

CANADA / JUDGMENT

Keiros-Meyer v. Canada (Attorney General)

2020 BCSC 1273

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Keiros-Meyer v. Canada (Attorney General),

2020 BCSC 1273

Date: 20200828

Docket: 27643

Registry: Vancouver

Between:

Albert Israel Keiros-Meyer

Applicant

And

Canada (Attorney General)

Respondent

Before: The Honourable Mr. Justice Schultes

Reasons for Judgment

The Applicant, appearing in person:

A.I. Keiros-Meyer

Counsel for the Respondent:

B. Ward

Place and Dates of Hearing:

Vancouver, B.C.

September 20-21, October 15, November 21, 2018;

January 23 & April 12, 2019

Place and Date of Judgment:

Vancouver, B.C.

August 28, 2020

Introduction

- [1] This is an application by Mr. Keiros-Meyer, an inmate of a federal penitentiary, for habeas corpus arising from his involuntary transfer to the Medium Security Unit of the Mission Institution ("Mission Medium") on July 6, 2018. He argues that the transfer, which was from the Minimum Security Unit of that institution ("Mission Minimum"), was procedurally unfair and unreasonable.
- [2] This is the second time he has applied for habeas corpus in relation to a transfer from Mission Minimum to Mission Medium. In his first application, the transfer was found to be unlawful, and he was ordered to be returned to minimum security. Correctional Service of Canada ("CSC") officials complied with that ruling, but then immediately moved him back to Mission Medium pending a hearing on his appropriate location and classification - this time purporting to comply with the required procedures.
- [3] He represented himself in this application and provided very lengthy and detailed written submissions and supporting affidavits. In order to render a comprehensible judgment of reasonable length, I have confined myself to summarizing and engaging with what I understand to be the essence of his arguments.

Background

- [4] Mr. Keiros-Meyer is serving a life sentence for second-degree murder that was imposed in 1993. He came to Mission Minimum in 2017 on a voluntary transfer from a minimum-security unit at another penitentiary.
- [5] His correctional history contained concerns about his inappropriate, sexually-themed interactions with staff members. More generally, he was described in it as overemphasizing his sexuality as an aspect of his personality. This was considered to be a risk factor for future offending.

- [6] He met with Mission Minimum officials upon his arrival there and discussed their expectations of his behaviour. He also signed an updated copy of his correctional plan (a document that is intended to guide his progress during his incarceration), which contained the expectation that his interactions with healthcare staff at the institution "would remain focused on medical issues and conversations are appropriate in nature". This expectation of appropriateness extended to his interactions with all staff members.
- [7] The incident that led to the first involuntary transfer was described in the reasons for judgment of Justice Sewell on the resulting habeas corpus application (*Keiros-Meyer v. Canada (Attorney General)*, 2018 BCSC 1104):

9 On January 23, 2018, Mr. Keiros-Meyer saw the doctor at Mission Minimum. The purpose of his appointment was to obtain antibiotic cream and band aids for his genitals. The doctor's consultation notes indicated that Mr. Keiros-Meyer tried to describe his masturbation practices to the doctor in excessive and uncomfortable detail, which the doctor described as "not an unusual thing". The doctor also noted that Mr. Keiros-Meyer had a heavily tattooed penis, including a tattoo of the words "your name" on the side. The doctor's note indicated that Mr. Keiros-Meyer seemed to enjoy saying "See, your name is on the side of my penis".

10 A male nurse who was present for the appointment also prepared a note confirming that this statement had been made and that the expression on Mr. Keiros-Meyer's face indicated that he was enjoying making the statement.

- [8] He was interviewed about his behaviour by CSC officials the next day. He disclosed additional relevant information to them, which became part of the Assessment for Decision ("A4D"), a CSC document that set out the reasons for his transfer:

23 In addition to referring to the circumstances of Mr. Keiros-Meyer's doctor's visit, this document reported that he has been secretly tattooing himself and that tattooing paraphernalia had been found in his cell when it was searched

- [9] Another assessment that was generated as part of that transfer process also plays a role in the present application:

24 An important tool used by Corrections staff in evaluating an inmate's security classification is a Security Reclassification Scale (SRS), alternatively known as General Statistical Information on Recidivism Scale (G-SIR). This scale consists of 15 questions, the answers to each of which result in a range of scores. The total score arrived at in this scale is very important in deciding what level of security is required for any particular inmate. When Mr. Keiros-Meyer was transferred to Mission Minimum, his score was consistent with him being housed in a minimum security institution.

25 Following Mr. Keiros-Meyer's behaviour on January 23, 2018, his SRS score was raised to 20.5, which put him in the mandatory medium security category. Mr. Keiros-Meyer was also provided with a functional specification showing how the scores for each of the questions on the SRS were determined.

(Importantly for the present application, the new SRS score would then be valid for two years.)

- [10] After being interviewed on January 24, he was transferred to Mission Medium on an interim placement, pending a review of his security classification level. This was pursuant to the procedure set out in Commissioner's Directive 710-2-4 ("CD 710-2-4"), which permits an immediate "movement" if it is determined to be necessary "for security reasons or the safety of the inmate or any other person" (s. 12). In such a case, the inmate must receive an explanation for the movement from the head of the institution or their designate and a document called "Notice of Involuntary Transfer/Movement Recommendation" stating the reasons for the transfer, both within two working days. That document also advises the inmate of their right to retain and instruct counsel without delay, to make representations about the movement in person or writing within two working days, and to request an extension of up to ten working days to prepare and submit a "rebuttal" (s. 13).
- [11] The institutional parole officer will then complete an A4D in relation to the transfer, and the inmate will receive a copy of it, along with a copy of the SRS, the "matrix" used to score the SRS and "any other information that will be used in the decision-making process".
- [12] The alternative procedure provided by CD 710-2-4, in circumstances where an immediate transfer is not required, is to give the inmate the documents supporting the transfer, followed by two working days to respond before it takes place (s. 8).
- [13] It is relevant to know, when dealing with both of Mr. Keiros-Meyer's transfers, that Mission Minimum and Medium are considered to be a "clustered" facility pursuant to another of the Commissioner's directives. This has the effect of incorporating both units in one penitentiary.
- [14] On the habeas corpus application Sewell J. concluded that the Attorney General had failed to provide any evidence showing why it had been necessary to transfer Mr. Keiros-Meyer immediately. Nor did the record provide any evidence from which it could be inferred that it was done for security reasons. Thus, the Attorney General had failed to meet their burden of showing that the deprivation of his liberty was lawful.
- [15] In the event that he had erred in reaching this conclusion, Sewell J. went on to assess the merits of the decision against the applicable standard of reasonableness, as it was then defined by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9. He concluded:

99 In this case, the Decision meets the reasonableness test set out in *Dunsmuir*. The Decision sets out the basis on which the decision is made and identifies the objectives of properly classifying the security requirements of Mr. Keiros-Meyer. The reasons are clearly articulated, intelligible and transparent.

100 Essentially, the Decision came down to assessing the security implications of Mr. Keiros-Meyer's conduct towards the doctor at his medical appointment, his practice of secretly tattooing as a coping mechanism and his failure to appreciate the significance of these behaviours. This assessment engaged the particular expertise of the management of the Institution.

101 I have concluded that there was evidence before the Warden on which he could reasonably have concluded that Mr. Keiros-Meyer was unmanageable in a minimum security facility and that justified the changes made to his SRS scale. The Decision therefore meets the reasonableness test.

