

CANADA / JUDGMENT

Nguyen v. Mission Institution (Warden)

2012 BCSC 103

COURT

Supreme Court of British Columbia

DECIDED

24 January 2012

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2012 BCSC 103 Nguyen v. Mission Institution (Warden)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nguyen v. Mission Institution (Warden),

2012 BCSC 103

Date: 20120124

Docket: 25877

Registry: Vancouver

Between:

Anh Nguyen

Applicant

And

Diane Knopf, Warden of Mission Institution

and Mark Kemball, Warden of Kent Institution

and The Correctional Service of Canada

Respondents

Before: The Honourable Mr. Justice McEwan

Reasons for Judgment

Counsel for the Applicant:

B.D. Vaze

E. Purtzki

Counsel for the Respondents:

J. Dagsvik

Place and Date of Hearing:

Vancouver, B.C.

October 25, 2011

Place and Date of Judgment:

Vancouver, B.C.

January 24, 2012

I

- [1] The applicant seeks an order of habeas corpus releasing him from his placement in the maximum-security Kent Institution, and returning him to Mission Institution, or a comparable medium security facility in the Pacific region of the federal corrections system.
- [2] The applicant is serving a seven year, three month and five day sentence for unlawful confinement and forcible confinement. He began serving this sentence on February 24, 2009. He was eligible for day parole on January 28, 2011, and is eligible for full parole on July 28, 2011. His statutory release date is December 29, 2013 and his warrant expiry date is May 31, 2016. He was initially classified as a maximum security offender but subsequently reclassified to medium-security. He had been at Mission Institution since August 2010.
- [3] On June 10, 2011, the applicant was transferred from Mission to Kent, a maximum security institution, on an emergency, involuntary basis under the purported authority of s. 29 of the Corrections and Conditional Release Act, S.C. 1992, c. 20 (the "CCRA") and s. 13 of the Corrections and Conditional Release Regulations, SOR/92-620 (the "Regulations").
- [4] Section 29, insofar as it is pertinent, reads as follows:

Transfers

- 29. The Commissioner may authorize the transfer of a person who is sentenced, transferred or committed to a penitentiary to
 - (a) another penitentiary in accordance with the regulations made under paragraph 96(d), subject to section 28 ...
- [5] The placement of inmates is guided by the provisions of s. 28:

PLACEMENT AND TRANSFER OF INMATES

Criteria for selection of penitentiary

28. Where 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 the person is confined is one that provides 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;
 - (b) accessibility to
 - (i) the person's home community and family,
 - (ii) a compatible cultural environment, and
 - (iii) a compatible linguistic environment; and
 - (c) the availability of appropriate programs and services and the person's willingness to participate in those programs.
- [6] Inmates are entitled to notice of such decisions, to make representation about them, to be given reasons, and to all of the information, or a summary of the information, that was considered in making the decision:

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.

Idem

- (2) Where an offender is entitled by this Part or the regulations to be given reasons for a decision taken by the Service about the offender, the person or body that takes the decision shall, subject to subsection (3), give the offender, forthwith after the decision is taken, all the information that was considered in the taking of the decision or a summary of that information.
- [7] This protocol is expanded in s. 12 of the Regulations:

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.
- [8] Section 13 of the Regulations operates as an exception:
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.

II

- [9] In January 2011, the applicant's security classification was reviewed and a rating of medium-security was maintained.
- [10] The day the applicant was removed, June 10, 2011, was a Friday, and it was not until June 15, 2011 that the applicant was given copies of a "Notice of Involuntary Transfer Recommendation", dated June 14, 2011, and an "Assessment for Decision" and "Security Reclassification Scale ("SRS")" dated June 13, 2011.
- [11] In order to address the issues raised in the petition it will be necessary to review these materials in some detail.
- [12] The Notice reads as follows:

Pursuant to Section 29 of the Corrections and Conditional Release Act, I have recommended your case be reviewed for an Involuntary Transfer to Kent Institution.

Mr. NGUYEN, the applicable review period notes you demonstrated positive behaviour with staff and were actively engaged in your Correctional Plan as you were residing in the Intensive Support Unit, had provided clean urinalysis tests and were motivated to make changes and cascade to lower security.

The incident which led to your segregation placement occurred on 2011-06-10. A culmination of information and evidence had been gathered by the Security Intelligence Office which directly presented evidence that you are the owner of a cell phone recently seized within the institution. In addition, an accumulation of source information (seven confirmed and three believed reliable) have noted Mr. NGUYEN is heavily involved in the institutional drug subculture and continues to involve himself in negative affiliations and organized levels of criminal activity for monetary gain.

Based on the evidence which indicates your ownership of a cell phone, in addition to the multiple source information connecting you to the institutional drug subculture, there are concerns regarding the manageability of you within a medium security environment. You have clearly disregarded the rules and regulations of a medium security environment by being in possession of contraband. Items such as a cell phone are of concern as they are often utilized for nefarious and illicit purposes supporting institutional subcultures. Your actions/behaviours are viewed as contributing to the on-going subculture and create concerns for the safe and secure environment within a medium security environment.

Due to current concerns, your CMT has recommended an involuntary transfer to Kent Maximum security Institution. Your current actions do not resemble of an individual who can be appropriately monitored within a medium security environment. Your actions suggest you require a more structured environment where you can be more closely monitored for activity and involvement in the institutional subculture. At this time, the CMT questions your ability to be safely managed at the medium security level. As such a transfer to Kent Institution is viewed as the least restrictive measure to manage your risk while ensuring the safety and security of the institution and persons within.

[Emphasis added.]

[13] The Assessment for Decision reads, in part:

PURPOSE OF REPORT

The purpose of this report is to address the circumstances surrounding Mr. NGUYEN'S emergency involuntary transfer to Kent Institution to address an increase in risk due to him being found to be in possession of a cell phone.

...

UPDATE OF PROGRESS SINCE LAST CPPR:

Mr. NGUYEN has completed the ICPM primer identified on his Correctional Plan and has been attending to his educational upgrading where he has continued to get generally favourable program performance reports. He has been receiving A level pay and continues to work as a vending machine operator. This position involves the handling of cash and is considered a position of trust.

In his multi target primer course dated 2011/03/31 Mr. NGUYEN was identified as requiring intervention for Anti-social thoughts, Anti-social Associates and Anti-social Behaviour. It was determined if Mr. NGUYEN would apply the skills he learned in program in conjunction with relying on his positive pro social community support he could remain a successful candidate for Conditional Release.

Unfortunately, it would appear Mr. NGUYEN has been relying heavily on impression management while secretly holding onto a pro criminal value system. It would appear from SIO information he is heavily involved in the institutional drug sub culture, gangs and not taking accountability for his past actions. It would appear Mr. NGUYEN is very advanced in his ability to impression manage given the fact he managed to participate in the criminal sub culture while housed on the Intensive Support Unit. This behaviour not only damages Mr. NGUYEN's credibility but goes to undermine the efforts of other offenders residing on the ISU who wish to be held accountable for their actions and seek positive change. The damage to offenders trying to make legitimate change in their lives while having to deal with the stress Mr. NGUYEN's activities place on them cannot be understated. Bullying, temptation to use drugs and fear of reprisal are but a few of the consequences of Mr. NGUYEN's behaviour. In addition, the CSC's ability to encourage and assist offenders to become law abiding citizens is also brought into question when this behaviour is allowed to continue unchecked.

