

CANADA / JUDGMENT

Howdle v. Mission Medium Institution (Warden)

2020 BCCA 334

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 334 Howdle v. Mission Medium Institution (Warden)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Howdle v. Mission Medium Institution (Warden),

2020 BCCA 334

Date: 20201127

Docket: CA45781

Between:

Clifford Barry Howdle

Appellant

(Petitioner)

And

The Warden of Mission Medium Institution

Respondent

(Respondent)

Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated October 15, 2018 (Howdle v. Canada (Attorney General), 2018 BCSC 1775, Vancouver Docket 27652).

Counsel for the Appellant:

N. Gilewicz

Counsel for the Respondent:

C. De Los Reyes

Place and Date of Hearing:

Vancouver, British Columbia

September 14, 2020

Place and Date of Judgment:

Vancouver, British Columbia

November 27, 2020

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Abrioux

Summary:

The appellant, a federal inmate at Mission Institution, appeals from the dismissal of his application for habeas corpus with certiorari in aid. The appellant challenged decisions made by Correctional Service Canada to transfer him on an immediate involuntary basis from a minimum security unit to a medium security unit within the same institution, and to subsequently reclassify him as a medium security offender. Held: Appeal dismissed. The chambers judge did not err in finding that the decisions of corrections staff to reclassify the appellant and transfer him to medium security were reasonable and procedurally fair. The decisions were well-founded, in compliance with the relevant regulations and directives, and the appellant was provided all the information necessary to meet the case against him and afforded an opportunity to rebut it.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

- [1] Mr. Howdle appeals the dismissal of his application for habeas corpus. The judge below concluded that Mr. Howdle was afforded all the procedural rights to which he was entitled when he was moved involuntarily from a minimum ("Mission Minimum") to a medium security setting ("Mission Medium") within what is referred to as a clustered institution ("Mission Institution"). She found that the Warden's decision classifying Mr. Howdle as a medium security inmate and placing him in Mission Medium was reasonable. She also rejected other arguments advanced by Mr. Howdle that are not in issue on this appeal.
- [2] Mr. Howdle's movement within Mission Institution was accomplished by relying on an "immediate" movement procedure, pending a review of his security level classification. The catalyst for moving Mr. Howdle immediately was the perception that his behaviour demonstrated an increase in risk. After his transfer to Mission Medium, Mr. Howdle received disclosure of information relevant to his security classification, and attended a Warden's Review Board hearing to determine his ultimate placement. It is common ground that an immediate transfer is a deprivation of liberty, thereby engaging the potential for a habeas corpus remedy if the deprivation of liberty is not lawful. Similarly, a Warden's decision upholding an involuntary transfer is a deprivation of liberty.
- [3] On appeal, Mr. Howdle contends that there was insufficient evidence to justify his immediate movement. He contends the judge erred in her interpretation of the regulation and directives governing immediate transfers. Mr. Howdle says, further, that contrary to the judge's conclusion, he did not receive the procedural rights to which he was entitled. And, finally, he argues that the Warden's decision to confirm his placement in Mission Medium was unreasonable because the Warden did not assess whether the decision to move Mr. Howdle immediately was justified, or whether the material before him was contradictory and sufficient to justify his ultimate conclusions.
- [4] The arguments advanced by Mr. Howdle on appeal are somewhat different from those advanced before the judge. As a result, the judge did not deal directly with every aspect of the issues raised on appeal.
- [5] For the reasons that follow, I would dismiss the appeal.

Background

- [6] Mr. Howdle was convicted of sexual assault and unlawful confinement in 1995. In 1999, while on day parole, he committed further violent sexual and physical assaults against four victims. In 2003, Mr. Howdle was designated a dangerous offender, and received an indeterminate sentence.

- [7] In December 2017, Mr. Howdle was placed in Mission Minimum. This occurred as a result of a review by Correctional Service Canada ("CSC") of his security classification, resulting in a score of 17 on his security reclassification scale ("SRS"). This score corresponds to a medium security rating, but falls within a range that gives CSC a discretion to override that rating and nonetheless place an inmate in minimum security.
- [8] CSC exercised its discretion to place Mr. Howdle in Mission Minimum. His placement there came with "expectations" attached. The Warden's Board stipulated that Mr. Howdle had to abide by his management plan, including attending weekly meetings with his institutional parole officer ("IPO") for the first month, after which time the frequency of the meetings could be reassessed, and he had to keep logs of his risk factors and emotions. The management plan also instructed his case management team ("CMT") to employ a cautious approach and intervene quickly at the first sign of deteriorating behaviour, including reacting inappropriately to negative information. As we shall see, this is precisely what happened.
- [9] Mr. Howdle's placement appears to have been incident free until concerns began to arise in April 2018. Mr. Howdle's CMT began to observe certain behaviours that indicated an escalation in Mr. Howdle's risk level to reoffend. On May 8, 2018, Mr. Howdle was informed that he was being immediately moved from Mission Minimum to Mission Medium pending a security level review. On May 10, 2018, he was given the series of documents contemplated by the scheme regulating the involuntary movement of inmates within an institution such as Mission. The documents disclosed that his CMT recommended that Mr. Howdle be classified as medium security and moved to Mission Medium. The basis of that recommendation was set out in the disclosure given to Mr. Howdle. On May 23, 2018, Mr. Howdle exercised his right to offer a rebuttal of the concerns expressed in these materials.
- [10] On May 30, 2018, a Warden's Review Board met, in Mr. Howdle's presence, to address the CMT recommendations. Following the Review Board, the Warden issued a written decision increasing Mr. Howdle's security classification from minimum to medium, and approving his involuntary transfer to Mission Medium. Mr. Howdle's application for habeas corpus followed on August 7, 2018.

The Regulatory Framework

- [11] Before analysing the facts giving rise to the appeal, I will set out the regulatory framework governing the involuntary movement of inmates within a clustered institution.
- [12] A clustered institution is a single institution housing more than one type of security level. Mission Institution includes both a Medium Security Unit and a Minimum Security Unit within the same penitentiary. Here we are dealing with an involuntary movement or transfer within a single institution, not a transfer between institutions.