The Current Transfer

CSC Action

- [16] Mr. Keiros-Meyer returned to Mission Minimum pursuant to the first habeas corpus decision on July 6, 2018. In his affidavit for this application, Acting Assistant Warden ("A/AW") Strijack deposed that notwithstanding Mr. Keiros-Meyer's successful application, CSC officials still considered him to be a medium security inmate, based on his updated SRS score.
- [17] A/AW Strijack advised Mr. Keiros-Meyer that he was once again to be immediately transferred to Mission Medium on an interim placement basis. In his affidavit, A/AW Strijack described what I took to be the underlying justification for an immediate transfer, which had been absent from the record on the preceding application.
- [18] He explained that Mission Minimum's perimeters, while clearly defined, "are not normally directly controlled", and inmates "are subject to comparatively less surveillance" than in higher security. As a result, "inmates must demonstrate, over and above their security classification, that they have the capacity to manage their own behaviour with minimal staff intervention." Further, "when there appears to be a possibility that an inmate's risk level has increased, an immediate transfer is necessary pending review of that risk level." This is because the "minimal supervision" and "open environment" of a minimum security facility cannot manage the risk to public safety posed by inmates who have a higher security classification. He provided the example of an inmate whose classification was under review simply walking away because of the lack of fences.
- [19] After advising Mr. Keiros-Meyer of the transfer, A/AW Strijack provided him with a memo titled "Access to Legal Counsel/Recommendation for Interim Placement". A/AW Strijack was the author of this memo. It set out the reasons underlying the recommendation to change Mr. Keiros-Meyer's placement to medium security. This included a recap of his identified risk factors, going back to an assessment in 2012, and the "catalyst" provided by his

interaction with the healthcare providers on January 23, in which he had "displayed high risk behaviours that were directly linked to [those] [r]isk [f]actors". These were in violation of the behavioural contract that he had signed upon arriving at Mission Minimum.

- [20] The memo also alleged that when he appeared before the Warden's Review Board to challenge the first transfer, Mr. Keiros-Meyer had failed to provide a plan to assist in managing his risk. Instead, he had "deflected responsibility for his actions". A particular concern about his risk to the public arose from the fact that he had hidden his "negative coping techniques" (which I took to be his tattooing) from his case management team since his return to minimum security classification in 2015.
- [21] The reasons for the second transfer, as set out in this memo, all related to the circumstances of the first transfer and the administrative process that had followed it.
- [22] The memo also addressed the need to transfer Mr. Keiros-Meyer immediately. A/AW Strijack wrote that he had carefully reviewed Sewell J.'s habeas corpus ruling and that CSC officials were complying with the order to return him to minimum security. However, "given the seriousness of the information" an interim placement to medium security was "the only viable option" to ensure public safety and the safety and security of the institution. This was because Mission Minimum could not provide the "structure and supervision" that Mr. Keiros-Meyer required. Instead, his risk "requires the structure of a medium security facility while [his] case [was] reviewed."
- [23] As he did in his affidavit for the present application, A/AW Strijack related this recommendation to the open environment and minimal requirement for supervision at Mission Minimum, including its less frequent mandatory contacts between staff members and inmates than in medium security, as well as its "open perimeter" and lack of a fence. Mr. Keiros-Meyer's limited understanding and ability to monitor his risk factors, and his failure to maintain open and honest communication with his case management team were described as being inconsistent with that lower level of security.
- [24] A/AW Strijack referred to having considered alternatives for dealing with Mr. Keiros-Meyer, short of an immediate transfer. These would have consisted of a behavioural management plan, increased reporting to the duty desk at Mission Minimum, increased monitoring, and regularly scheduled meetings with the institutional parole officer. He concluded however that these would be insufficient to address the risk and that therefore Mr. Keiros-Meyer "cannot be housed [in minimum security] even for a short time because of his current security rating and security considerations specific to his case."
- [25] After being asked if he had any questions, Mr. Keiros-Meyer requested to speak to a lawyer. A/AW Strijack deposed that because Mr. Keiros-Meyer was considered to be a medium security offender and Mission Minimum has no secure phone room, he told him that his access to counsel would be facilitated once he arrived at Mission Medium.

- [26] On July 9, Mr. Keiros-Meyer met with Institutional Parole Officer ("IPO") Kevin Johnson. According to IPO Johnson's notes, Mr. Keiros-Meyer apologized for the behaviour that had resulted in his interim placement to medium security, and advised that he needed to "work more on understanding his behaviour and staying away from activities, thoughts and behaviours which increase his risk and promote his old life". He expressed an intention to "work with his [case management team], [p]rograms and other supports to gain insight into his behaviour and garner support for a reduction in his security."
- [27] On July 10, IPO Johnson gave Mr. Keiros-Meyer the Notice of Involuntary Transfer/Movement Recommendation required by CD 710-2-4. Although this was not within the two working days of the movement required by the directive, the substance of this document was virtually identical to that of the Access to Legal Counsel/Recommendation for Interim Placement that he had been given at the time of his movement back to medium security, which had contained the reasons for it.
- [28] Mr. Keiros-Meyer signed an acknowledgment that he had received this notice and that, among other things, he had been provided with a reasonable opportunity to retain and instruct counsel, that he wished to make representations about the proposed transfer, and that he wished to have an extension of time in which to make them. The requested extension was six days.
- [29] IPO Johnson wrote that during their interaction he had provided Mr. Keiros-Meyer with "all paperwork, including but not limited to an SRS scale "
- [30] A/AW Strijack deposed that before the Warden's Review Board dealing with the transfer, Mr. Keiros-Meyer was also provided with an A4D, dated July 10. It was written by IPO Johnson. It set out the circumstances that had led to the first transfer, Mr. Keiros-Meyer's measurable risk factors and his SRS score which, as I have mentioned, remained valid from the time of the first transfer. The A4D noted that Mr. Keiros-Meyer's "overall security rating suggests a medium classification."
- [31] Dealing with his history, the A4D noted the past concerns about Mr. Keiros-Meyer's preoccupation with his genitalia, his efforts to engage staff in inappropriate conversations concerning it, and the concerning relationship between his self-tattooing and his risk. It noted that he had not received treatment in the six months that he had been back in Mission Medium after the first transfer but that he was on the waiting list for a "maintenance" program.
- [32] The A4D concluded that while Mr. Keiros-Meyer demonstrated an "academic" understanding of his risk factors, he had a minimal "intrinsic" understanding of them. It reported that he had indicated a desire to demonstrate such an intrinsic understanding through such behaviour as being more open with his case management team.

- [33] Ultimately, the A4D recommended him for continued medium security placement "due to the identified deteriorating behaviour[,] which included ongoing secretive behaviour directly linked to his crime cycle and not meeting the behaviour expectations of a minimum security offender."

Mr. Keiros-Meyer's Rebuttal Submissions

- [34] He provided two written submissions, first on July 16 and then a supplement on July 19, the date that the Warden's Review Board hearing was held.
- [35] In the July 16 submission, he sought a return to minimum security, preferably to the facility with the greatest number of aboriginal programs possible. He asked that this take place only after he had completed a professional cook training course that was ongoing.
- [36] He proposed an extensive list of strategies for managing his risk in minimum security, amounting to an increased level of supervision of his activities and various restrictions on his freedom.
- [37] He recounted his return to Mission Medium pursuant to the court decision, and quoted A/AW Strijack explaining to him that CSC had complied with the procedural basis for the decision, by "reclassifying" him back to Mission Medium under the "corrected" procedure.
- [38] The core of his submission was his explanation of his numerous areas of progress at Mission Medium over the preceding six months, which he argued had not been taken into account when he was moved back. He quoted IPO Johnson as suggesting that perhaps the movement had resulted from a lack of information about his progress, and about his "deeper insights gained only through sustained positive behaviour".
- [39] He said that he had mentioned some of the indications of his progress to IPO Johnson, but they had not been included in the A4D. These included his lack of any institutional incidents or violations, his high marks in the professional cooking course, the cessation of his tattooing, his apology to and subsequent positive interactions with the institutional doctor, and his renewed focus on "supporting and honouring" his family.
- [40] Other indications of his progress, which he had not had the opportunity to mention to IPO Johnson due to the brief duration of their meeting, included: his efforts to gain greater understanding of his behaviour, such as by keeping a journal about his emotions; renewing his commitment to his family by cancelling a request to be transferred to serve his sentence in the country of his birth; working with the facilitator of restorative justice "alternatives to violence" program; and receiving advice from Indigenous elders and other spiritual advisors about the direct relationship between his risk factors and his sexuality. He had also considered his past assessment reports and the psychological underpinnings of his behaviour.