Since arriving at Mission Institution on 2010/08/02 Mr. NGUYEN had not been a management concern. He sought out employment and was participating in his Correctional Plan. On 2011/06/10 Mr. NGUYEN was involuntarily transferred to Kent institution for being identified as the owner of a cellular telephone found in possession of another inmate. After a thorough investigation, the Security Intelligence Officer determined Mr. NGUYEN was using the cellular phone to participate in the institutional drug sub culture. A cellular phone is a particular security

concern in a medium security setting as it allows the inmate population unfettered access to criminal associates in the community. The phone can be used to arrange for ongoing criminal activity both inside the institution and in the community. Given the recent amount of incidents involving weapons and violence at Mission Institution, coupled with the reliable belief he indeed was the owner of the phone, the CMT are left with few options but to return Mr. NGUYEN to a higher security rating. The CMT believe Mr. NGUYEN is a highly sophisticated manipulative offender with gang ties. Gang activity was targeted as one of the key components to address in the recent Transformation Agenda launched by the CSC. By participating in gang activity, Mr. NGUYEN is not being accountable for his rehabilitation, and is endangering the lives of staff and other offenders at Mission Institution. Given the fact he was previously thought of as making sound progress towards the completion of his Correctional Plan, it is deemed Mr. NGUYEN requires the structure and supervision of a Maximum Security setting to offset his manipulative conning behaviour.

Comments from receiving institution:

As this is being dealt with as an involuntary transfer no comments were requested from Kent Institution.

Consultation with Security Intelligence Officer:

Security Intelligence Officer K. Carlson was contacted on 2011/06/13. After reviewing the observation reports from the incident on 2011/06/10 it was determined Mr. NGUYEN is no longer manageable or willing to be managed at the medium level. The phone was confirmed to be Mr. NGUYEN's when an SIO investigation confirmed numbers associated only to Mr. NGUYEN were programmed into the phone. An SIR document completed on 2011/06/13 noted an accumulation of source information (7 confirmed reliable based on staff observation and three believed reliable based on source information) which indicates Mr. NGUYEN's involvement in the drug subculture and gang associations.

As demonstrated by his actions Mr. NGUYEN is not willing to abide by direction or willing to comply with Correctional Centre Rules and Regulations. For the safety of staff and offenders he had to be segregated and once there participated in behaviour harmful to the good order of the institution.

SECURITY CLASSIFICATION:

Mr. NGUYEN has recently had an SRS completed on 2011/01/26. His Security Rating Scale score was 20 which placed him as a medium security offender. According to his most recent Offender Security Level report his Institutional Adjustment was rated as medium, his escape risk is moderate due to past failures on conditional release and his public safety rating was moderate. Due to the incident on 2011/06/10 his SRS was recalculated for the purpose of this report. His new SRS rating is 26 which is consistent with a medium rating but falls within the discretionary range for Maximum security. As a result of this incident his Institutional Adjustment is being raised to High from Moderate. In addition he is currently rated as Medium for Reintegration potential.

INSTITUTIONAL ADJUSTMENT: HIGH (changed from last review)

This report should be read in conjunction with Assessment for Decision dated 2011/01/26 for a review of Mr. NGUYEN'S behaviour until this time. The case management team was not prepared to support a minimum security reclassification at that time but agreed to reconsider the idea early in 2012 if Mr. NGUYEN could avoid involvement in the drug subculture, avoid being implicated in any muscling activity and otherwise be of good behaviour.

Since his previous OSL Mr. NGUYEN has given the appearance of a model inmate. He has participated in the ISU since 2010/08/02 without receiving any institutional charges. He was suspected of being involved in a group of offenders who bullied another offender into leaving the unit. Other than the one incident, he remained employed, attended school and gave the appearance of being fully engaged in his Correctional Plan.

There was however protected reliable source information to indicate he was involved in the drug sub culture. The discovery of the cell phone coupled with a body of protected reliable source information deemed to be confirmed credible give this CMT reason to believe Mr. NGUYEN is heavily involved with the institutional drug sub culture and is using his time in custody to make a profit and to meet business associates for continued criminal gains upon release. Given the recent increase in gang violence in the greater community the CMT is compelled to take this recent incident seriously.

Mr. NGUYEN has demonstrated the ability to convincingly manipulate the prison system for the last nine months by giving the appearance of someone focused on change while participating in the prison drug sub culture. The CMT must assess his level of Institutional Adjustment as High. Given his level of sophistication and engrained pro criminal belief system the CMT would not be able to judge any future level of legitimate change. Mr. NGUYEN must first take full accountability by explaining how and why he felt the need to participate in this activity prior to being considered for any form of reduced security in the future. His next CMT should work closely with Mr. NGUYEN to determine his level of accountability and motivation to change.

After arriving at Mission Institution Mr. NGUYEN appeared to be adjusting well to a medium security setting, he had not come to the attention of management prior to this incident. However, due to the recent amount of violence at Mission Institution coupled with an inability for Mr. NGUYEN to be open and disclosive with his CMT it is deemed he is no longer manageable at a medium setting. At this time it is unknown how long this cell phone was in the institution.

Mr. NGUYEN is rated High for Institutional Adjustment due to the fact he was able to participate in the institutional drug sub culture for a prolonged period of time all while housed on the ISU. To change this rating he must become open and disclosive with his CMT about his activities and use skills presented to him in program.

ESCAPE RISK - Moderate (no change from last review)

There is no new information to suggest Mr. NGUYEN's rating in this area should be altered since the last review. Mr. NGUYEN is a Canadian citizen not subject to deportation. There are no outstanding charges or appeals on file. Mr. NGUYEN is unlikely to make active efforts to escape but may do so should the opportunity present itself. He remains accurately assessed as a Moderate escape risk.

In his previous OSL the CMT indicated he represented a moderate risk due to sentence length and a history of violent impulsive behaviour. Given the fact he has recently cascaded to Medium Security and there are indicators of involvement in the institutional drug sub culture the CMT feel a prolonged period of incident free behaviour is required prior to any reduction in this area.

Given the circumstances of this review his intentions with the cell phone are unknown at this time. This draws concerns regarding Mr. NGUYEN's intent and it is not beyond reason to presume this could include making arrangements to escape.

The criteria for a Low Escape Risk according to CD 710-6 state the offender must have no indicators of escape potential and have no significant history of breaches of trust. When Hr. NGUYEN can display behaviour reflective of this he can be considered for a reduction in his Escape Risk rating.

[Emphasis added.]

III

[14] The applicant responded to this material by requesting a hearing in writing. On June 21, 2011, he denied the allegations and submitted that the correctional service had "failed to adequately provide enough evidence to support these charges and claims."

[15] On July 5, the applicant's counsel tendered a further submission, pertinent parts of which include:

It shall be the submission here, on Mr. Nguyen's behalf, that the allegations against him which have resulted in his involuntary transfer recommendation are bald and baseless in nature, and that the information provided to Mr. Nguyen in reference to such allegations reflect how baseless they are; in sum, Mr. Nguyen has been provided with so little information regarding the allegations against him that he is completely precluded from any ability to make a meaningful response to the recommendation that he be transferred. In turn, it appears there is no proper basis, and simply not enough information, upon which to recommend that he be transferred to Kent. Finally, it also appears that there are some real problems with Mr. Nguyen's security re-classification process, such that it would further be improper for him to be transferred.

