proceeding where the innocence of an accused is at stake (i.e., Stinchcombe disclosure): May at para. 91. Furthermore, sensitive information such as that relating to confidential informers need not be disclosed either. This point was also made in Demaria at page 77:

There is, of course, no doubt that the authorities were entitled to protect confidential sources of information. A penitentiary is not a choir school and, if informers were involved (the record here does not reveal whether they were or not), it is important that they not be put at risk. But even if that were the case it should always be possible to give the substance of the information while protecting the identity of the informant.

[86] Significantly, a good example of what a clear, concise, and adequate notice containing disclosure of the rationale for an inmate transfer can be found in the case at bar. It is set out in the October 4, 2024, affidavit made by XSCC Deputy Warden Kenneth Kay, the corrections official who made the transfer decision at issue. This affidavit, which has been filed in open court and is publicly accessible, makes mention of the substance of information received from an informer while protecting their identity. It states as follows:

[23] On April 29, 2024, an inmate successfully escaped XSCC and was later recaptured.

[24] On May 3, 2024, a credible informer told me that Mr. Bevan was involved in that inmate's escape and had prior knowledge of the inmate's escape plan. I considered the informer credible because they had first-hand knowledge of the inmate's escape and their plan.

[25] I considered the informer credible also because there was a security video footage that corroborated the informer's statement. The escaped inmate used a power tool to escape XSCC, and the footage showed that the escaped inmate took the power tool from the woodshop that Mr. Bevan and another inmate were employed in. Mr. Bevan and the other inmate had access to the woodshop and the power tools but the escape [sic] inmate did not.

[26] Based on the information provided by this informer, I believe Mr. Bevan had knowledge of how to escape from XSCC and was likely complicit in that inmate's successful escape plan, which were contrary to XSCC's rules and expectations. This posed a security risk to the security and proper administration of XSCC. Upon learning about Mr. Bevan's complicity in the inmate's successful escape, on May 3, 2024, I immediately decided to transfer Mr. Bevan from XSCC to FRCC.

[87] However, this information was not provided to Mr. Bevan at the time of his transfer on May 3, 2024. Instead, he was told nothing about the rationale for his transfer decision until four days later, and the explanation he was provided did not contain anything close to the level of detail found in Deputy Warden Kay's affidavit. The Province has not explained why the information set out in the four short paragraphs just quoted from Deputy Warden Kay's affidavit could not have been given to Mr. Bevan orally around the time he was transferred.

[88] In sum, I find that this lack of proper notice and disclosure constitutes a breach of the procedural fairness to which Mr. Bevan was entitled.

(2) Opportunity to make representations

[89] The importance of affording an inmate the opportunity to make representations when faced with a denial of their residual liberty was discussed by the Supreme Court of Canada in *Cardinal v. Director of Kent Institution*, [1985] 2 SCR 643 [Cardinal] at paras. 21 and 22, where Justice Le Dain wrote:

[21] I agree with McEachern C.J.S.C. and Anderson J.A. that because of the serious effect of the Director's decision on the appellants, procedural fairness required that he inform them of the reasons for his intended decision and give them an opportunity, however informal, to make representations to him concerning these reasons and the general question whether it was necessary or desirable to continue their segregation for the maintenance of good order and discipline in the institution. ... At the same time, he had a duty to hear and consider what the appellants had to say concerning their alleged involvement in the incident, as well as anything else that could be relevant to the question whether their release from segregation might introduce an unsettling element into the general inmate population and thus have an adverse effect on the maintenance of good order and discipline in the institution.

...

[22] These were in my opinion the minimal or essential requirements of procedural fairness in the circumstances, and they are fully compatible with the concern that the process of prison administration, because of its special nature and exigencies, should not be unduly burdened or obstructed by the imposition of unreasonable or inappropriate procedural requirements.

[90] I acknowledge that the administrative decision in issue in *Cardinal* concerned the segregation of an inmate from the general prison population, which will generally constitute a more serious deprivation of residual liberty than a transfer decision. However, I can see no valid reason for not including as an applicable principle of procedural fairness that, after receiving notice and disclosure of information regarding an impending transfer, the inmate subject to that notice be given a chance, however informal, to explain why a transfer is unwarranted. The two notions are inexorably linked.

- [91] That said, as was fairly noted by counsel for Mr. Bevan, there may be circumstances that require that a transfer decision be implemented quickly before an inmate is afforded an opportunity to make representations. Such a scenario is contemplated in the federal context at s. 13 of the Correctional and Conditional Release Regulations. It provides for the possibility of effecting the transfer first and then providing notice, disclosure, an opportunity to make representations, and reasons for a final decision afterwards if this is "necessary...for the security of the penitentiary or the safety of the inmate or any other person". In keeping with the principle that the duty of fairness is flexible and variable, I accept that when there are exigent circumstances, these elements of procedural fairness may be provided after the transfer is effected.
- [92] In the case at bar, however, the evidence does not show that the security risk posed by Mr. Bevan was so significant that he had to be transferred from XSCC to FRCC before being first informed of the rationale for the transfer and being given an informal opportunity to address the concerns of corrections officials. I find that this, too, was a breach of the requisite level of procedural fairness that is applicable.
- (3) Reasons
- [93] In *Baker*, the Supreme Court of Canada held, at para. 43, that:
- [43] ... in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision.
- [94] This includes cases where the decision is particularly significant or critical to a person. In my view, an inmate transfer decision to a more restrictive correctional centre is such a significant and critical decision that meaningful written reasons to explain why it was made must be provided.
- [95] This was also the conclusion that was effectively reached by Justice Martinson of this court in *MacKenzie v. LeBlanc*, 2007 BCSC 768, albeit in the federal correctional context where there is a statutory duty to give reasons for transfer decisions. It was noted at paras. 36 and 37 that while such reasons need not be extensive, they cannot be simply conclusory or require the reader to guess why the decision was made:
- [36] I agree with the wardens that it is important to keep in mind the very difficult situation faced in prisons by institution heads. They are not, as Bouck J. put it, trained lawyers or judges with little else to do but spend their days writing decisions. The requirement to provide reasons is but one of many aspects of their job. However, keeping in mind the purpose underlying the requirement for reasons set out in *Baker*, it is not sufficient to merely state that the evidence demonstrates that the case has been met and that, therefore, the applicant meets the requirements for maximum-security. That Mr. MacKenzie "requires a highly structured environment in which individual or group interactions are subject to constant and direct supervision" is tantamount to stating that Mr. MacKenzie requires a maximum-security environment. That statement provides Mr. MacKenzie with the result - that he will