- [41] His insights about the role played by his sexuality had led him to cease "sexual activity with random casual or multiple partners" within the institution, and instead focus on dealing with the problems in this aspect of his life. (He added that he had updated IPO Johnson further on these positive changes when they met on July 11.)
- [42] These submissions were supported by reports confirming his subsequent appointments with the doctor (which had proceeded without incident), his efforts and behaviour within the institution, and his performance in the cooking course, as well as by a letter from the facilitator of the restorative justice program, who endorsed his return to minimum security.
- [43] On the merits of the transfer, Mr. Keiros-Meyer made submissions that foreshadowed his submissions on this application. In overview, he argued that the decision was based on the same information that had led to the confirmation of the first transfer, and had not taken into account his progress since then; it did not take into account the alternatives of restricting his behaviour at Mission Minimum, transferring him to another minimum security facility or transferring him on a non-emergency basis so he could make submissions while still in minimum security; he had not been properly "returned" to minimum security pursuant to Sewell J.'s order; and (as I have previously summarized) IPO Johnson had not fully and accurately reported all of the examples of his progress that he had provided.
- [44] In his July 19 supplement, he began with an extensive apology for the conduct that had led to the first transfer. He acknowledged the concerns that his inappropriate comments to the medical staff and secretive tattooing would have raised, given their connection to his lifestyle at the time he committed the murder.
- [45] However, he once again stressed the positive effects of his efforts over the ensuing six months and the greater insights he had gained into his behaviour as a result. Of particular significance, he had faced up to his past problems at Mission Medium, where he had been assigned at several earlier points in his incarceration, and actually benefited from remaining there for a further period. He elaborated on the extensive management plan that he had previously proposed to allow him to stay in minimum security. Finally, he focused again on the flaws in the current transfer: the absence of a transfer warrant, the failure to provide him with access to counsel immediately and the inadequate disclosure of the results of his past reviews, his consultations with elders and spiritual advisers, the most recent scoring criteria for the SRS, and the results of his previous institutional charges.

Warden's Review Board Decisions

- [46] The Warden's Review Board process produced two documents reflecting the analysis and decision: "Referral Sheet For: Invo[luntary] Mov[ement] Within Clustered Site" and "Referral Decision Sheet For: Offender Security Level". Both were issued on July 25. Their contents are almost identical, with slight variations to address the specific final decisions being provided by each one.

- [47] In them, the warden summarized Mr. Keiros-Meyer's oral submissions at the hearing about the positive insights he had gained in the preceding six months, his proactive steps to cease his harmful behaviours, and his resulting belief that he is manageable in minimum security. His oral submissions had also acknowledged his harmful behaviours, expressed appreciation for the intervention team having caught him and explained that he was glad to have spent the resulting period at Mission Medium.
- [48] Later in the decisions, the warden referred to the contents of the written rebuttals, including Mr. Keiros-Meyer's journaling, family support, restorative justice participation and guidance from elders to gain greater insight.
- [49] The warden described A/AW Strijack and IPO Johnson challenging Mr. Keiros-Meyer during the hearing about the secretive nature of his tattooing, and the fact that it had continued for two years despite the controls that were then in place, his ongoing participation in programs and the involvement of his case management team.
- [50] IPO Johnson expressed the view that such secretive behaviour was not indicative of a minimum security inmate, and that there was only Mr. Keiros-Meyer's "own word to go on" that he had been more open in his behaviour during the last six months. In any event, IPO Johnson suggested that six months of positive behaviour could not address two years of secretive actions. As he expressed it, "There is a need to demonstrate change". He also questioned whether Mr. Keiros-Meyer's past participation in maintenance programs actually reduced his current risk, and whether further such programs would assist in that regard. On a more positive note, he stressed that Mr. Keiros-Meyer's greater understanding of his risk would provide him with a potential opportunity to return to minimum security.
- [51] A key portion of the warden's reasoning was expressed in the following paragraphs:
- There is a documented history of you not being cognizant of boundary issues and they have resulted in you previously becoming unmanageable in a minimum security environment. You hid this behaviour for two years and with approximately twenty-five years of incarceration, your focus appears to be on the past. There is a direct link between institutional behaviours, risk related to the index offense [sic] and your criminal offence pattern. You have yet to demonstrate an ability to appropriately manage negative thoughts or behaviours.
- While you are able to verbalize a good understanding of the risk related issues, the pattern remains the same. There is an inability on your part to use the resources available in an open setting or even in a structured setting to assist you managing your risk. You continue to display the academic understanding of your risk detailed in the file information and display no in depth understanding, nor an ability to deal with situations of risk related behaviour.
- [52] In response to Mr. Keiros-Meyer's proposed enhanced management plan to allow him to remain in minimum security, the warden observed that the level of intervention that Mr. Keiros-Meyer was proposing did not meet the criteria for "low institutional adjustment", which I took to be a prerequisite for minimum security classification.

- [53] Addressing Mr. Keiros-Meyer's procedural arguments in his rebuttal, the warden concluded that (1) because Mission Minimum and Mission Medium are considered a "clustered site" under the applicable legislation and regulations, no transfer warrant was required; (2) the lack of secure facilities to contact counsel at Mission Minimum amounted to a compelling circumstance justifying a delay in implementing his right until he reached Mission Medium; and (3) he had been provided with all relevant information about his interim placement, as required by CD 710-2-4.
- [54] The warden noted the previous recalculation of Mr. Keiros-Meyer's SRS score in connection with the January incident, fell within the medium security rating (he erroneously described as "minimum security", but in light of the material generated in support of the first transfer it is clear that the score in question falls within medium security).
- [55] Dealing with Mr. Keiros-Meyer's institutional adjustment rating, he concluded that it should be assessed as "moderate":

It is noted there have been no incidents or charges during the period you have resided at Mission Institution (Medium). There is a significant history of inappropriate behaviours towards staff as detailed in the Assessment for Decision. The two years of maladaptive coping is highly concerning and there is a need for significant period of positive behaviour. Overall your behaviour reflects the need for regular and direct supervision of a medium security institution. Your behaviours would require a level of special management intervention, which does not meet the criteria of set out in CD 710-6 for Low institutional Adjustment. Accordingly, you are assessed as a Moderate institutional adjustment.

- [56] The warden concurred with the recommendation that Mr. Keiros-Meyer's escape risk rating should remain as "low".

- [57] With respect to Mr. Keiros-Meyer's risk to public safety rating, the warden observed:

As noted in the Assessment for Decision report, the 2012-08-27 Psychological Assessment notes 31 indicators of risk. Highlighted as areas of concern within the report were you being "overenthusiastic about some aspects of your life; not considering others' perspectives; behaving in a self-centered, narcissistic manner; appearing to have multiple relationships; pushing staff boundaries; being less-communicative in general, not taking responsibility for your actions and their consequences; and minimizing problems." The detailed behaviours are a direct correlation to these risk areas and at this point, you do not appear to be able to manage your risk areas.

You successfully hid your negative coping techniques from your CMT since the return to Mountain Institution and eventual transfer to Mission Institution (Minimum). During the Warden's Board you stated you planned on speaking with the programs officer at the minimum regarding the on going issue but lacked the rapport with that individual to disclose your actions. Communication with all members of the CMT is the key to any individual's success and you have not displayed the ability to manage your risk related issues. There remains a need for you to focus on using the experiences gained within programs to allow you to demonstrate management of

your risks. There is a need for a sustained period of manageability as well as a need for you to move beyond the academic understanding of your risk related areas.

[58] Thus, he confirmed that a "moderate" rating for this level of risk was appropriate.

[59] The upshot of all of this was that the decisions confirmed Mr. Keiros-Meyer's transfer and his medium security classification.