...

The assertions against Mr. Nguyen appear to be based on little or no real information, and if they indeed are with substance, such substance has not been provided to Mr. Nguyen in any kind of manner that would allow him to meaningfully respond to the serious allegations against him. On page two of the A4D, it is stated very simply that "it would appear from SIO information [Mr. Nguyen] is heavily involved in the institutional drug sub culture, gangs...." with absolutely no further information substantiating the assertions. At a minimum, it would be expected that the A4D would contain a detailed list of incidents which would indicate Mr. Nguyen's involvement in the Institutional drug trade and gang activity, and if the Security Intelligence Office (SIO) is relying on information received from informants to reach the conclusion of Mr. Nguyen's involvement in such activity, it would also be expected that there would be a list of when information is received, the type of information received, and the reliability of such information received. There should be something of substance upon which the bald assertions of impropriety would be based, but in this case there is simply nothing. This puts Mr. Nguyen in a simply impossible position because in the absence of any real information, all he can do (other than make his own and limited inquiries, which shall be addressed further below) in his defence is issue a flat denial against the allegations made, and without having the opportunity that any ordinary individual -- be it in a workplace, a prison, or in a criminal court -- would have to defend themselves against serious allegations, including by testing the veracity of allegations as well as such allegations' internal and external consistency.

It is submitted that before any final decision can be made on Mr. Nguyen's case, better, further, and other information regarding the allegations against him must be provided, and he should be given a proper opportunity to respond to any other information that is in existence. If there is no further information, it is submitted that Mr. Nguyen should not be transferred and must be returned to Mission Institution.

The baldness of the assertions regarding Mr. Nguyen's involvement in the Institutional drug and gang subculture are mirrored in the allegations regarding his supposed ownership and use of a cellular phone. At page three of the A4D it is stated that "On 2011/06/10 [believed to actually be 2011] Mr. Nguyen was involuntarily transferred to Kent Institution for being identified as the owner of a cellular telephone found in possession of another inmate. After a thorough investigation, the Security Intelligence Officer determined Mr. Nguyen was using the cellular phone to participate in the institutional drug sub culture" and further, later, that "coupled with the reliable belief he indeed was the owner of the phone" and finally that "The CMT believe Mr. Nguyen is a highly sophisticated manipulative offender with gang ties." There is also a statement on the same page that an SIO investigation confirmed that the cellular phone which was found was indeed Mr. Nguyen's because the numbers associated with him were found on the phone, while an SIR document of June 13, 2011 noted source information "(7 confirmed reliable based on staff observation and three believed reliable based on source information) which indicates Mr. Nguyen's involvement in the drug subculture and gang associations." Later, on page four of the A4D and under the heading of "Institutional Adjustment" it is again stated that "There was however protected reliable source information to indicate he was involved in the drug sub culture. The discovery of the cell phone coupled with a body of protected reliable source

information deemed to be confirmed credible give this CMT reason to believe Mr. Nguyen is heavily involved with the institutional drug sub culture and is using his time In custody to make a profit and to meet business associates for continued criminal gains upon release."

Once again, there is simply no substance provided to substantiate any of the above assertions. As such, Mr. Nguyen cannot meaningfully respond to them. What was the "thorough investigation" of the SIO, and what were the fruits thereof? What was the contents of the SIR of June 13, 2011? What were the staff observations that confirmed source information to be reliable? What is the body of "reliable information" demonstrating Mr. Nguyen's involvement in improper activity? Why is it deemed reliable at all? What is its level of reliability, i.e, is it confirmed reliable, believed reliable, of doubtful reliability or unknown reliability? And if it is believed reliable, why is it believed reliable? At a minimum, Mr. Nguyen would need substance behind the assertions inherent above, and substantial answers to all of these questions, if he is to provide a meaningful response. Without any further information, all he can say is 'no' and cannot test the investigation or assertions against him in any meaningful way. For example, if Mr. Nguyen was provided with the staff observation reports that "confirmed as reliable" the source information that he was using a cellular phone, he could test that information; but on the other hand, if such information does not exist and that is why it is not being disclosed to him, that itself would form part of his rebuttal against his involuntary transfer, by way of his assertion that there simply is no information which indicates that his security level should be elevated.

[16] The applicant's counsel took issue with the reported SRS scores, and with the inferences drawn with respect to the applicant's progress in Mission Institution. He summarized at p. 7:

Mr. Nguyen continues to take the position that he has been provided with so few details of the allegations against him that he has effectively been precluded from providing any kind of meaningful response to his recommended involuntary transfer. However, in the absence of being given more information, he has had to try and figure things out for himself. First, he categorically denies that he possessed or used a cellular phone at any time while at Mission Institution. Furthermore, he categorically denies having been involved in the Institutional drug subculture or having gang ties of any sort whatsoever. He can say that he has come to understand who was found in possession of a cellular phone and states that this individual is Nhan Ly, also a person of Vietnamese descent. As Mr. Nguyen has also come to understand, the cellular phone that was found was associated with Mr. Nguyen because there were common phone numbers between his phone list and the numbers Mr. Ly had been utilizing. Mr. Nguyen states that this is solely because they are related through marriage and therefore have some common friends and relatives, not because he has been associated with the same phone in any way, Mr. Nguyen states that Mr. Ly will indeed provide testimony to that effect, and he urges the Institution to make the appropriate inquiries to verify the explanation that he has provided about the phone.

Mr. Nguyen also indicates that he has won a CSC grievance against being tagged having gang ties and ties to the Institutional drug subculture; he asks that the Institution respectfully look into the outcome of such grievance and consider it in its evaluation of his situation.

Overall, Mr. Nguyen takes issue with how he has been assessed within his latest A4D. He is most certainly not the manipulative "conman" menace that he is being described to be, and it is perplexing as to how, on the one hand, he can be described as a model, pro-social inmate, and on the other, as a menace with gang and drug ties. As described at length earlier, there appears to be no real information tying Mr. Nguyen to the Institutional gang and drug subculture, and his background further bears this out. As stated, Mr. Nguyen had no offence history prior to his current incarceration, and he has both admitted to and maintained what his role was in the offence which landed him in prison. There never was and there is no gang involvement on Mr. Nguyen's part, nor is there nor has there ever been any drug involvement on his part. Mr. Nguyen comes from a pro-social and hard-working Vietnamese refugee family. He was attending post-secondary education at the time of his index offence. He admits that he became involved in his crime once he developed a gambling debt. Simply put, the offence in which he participated was not part of a larger criminal lifestyle that he was alleged to have held or is alleged to hold. His background would also not indicate that he would be looking to engage in a more active criminal lifestyle once he is released from custody. He just wants to finish his sentence and move on from this horrible chapter in his life.

[Emphasis added]

[17] On July 18, 2011, Mission Institution issued an "Addendum to Assessment for Decision". This included the following:

PURPOSE OF REPORT:

This addendum is to provide additional analysis for the final recommendation for Mr. Nguyen's involuntary transfer to Kent Maximum Security Institution as per the Assessment for Decision (Mandzak) dated 2011-06-13. The analysis will also be incorporated into additional information to support Mr. Nguyen's Institutional Adjustment rating which is currently assessed as High; reassessed from Moderate.