[13] The placement and movement or transfer of inmates within the penitentiary system is governed by the Corrections and Conditional Release Act, S.C. 1992, c. 20 [CCRA], as well as the regulations and applicable directives.

[14] One overarching principle found in the CCRA is that CSC should use the least restrictive measures consistent with the protection of society, staff members and offenders: see s. 4(c). This guideline is more specifically articulated in respect of the placement and transfer or movement of inmates in s. 28, which includes the following:

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 the least restrictive environment for that person, 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;

[15] CSC has the authority to "transfer" inmates to other institutions or to "move" them within the same institution, voluntarily or involuntarily, according to the inmate's security classification: see CCRA, s. 29; CD 710-2-4 (a Commissioner's Directive elaborating on procedure). Section 30 provides that each inmate will receive a security classification of maximum, medium or minimum in accordance with the regulations and contemplates written reasons for a change to an inmate's classification.

[16] A movement or transfer of an inmate is regulated by the Corrections and Conditional Release Regulations, S.O.R./92-620 [Regulations]. The Regulations contemplate two mechanisms by which a transfer may occur: a proposed transfer and an immediate transfer subject to subsequent assessment.

[17] Section 12 of the Regulations governs the process where an inmate is given notice of a proposed transfer. It provides:

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;

- (c) forward the inmate's representations to the Commissioner or to a staff member designated in accordance with paragraph 5(1)(b); and
- (d) give the inmate written notice of the final decision respecting the transfer, and the reasons for the decision,
- (i) at least two days before the transfer if the final decision is to transfer the inmate, unless the inmate consents to a shorter period; and
- (ii) within five working days after the decision if the final decision is not to transfer the inmate.

[18] By contrast, s. 13 governs the process whereby an immediate transfer is deemed necessary for the security of the penitentiary or the safety of the inmate or any other person. Where an immediate transfer of an inmate is effected, the assessment of the security classification of the inmate happens after the transfer:

13 (1) Section 12 does not apply where the Commissioner or a staff member designated in accordance with paragraph 5(1)(b) determines that it is necessary to immediately transfer an inmate for the security of the penitentiary or the safety of the inmate or any other person.

- (2) Where the Commissioner or a staff member designated in accordance with paragraph 5(1)(b) determines that it is necessary to immediately transfer an inmate for the reasons set out in subsection (1), the institutional head of the penitentiary to which the inmate is transferred or a staff member designated by that institutional head shall
 - (a) meet with the inmate not more than two working days after the transfer to explain the reasons for the transfer and give the inmate an opportunity to make representations with respect to the transfer in person or, if the inmate prefers, in writing;
 - (b) forward the inmate's representations to the Commissioner or to a staff member designated in accordance with paragraph 5(1)(b); and
 - (c) give the inmate, within five working days after the final decision, written notice of the final decision respecting the transfer and the reasons for the decision.

[19] It is apparent that a transfer under s. 13 involves an immediate deprivation of liberty that does not occur when the procedure set out in s. 12 is followed. Unlike in s. 12, an inmate transferred using the s. 13 procedure is immediately moved to the different institutional setting prior to any determination of his security level. The subsequent evaluation of the inmate's security level has the potential to confirm the deprivation of liberty, or constitute a further deprivation of liberty, for instance if the inmate's security level is increased by being placed permanently in a higher institutional security setting. However, even if the review determines that the inmate has the right to remain in the lower institutional security setting, the immediate transfer of the inmate remains a deprivation of liberty that can be challenged in a habeas corpus application.

- [20] Mr. Howdle was subject to an immediate transfer and subsequent security reclassification under s. 13. He argues that the provision is an exception to the usual process of transfer provided for by s. 12. He contends that the judge legally erred in her interpretation of the scope of s. 13. I will return to this contention.
- [21] Commissioner's Directives ("CD") complement the Regulations. In this case, CD 710-2-4 elaborates on the procedure by which CSC can involuntarily move an inmate within a clustered institution. Sections 7-21 deal with movement to a higher security level location. Section 8 deals with the procedure for a proposed movement as contemplated by s. 12 of the Regulations. It includes a definition of the information an inmate is to be given in support of the proposed movement. Section 12 of CD 710-2-4 covers immediate movements in terms that replicate s. 13 of the Regulations, so far as the preconditions for an immediate movement are concerned:
12. When it is determined necessary to immediately move an inmate for security reasons or the safety of the inmate or any other person, the inmate will:
 - a. be placed in administrative segregation, when the criteria for a segregation placement are deemed to have been met pursuant to CD 709 - Administrative Segregation, or
 - b. be moved to the higher security level location on an interim placement pending a review of his/her security classification level. A Threat Risk Assessment will be completed prior to integrating the inmate.
- [22] Mr. Howdle was immediately moved to Mission Medium on an interim placement pending his security classification review, according to the procedure set out by s. 12 of CD 710-2-4 (s. 13 of the Regulations). Annex A of CD 710-2-4 defines interim placement as:
- ... the movement/placement of an inmate in a higher security location pending a review of his/her security classification when there is reason to believe that there might be a risk for the public, staff or inmates that cannot be managed within the current location and the inmate does not meet the criteria for administrative segregation.
- [23] Sections 13-15 of CD 710-2-4 stipulate the information to be provided to an inmate in the case of an immediate transfer. An inmate is entitled to receive an explanation of the reasons for the recommended movement. Additionally, he receives a document called "Notice of Involuntary Transfer/Movement Recommendation", an "Assessment for Decision" ("A4D") in which the inmate's CMT sets out its recommendation concerning the inmate's security reclassification and involuntary transfer, the inmate's Security Reclassification Scale, the Security Reclassification Scale Functional Specification (a scoring matrix), and any other information to be used in the decision making process. The inmate has a right to legal counsel and an opportunity to respond and attempt to rebut the CMT's recommendation. In short, the CSC is required to disclose to an inmate the basis upon which it proposes to move him, so that he knows the case he has to meet. This obligation is statutorily prescribed in s. 27 of the CCRA:

Information to be given to offenders

27 (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, 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.