Application for Cross-Examination and Additional Disclosure

[60] At the end of his submissions in the present application, Mr. Keiros-Meyer applied to cross-examine A/AW Strijack on his affidavit, for subpoenas to compel the warden and an Indigenous elder who had provided him with ongoing support to attend the hearing to give oral testimony, and for production of any available recordings of his interactions with A/AW Strijack during the initial notice process and the proceedings at the Warden's Review Board hearing. I concluded (at 2019 BCSC 2457) that Mr. Keiros-Meyer had not shown that any of the procedures or disclosure he was seeking would assist in resolving the actual issues on this application, and dismissed his application.

Governing Principles

[61] Habeas corpus, as administered by provincial superior courts, is an essential tool for determining the lawfulness of a deprivation of an inmate's residual liberty, which can include a change in their security classification. Lawfulness in this context includes whether the inmate was accorded procedural fairness in the making of the decision, and whether the decision was reasonable. Once a deprivation of that residual liberty has been shown, the onus shifts to the authorities responsible for the inmate's custody to show that it was lawful. (The Attorney General concedes that there has been such a deprivation in this case.)

[62] Although other bases for a finding of unreasonableness are possible, "a decision will be unreasonable, and therefore unlawful, if an inmate's liberty interests are sacrificed absent any evidence or on the basis of unreliable or irrelevant evidence, or evidence that cannot support the conclusion": *Mission Institution v. Khela*, [2014] 1 S.C.R. 502 at paras. 34, 52 and 74.

[63] At the time that *Khela* was decided, the governing authority on the assessment of reasonableness was still *Dunsmuir*, so the focus was on whether the administrative decision in question fell within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" and exhibited "justification, transparency and intelligibility" (*Dunsmuir* at para.47). This was the approach that Sewell J. used in assessing the reasonableness of Mr. Keiros-Meyer's first transfer, as the excerpt from his analysis shows.

- [64] The Supreme Court of Canada recently clarified the approach to assessing the reasonableness of administrative decisions in Canada (*Minister of Citizenship and Immigration*) v. Vavilov, 2019 SCC 65. While the principles in *Dunsmuir* were not discarded, the Court gave more specific guidance about how the reasonableness analysis is to be carried out.
- [65] In particular, Vavilov directed that the focus of the reviewing court must be on the decision in question: both the decision-maker's process and the outcome. The reviewing court does not ask whether it would have reached the same decisions (para.83). Nor should a standard of perfection, or language equivalent to what would be found in court decisions, be required - a specialized decision-maker will often use technical language appropriate to their expertise (paras. 91-93).
- [66] Rather, the court is to consider first whether the decision was a product of internally coherent reasoning:

102 To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error"... However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived"... Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment"

103 While, as we indicated earlier (at paras. 89-96), formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point

104 Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".

[internal citations omitted]

[67] Significantly, even if the outcome is reasonable, it is "not normally appropriate" for the reviewing court to devise a line of reasoning that could have supported it, when such reasoning was not provided by the decision-maker. Specifically, "it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome" (para. 96).

[68] In addition, the decision "must be justified in relation to the constellation of law and facts" that are relevant to it (para. 105). To assist in this aspect of the analysis, the Court set out "a number of elements that will generally be relevant in evaluating whether a given decision is reasonable":

106 namely the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.

[69] Thus, the discretion exercised by the decision-maker must fall within the statutory purposes for which it was granted, and must be guided by any other relevant statutory regimes or binding court decisions that may have dealt with the language or issue in question (paras. 108, 111-112).

[70] While the decision maker does not have to engage in a formal process of statutory interpretation, its application of the governing legislation "must be consistent with the text, context and purpose of the provision" (para. 120).

[71] The reviewing court must not reweigh or reassess the evidence that was before the decision maker. However, "[t]he reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it" (paras. 125-126).

[72] The Court's comments on the decision makers' handling of the participants' submissions are particularly useful in this case:

128 Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis", or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion"... To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the

process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning

[internal citations omitted]

[73] A further consideration is that, "[w]here a decision maker does depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons", with the decision being unreasonable if it fails to meet this burden (para. 131).

[74] Finally, in the case of "decisions with consequences that threaten an individual's life, liberty, dignity or livelihood", the decision maker "must explain why its decision best reflects the legislature's intention" (para. 133).

Positions and Discussion

Procedural Fairness

Not Actually "Returned" to Mission Minimum

[75] Mr. Keiros-Meyer submits that Sewell J.'s order was not complied with because he was simply driven to Mission Minimum and put into a secure building, where he was advised of his immediate return to medium security, without being subjected to any of the usual intake procedures as an inmate of Mission Minimum. He argues that his successful habeas corpus application triggered his "discharge" from medium security, thus requiring that the steps set out in the Corrections and Conditional Release Regulations (the "CCRR") to classify him to minimum security again be taken, including the full classification review that is required under the directives. In essence, he should have had the "residual liberties" of minimum security restored to him, in accordance with Sewell J.'s ruling, before a new transfer process was begun.

[76] Instead, as he elaborated in his arguments about unreasonableness, the transfer was carried out without any new supporting information. He submits that it was arbitrary to subject him to the transfer automatically, solely on the basis of his "existing" classification.

[77] On the issue of his security classification at that point, he suggests that in addition to simply ordering the release of the inmate from the form of detention that has been found to be unlawful, there is no reason why the provincial superior courts' concurrent jurisdiction with the Federal Court in habeas corpus should not include the ability to set aside a security classification, as the Federal Court is permitted to do.

[78] In addition, he submits A/AW Strijack misinterpreted the effect of that decision when he wrote in the Access to Legal Counsel/Recommendation for Interim Placement that "[a]s per the Court's decision Mission institution (Medium) was seen as the appropriate medium security institution " In fact, Sewell J.'s decision did not include any determination to that effect.

- [79] Mr. Keiros-Meyer also notes that the document served on him was completed before Sewell J.'s order was complied with, and that in it A/AW Strijack indicated that "[t]he A/Warden has been consulted in regards to this recommendation." This raises concerns about who that "A/Warden" was, including whether it was the warden who ultimately ruled on his transfer, and what information was received and considered by that person as part of the consultation. (As I will summarize, Mr. Keiros-Meyer also argues, as a further aspect of procedural fairness, that any such information should have been disclosed to him, as forming part of the material that was relied on in reaching the transfer decision.)
- [80] Counsel for the Attorney General responds that these arguments misconceive the effect of the previous successful habeas corpus application. While it led to Mr. Keiros-Meyer's physical release from the form of detention that had been found to be unlawful (the immediate transfer to medium security), the decision underlying it, namely that he was appropriately a medium security prisoner, was not quashed by it.
- [81] On this point counsel relies on the decision at the Court of Appeal level in Khela (2011 BCCA 450, paras. 88, 94), where it was observed that only the Federal Court of Appeal could quash a transfer decision, and that the proper order should instead have been, "to release Mr. Khela from detention in Kent Institution and to return him to incarceration in a medium security institution to be dealt with there as the prison authorities considered appropriate" (emphasis added) (para. 88). Or, as it was expressed in *Ewing v. Mission Institution* (1994) 92 C.C.C. (3d) 484 (B.C.C.A.):
- 53 The important point to note from the Miller case [*R. v. Miller*, [1985] 2 S.C.R. 6] is that the remedy granted by habeas corpus is the physical release of the petitioner from some form of restraint.
- [82] I agree with counsel for the Attorney General that the effect of the successful habeas corpus application was to release Mr. Keiros-Meyer from the unlawful deprivation of his liberty, in the form of his unlawful transfer, and return him to his physical location before it occurred.
- [83] The basis of the order was that the failure of CSC officials to justify Mr. Keiros-Meyer's immediate movement, either at the time it was carried out or in the habeas corpus application, had rendered the transfer unlawful. Sewell J.'s order did not purport to review the underlying increase in security classification that had led to the transfer. In fact his conclusion was the opposite: if he had been incorrect on the immediate movement issue, he would have upheld the warden's decision confirming Mr. Keiros-Meyer's transfer to medium security as reasonable.
- [84] As a result, the officials were entitled to view Mr. Keiros-Meyer as they had before they unlawfully transferred him immediately - as an inmate whose anticipated classification based on his risk factors exceeded the ability of a minimum security facility to accommodate safely. They were not required to re-admit him to Mission Minimum, permit him to experience the additional residual liberty available there, or conduct a new classification process that ignored the previous information or conclusion of the Warden's

Board. This is made explicit by the final paragraph of Sewell J.'s reasons:

105 Nothing in these reasons is intended to prevent further consideration of the appropriate level of security for Mr. Keiros-Meyer in accordance with the CCRA and the procedure set out in CD 710-2-4.