SECURITY INTELLIGENCE INFORMATION UPDATE:

A Review of Mr. Nguyen's security intelligence file was completed 2011-07-11 and clarification of security intelligence reports and Offender Observation reports has been done.

The CMT is satisfied after reviewing the security intelligence information that Mr. Nguyen was actively involved in the institutional sub culture (drugs/tobacco) at Mission Institution. Furthermore, there is sufficient information to conclude that Mr. Nguyen was involved with Asian criminal organized crime groups or gangs within the institutional setting.

The following entries are noted:

2010-09-05: OSOR (Protected B) indicates that a dinner party was held for Mr. Nguyen complete with a rose and a candle.

2010-12-22: OSOR (Protected B) indicates a new inmate (Herein referred to as Inmate A) was welcomed in open arms by Mr. Nguyen and Mr. Nguyen carried his stuff to living unit five (5).

The following information is noted after the SIO file review and represents a gist of information contained in the Security Intelligence Report dated 2011-06-13. The following information is considered protected C information and source information reliability will be clarified:

January 2011: OSOR (Protected C - confirmed reliable source) indicates that an inmate A had requested to move in with Mr. Nguyen.

February 2011: OSOR (Protected C - confirmed reliable source) indicated that Mr. Nguyen and another inmate were found in a storage room in the A 27 corridor at Mission institution. Mr. Nguyen and the other inmate indicated they were vending machine clerks and were allowed to be in the store room. What is concerning is that both inmates were unsupervised as no Social Program Officer (SPO) was present. Employment records confirm that Mr. Nguyen was a vending machine clerk while at Mission Institution. It was also confirmed by the SPO that vending machine clerks are not allowed in the store room unsupervised.

February 2011: OSOR (Protected C - confirmed reliable source) notes that Mr. Nguyen was seen sharing hugs and back patting with two other Asian offenders. The SIO notes that Asian gang members show their respect to one another through hugs and back patting.

February 2011: OSOR (Protected C - confirmed reliable source) indicated that Mr. Nguyen was observed with a freshly painted cell. This was noted after paint cans were found in the janitor's closet. This suggests that another inmate on the unit was desperate for money.

March 2011: OSOR (Protected C - confirmed reliable source) indicated that Mr. Nguyen and three other inmates were having their meals served to them an inmate social. The observation also notes that their garbage cleaned by another inmate.

April 2011: OSOR (Protected C - confirmed reliable source) indicates an inmate source (believed reliable) stated that another inmate in the population owed Mr. Nguyen a substantial amount of money and was also holding pills for Mr. Nguyen.

April 2011: OSOR (Protected C - confirmed reliable source) indicates an inmate had approached the unit console and indicated to the Correctional Officer that he needed to talk but not now. Mr. Nguyen and inmate A were watching the inmate at the console very closely.

May 2011: OSOR (Protected C -- believed reliable source) indicates that Mr. Nguyen and three other inmates were part of a group who were attempting to move the undesirables off the unit.

May 2011: OSOR (Protected C -- confirmed reliable source) indicates staff observed an Asian inmate arrive (herein referred to as inmate B). Mr. Nguyen and inmate A went out to meet inmate B. Inmate B greeted both inmates individually with lots of hugging and rubbing of the arms and back. Mr. Nguyen spoke with inmate B closely for about 15 minutes with his hand on his shoulder.

May 2011: OSOR (Protected C - confirmed reliable source) indicates that that staff observed Mr. Nguyen and inmate B outside of living unit one (1) and they greeted each other in a tight embrace. Both inmates were seated at the picnic table talking closely and lowered their voices as the officer approached the area.

May 2011: OSOR (Protected C - confirmed reliable source) Mr. Nguyen was seen hugging inmate B.

May 2011: OSOR. (Protected C - confirmed reliable source) indicates that a cell phone with a SIMS card was seized from an inmate (herein referred to as inmate C). SIO information notes that one of the cell phone numbers is linked to Mr. Nguyen.

June 2011: OSOR (Protected C - confirmed reliable source) notes that Mr. Nguyen to be selling a chess board to an individual (related to inmate A) for \$500.00. It was noted by the Social Program Office that these items sell for \$200.00 or less. The SIO believes that the extra money is a payment from inmate A to Mr. Nguyen for drugs and tobacco.

June 2011: OSOR (Protected C - believed reliable source) indicated an Asian inmate in residing in Living Unit one (1) is responsible for a large portion of the drugs in the institution. The inmate identified is Mr. Nguyen and the source indicated that Mr. Nguyen has a lot of inmates who work for him. Source states that inmate C was just segregated for being in possession of a cell phone and is heavily in debt to Mr. Nguyen and purposely got caught with the phone due to his debt issues. Source information states the cell phone belonged to Mr. Nguyen and inmate C was holding the cell phone due to debt issues.

The SIO believes the source to be of believed reliability due to the information being corroborated by other sources.

Analysis is that Mr. Nguyen was known to frequently associate with known members of Asian Organized Crime. Based on the information prepared by the SIO department, the Warden of Mission Institution approved the listing of Mr. Nguyen as a gang associate.

The SIO also believes that Mr. Nguyen was seen as a high ranking member of the institutional sub culture (drugs/tobacco).

Additional SIO file entries include:

2011-06-21: OSOR. (Protected C - confirmed reliable source) indicates that while Mr. Nguyen cell was being packed there were numerous unauthorized items in his cell including bank account numbers and debt sheets.

Based on the information provided, there is enough information to adequately support an assessed Institutional Adjustment rating of High. Moreover, given Mr. Nguyen's ties to Asian crime members he represents a clear danger and risk to the safety of staff and inmates at a medium security institution. Mr. Nguyen requires the structure of a Maximum Security environment where he will be subject to constant and direct supervision to manage his risk.

OTHER INFORMATION:

The CMT has determined that Mr. Nguyen is appropriately assessed as a Maximum Security Inmate. His involvement in the institutional drug/tobacco culture, ownership of a cell phone and ties to organized criminal groups clearly subverts the efforts CSC makes to provide a drug and crime free environment.

Case Management team believes that Mr. Nguyen is very adept at hiding his true intentions and associations. He is currently housed in a Maximum Security environment and is considered a respected member of the general population.

Mr. Nguyen has demonstrated his ability to portray an image of being a model inmate through an absence of charges, negative drug tests and participation in his Correctional Plan. However based on the culmination of reliable and persuasive source information Mr. Nguyen is considered criminally entrenched and poses a threat to the good order of the institution (Mission Institution). Furthermore based on the belief that he was a high ranking member of the drug trade at Mission Institution and had others in his employ Mr. Nguyen clearly undermines the security efforts (both static and dynamic) employed to ensure that all offenders have a safe environment in which to complete their sentences. The CMT considers Mr. Nguyen to very dangerous given his level of influence over others and the risk he poses (to a Medium Security Institution and those contained therein) and that risk is mitigated currently through the security features of a Maximum Security environment.

FINAL RECOMMENDATION:

Offender Security Level: Maximum.

Involuntary Transfer to Kent Institution: Approved.

[Emphasis added]

[18] Counsel for the applicant was given until August 2, 2011 to provide a rebuttal to the amplified information included in the Addendum.