[24] This procedure is intended to guarantee procedural fairness. Further procedural protections are built into the Warden's Review Board hearing, including a duty to provide written reasons to justify the result.

The Circumstances Leading to Mr. Howdle's Immediate Movement

[25] As I have observed, CSC placed Mr. Howdle in Mission Minimum in December 2017, even though his security classification was medium. In making this placement, Mr. Howdle understood that his placement in Mission Minimum came with the expectations described above.

[26] Between April and early May 2018, a member of Mr. Howdle's CMT prepared a Correctional Plan Update ("CPU") to address his forthcoming full parole review. The CPU identified "indicators of elevation in risk". The CPU detailed troubling changes in Mr. Howdle's behaviour, including difficulties in his relationship with his CMT, efforts to isolate himself from his IPO, and other concerns about how Mr. Howdle was managing his emotions. Many of the details of Mr. Howdle's behaviour are consistent with and reflected in later documentation explaining the decision to move him immediately. Having said that, the CPU contained some statements that Mr. Howdle relies on to ground his arguments on appeal. For example, the CPU recorded that at Mission Minimum: "He has not been documented of any security concerns." In addition, the report stated: "Positively, Mr. Howdle has not presented with significant institutional behavioural concerns and has not required ongoing interventions from the CMT to address his behaviour." Under the heading "Correctional and Sentence Planning," the CPU also refers to Mr. Howdle's ongoing management at Mission Minimum. Mr. Howdle relies particularly on this latter section to support his view that he did not need to be moved immediately or at all, and that the documented concerns could have been adequately managed in Mission Minimum, as he says was contemplated by the CPU.

[27] On April 23, 2018, Mr. Howdle met with his CMT and discussed a number of concerns about his behaviour. After the meeting, Mr. Howdle sent an emotionally charged and accusatory letter to the Manager of Programs and abruptly terminated his current employment at the institution. Another meeting took place the next day.

[28] On May 8, 2018, Mr. Howdle's CMT met with the Deputy Warden, among others. The discussion focused on: Mr. Howdle's fixation on two female CSC community contract workers; his undisclosed application for an unescorted temporary absence to the

community residential facility where one of the female contractors worked; his tendency to make emotionally-based decisions; his inability to use program skills; his denial of and failure to log sexual fantasies, and; the link between these behaviours and the risks noted in previous psychological risk assessments. CSC made the decision to remove Mr. Howdle from Mission Minimum at that meeting.

[29] CSC informed Mr. Howdle of the decision in a "Legal Counsel Notification - Placement to Higher Security" memorandum (the "Interim Placement Memorandum"). It explained that CSC had decided that it was necessary to move him immediately to a more secure environment for the safety of the public, the institution, or persons within it, pending a review of his security classification.

[30] On May 10, 2018, Mr. Howdle received the Notice of Involuntary Transfer/Movement Recommendation; the A4D, recommending that he be classified as a medium security inmate and moved involuntarily to Mission Medium; his Security Reclassification Scale ("SRS"); and a redacted copy of the SRS Functional Specification, which sets out the process by which CSC calculates an inmate's SRS score and the applicable security level based on score ranges. In short, he received all those documents to which he was entitled. His SRS reflected a score of 19.5; a medium security score that falls outside the discretionary range for CSC to apply a minimum security rating override.

[31] In the A4D, the CMT recounted growing concerns about Mr. Howdle's risk level, noting that he was exhibiting signs of conduct that, in the past, had been a forerunner to his violent criminal offending. The CMT reported several incidents, including attempts to isolate two female contractors and shut out his IPO, concluding that:

[Mr. Howdle] has continued to show an increasing challenge of controlling his institutional behaviour in terms of interactions with staff members, continued to attempt further isolation of various CMT members and has admitted to current lack of transparency with his CMT in terms of risk management strategies put in place in order to manage and transition him to minimum security.

[32] The A4D described the April 23 meeting between Mr. Howdle and his CMT, referenced above. Mr. Howdle's response to the discussion is described as "very concrete and emotional" and as demonstrating his "inability to consider other information" once he had made a decision. In the meeting, Mr. Howdle accused his CMT of lying about recent interactions, and made allegations that CSC staff were blocking access to apprenticeship books that he was awaiting to be delivered.

[33] The CMT ultimately recommended that Mr. Howdle be moved from minimum to medium security given the risk to public safety should he escape. The judge accurately summarized the CMT's perceived safety concerns in detail, beginning at para. 24:

[24]

- (a) Mr. Howdle's failure to log sexual fantasies, during the six months he had been at Mission Minimum, despite repeated requests from his IPO to document these concerns and the program skills that he used to manage these thoughts and fantasies. The A4D recorded that Mr. Howdle admitted to having sexual fantasies and noted it was normal to have them. When he was challenged on why his sexual fantasies were not included in his logs, he said that his CMT was not qualified to assess them and he was omitting them;
- (b) Mr. Howdle's increasingly difficult and "concrete thinking" and decision making and his behaviour of delaying with his risk factors within the institution. He had become argumentative and demanding with members of his CMT and isolated himself from his IPO;
- (c) Mr. Howdle's intractability when discussing the conduct issues identified by his IPO and the Manager of Programs;
- (d) Mr. Howdle's recent willingness to actively deceive his CMT and other stakeholders which the A4D reported as a "significant return to past behaviours";
- (e) Mr. Howdle's working to isolate two female community contractors from communication with his IPO and his application for ETAs to one CRF where one of the females worked, without disclosing this intention to his IPO; and
- (f) Mr. Howdle's recent withdrawal from interactions with his IPO and his demanding and accusatory statements towards his IPO, the Manager of programs and other staff members.

[25] The A4D equated these concerns to an increase in his risk to public safety and that the public safety risk would be extremely elevated if Mr. Howdle escaped. The A4D concluded:

Mr. Howdle's current risk to reoffend, given the unstable emotional state, the lack of control over his current circumstances, his attempts to isolate females within the community setting while inside the institution and his refusal to log and address risk related thoughts and fantasies is elevated to a high level.