be transferred - but not the reasons for the result.

- [37] ... In this case, I am unable to infer from what was said what the reasons may have been. I would have to guess. While reasons need not be lengthy, they must be sufficient to allow an inmate and the reviewing court to determine without guessing what the process was that led to the decision.
- [96] I turn now to the present case. As has already been noted, written reasons for Mr. Bevan's transfer decision were provided on July 3, 2024. For convenience, these reasons are restated here:

During our investigation following a critical incident at [XSCC], information came forward that you had knowledge of a planned security breach and further information suggested that you were made aware of the circumstances related to the breach. Considering this information, you were reclassified to FRCC.

- [97] While it would be unfair to characterize these reasons as merely conclusory, I am not satisfied that they meaningfully explain why the transfer decision was made. They require Mr. Bevan to guess and infer why he had been transferred, which he should not have to do.
- [98] As to what level of detail should have been provided in the reasons for decision, I refer once again to the four paragraphs of XSCC Deputy Warden Kenneth Kay's affidavit of October 4, 2024. In my view, had a letter containing this information been sent to Mr. Bevan at some reasonable point in time following the transfer, this would have sufficed to meet the applicable requirements for procedural fairness. However, this was not done in this case.
- [99] Accordingly, the absence of adequate written reasons for the decision to transfer Mr. Bevan also constitutes a breach of the procedural fairness that was required in this case.

Conclusion

- [100] In conclusion, I find that the Province has not met its burden to demonstrate that Mr. Bevan was afforded the procedural fairness he was legally entitled to receive when he was transferred from XSCC to FRCC on May 3, 2024, in three respects. First, Mr. Bevan was not provided with contemporaneous notice and disclosure of basic information regarding the rationale of the decision to transfer him from XSCC to FRCC. Second, Mr. Bevan was not provided with a contemporaneous opportunity to make oral or written submissions in respect of this decision. Third, Mr. Bevan also was not provided with adequate written reasons for this decision. Finally, the Province did not show the existence of any exigent circumstances that might have justified these omissions in this case.
- [101] As such, Mr. Bevan's transfer from XSCC to FRCC, which has resulted in a continuing deprivation of Mr. Bevan's residual liberty, is unlawful. In accordance with the non-discretionary nature of habeas corpus, I must therefore issue an order that provides Mr. Bevan with relief from this deprivation.

- [102] Before setting out the specific terms of that order, however, I will address counsel for Mr. Bevan's request that I also expressly prescribe the specific content of the common law duty of procedural fairness that applies to all provincial inmates who are transferred between correctional centres. As has been noted, he suggests that this be done by reference to analogous provisions in the federal Correctional and Conditional Release Regulations and the provincial Correction Act Regulation.
- [103] Simply put, I decline to do so. I am concerned that this would amount to an unjustified judicial appropriation of the legislative role that is to be performed by the Legislature of British Columbia, and those persons and bodies who have been delegated the authority to make regulations.
- [104] I so refuse while respectfully acknowledging that a direction similar to what is being sought by Mr. Bevan's counsel appears to have been issued in *Charlie v. British Columbia (Attorney General)*, 2016 BCSC 2292 [Charlie]. It was made with respect to the procedure to be applied when inmates are placed in "Enhanced Supervision Placement (ESP)", a form of separate confinement. However, the reasons for judgment in *Charlie* do not clearly explain either the source of the court's authority to prescribe such a detailed code of procedure, or the basis for any of its specific provisions. In the present circumstances, I am not prepared to follow a similar approach to adjudicating this habeas corpus application.
- [105] Finally, and most importantly, it seems to me that to the extent that guidance is required as to what the common law procedural fairness requirements are for inmates who find themselves in a similar situation to Mr. Bevan in the future, that guidance can be drawn from these reasons as they are written.

Disposition

- [106] The following order is issued:

- (1) Mr. Bevan's petition is allowed.
- (2) An order in the nature of habeas corpus with certiorari in aid is granted.
- (3) Mr. Bevan is to be returned to a medium security institution, to be dealt with therein as correctional authorities consider to be appropriate.

- [107] If the parties cannot agree on a costs order, they are at liberty to make submissions in writing through Supreme Court Scheduling. If necessary, the schedule for the exchange of such submissions shall be as follows: Mr. Bevan's submissions are to be filed and served within two weeks from today; the Province's response thereto is to be filed and served no later than two weeks after receipt of Mr. Bevan's submissions; and Mr. Bevan's reply, if any, shall be filed and served no later than one week after receipt of the Province's submissions.

"Brongers J."

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