[19] On August 4, 2011, the Acting Warden, Barbara Van Vugt, rendered a "Final Decision" confirming the applicant's transfer to Kent and concluding that the applicant was appropriately rated as a maximum-security inmate. The Acting Warden conceded that the applicant had not been provided with sufficient documentations, as he had asserted on June 21, 2011:

Upon review of the documentation, I agree sufficient information was not provided, and as such an addendum was provided to you on 2011-07-18. You had noted in sharing documentation you would consult your lawyer and notify your COII of your rebuttal decision. As of 2011-07-22, no response was been received from you however it is noted there were several incidents going on at Kent Institution which were outside the control of staff and limited communication between sites. It is also noted your lawyer had submitted to respectfully review the addendum and rebut on your behalf. Several attempts were made to get confirmation from you allowing CSC to

provide your counsel with the Addendum to Assessment for Decision dated 2011-07-12. This was finally confirmed and as such your counsel was provided with the additional details on 2011-07-29.

The second rebuttal from your counsel was received on 2011-08-02 and this rebuttal outlined the following concerns:

Specifically it was noted your counsel felt that they did not have adequate time to respond to the Addendum dated 2011-07-12 based on their assumption that the addendum provided would be fairly succinct, however given the length of the addendum, your counsel requested a further extension of 2011-08-05. They also indicated you had not received a copy of the Notice of Involuntary Transfer (and by virtue, neither had your counsel). Finally your counsel indicated the reports received were dated 2011-07-29 and felt this was not the documentation discussed. In response to this, I have denied your counsel's request for an additional extension. As per policy requirements of 48 hours and the lengthy period of time already extended, I believe due diligence has been met in these circumstances.

[Emphasis added]

[20] After addressing the issue of the SRS scores, the Acting Warden went on:

Mr. NGUYEN, in regards to your offender security level, it is the recommendation your CMT that your Institutional Adjustment be reassessed as HIGH. Specific concerns in your case are directly related to your involvement in the institutional sub culture (drugs/tobacco), associations to Asian gangs and information linking you to a cell phone. While it is noted you were otherwise demonstrating positive behaviour within the institution (involved in your Correctional Plan and residing in the ISU), the concerns outweigh potential gains. It is noted your rebuttals disputed the rating for this area, I am satisfied this has been addressed and therefore I concur with the CMT's rating of HIGH for Institutional Adjustment.

Mr. NGUYEN, your escape risk was maintained as MODERATE. Concerns noted which suggest maintaining this rating is a history of violent impulsive behaviour. There are current indicators of involvement in the drug subculture, possible gang association and ties to a cell phone found within the institution. Given the current indicators, I concur with the CMT and assess you as MODERATE for Escape Risk.

Mr. NGUYEN, your CMT has recommended a rating of HIGH for Risk to Public Safety. Current concerns are related to your index offence and your involvement within the institution as it relates to your associations and behaviours despite program intervention. I am not satisfied there is sufficient information to suggest an elevation in this area. Your offending was such that individuals were victimized regardless of your intent. You have been involved in addressing Your Correctional Plan through programming and resided in the ISU. Given this information I believe you remain appropriately rated as MODERATE for Risk to Public Safety.

Commissioner's Directive (CD) 706 gives clear instruction as to what is expected of medium-security inmates. Medium-security inmates demonstrate the "desire and ability to interact effectively with others, individually and in moderately structured groups while subject to regular and often direct supervision". It is my opinion you require a higher degree of structure and supervision, as by the behaviour referred to in the Assessment for Decision dated 2011-06-13 and the Addendum to Assessment for Decision: dated 2011-07-12.

Your actions demonstrate you are not suitable to a medium-security environment. Your frequent involvement with members of Asian organized crime, the belief of the Security Intelligence Office regarding your involvement in the institutional sub culture (drugs/tobacco) and your connection to a cell phone found within the institution causes your CMT to question your manageability within a medium- security environment. You demonstrate you have the ability to circumvent security measures within a medium-security environment to gain access to items which are utilized for illicit purposes, including but not limited to the institutional subculture. Your actions are reflective of a need for more intensive supervision than can be offered within a medium-security institution.

Given all of the information presented to this board, I am approving your ratings in the areas of Institutional Adjustment as HIGH, Escape Risk as MODERATE and Risk to Public Safety as MODERATE.

Before being considered for a return to a medium-security institution, you must demonstrate a minimum of six months during which you have consistently addressed the concerns identified in the Assessment for Decision of 2011-06-13 and the Addendum to the Assessment for Decision dated 2011-07-12.

FINAL DECISION:

Involuntary Transfer to Kent maximum-security - APPROVED

Offender Security Level - MAXIMUM

[Emphasis added.]

- [21] The reasons for the "maximum offender security level" are a verbatim repeat of the "Referral Decision sheet for 1st Transfer (involuntary)" excerpted at para. 19.
- [22] On August 5, 2011, counsel reiterated the need for more time to review the information that had been provided in the Addendum, notwithstanding the issue of the two "Final" decisions on August 4, 2011.
- [23] On September 19, 2011, Mr. Nguyen's application for habeas corpus was stamped in the Vancouver Criminal Registry.
- [24] On September 28, 2011, the respondents agreed to set aside the August 4, 2011 "Final" decisions.

[25] On October 3, 2011, counsel submitted a further rebuttal which included the following observations:

As you would be aware, Anh Nguyen has filed an application for habeas corpus with or without certiorari in aid in respect of his involuntary transfer from Mission to Kent Institution in June of 2011. Your counsel has suggested that as Mr. Nguyen was never provided with an opportunity to make a rebuttal as against an addendum to the assessment for decision (A4D) in his transfer case, dated July 18, 2011, he should and may now make such rebuttal before proceeding with his application. At this time Mr. Nguyen intends to go forward with his habeas corpus application but shall take the time to issue a rebuttal in the hopes that the Institution will pay heed to it and take a reasoned approach to his case as a whole, and consider issuing a new final decision.

In Mr. Nguyen's first rebuttal dated July 5, 2011, counsel indicated that the essential allegations which prompted Mr. Nguyen's emergency involuntary transfer appeared to be so bald and baseless, indeed, so devoid of detail, that he could not be expected to reasonably respond to them and would require more information. Notwithstanding the issuance of the A4D, Mr. Nguyen continues to state that the allegations germane to his transfer are still being proffered without any real substance. The basic allegation against Mr. Nguyen which appears to have prompted his transfer was the discovery of a cellular phone in the possession of another inmate. The Security Intelligence Office (SIO) determined that Mr. Nguyen was the actual owner of the telephone, due to common numbers between that phone and Mr. Nguyen's calling list. With respect to this allegation, the only information provided in the July 18, 2011 Addendum is at page 3, where it is stated that in June of 2011 a source (protected C -- believed reliable) has given information of a number of inmates working for Mr. Nguyen, and that the inmate found with the phone was purposely caught due to being in debt to Mr. Nguyen. It is then stated that the source of this information is believed reliable due to such information being corroborated by other sources.

This begs the question: what is this other corroborative information? If there is such information, be it from one, two, or however many other sources, it should be provided to Mr. Nguyen so that it is both demonstrated to actually exist and so that Mr. Nguyen can respond to it, as may be necessary. Furthermore, what is it about the source that makes it reliable, and what was specifically stated? This is additional information that would allow Mr. Nguyen to respond to what he says are false allegations against him.