When things are going his way, Mr. Howdle is in control of the situation and therefore has no challenges to manage in terms of daily functioning. When he lacks control of the situation, he tends towards very risky thought patterns and behaviours.

[26] The A4D notes the link between Mr. Howdle's emotional instability and lack of control with a heightened risk to offend. Referring to recent psychological information on file, the A4D notes that "signs of non-cooperation with supervisory staff" would be a significant cause for concern, as well as "withdrawal from legitimate support persons" including IPOs.

[27] The A4D concluded with a recommendation for a transfer to Mission Medium given the risk to the public safety should Mr. Howdle escape. Mr. Howdle was assessed as "currently exhibiting signs of pre-contemplative criminal offending which [were] eerily similar to his past criminal offending".

[28] In summary, in reaching their recommendation, the CMT considered, among other things, Mr. Howdle's:

- (a) heightened state of emotional arousal concerning access to his apprenticeship books, as well as consequential decision making and inability to apply skills that he had learned in various programs he had undertaken while incarcerated;
- (b) admissions of sexual fantasies or thoughts and his failure to record those fantasies in a log he was required to keep;
- (c) fixation on two female community members and attempts to communicate with them without involvement of his CMT; and
- (d) past conduct, in particular, his ability to cascade successfully through minimum security and then committing further offences while on day parole after being romantically rejected by a former institutional volunteer.

[34] Finally, the particular concerns about Mr. Howdle must be set in the context of Mission Institution as a whole, and Mission Minimum in particular. The Acting Assistant Warden, Mr. Strijack, described Mission Institution as a clustered facility containing both a minimum and a medium unit within the penitentiary. Mission Minimum has clearly defined perimeters that are not normally directly controlled. Inmates at Mission Minimum are subject to relatively little surveillance and must demonstrate they have the capacity to manage their own behaviour with minimal staff intervention. Mr. Strijack explained that minimum security units have a lower tolerance for problematic behaviour because lower staff presence makes problematic behaviour more difficult to prevent. For example, inmates may freely approach CSC staff at Mission Minimum without the staff member being aware of, or able to control, that approach.

[35] Mr. Strijack explained in a paragraph of his affidavit that:

When there is a concern that a minimum security environment is no longer consistent with an inmate's security requirements, he may be involuntarily moved or transferred to a higher security unit or institution. Where there appears to be a possibility that an inmate's risk level has increased, an immediate transfer is necessary pending a review of that risk level. This is because minimum security facilities, which feature minimal supervision and an open environment, cannot manage the public security risk presented by inmates whose security classification is medium or maximum. Mission-[Minimum], for example, does not have a fenced perimeter. Accordingly, there is nothing preventing an inmate whose security classification is under review (and which may subsequently be increased) from walking away from the institution.

[36] Mr. Howdle prepared a rebuttal of the concerns raised in the A4D challenging many of the claims made in it. Specifically, he disputed the allegations about his attempts to isolate the two female contractors and distance himself from his CMT, his failure to log sexual thoughts, and his heightened emotional state and conduct with institutional staff regarding his apprenticeship books. He appeared and was heard at the Warden's Review Board. The

Warden provided written reasons classifying Mr. Howdle as a medium security inmate and confirming his placement in Mission Medium. I will describe those reasons more fully in considering whether they were reasonable or whether there is any basis to interfere with the judge's conclusion that they were reasonable.

The Judgment Below and the Issues on Appeal

- [37] The issues on appeal are framed differently from the way they were presented to the judge, although there is some overlap.
- [38] The judge addressed whether the immediate movement was consistent with the regulatory scheme. She held that it was and that it was a lawful decision. On appeal, Mr. Howdle says the underlying decision to transfer him was unsupported by evidence and not done in accordance with CD 710-2-4. He says that the Warden's reasons were inadequate because they failed to address whether he should have been moved immediately, and failed to address contradictory and insufficient evidence in the record. He says that the judge erred in undertaking her own analysis of whether the immediate transfer was reasonably justifiable. In any event, she erred in her analysis of the regulatory scheme, and whether the evidence was capable of supporting an immediate transfer.
- [39] As I understand it, Mr. Howdle argues that deficiencies in the immediate transfer process also contaminate the Warden's decision as to his ultimate security classification and corresponding placement. Here he says that he did not receive proper disclosure of the reasons why CSC changed its earlier view, expressed he says in the CPU, that he could continue to be managed in Mission Minimum, to the view in the A4D that he should be moved to Mission Medium. Moreover, he says he did not get proper disclosure of what alternatives to movement were considered by his CMT, nor did he receive sufficient particularity as to the "multiple interventions" by CSC staff needed to manage his behaviour, which were relied upon to justify the move. These failures to disclose undermine, he contends, the procedural fairness of his Warden's Review Board Hearing and render the Warden's decision, which did not grapple with these issues, unreasonable.
- [40] Mr. Howdle's attack in this Court on the Warden's decision, as it relates both to procedural fairness and substantive reasonableness, is different from the position advanced below. I will address his submissions to us. The judge did not comment directly on the matters argued before us. Her focus was on whether the Warden's decision was preordained.

The Law on Habeas Corpus Challenges to Inmate Transfer Decisions

- [41] The principles applicable on an application for habeas corpus are settled. In *Mission Institution v. Khela*, 2014 SCC 24, Justice LeBel wrote for the Court:
- [40] on an application for habeas corpus, the legal burden rests with the detaining authorities once the prisoner has established a deprivation of liberty and raised a legitimate ground upon which to challenge its legality (May, at para. 71; Farbey, Sharpe and Atrill, at pp. 84-86).

This particular shift in onus is unique to the writ of habeas corpus. Shifting the legal burden onto the detaining authorities is compatible with the very foundation of the law of habeas corpus, namely that a deprivation of liberty is permissible only if the party effecting the deprivation can demonstrate that it is justified. The shift is particularly understandable in the context of an emergency or involuntary inmate transfer, as an individual who has been deprived of liberty in such a context will not have the requisite resources or the ability to discover why the deprivation has occurred or to build a case that it was unlawful.