[85] That is in fact what then occurred. The difference between the first and second transfers was that in the second one the documents provided to Mr. Keiros-Meyer, both upon his immediate movement and before the Warden's Board hearing, set out the justification for an immediate movement. This had the effect of informing him fully of that justification and triggering the exercise of discretion in subjecting him to an interim placement pursuant to s. 12 of CD 710-2-4.

No Valid Transfer Warrant

[86] As counsel for the Attorney General points out, this argument was dealt with directly by Sewell J. in his decision on the first transfer:

41 I accept the respondent's submission that Mr. Keiros-Meyer was not transferred from one institution to another and that s. 29 of the CCRA is therefore not applicable to him. I find that Mission Institution is a clustered institution as defined in Commissioner's Directive 706. Section 97 of the CCRA gives the Commissioner the authority to make rules. Commissioner's Directive 706 is such a rule. Therefore no warrant was required to effect his transfer from one unit to another within a clustered institution.

[87] While he acknowledges that aspect of the ruling, Mr. Keiros-Meyer says that the circumstances of the second transfer are sufficiently different to lead to a different outcome on this application.

[88] For background, he notes that s. 29 authorizes the Commissioner (or, pursuant s. 5(1) (b) of the CCRR, the Commissioner's designate) to transfer an inmate to "another penitentiary". Section 16 of the CCRR provides that such a transfer "shall be effected by a warrant to transfer".

[89] While he concedes that CD 710-2-4 does not require transfer warrants for movements within a clustered institution, he submits that its "parent" directive, CD 710-2, regarding "Transfer of Inmates", requires them for all transfers to a higher level of security, without exception. More importantly, CD 710-2-4, as a mere "policy", cannot override the express requirement for a warrant in s. 16 of the CCRR.

[90] He weaves into this argument another aspect of Sewell J.'s ruling. The Notice of Involuntary Transfer for the first transfer had purported to rely on s. 29. If that section had been engaged, a transfer warrant would have been required. However, Sewell J. found that this "was an immaterial error that did not affect the validity of the Notice or deprive the Institutional Head of the jurisdiction to proceed with the transfer" (para. 43). Mr. Keiros-Meyer argues that in light of the circumstances of the second transfer, that reference to s. 29

should now be seen as an intentional and substantive error on the part of the CSC officials, one that went to their jurisdiction to make the second transfer as well.

- [91] He provides an extensive analysis of the actual physical relationship between Mission Minimum and Mission Medium (also noting the absence from the record of any certification by the Attorney General that they are a single penitentiary), and the various practical separations between them, to show that in reality they operate as separate entities and institutions.
- [92] The absence of a transfer warrant is more than a technical deficiency in Mr. Keiros-Meyer's submission, because such a warrant would have contained vital information about the origins of the transfer, which he could have followed up on in order to challenge the transfer more effectively.
- [93] A more technical, but no less significant deficiency he identifies is that s. 11 of CD 710-2-4 provides that the Institutional Head or Deputy Warden have the authority to approve a transfer to a higher level of security with a clustered institution, while the "office in charge" may do so only "outside of regular business hours". The current transfer took place at 1:00 pm, within normal business hours, and A/AW Strijack was neither an institutional head nor a deputy warden.
- [94] The Attorney General responds that Sewell J.'s ruling on this issue remains directly on point and is binding in the current circumstances.
- [95] Given that the parties and the issue are the same, this could be considered a case in which Mr. Keiros-Meyer is estopped by Sewell J.'s decision from raising an argument that has already been conclusively decided against him. However, even if one engages with the merits a second time, his argument is not persuasive.
- [96] Fundamentally, it fails to grasp the basis on which subordinate legislation and administrative directives are made. Sections 16 and 29 of the Corrections and Conditional Release Act ("CCRA") create the requirement for a warrant when an inmate is transferred between penitentiaries.
- [97] As Sewell J. explained, the Commissioner is given the authority to make rules pursuant to s. 97 of the CCRA and the directive establishing the two Mission facilities as a clustered institution is such a rule. It does not subvert the intention of s. 29 or exceed the authority delegated under the CCRA to designate two institutions as effectively a single penitentiary for the purposes of transfers. Mr. Keiros-Meyer's efforts to distinguish these two particular institutions on a practical basis also does not undermine the legitimacy of the Commissioner's designation.

- [98] Finally, despite Mr. Keiros-Meyer's resourceful argument, the reference by A/AW Strijack in the initial notice to having consulted with the "A/[which I infer meant Acting] Warden" is a sufficient indication that the immediate movement within business hours was approved by one of the required officials under CD 710-2-4.

Applicable Commissioner's Directives Not Followed

- [99] Mr. Keiros-Meyer submits that there is no actual justification for his immediate movement in the Access to Legal Counsel/Recommendation for Interim Placement or Notice of Involuntary Transfer/Movement Recommendation memos, either the basis for his classification or the security risks that supposedly required it to take place immediately.
- [100] The conclusion that he could not be housed safely in minimum security because he was a medium security inmate reflects an incoherent analysis, he says, because the whole purpose of the transfer process, culminating with the Warden's Board, was to determine those exact questions - what his classification and location should be. The CSC officials let their erroneous conclusion about his existing classification create false urgency about what would be his most suitable facility pending a classification review. The incorrect allegation that Mission Medium was the most suitable facility "[a]s per the Court's decision" is significant under this heading as well.
- [101] This process also involved the rejection of numerous relevant considerations, such as the alternative of enhanced security measures and monitoring within Mission Minimum, and the absence of any new information on his progress and behaviour. The options of temporally transferring him to an institution with multiple levels of security (such as Pacific Institution Regional treatment Centre), or choosing the other option provided by the directive (placing him in administrative segregation within Mission Minimum) were not canvassed either.
- [102] Crucially, the process was based on an SRS score that was not "accurate, complete and up to date". The CSC is required by s. 24(1) of the CCRA to take all reasonable steps to ensure that the material it relies on meets that description. The scoring of Mr. Keiros-Meyer's SRS was based on the 2001 "technical specs". A more recent version of those "specs", issued in 2012, contains instructional notes that would have led to his limited history of disciplinary incidents over the previous year, and his progress within Mission Medium more recently, being scored more favourably, resulting in a score consistent with minimum security classification. (In an affidavit from the previous habeas corpus application, A/AW Strijack described the 2012 document as "an instructional memorandum for staff" who are responsible for inputting information relating to inmates' SRS scores. He said that this document "is not typically provided to offenders" and was not relied on by the warden in reaching the (first) transfer decision.)

- [103] Counsel for the Attorney General submits that the justification for an immediate transfer pursuant to the procedure contemplated in CD 710-2-4 were clearly stated in both the Access to Legal Counsel/Recommendation for Interim Placement and Notice of Involuntary Transfer/Movement Recommendation memos. They referred to his SRS rating, his behaviour requiring structure and supervision beyond what was available at Mission Minimum, the inability to manage his public safety risk in an open-perimeter facility, even while his risk was being reviewed, and the inadequacy of alternatives such as a behavioural management and increased monitoring. He was also provided with the necessary notices and additional documents required by CD 710-2-4, all within the required time periods.
- [104] It is important to keep in mind that at this stage we are dealing with compliance with the Commissioner's directives as an aspect of procedural fairness. What was found to be lacking in the first habeas corpus application was any justification for an immediate movement. I am satisfied that both the initial and subsequent memos in this case provided a sufficiently detailed and transparent identification of the risks posed by Mr. Keiros-Meyer and the corresponding inadequacy of Mission Minimum to cope with them to trigger the application of s. 12 of CD 710-2-4 and fully inform him of the basis of the decision pursuant to s. 13. The balancing of competing considerations and the scoring of the SRS are potential aspects of the reasonableness analysis.
- [105] I cannot account for the use of the term "[a]s per the Court's decision" in reference to the reasons that Mission Medium was believed to be the most suitable facility. Certainly Sewell J. did not make that finding. Perhaps A/AW Strijack was making reference to Sewell J.'s final comment that his decision was not intended to restrict subsequent decisions about Mr. Keiros-Meyer's appropriate level of security. Regardless, to the extent that it may have been a misstatement, I do not find that it prejudiced Mr. Keiros-Meyer by depriving him of any essential information, or that it undermined the grounds for applying s. 12.