And finally, and more substantively, Mr. Nguyen once again asks that the Security Intelligence Office complete a proper investigation into this matter by actually inquiring with the inmate who is was said to be "holding" the cell phone that actually belonged to Mr. Nguyen. As indicated in Mr. Nguyen's previous rebuttal, he was able to determine that the inmate in question was one Mr. Nhan Ly, an inmate who was also transferred to Kent, and to whom Mr. Nguyen is related (through marriage). Mr. Ly will indicate that indeed there is no substance to the allegations that he was holding a phone for Mr. Nguyen nor is he in his debt in any way. Indeed, counsel has obtained a statement from Mr. Ly to this effect, and which can be provided to your attention in the coming two days.

That leaves the numerous other pieces of information that the Institution has provided which it says indicate that Mr. Nguyen's risk is elevated. All of this information is listed at pages 1-3 of the July 18 Addendum. A response to same consists of as many questions as rebutting propositions. First, all of the information is indicated to be of protected B or protected C -- confirmed reliable source information. The protected B information indicates no reliability and therefore should be discounted, notwithstanding that the information itself contains nothing of substance that could or should be used against Mr. Nguyen. The use of protected C -- confirmed reliable information is disturbing and problematic. As the Institution is well aware, the reliability of source information appears to be determinative in many decisions made with respect to inmates, and the greater amount of reliable information is similarly both important and corroborative. In discussing this matter with Mr. Nguyen and in examining what is stated in the actual information itself, it appears that the protected C -- confirmed reliable information may indeed simply be statements from corrections officers. If this is indeed the case, then the information provided should exist in Officer observation reports; there would thus be no reason to withhold such information from Mr. Nguyen. It is therefore requested that such statements be provided to Mr. Nguyen and that he be permitted to respond to them as may be necessary.

Furthermore, and once again, the basic allegation which appears to have prompted Mr. Nguyen's transfer are the allegations concerning his imputed ownership of a cell phone and deemed involvement in the Institution drug subculture, and that all other, earlier allegations are now being raised after the fact to further justify Mr. Nguyen's transfer. Such information should therefore not be used against him in effecting the transfer. Similarly, all of this information appears to have been on Mr. Nguyen's file for some time. If allegations were being made against him he should have had the opportunity to respond to them at the time they were made, as it is best to respond contemporaneously to anything rather than trying to recall an incident several months later. Nor should it later be said that Mr. Nguyen did not respond to allegations as he was not made aware of any of same until the time of his involuntary transfer. Again, and on this basis, the other and past information provided in Mr. Nguyen's July 18 Addendum should therefore not be used against him towards effecting transfer.

In any event, and in substance, the information contained at pages 1-3 of the Addendum truly do not indicate anything real that could or should be used in a determination of Mr. Nguyen as having an elevated level of risk. One inmate requests to move in with Mr. Nguyen. On another occasion, he is friendly to another inmate and helps him with his things, while at another time he and another individual are simply found in the vending area unsupervised. There is little of significance in these matters. Cultural biases, unfortunately, also seem to crop up in the report, assumptions being made that when inmates of Asian descent greet each other -- either with hugs or any physical greeting- that they must be gang members or that it is a 'gang' thing. Many of the other pieces of information tend to be conclusions rather than information. Some of them are so innocuous that Mr. Nguyen cannot even recall the specific events issue, such that he could not respond as to whether there is any significance to them or not. No conclusions can be drawn from whether or not an inmate painted Mr. Nguyen's cell or whether, at a social, a meal was served to him by another. Some claims another inmate owed Mr. Nguyen money. Another inmate

wants to talk but "not now". One source says that Mr. Nguyen is part of a group that seeks to have undesirables removed but there is nothing further to that. And then Mr. Nguyen was hugging an inmate of Asian background and greeting him when he came to the unit. Respectfully, none of this information can properly be said to be conclusive of anything at all.

Nevertheless, it is stated in the report that 'analysis' is that Mr. Nguyen associated with known members of Asian organized crime. This conclusion or statement creates more than it answers. What is Asian organized crime? South Asian? East Asian? Or just 'Asian'? And who are the 'known members'? Have they been identified as members of 'asian' organized crime? Have they been convicted of any kind of criminal offence? None of this provides any basis for reaching such an extreme conclusion that Mr. Nguyen be approved and listed as a gang associate. And all of the lack of information aside, it is indeed unfortunate that Mr. Nguyen's ethnicity, he being born and raised in Canada, should essentially be used against him at all. Mr. Nguyen cannot be blamed for merely associating with those who may come from a similar cultural or linguistic background and community. In any event, Mr. Nguyen denies that he is or ever has been a member or associate of 'Asian' organized crime or any organized crime outfit, for that matter, real or imagined. He came to his current sentence having never been incarcerated before, and he comes from a hard-working, pro-social background.

The SIO also states its 'belief that Mr. Nguyen was a high-ranking member of the institutional drug subculture. Mere belief is not enough to reach any conclusion. Information underpinning such belief is, and there is no information here.

All in all, the July 18 Addendum and the previous A4D are both long on rhetoric and short on information that could otherwise properly be used to reach the conclusions within. The essential conclusion reached by the Addendum is that the body of information demonstrates that Mr. Nguyen should have a High Institutional Adjustment Rating and that he is criminally entrenched, requiring a maximum security environment in which to manage him. Respectfully, as indicated above and as indicated in Mr. Nguyen's July 5, 2011 rebuttal, there simply is no proper informational basis upon which to conclude that Mr. Nguyen should have been transferred, and in any event other information (such as the Officer observation reports) should have been and should be provided to Mr. Nguyen.

It is hoped that the Institutional shall properly consider the above, along with the July 5, 2011 A4D, in reaching a new and different decision with respect to Mr. Nguyen's transfer, thus sparing him the difficulty of having to go to Court and seek habeas corpus.

[Emphasis added.]

[26] On October 11, 2011, the applicant submitted a letter from the person in possession of the cell phone. He said the following:

From: Nhan Ly FPS: 382516C

With regards to the involuntary transfer of Anh Nguyen from Mission to Kent, I, Nhan Ly, have the following to say:

I understand Mr. Nguyen is being said to be the owner of a cell phone that was found in my possession. I unequivocally state the phone was in no way owned or used by Mr. Nguyen.

I also understand that there was a number on the phone that is common between myself and Mr. Nguyen. Of course there was, as I often speak to Mr. Nguyen's mother and father, who are my aunt and uncle (blood relations of my common-law-wife).