- [41] a writ of habeas corpus issues as of right if the applicant proves a deprivation of liberty and raises a legitimate ground upon which to question the legality of the deprivation. In other words, the matter must proceed to a hearing if the inmate shows some basis for concluding that the detention is unlawful (May, at paras. 33 and 71; Farbey, Sharpe and Atrill, at pp. 52-54).

[Emphasis in original.]

- [42] There is no dispute that immediately moving Mr. Howdle on May 8, 2018 deprived him of his liberty. If the respondent authorities cannot demonstrate the deprivation of liberty is lawful, Mr. Howdle is entitled to a remedy; namely, that he be released from the unlawful deprivation of liberty and returned to his prior status. What that means in a practical sense has been considered in two cases, which in particular involve the situation where a subsequent Warden's decision confirming the new security level and placement has been found to be reasonable: see *Keiros-Meyer v. Canada (Attorney General)*, 2018 BCSC 1104 [Keiros-Meyer #1]; *Keiros-Meyer v. Canada (Attorney General)*, 2020 BCSC 1273 [Keiros-Meyer #2].
- [43] Both the immediate involuntary movement process to which Mr. Howdle was subject, and the later decision to reclassify him as a medium security inmate, must be lawful. If either is not lawful, Mr. Howdle is entitled to be returned to his status preceding the unlawful deprivation of his liberty. Such a conclusion would not, however, quash any underlying decision by CSC that he is appropriately classified as a medium security inmate. As the Supreme Court has stated, certiorari in aid of habeas corpus only employs the writ to grant the court authority to review the full record and ensure it supports the administrative decision: *Khela* at para. 71. Certiorari is not employed, as it is in the Federal Court, to quash the administrative decision: *Khela* at para. 36. In other words, it appears that, even if habeas corpus is granted, prison authorities would be free to begin the transfer process anew, so long as they did so in a lawful manner: *Keiros-Meyer* #2 at para. 84.
- [44] Certain other principles are not contested. The standard of review applicable to a decision to transfer or move an offender is reasonableness: *Khela* at paras. 73-75. The Supreme Court has also stated that procedural fairness in this context is reviewable on a correctness standard: *Khela* at para. 79. If a decision is either unreasonable or procedurally unfair, it will be unlawful.

- [45] To comply with the duty of procedural fairness, an inmate subject to an immediate involuntary transfer must be given all the information considered by CSC in the transfer decision, though a summary suffices: CCRA, s. 27(1). The inmate must be given the opportunity to make representations: Regulations, s. 13(2)(a). CSC must also comply with the specific statutory disclosure requirements for an immediate movement within a clustered institution, described above, including written reasons if the inmate's security classification is changed, and the disclosure of certain documents outlined in CD 710-2-4.
- [46] An inmate transfer decision will be unreasonable where it sacrifices an inmate's liberty interest "absent any evidence or on the basis of unreliable or irrelevant evidence, or evidence that cannot support the conclusion": Khela at para. 74. Moreover, in assessing whether a decision is reasonable, a judge must show deference to the expertise of the decision maker. Correctional decision makers have particular knowledge of the institution and of "the individuals who live and work in it": Khela at para. 76. They are better placed than courts to assess whether an inmate poses a threat to institutional safety and security, which is an inherently context-specific determination requiring "intimate knowledge of that penitentiary's culture and of the behaviour of the individuals inside its walls": Khela at para. 76.

Standard of Review on Appeal

- [47] The parties disagree about the standard of review on appeal. Briefly put, the Crown argues that the standard of review is the appellate standard set out in *Housen v. Nikolaisen*, 2002 SCC 33, and that the issues on appeal raise questions of mixed fact and law to be reviewed on a standard of palpable and overriding error. Mr. Howdle says that this Court should apply the standard for an appeal of a judicial review of an administrative law decision as set out in cases such as *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 46; and *Lemieux v. British Columbia v. British Columbia (Superintendent of Motor Vehicles)*, 2019 BCCA 230 at para. 88.
- [48] Surprisingly, the question of whether the appellate standard of review for a judge's decision in a habeas corpus application is the judicial review or the appellate standard is not clearly settled: see e.g., *Earhart v. Canada (Attorney General)*, 2019 ONCA 980 at para. 30; *R. v. Bishop*, 2009 SKCA 117 at paras. 41-42 (applying the judicial review standard); compare *R. v. Shoemaker*, 2019 ABCA 266 at para. 6; *R. v. Elliott*, 2016 MBCA 70 at para. 7; *Z.B. v. Provincial Director of Adults in Need of Protective Intervention*, 2020 NLCA 17 at para. 32 (applying the appellate standard of review).
- [49] I have concluded that it is not necessary in this appeal to attempt to resolve the issue about the appropriate standard of review on an appeal from an application for habeas corpus. Whatever appellate standard of review applies, I am unable to discern any errors in the judge's analysis of the case that could support appellate interference. As I read the judgment, the judge identified the correct standard of review in respect of the issues she had to decide. She determined that the decisions to transfer were reasonable or complied with

the Regulations. She found that Mr. Howdle was not denied procedural fairness. If we treat the matter as one in which we put ourselves in the shoes of the judge to assess whether the transfer decisions were reasonable, I am of the view that those decisions were reasonable. I see no error in her findings about procedural fairness. If we were to apply the ordinary appellate review, I do not think she made any palpable and overriding errors of fact nor any error in respect of any extricable legal question.