Right to Counsel Infringed

- [106] In the first application Sewell J. found that s. 10 of the Charter was not engaged, on the basis that Mr. Keiros-Meyer was not "arrested or detained" as that provision envisions, citing *Richer v. Pinel*, 2003 FC 887.
- [107] Mr. Keiros-Meyer relies on a different line of authority, citing the decision in *Williams v. Canada (Regional Transfer Board)*, [1993] 1 F.C. 710 at para. 28, in which it was found that a transfer of an inmate to maximum security was a "new and fresh detention" that triggered his right to counsel pursuant to s. 10(b) of the Charter.
- [108] Based on this authority, he submits that there were several areas within minimum security where he could have been allowed to exercise his right after being advised of the immediate movement, such as the inmate calling area, the legal visits room, or the duty office. Since he was in handcuffs at the point he was advised of the involuntary movement, he could also have been placed in a holding cage and given a phone to use there.

- [109] He seeks to dispel the suggestion that an immediate call would not have had any effect on his involuntary movement. Without legal advice, he was like "a deer caught in the headlights" when faced with it, and he contends that A/AW Strijack effectively drew an adverse inference from his lack of a response to the content of the memo he was served with. In the absence of access to counsel their interactions amounted to an improper interview of him, analogous to police interviews of suspects who have been denied such access in s. 10(b) Charter cases.
- [110] The Attorney General's counsel responds that access was permitted as soon as secure facilities in which to make a call were available, and that the absence of such facilities at Mission Minimum provided a compelling reason to delay the right being exercised.
- [111] More fundamentally, the analogy to the s. 10(b) right upon arrest or detention is not apt, counsel says, and there is no right to make submissions at the time of an immediate transfer - under the directive inmates are to be advised within two working days of that right - so there was no prejudice to Mr. Keiros-Meyer caused by the brief delay in his access.
- [112] The circumstances under which an inmate is entitled to be advised of their right to instruct legal counsel and given a reasonable opportunity to do so are codified in s. 97(2) of the CRRR. Those circumstances include "(c) an emergency transfer under section 13" of those regulations. Section 97(2) has been held to be a codification of the right to counsel requirements in *Williams: Hamm v. Canada (Attorney General)* 2019 ABQB 247 at para. 200.
- [113] However, what Mr. Keiros-Meyer was actually subjected to was "an interim placement pending a review of his security classification level". In that situation, the time period for providing him with a document that included notification of his "right to legal counsel without delay" pursuant to s. 13 of CD 710-2-4 was two working days. He actually received that information at the time of the temporary movement.
- [114] I disagree with Mr. Keiros-Meyer's characterization of his initial interaction with A/AW Strijack without the assistance of counsel as involving anything prejudicial to his ultimate interests in the transfer process. The structure of s. 12 is to permit an immediate interim placement, followed by a very swift right of review, including the inmate's submissions. Given that his immediate movement was inevitable, subject to the subsequent review, and no evidence-gathering took place at the time he was advised of it, it seems obvious why s. 13 provides for notification of the right to counsel at the point that the Notice of Involuntary Transfer/Movement Recommendation is served, since that is when the assistance of counsel can lead to the drafting of effective representations in response.
- [115] Despite this conclusion, the question remains whether these various CSC regulations and directions are exhaustive of an inmate's right to counsel in the circumstances that they describe, or whether s. 10(b) still applies and supersedes them.

- [116] Judicial comity and the implicit reasoning of the Court of Appeal seem to favour Williams. It was cited with approval on this issue, specifically the movement of inmates to administrative segregation, in *British Columbia Civil Liberties Assn. v. Canada (Attorney General)* 2018 BCSC 62 at para. 424, varied on other grounds 2019 BCCA 228. Its application was distinguished in relation to the transportation and surrender of applicants whose extradition proceedings had been concluded in *India v. Badesha*, 2018 BCCA 470 at para. 65, but the Court of Appeal appeared to proceed on the assumption that it would have applied if there had been a "fresh detention" and the jeopardy the applicants faced had changed.
- [117] In contrast, *Richer*, the decision cited by Sewell J. and the older case it relied on, *Latham v. Canada (Solicitor General)* [1984] F.C.J. No 177, have not been cited on this issue by any other British Columbia decisions.
- [118] I conclude that on our particular facts it is not necessary to resolve this question. Having advised Mr. Keiros-Meyer of that right when he first informed him of the temporary placement, A/AW Strijack had a duty to facilitate it without delay. For the purposes of the analysis I will treat this as the functional equivalent of a s. 10(b) right. The question then becomes whether that included allowing him to exercise it in facilities that were not considered to be secure for that purpose, or whether it was reasonable to delay the exercise long enough to transport him to secure ones.
- [119] If the analogy to the s. 10(b) jurisprudence holds, the inquiry into whether it was unreasonable to delay the implementation of the right until the detainee reached a secure facility must take into account the circumstances of each case, and there is little prejudice arising from such a delay if the detaining officers refrain from attempting to question the detainee: see for example, *R. v K.W.J.*, 2012 NWTCA 3 at para. 28. Or, as it was expressed in *R. v Nelson*, 2010 ABCA 349 at para. 17, cited with approval in *R. v Ashby*, 2013 BCCA 334, at para. 72:
- Immediacy does not mean instantaneous; practical considerations still play a role, particularly with respect to the police's obligation to implement an arrested person's contact with counsel.
- [120] In our particular circumstances, I accept Mr. Keiros-Meyer's description of facilities within Mission Minimum from which he could in theory have made a call (although there is no evidence that he specifically asked to use any of them at the time, only that he asked to speak to counsel), but that does not lead me to conclude, as a matter of procedural fairness, that it was unreasonable for A/AW Strijack to hold off on providing access until the secure facilities at Mission Medium were available.
- [121] The fact that A/AW Strijack did not engage in any questioning or evidence-gathering before counsel was contacted and indeed simply set in motion a process that would yield only those submissions that Mr. Keiros-Meyer ultimately wished to make on his own behalf, adds further weight to this conclusion.

[122] Finally, although he disavows it as an indication of his position on the issue, I am entitled to take into account that Mr. Keiros-Meyer signed a document provided by IPO Johnson that acknowledged, among other things, that he had had a reasonable opportunity to contact counsel.

Punishment Under an Administrative Guise

[123] This argument was also previously rejected by Sewell J., but Mr. Keiros-Meyer seeks to elaborate on it on the basis of "newer and greater evidence with supporting authorities now".

[124] In essence, he argues that he was improperly subjected to both administrative and disciplinary processes arising from the incident that led to his first transfer. These consisted of the immediate movement (administrative) and institutional charges laid against him related to the possession of tattooing items in his room (disciplinary). The effect of this combined approach was to place him in greater jeopardy than either of the two processes could have achieved on their own, which is contrary to Parliament's intent in the legislation governing the correctional regime.

[125] In addition, contrary to Sewell J.'s understanding based on the record that was before him, the disciplinary charges were actually moving forward before the Warden's Board confirmed the first transfer, so there is now evidence that they were used to facilitate that transfer.

[126] Mr. Keiros-Meyer alleges that charges of possessing the tattooing equipment were used to inflict the maximum harm on him, in addition to the transfer. The simple possession of these items would not in themselves have formed the basis of a transfer, because of the absence of any "actus reus".