I also understand that it is being stated that the person found in possession of the cell phone that is being linked to Mr. Nguyen is said to be in his debt and is being forced to admit ownership of the phone when it is actually belonging to Mr. Nguyen. This is absolutely untrue. I was not in Mr. Nguyen's debt and I would not take the fall for something he did. NL

[27] On October 12, 2011, Acting Warden Van Vugt issued a new "Final" decision, confirming the applicant's transfer and his maximum security rating. The rebuttal submission and the letters from the purported cell phone owner are dealt with as follows:

In response to the above noted submissions, my responses are as noted below:

- 1) You deny the allegations and charges against you and indicate that the investigating CSC staff has "failed to adequately provide enough evidence to support these charges and claims". Upon review of the documentation, I agree sufficient information was not provided, and as such an addendum was provided to you on 2011-07-18. Rebuttals from your counsel have been submitted and considered in regards to the additional information. Based on the content of the rebuttals, it is clear both you and your counsel have a firm understanding of the information as it relates to concerns regarding associations and the institutional drug subculture and possession/ownership of a cell phone. As such I do not agree with the submission presented.
- 2) Your counsel has requested further information (reports) which outline the information utilized to determine your involvement in the institutional drug subculture. As noted above, it is clear you and your counsel understand the concerns related to your case. As noted in the Assessment for Decision, there are multiple source information confirmed and believed reliable which provides information suggesting your involvement in the drug subculture. There is some corroboration to this information as evidence (bank account numbers and debt sheets) were seized from your cell upon your involuntary transfer. As such I am satisfied that there is adequate evidence to suggest you were involved in the institutional subculture.
- ...
- 4) I agree that there is not sufficient information to allow for a gang connection for the purpose of this decision and further submit that your CMT's concerns regarding your associations are limited. I do not believe sufficient information (for the purpose of this decision) has

been provided which would soundly conclude you have gang affiliations or criminal associations. However, I will state that all incarcerated offenders are subject to scrutiny of their associations and are expected to conduct themselves a law-abiding manner and not involve themselves in illicit activity.

- 5) The SIO department has provided sufficient information to suggest your involvement in the institutional subculture as it relates to source information (confirmed and believed reliable), receipt of evidence to bank account and debt sheets, and contact information specifically connected to you in relation to a seized cell phone. As such I am satisfied there is sufficient information present on which to render a decision.
- 6) In the rebuttal provided by your counsel, it was noted another inmate was prepared to discount your involvement with the cell phone and was prepared to provide information in writing which would place sole ownership on this other individual. The letter was received on 2011-10-11 and has been considered as part of the decision making process. The veracity of this claim cannot be verified and the reliability of any support from other incarcerated individual cannot be confirmed. It is unclear what influence may be behind the interview with the respective incarcerated individual provided subsequent to your removal from Mission Institution general population.

Your CMT has recommended ratings of High for Institutional Adjustment, Moderate for Escape Risk and High for Risk to Public Safety. Your SRS tool (Score of 26) which supports a medium security classification however falls within the five percent discretionary range for a maximum security classification.

Your CMT has reviewed your Institutional Adjustments and is recommending a High rating. You were previously assessed as Moderate in this area. Your CMT has indicated you have participated in programming, had required minimal interventions and maintained employment. The concern which has led your CMT to elevate your rating in this area is the information surrounding the cell phone, concerns related to involvement in the institution subculture and concerns related to associations. As noted above, the information related to associates may suggest a concern, but sufficient information has not been provided which would clearly outline the roles these individuals play in relation to criminal organizations or involvement in the drug subculture. It is acknowledged that inmates of similar ethno cultural backgrounds have a tendency to associate and as such this is not a basis for illicit association. As noted above, there is some concern noted related to your involvement in the institutional subculture. There is source information (believed and confirmed reliable) which stipulates your involvement. There is also evidence seized related to bank accounts and debt sheets which can corroborate involvement in illicit activity. The concerns regarding your connection to the seized cell phone also remain valid. The SIO department has concluded that the information discovered on the cell phone includes contacts which they have concluded belong solely to you. The use of or ownership of a cell phone within an institutional environment is considered very serious. As such, I support the CMT recommendation for a rating of High for Institutional Adjustment.

Your CMT has recommended maintaining your Escape Risk rating as Moderate. This recommendation was based on a history of violent impulsive behaviour. The CMT has demonstrated current indicators of suspected gang associations and the SIO department has linked numbers found on a seized cell phone to be associated exclusively to you. While there is no escape history and no concerns surrounding community supervision, your CMT has indicated concerns related to illicit activity which can be incorporated under other risk indicators as they demonstrate concerns surrounding potential access to the community. As such I am satisfied there are reasonable grounds to conclude you remain a Moderate Escape Risk.

Your CMT has recommended elevating your Risk to Public Safety to High. Taken into consideration is the seriousness of your offence, the level of premeditation involved, contributing factors and progress against said factors. It is noted you have successfully completed the ICFM Multi Target Primer. Your CMT has outlined concerns related to your associations and behaviours despite some program intervention. I am not satisfied there is sufficient information to suggest and elevation in this area. Your offending was such that individuals were victimized regardless of your intent. You have demonstrated motivation to address your Correctional Plan and you have resided in the ISU. Given this information I believe you remain appropriately rated as Moderate for Risk to Public Safety.

Commissioner's Directive (CD) 706 gives clear instruction as to what is expected of medium security inmates. Medium security inmates demonstrate the "desire and ability to interact effectively with others, individually and in moderately structured groups while subject to regular and often direct supervision.

Current information and corroborated evidence would suggest you are involved in illicit activities within the institution, which cause concerns for your manageability within the confines of a medium security environment. Of concern is the established connection to the seized cell phone. This suggests the ability to circumvent security measures within a medium security environment to gain access to items which are utilized for illicit purposes, including but not limited to the institutional subculture. This suggests a need for more intensive supervision than can be offered within a medium security institution.

Given all of the information presented to this board, I am approving your ratings in the areas of Institutional Adjustment as High, Escape Risk as Moderate and Risk to Public Safety as Moderate.

Before being considered for a return to a medium security institution, you must demonstrate a minimum of six months during which you have consistently addressed the concerns identified in the Assessment for Decision and the Addendum to the Assessment for Decision.

FINAL DECISION:

Involuntary Transfer to Kent maximum security - APPROVED

Offender Security Level - MAXIMUM

[Emphasis added.]

[28] Again the security classification document is a verbatim repeat of the transfer decision.

IV

[29] It is well-established in our law that transfers of inmates to more restrictive settings constitute a deprivation of liberty. In *May v. Ferndale Institution*, 2005 SCC 82, the majority, per LeBel and Fish JJ., observed at paras. 74-77:

74 A successful application for habeas corpus requires two elements: (1) a deprivation of liberty and (2) that the deprivation be unlawful. The onus of making out a deprivation of liberty rests on the applicant. The onus of establishing the lawfulness of that deprivation rests on the detaining authority.

75 With respect to the first element of habeas corpus, the appellants claim that transfer to a more restrictive institutional setting deprives them of their residual liberty. With respect to the second element of habeas corpus, the appellants contend that the deprivation of their residual liberty was unlawful because it was arbitrary and violated CSC's statutory duty to disclose entrenched in s. 27(1) of the CCRA.

(1) Deprivation of Liberty

76 The decision to transfer an inmate to a more restrictive institutional setting constitutes a deprivation of his or her residual liberty: *Miller*, at p. 637; *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459, at p. 464. As a result, there is no question that the appellants have discharged their burden of making out a deprivation of liberty. We must therefore go on to consider whether that deprivation was lawful.

(2) Lawfulness of the Deprivation of Liberty

77 A deprivation of liberty will only be lawful where it is within the jurisdiction of the decision-maker. Absent express provision to the contrary, administrative decisions must be made in accordance with the Charter. Administrative decisions that violate the Charter are null and void for lack of jurisdiction: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078. Section 7 of the Charter provides that an individual's liberty cannot be impinged upon except in accordance with the principles of fundamental justice. Administrative decisions must also be made in accordance with the common law duty of procedural fairness and requisite statutory duties. Transfer decisions engaging inmates' liberty interest must therefore respect those requirements.