The Immediate Involuntary Transfer

- [50] On appeal, Mr. Howdle contests the decision to move him immediately. He says the judge erred in her interpretation of the procedure set out by CD 710-2-4 and s. 13 of the Regulations. Moreover, he says, the facts do not support the decision to move him immediately to an interim placement. He connects his argument on this ground to alleged deficiencies in the Warden's decision.
- [51] The judge disposed of the issue of Mr. Howdle's immediate transfer briefly. She held:
- [70] Mr. Howdle also appears to argue that his movement to Mission Medium was unlawful because it was not "immediately necessary" to preserve public safety and therefore did not comply with the CD concerning immediate involuntary transfers.
- [71] His argument in this regard also cannot succeed. Mr. Howdle's movement was made pursuant to CD 710-2-4. As it applied to Mr. Howdle, s. 12 of the CD provides that an immediate movement may be made for safety or security reasons:
12. When it is determined necessary to immediately move an inmate for security reasons or the safety of the inmate or any other person, the inmate will:
 - b. be moved to the higher security level location on an interim placement pending a review of his/her security classification level.
- [72] As explained in the Interim Placement Memo, Mr. Howdle's CMT concluded that he was exhibiting behaviours which correlated to his previous pattern of offending. An immediate transfer to a more secure environment was necessary to permit the CSC to assess Mr. Howdle's level of risk. I accept Mr. Strijackk's evidence about the minimal supervision and open environment at Mission Minimum and that it was not an appropriate facility in which to manage the public safety risk presented by an inmate whose security classification level is medium or maximum. The rationale for Mr. Howdle's immediate transfer was appropriately set out in the Interim Placement Memo which was provided to him.
- [73] The decision to effect an immediate transfer complied with CD 710-2-4. I accept that, to effectively manage the potential of a perceived increase in Mr. Howdle's risk level, an immediate transfer to Mission Medium was required pending the review of his security classification and that the CSC decision to effect an immediate transfer was lawful.

- [52] Mr. Howdle argues that the judge erred in law in her interpretation of the immediate transfer process outlined in CD 710-2-4. He says she interpreted it as applying whenever there is a potential increase in risk. Accordingly, rather than being the exception to the usual method of transfer found in s. 12 of the Regulations and s. 8 of the CD, it becomes the rule. In his view, the immediate transfer process has a more narrow application, for example to cases where an inmate has engaged in illegal activity, poses an escape risk, or has been involved in violent behaviour. He contends the immediate transfer procedure should only be employed as an exception in particular circumstances, given its immediate impact on an inmate's liberty. He goes on to illustrate the problems with such an overly broad interpretation of s. 12 of CD 710-2-4 by drawing our attention to the manner in which the lower court's decision has since been taken up in the jurisprudence, citing *Bromby v. Warden of William Head Institution*, 2020 BCSC 1119 at para. 49:
- [49] When I consider the decision in *Howdle v. Canada (Attorney General)*, 2018 BCSC 1775, I am reminded that the presence of an inmate characterized as a medium-security inmate in a minimum-security institution alone may constitute grounds for immediate movement given the risk presented in an open-perimeter environment and with minimal supervision.
- [53] I do not believe that the judge impermissibly broadened the scope of the immediate transfer procedure in CD 710-2-4. In my opinion, the judge identified a variety of circumstances that justified the application of the immediate movement procedure to Mr. Howdle. Those circumstances included the specific characteristics of Mission Minimum as described in Mr. Strijack's affidavit, and the particulars of the potential elevated risk posed by Mr. Howdle's behaviour. The analysis of that risk is informed by the concern, referred to by the judge, that Mr. Howdle was exhibiting behaviours which correlated to his previous pattern of offending. The judge had evidence before her, as I have set out above, of the immediacy of the risk posed by Mr. Howdle, specifically--not simply the risk posed by a medium security offender, generally.
- [54] The increase in potential risk was rooted in concrete behaviour "eerily" similar to his past criminal offending. Although his escape risk was assessed as low, it was not non-existent. CSC expressly assessed the risk to public safety in light of the offences he might commit if he escaped. It seems clear to me that the judge examined whether the decision immediately to move Mr. Howdle was reasonably justified, given the wording of CD 710-2-4, as it applied to Mr. Howdle's specific circumstances. As ever, general statements of principle should be read in the context of the facts giving rise to them.
- [55] Although I have rejected Mr. Howdle's argument that the judge fell into any legal error in her interpretation of the Regulations and CD 710-2-4, I appreciate his concern that if any potential increase in risk automatically justified an immediate transfer pending a security reassessment, the immediate transfer procedure could become the route for all movements within or transfers between institutions. While I am not persuaded that the procedure contemplated by s. 13 of the Regulations, or s. 12 of CD 710-2-4, is properly thought of as an exception to the usual method of transfer, I agree that it is the proper route only where the

necessary conditions stipulated to justify an immediate transfer reasonably apply. Namely, it should only be used where a transfer is determined to be immediately necessary to protect the safety of the inmate or any other person, or to preserve the security of the institution. Judges must examine, with appropriate deference, reliance on immediate transfers, by reference to the application of those criteria to the particular facts of the offender in a specific institutional setting. I should say, however, that, contrary to a submission I understood Mr. Howdle to advance, there will be situations where the potential of a risk to safety alone will be sufficient to justify resort to an immediate movement or transfer.

- [56] Mr. Howdle goes on to argue that the immediate transfer procedure was unreasonably applied to him. He says it rested merely on uncorroborated indications of potential risk, and that it was unsupported by evidence that he posed an escape risk. Moreover, the CPU contemplated that he could continue to be successfully managed in Mission Minimum. His argument is directed both to CSC's decision to immediately transfer him, and to the reasonableness of the Warden's decision to confirm the transfer by placing him in Mission Medium on a permanent basis.
- [57] Mr. Howdle's argument may be summarized as follows. His IPO prepared an updated CPU to aid the parole board in assessing his eligibility for parole in an upcoming review. The substantive content of the CPU appears to have been completed by April 13. The CPU disclosed information about his elevated risk factors, but it also contemplated that Mr. Howdle would continue to be managed within a minimum security setting. The CPU also reflected that Mr. Howdle had not been the subject of any significant security concerns, nor had he required ongoing interventions from the CMT to manage his behaviour while at Mission Minimum. After April 13, it appears that the CPU was updated and reviewed by a more senior official, and then date and time locked on May 3. In the meantime, Mr. Howdle had had two meetings on April 23 and 24 with his CMT. On May 8, the CMT meeting took place which led to the recommendation that he be immediately transferred to Mission Medium.
- [58] Mr. Howdle argues that there is no evidence of any changes in his behaviour between the finalization of the CPU, which contemplates his ongoing placement in minimum security, and the CMT meeting, which would explain why he was suddenly deemed to require an immediate transfer to Mission Medium five days later. He says that he did not receive any disclosure of the basis for the change in the view that he could be managed in Mission Minimum, and that this shows the Warden did not put his mind to whether his circumstances warranted using the immediate transfer mechanism. The disclosure point will be addressed below in considering procedural fairness. For the purpose of substantive reasonableness, Mr. Howdle says the decision to move him was based on insufficient or contradictory evidence and therefore was unreasonable both because the evidence did not justify it and because the decision makers did not grapple with a critical issue: why now, if not before?