[127] Further, even though no institutional charges remained outstanding at the time of the second transfer, he says that they continued to form part of the factual background of that transfer, lending greater seriousness to the immediate movement.

[128] An indication of the validity of these concerns about punishment under an administrative guise, according to Mr. Keiros-Meyer, are certain handwritten editorial comments on the copy of his rebuttal submissions to the warden. These comments disparage some of the points that he raised in the submission and may well have influenced the warden in the ultimate decision, he suggests.

[129] The Attorney General's counsel responds that Mr. Keiros-Meyer's suggestion of an oblique motive for the CSC's actions is based on the assumption that institutional discipline could not have been initiated in addition to an involuntary transfer, and is not supported by any admissible evidence. He submits that Mr. Keiros-Meyer has misconceived the significance of the tattooing to the transfer decision - it was his practice of it as a coping mechanism, along with his inappropriate interactions with medical staff and his failure to demonstrate

a deeper understanding of the risks they posed, that drove the security concerns.

- [130] As an issue of procedural fairness, this argument is not persuasive. Discipline for possessing contraband tattooing equipment addresses different institutional concerns than secretiveness about tattooing as a risk factor related to offending. There is no support for Mr. Keiros-Meyer's bald assertion that the disciplinary process was intended to prejudice him in his transfer review and indeed it appears to have played no role in the warden's reasoning. The Attorney General's counsel has correctly described the legitimate role that the tattooing played in the case management team's concerns and the warden's ultimate conclusions.

Inadequate Disclosure

- [131] Mr. Keiros-Meyer's concern here is that it is not possible to say with any certainty what information the warden relied on in reaching the decision to confirm the transfer.
- [132] As I have previously described, A/AW Strijack referred to having consulted with the "A/ Warden" in the initial written notice of the movement and erroneously suggested in the same document that Sewell J.'s decision had endorsed Mission Medium as the most suitable facility for Mr. Keiros-Meyer. This raises the question of what information was passed on to the warden in the course of that consultation and in reaching that conclusion.
- [133] There was also no disclosure of the alternative options for dealing with him that may have been suggested to the warden by his case management team.
- [134] Other specific items of disclosure that Mr. Keiros-Meyer requested but did not receive included: an unvetted copy of the SRS scaling tool, a document called a "CRS" scaling tool, the doctor's notes and progress reports for the January 2018 incident that led to the first transfer and an update to his correctional plan from August of 2017. He also requested the source material for various assertions about his psychiatric issues and risk factors that were referred to in his A4D, such as a vaguely-described "psychiatric report", the nature of his risk factors, and the calculation of another risk assessment tool called Statistical Information on Recidivism (which based on the excerpt from Sewell J.'s reasons that I have quoted, may be another name for the SRS).
- [135] Although he concedes that recording of the Warden's Board hearing is not required by "law or policy", Mr. Keiros-Meyer points out that such a recording would have preserved the oral representations about his case that were made by the participants during it.
- [136] Counsel for the Attorney General distinguishes the disclosure requirements for an administrative procedure of this kind, which are governed by s. 27(1) of the CCRA from the disclosure of all relevant evidence that is necessary in a criminal prosecution. Section 27(1) requires disclosure of "all the information to be considered in the taking of the decision or a summary of that information", subject only to being withheld for specific security-related reasons pursuant to ss. (3). As explained by the Supreme Court of Canada in *Khela*:

83 Section 27 does not require the authorities to produce evidence in their possession that was not taken into account in the transfer decision; they are only required to disclose the evidence that was considered. Further, whereas *Stinchcombe* [[1991] 3 S.C.R. 326] requires the Crown to disclose all relevant information, s. 27 of the CCRA provides that a summary of that information will suffice.

- [137] Counsel adds that Mr. Keiros-Meyer has repeated some arguments under this heading that were rejected by Sewell J. - specifically that disclosure of information about any alternative options to transferring him relates to procedural fairness rather than the reasonableness of the decision, and that the vetted portions of the SRS scoring tool that was provided to him were relevant to the decision.
- [138] Counsel's essential point, however, is that the Warden's decisions are transparent in the manner in which they list the specific items that he relied on, all of which were either disclosed to Mr. Keiros-Meyer in advance as required by the CCRA or, in the case of his rebuttal submissions, generated by him.
- [139] I recognize that Khela (paras. 96-97) has included in the ambit of "all the information to be considered in the taking of the decision" underlying material that had to be used in order for the named information to be considered (in that case the scoring matrix for the SRS). But even employing this generous approach, I cannot conclude that any of the items Mr. Keiros-Meyer has identified fall within it. While s. 27 is worded prospectively, in terms of a reasonable time before the hearing, para. 83 of Khela makes it clear that compliance with it will be analyzed retrospectively. There is no indication that any assessment or scoring tools beyond the 2001 matrix for the SRS score that was disclosed were taken into account. Nor is there any suggestion that the notes and progress reports of the doctor with whom he interacted inappropriately played any role in the analysis - the essential elements of that problematic interaction were never in issue in the hearing.
- [140] The warden did refer to the 2012 psychological assessment and the 31 indicators of Mr. Keiros-Meyer's risk arising from it. However, in his first rebuttal submission Mr. Keiros-Meyer himself referred to the fact that "I also failed to take more seriously the psych assessments of such good doctors and Dr. Sirkia who identified 31 risk areas that may reflect elevated risk " and then proceeded to list in detail what appear to be the most critical ones, which were the same factors listed by the warden. He also referred to having reviewed previous psychological assessments as part of his process of self-reflection. (I note that in his affidavit he referred to being unable to access the psychological reports, which were among his "legal papers", after his transfer and to not receiving them until after the hearing, and that he had to go "off the top of his head" to recall them for his rebuttal submissions.) Given that his impressive recall of their contents conforms to the use that the warden made of them, there is no basis on which to find a breach of the CSC's disclosure obligations.

Reasonableness

[141] As part of the context in which the reasonableness of the warden's decision confirming the transfer should be assessed, Mr. Keiros-Meyer refers to the warden's "history" with him, including the warden's repeated negative remarks about his prospects within the correctional system and how the warden intended to treat him. In his affidavit, Mr. Keiros-Meyer also quoted the Indigenous elder who supported him as describing a general bias and resentment towards him on the part of CSC officials, because of his past litigiousness.

[142] The specific remarks Mr. Keiros-Meyer cited included threatening to "throw away the key" on him, to "put him behind double razor wire fencing" (which he says the warden made during the actual Warden's Board Hearing) and that "we can do this for another 20 years" (which he attributed in his affidavit to A/AW Strijack). The warden also described himself as being the person with the special expertise necessary to deal with Mr. Keiros-Meyer.

[143] Rather than constituting prior specialized experience in dealing with him that should be given deference in this review, this history is said to be an indication of bias and the warden's underlying improper motivations, and should be carefully scrutinized, it is argued.

[144] An additional preliminary issue for consideration is whether CSC officials failed to comply with the actual substance of Sewell J.'s order, and whether that non-compliance should give rise to a remedy in itself.