- [59] The Crown's primary submission in response is that referring to the CPU is a red herring, because it was prepared for a different purpose from those documents forming the basis of the decision to move Mr. Howdle. The CPU is prepared to assist in determining parole eligibility. It is not addressing security classification, or whether and how a transfer or movement of an inmate should occur. Moreover, it is not normally one of the documents provided to a Warden as part of a Warden's Review Board. It is not normally part of the decision making process, and is irrelevant to it.
- [60] With respect, I do not find the Crown's submission compelling. I accept that the purpose of the CPU is different from a document such as an A4D that explicitly addresses the issues before a Warden's Review Board. That does not necessarily mean, however, that information or expressions of opinion within a CPU are irrelevant to a decision to move or transfer an inmate. Certainly, that information or those opinions must be understood in the context in which they are recorded. It may be, nonetheless, that the information contained within a CPU is material to the decision to invoke a particular transfer or movement procedure. Typically, I would expect that material to be reflected in a document such as an A4D.
- [61] Nonetheless, I do not think Mr. Howdle's argument can succeed. As a starting point, I do not read the documents as demonstrating an unexplained change of opinion as to his ability to be managed in minimum security, as Mr. Howdle argues. To the contrary, I read the CPU as corroborating his CMT's developing recognition that Mr. Howdle's behaviour was deteriorating, and his risk level was escalating. The principal passage in the CPU relied on by Mr. Howdle refers to "the expectations outlined for Mr. Howdle as part of his ongoing management at Mission Minimum security." The expectations included meeting with his IPO, logging of risk factors, and other matters. Immediately following the listing of expectations the CPU states: "The following are some indicators of elevation in risk which the CMT will monitor; lack of cooperation with following rules , sexual preoccupation and indication of inappropriate sexual fantasies, withdrawing from positive supports ...".
- [62] I do not think this document can be read as endorsing or recommending Mr. Howdle's continued management within Mission Minimum. It is not addressing that issue. As I read this document, the author of the CPU first referred to the expectations that had been outlined as part of the management plan when Mr. Howdle was placed in Mission Minimum, but then identified some areas of risk to be monitored by the CMT, again as contemplated originally.
- [63] This is exactly what happened. The evidence suggests that the issues flagged in the CPU led to meetings between Mr. Howdle and his CMT on April 23 and 24. The CPU appears to have been formally completed and time locked on May 3. A CMT meeting then took place on May 8 with a number of officials to analyse the risks posed by the changes in Mr. Howdle's behaviour. It is clear from the summary of that meeting that the issues discussed arose out of concerns first reported in the CPU, concerns which ultimately led to the decision to move Mr. Howdle. The link to the CPU is made clear in the A4D:

Mr. Howdle's most recent Correctional Plan Update (CPU) was completed 2018-04-13 for his legislated parole review. Since this report, Mr. Howdle was transferred on an interim basis in order to have his Offender Security Level assessed given current circumstances. He has continued to show an increasing challenge of controlling his institutional behaviour in terms of interactions with staff members, continued to attempt further isolation of various CMT members and has admitted to current lack of transparency with his CMT in terms of risk management strategies put in place in order to manage and transition him to minimum security.

- [64] When the material documents are read together and in context, it seems clear that the updated CPU recorded the principal concerns arising out of Mr. Howdle's behaviour, but it did not purport to make a recommendation about Mr. Howdle's appropriate placement or security classification. Rather, it laid the foundation for Mr. Howdle's CMT to examine those concerns for the purpose of deciding what his security classification should be, and whether an immediate movement was called for. The documents do not support the contention that CSC had an unexplained and unjustified change of heart about Mr. Howdle's placement. What happened, it seems to me, was an unfolding of considered decision making that was catalyzed by the concerns identified in the CPU, and which led to the decisions under challenge.
- [65] Contrary to what Mr. Howdle suggests, the decision to move him was well founded. It bears repeating that his placement in Mission Minimum was "conditional." CSC exercised its discretion to override Mr. Howdle's security classification as a medium security inmate (with a score of 17) and place him in Mission Minimum. His placement there required him to follow a management plan, and the Warden's Board had instructed his CMT to be cautious and intervene quickly at the first sign of deteriorating behaviour, including reacting inappropriately to negative information.
- [66] Mr. Howdle did not follow the management plan. His CMT recommended that he be moved from Mission Minimum to Mission Medium because there was evidence that his risk indicators were increasing in a manner that was reminiscent of his previous violent offending. Contrary to what Mr. Howdle suggests, the CPU forms part of the evidentiary foundation for his immediate movement. The CPU extensively records many of his developing behavioural problems, concerns that would also be reflected in later documents, such as the A4D, and which would substantially ground the decision to reclassify him as medium security.
- [67] His CMT considered that his elevated risk could not be safely managed in a minimum security setting lacking perimeter fencing in which inmates were expected to be essentially self-monitoring. The concern was the serious risk he posed to the public if he should escape, even if he was classified as a low escape risk. In suggesting Mr. Howdle's immediate transfer pending a review of his security classification, the CMT fulfilled its mandate.

- [68] Accordingly, there was sufficient evidence supporting the decision of CSC to immediately transfer Mr. Howdle. Evidence capable of justifying an immediate risk existed from the time the concerns were expressed in the CPU, and continued to be developed through his meetings with his CMT. I would not say that further evidence had to materialize between the writing of the CPU and the May 8 decision to transfer him in order to justify the immediate transfer. The evidence existed throughout the period.
- [69] It seems to me then that the decision to transfer Mr. Howdle immediately was a reasonable decision. This was also the view of the judge, who brought to bear an appropriately deferential attitude towards assessing the decision to move Mr. Howdle immediately. The changes in Mr. Howdle's behaviour ultimately led CSC to conclude that Mr. Howdle posed a risk to the public if he escaped because his current behaviour was eerily similar to behaviour that had precipitated his previous offences while on day parole. CSC made a judgment call to move him on this basis. The judge rightly deferred to that judgment call which was, as she recognised, well supported by the evidence.

Was the Warden's Decision Reasonable?

- [70] I next turn to Mr. Howdle's argument that the Warden's decision to confirm the interim transfer, in effect keeping him in Mission Medium, was unreasonable. Mr. Howdle argues that the Warden's reasons were insufficient because he did not address whether the immediate transfer was necessary or supportable. He says it was an error then for the judge to assess the merits of the transfer decision herself, rather than to address the deficiency in the Warden's reasons.
- [71] I see no merit in that suggestion. The issue before the Warden was to determine Mr. Howdle's security classification and proper placement within the Institution. It was not whether he should have been moved immediately. I do not think the Warden can be criticized for not dealing with an irrelevant issue. His failure to deal with that question does not lay any foundation for concluding the ultimate decision confirming the placement was unreasonable.
- [72] The judge similarly cannot be criticized for failing to address this issue. The judge focused rightly on the real issue before her: namely, whether the immediate transfer was lawful because it was done in accordance with the regulatory requirements of CD 710-2-4. She concluded that it was and I agree with that conclusion.
- [73] As the judge recognized, institutional heads and CSC staff have considerable expertise in the assessment and management of security risks in an institution. At paras. 91-93, the judge noted that the Warden's decision to confirm Mr. Howdle's move to Mission Medium took account of:
- a) the CMT's subjective assessment of concerns about the appellant's institutional behaviours and his reaction and decision making when confronted with his behaviours;

- b) observations of the appellant during the five months he was in Mission Minimum;
- c) CSC's knowledge of the appellant's past behaviour and pattern of offending;
- d) previous psychological assessments;
- e) recommendations regarding the management of his security risk as set out in earlier case management plans; and
- f) Mr. Howdle's behaviour and reactions during his oral submissions at the Warden's Review Board.

[74] In addition, Mr. Howdle's updated SRS score of 19.5 corresponds with a rating of medium security, which places him outside of the discretionary override for placement at a minimum security institution. Consultation with Security Intelligence, who reviewed Mr. Howdle's file for the purpose of the A4D, indicated that he needed greater control and supervision than could be provided at a minimum security institution. Under s. 18 of the Regulations, one definition of a medium security offender is an inmate who is assessed as requiring a moderate degree of supervision and control.

[75] Finally, Mr. Howdle also criticizes the Warden for failing to grapple with what he describes as inconsistencies in the information in the CPU and the A4D in the placement decision. I have already expressed my view that the documents should not be seen as inconsistent or contradictory in a material way. I do not think there is any merit to the contention that the Warden's conclusion is unreasonable because he did not address, grapple with, or consider any alleged inconsistencies in the information before him.

[76] In light of all of the above, I see no basis on which this Court or the judge below could have reached any conclusion other than that the Warden's decision was reasonable. I do not think Mr. Howdle has identified any basis on which a court could interfere with the Warden's decision. The appellant simply disagrees with the Warden's and the chambers judge's conclusions, and seeks a rehearing of the merits of his case.

Was Mr. Howdle Afforded Procedural Fairness?

[77] Mr. Howdle also contends that the Warden's decision was not procedurally fair. He says that the information he was given did not provide him with sufficient particulars of the "multiple interventions" by his CMT, relied on by the Warden, that were needed to manage his behaviour, or of what alternatives to movement had been considered and rejected. He says that, without that information, he was not able to respond to the case he had to meet. In other words, the issue is not whether Mr. Howdle received the documents he was entitled to, which is not in dispute, but whether he had the information necessary to make a proper response.

- [78] The judge found that Mr. Howdle received the information to which he was entitled, and the requirements of procedural fairness were satisfied. The challenge to disclosure mounted in this Court appears to have a different focus to the issues raised below. Nonetheless, I am satisfied that Mr. Howdle received the disclosure to which he was entitled.
- [79] The disclosure that must be provided has to be assessed in the context of the case that Mr. Howdle had to meet. That case had to do with the view of his CMT that Mr. Howdle was exhibiting behaviours and attitudes that were so similar to what had occurred before his previous offences that the risk to the public if he were to escape justified an immediate transfer. The record is replete with the specifics and details of the information that caused the CMT concern, and on which the A4D is based, including multiple interactions between Mr. Howdle and his CMT. It seems clear that Mr. Howdle was informed of the concerns, recommendations, and interactions with his CMT that would be before the Warden for his consideration at the Review Board. Indeed, his rebuttal to the A4D that was considered by the Warden makes clear that he had the information necessary to meet the case against him, as he was able to respond to substantially all of the concerns that formed the basis for the move.
- [80] Similarly, it is clear from the record that the CMT did not think there was any viable alternative but to transfer Mr. Howdle immediately, and to recommend a medium security classification and placement. The Notice of Involuntary Transfer given to Mr. Howdle reads:
- The CMT has considered all viable options at Minimum security such as a behavioural management plan but given the indicators of increased risk specifically in the area of Public Safety Risk the behaviour is not manageable within a minimum security environment.
- [81] In my opinion, Mr. Howdle received full disclosure of why the management plan, which had been the basis of his placement at Mission Minimum, was no longer a viable option. He was not, in my respectful opinion, deprived of any information necessary to meet the case against him.

Disposition

- [82] I would dismiss the appeal. In addition, the properly named respondent in these proceedings should be the Attorney General of Canada or the Warden of Mission Medium Institution. I would order the style of proceeding be amended accordingly.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice Dickson"

I agree:

"The Honourable Mr. Justice Abrioux"

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