[145] On the core question of reasonableness, Mr. Keiros-Meyer's arguments include the following:

- The behavioural contract that he entered into upon arriving at Mission Minimum was so broadly worded that it gave his case management team discretion to determine that virtually any behaviour on his part was inappropriate. This discretion was used to harass him and create a negative atmosphere that inhibited his efforts to improve himself;
- Because he was not granted access to counsel, he was denied the opportunity to make representations about his questions and concerns when he was first advised of the immediate movement. This put him at a disadvantage from the outset. The opportunity to make those representations later was of diminished value, he argues, because by then he was making them from medium security;
- The warden failed to properly weigh his incident-free behaviour in the intervening six months since the first transfer;
- The A4D that was relied on in the decision-making process improperly characterized his past behaviour as a form of sexual deviancy (an error compounded by the case management team's failure to disclose the psychological reports on which that remark was based);

- He was denied access to material in his cell that he could have used to respond to the allegations against him;
- He was found to have only an academic understanding of his risk factors, without having been given a fair opportunity to demonstrate a fuller understanding through a sufficient interview process;
- While he acknowledges that his actions and attitudes at the time of the first transfer were "deserving of rebuke", and provided grounds to elevate his risk, there was no evidence that he posed a risk that could not be managed at minimum security, or at a facility that included multiple security levels;
- The warden drew unjustified conclusions about the level of risk posed by his tattooing and his interaction with medical staff and overemphasized these risks in his decision. There is also no actual connection between tattooing and the behaviour that led to the offence for which he is incarcerated;
- Matters treated as risk factors by the warden had actually been identified by the psychologist who assessed him only as prompts for further discussion with him;
- The interaction with medical staff was not at his request and, through a detailed review of that interaction and the participation of the various staff members, he seeks to demonstrate that any concerns arising from it have been exaggerated. It was, at worst, an "awkward" encounter, not an indication of elevated security requirements;
- Among other shortcomings, insufficient weight was given to his medical history within the institution, relating to his legitimate medical condition of "genital gigantism"; and
- The failure to disclose the doctor's "raw report or notes" in the electronic records system compounded his difficulty in advancing this argument, Mr. Keiros-Meyer says.

[146] Counsel for the Attorney General reminds me that when courts are assessing the reasonableness of administrative decisions in the correctional context, the specialized expertise of correctional officials in balancing the various competing concerns relating to security within an institution is entitled to deference. Referring again to Khela:

76 Determining whether an inmate poses a threat to the security of the penitentiary or of the individuals who live and work in it requires intimate knowledge of that penitentiary's culture and of the behaviour of the individuals inside its walls. Wardens and the Commissioner possess this knowledge, and related practical experience, to a greater degree than a provincial superior court judge.

[147] The warden's own extensive personal interactions and experience in dealing with Mr. Keiros-Meyer formed a legitimate part of this expertise, it is argued. The same is true of the experience of his case management team.

- [148] While the actual object of this habeas corpus application is the warden's decision confirming the transfer, counsel says that the immediate transfer was also reasonable in itself, given the identified security concerns and the deficiencies of the minimum security facility when it came to addressing them.
- [149] As to the warden's decision, counsel points out that he took Mr. Keiros-Meyer's lack of problems in the intervening six months into account, but that it was reasonable to conclude that it was outweighed by the security concerns arising from his problematic behaviour during the January incidents, the preceding lengthy period of surreptitious tattooing, and his shallow grasp of their serious implications for his risk level. At bottom, counsel says that the level of trust critical to functioning safely in minimum security was undermined by these behaviours.
- [150] I should point out first of all that Mr. Keiros-Meyer's submissions about the attitude demonstrated by the warden's previous remarks to him really fall under procedural fairness, which includes the issue of whether there was a reasonable apprehension of bias on the part of a decision-maker. The test is whether "an informed person, viewing the matter realistically and practically [would conclude] that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly": *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 46 and 47.
- [151] I am unable to find that the warden's prior experience with Mr. Keiros-Meyer or such remarks, which in the absence of any contradicting evidence I must accept were made, would have led to such a conclusion.
- [152] Past experience with an inmate, without more, is not a reason to doubt a decision-maker's impartiality.
- [153] With respect to the warden's remarks, there is some uncertainty in the material about whether one of the attributed remarks was actually made by A/AW Strijack, who was not the decision-maker. The "double-razor wire" remark, which Mr. Keiros-Meyer says was made by the warden during the hearing, is equally consistent with being a shorthand description of the enhanced security that is available at Mission Medium, and the manner in which it was quoted in Mr. Keiros-Meyer's affidavit seems to support that interpretation. Referring to a willingness to engage in the process for another 20 years is similarly susceptible to being interpreted as a legitimate comment on Mr. Keiros-Meyer's difficulties in embracing real change. The point is that without knowing the surrounding context in which they were made, which has not been provided, an informed person would not be likely to infer that the remarks attributed to the warden indicated a closed mind in relation to the adjudication of the transfer decision. (Although it was raised as an aspect of procedural fairness, the fact that editorial comments were written on Mr. Keiros-Meyer's rebuttal submission by another CSC official does not raise any concerns about the warden's own impartiality.)

- [154] Mr. Keiros-Meyer's other threshold issue, that non-compliance with Sewell J.'s order could give rise to a remedy in itself, was subsumed in my conclusion about the nature of that order and its effect on Mr. Keiros-Meyer's custodial status.
- [155] Because of the wide scope of Mr. Keiros-Meyer's arguments and supporting material it is useful, before embarking on a consideration of the reasonableness of the decision to confirm his transfer, to refocus on the fact that it is a review based on the record that was before the warden. To the extent that Mr. Keiros-Meyer has sought to reargue the issues based on additional evidence and submissions that were not before, that is not material that I can take into account at this point.
- [156] The reason that this is important is that when he appeared before the Warden's Board Mr. Keiros-Meyer was contrite about the behavioural concerns, and focused instead on his positive recent behaviour and newly-gained insights, and his alternative proposals about how he could be managed in minimum security. Those were the arguments that the warden was responding to in his decisions.
- [157] The warden had a fairly specific issue to deal with - whether Mr. Keiros-Meyer was manageable within minimum security or whether a higher level was needed in order to address the concerns raised by his behaviour. His decision came down to Mr. Keiros-Meyer's history of related issues, the direct link between them and his original offence and offending pattern, and his two years of secretive and maladaptive coping behaviour. He acknowledged Mr. Keiros-Meyer's professed understanding of the risks posed by his behavior (although he found that it did not progress beyond the academic level), as well as his numerous efforts towards self-improvement and his lack of any disciplinary infractions during the period since the triggering incident and revelations. At the end of the day however, the warden concluded that the structure and supervision of medium security was needed to manage these behaviours and their attendant risks.
- [158] In my estimation, the warden followed a rational, logical and coherent path to his conclusion. There are no identifiable gaps or inconsistencies in his reasoning and the outcome appears to flow naturally from the preceding processes, including the consideration and weighing of matters that could have led to a different one. He appeared to consider the relevant factors dictated by its overall regulatory regime and to relate those to the actual evidence that was presented. To the extent that it reflects an exercise of his discretion, that exercise is consistent with the purpose for which it was granted by the regulatory regime. He engaged fully with Mr. Keiros-Meyer's extensive rebuttal submissions and explained the outcome in a manner that was sensitive to the serious liberty interests that were at stake.
- [159] To the extent that his present arguments address the evidence and submissions that were actually before the warden, I am not persuaded that Mr. Keiros-Meyer has identified any element of unreasonableness, as Vavilov has explained it. It was for the warden to decide how much weight to attribute to the period of incident-free behaviour and there was

evidence before him on which he could reasonably link the secretive tattooing to Mr. Keiros-Meyer's risk. While it played only a limited role in his ultimate reasoning, the point of the incident with the doctor was its inappropriateness in relation to Mr. Keiros-Meyer's past "boundary issues", so its broader medical context was not relevant or helpful. (Although it is really a matter of procedural fairness, this conclusion encompasses the requirement for disclosure of any additional medical information. I have already concluded under the procedural fairness heading that Mr. Keiros-Meyer was not prejudiced by being unable to access the reports in his former cell.) Similarly, there is no suggestion in the reports that Mr. Keiros-Meyer was treated in any respect as a "sexual deviant" in the decision-making process. It was the relationship of his acknowledged behaviour to his risk factors that was the relevant consideration.

[160] This is certainly not a case like *Nguyen v. Mission Institution (Warden)*, 2012 BCSC 103 at para. 63, which was cited by Mr. Keiros-Meyer, in which CSC officials "continued to swaddle a small amount of evidence in clouds of justification".

Conclusion

[161] Despite Mr. Keiros-Meyer's resourceful submissions, I conclude that the decision confirming his transfer and security level was procedurally fair and reasonable. His application must therefore be dismissed.

"Schultes J."

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