[30] There is, accordingly, no question that the first element of an application for habeas corpus is established in this case. The only question is the lawfulness of the deprivation, the burden of establishing which falls on the respondents.

- [31] The nature of habeas corpus has been a subject of some uncertainty and debate. Some cases suggest there is a distinction between the jurisdictional remedy of habeas corpus, which is concerned only with the lawfulness of a decision, and judicial review, which may involve the question of "reasonableness." In *Khela v. Mission Institution (Warden)*, 2011 BCCA 450, our Court of Appeal has recently explicated the scope and nature of habeas corpus as, in fact, engaging the concept of reasonableness. The court, per Chiasson J.A., addressed the issue as follows:
- [62] The Warden urges that habeas corpus should not be treated like judicial review and that to do so would water down habeas corpus. Relying on cases such as *Williams*, *Tan* and *Cooper*, she states that the court is "not to review the merits of the impugned decision". A number of difficulties arise from these cases.
- [63] The analysis in these cases is grounded on the notion that habeas corpus will issue only if there is a loss of jurisdiction, that is, only if the unlawfulness of the confinement is based on an absence of jurisdiction. Historically, this was the approach of the courts, but as R.J. Sharpe observes in *The Law of Habeas Corpus* (Oxford: Clarendon Press, 1989) at pp. 21 - 22, the courts long ago moved away from the strict application of jurisdiction as a basis for the issuance of habeas corpus:

In addition to giving jurisdictional error an almost limitless definition, the courts have adopted another technique to achieve review which is also to be found in the habeas corpus cases. This method is to abandon the idea that review can only be based on jurisdictional error and to claim that in certain situations, any apparent error will allow for interference. ...

The unmistakable trend is to broaden the grounds for judicial review to include virtually all errors of law. If the court chooses not to classify the error as going to jurisdiction, it may be possible to review it as an error on the face of the material before the court.

The scope of review on habeas corpus, it will be argued, demonstrates these characteristics. Because personal liberty is at stake, there has always been the possibility of a broad scope of review. The courts have shown themselves ready to mould concepts and definitions so as to achieve the power to give a remedy where a remedy seems to be needed.

- [64] At pp. 34 - 35, he observes that on habeas corpus, relief may issue on the grounds of patent error:

This aspect of review, long neglected but now revived in the law of certiorari, is that the superior court may examine the record or documents brought before it relating to the inferior court's proceedings and give a remedy where there is a patent error or 'error on the face of the record'. This may occur even where the error is not one which goes to jurisdiction.

It is sometimes supposed that habeas corpus is merely a form of collateral attack, but equally, it is often recognized that collateral attack does not adequately describe the powers of review which the court has. While the attack is collateral in form, there are quite clearly reviewing powers akin to those available on direct review, and the basis for the exercise of these powers is not excess of jurisdiction but is closer to 'error on the face of the record'.

Quite plainly, relief may be granted in cases where the return to the writ is bad, yet free from jurisdictional error. The whole purpose of habeas corpus is to determine whether or not the gaoler can produce legal authority for the detention. If the reason or document he returns is erroneous in law or, in certain cases, in fact, the detention is not justified. The nature of the review differs from that had on certiorari in that the whole record of proceedings is not necessarily brought before the court and there is no power to quash. But the return, as in the case of the record on certiorari, is subjected to a search for error on the face.

[65] In *Dunsmuir*, the Supreme Court commented on true jurisdiction issues, stating at para. 59:

'Jurisdiction' is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction. ... We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

[66] In my view, the question of whether a decision to reclassify a prisoner is reasonable is not jurisdictional (in the *Dunsmuir* sense) and need not be for habeas corpus to be ordered (see: *Northstar Lumber v. United Steelworkers of America*, Local No. 1-424, 2009 BCCA 173 at para. 37). The question is whether the deprivation of liberty was lawful. I do not think an unreasonable decision is lawful.

[67] The limited approach advocated by the Warden derives from the considerable deference courts have given to decisions made by prison administrators, a deference which flows from the historical refusal of courts to review at all such decisions. Once the door was opened to consider such decisions, I see no principled basis on which to limit the scope of judicial review. The issue is not whether the reasonableness of prison administrators' decisions can be considered by a court, but an accurate assessment of what such a consideration will involve.

[32] Further on, Chiasson J.A. observes:

[76] The editors of the third edition of *The Law of Habeas Corpus*, published in April 2011 (Judith Farbey, Professor, now Mr. Justice Sharpe and Simon Atrill) are critical of two English decisions - *R. v. Secretary of State for the Home Department*, ex p. *Cheblak*, [1991] 1 W.L.R. 890 and *R. v. Secretary of State for the Home Department*, ex p. *Muboyayi*, [1992] Q.B. 244 - which held that habeas corpus:

... lies only in relation to 'jurisdictional error' in contradistinction to the 'prior underlying administrative decision' ... detention without power (in excess of jurisdiction) is to be challenged by application for habeas corpus; unreasonable detention within the corners of a statutory power and so within jurisdiction) is to be challenged by application for judicial review (at p. 19).

The editors assert that: "the scope of review on habeas corpus ought to be coextensive with the scope of judicial review proceedings".

[77] At p. 61, the editors express their agreement with view of Professor Wade as expressed in *Habeas Corpus and Judicial Review*, (1997) L.Q.R. 55 at. p. 62:

Whether there is an 'underlying administrative decision' is quite irrelevant. The question is whether the prisoner's detention is lawful or unlawful. The prisoner ought to be able to rely on any ground, which, if made good, would entitle him to his release. To this he is entitled as of right, as has been clear law for centuries.

[78] Wade also expresses agreement with the English Law Commission recommendation that the scope of review for habeas corpus and judicial review should be the same.

[79] In language fully consistent with the words of the Supreme Court of Canada in *May* state, the editors of the third edition state at p. 63:

Habeas corpus nonetheless retains an important constitutional function above and beyond judicial review. It enables anyone in detention to have a case brought speedily to court and to seek release as of right whereas the law and procedures of judicial review are in their very essence discretionary. The liberty of the individual, and the principle that governments must be able to justify each and every detention of an individual, are core elements of constitutional democracies. It is to be hoped and expected that judges in democracies will protect liberty irrespective of the procedural route by which a case comes to court. But habeas corpus is a bulwark against arbitrary decision-making and, to this extent, it is a right too precious to remove from the constitutional framework in which it is embedded.

I agree with these observations and see no basis for excluding a consideration of reasonableness from the scope of review of superior courts on an application for habeas corpus. In Canada, a person deprived of liberty should not be limited in the scope of review by his or her choice of forum.

[80] In argument on this appeal, much was made of the distinction between certiorari to quash and certiorari-in-aid. In *Miller*, the Court noted the distinction between the two, quoting from Laskin C.J. in *Mitchell v. The Queen*, [1976] 2 S.C.R. 570: certiorari is used to quash a decision or order on its own strength and "certiorari-in-aid of habeas corpus [is used] to make the latter remedy more effective" (at p. 578; qtd. at para. 13). In the context of federal tribunals, certiorari to quash is within the jurisdiction of the Federal Court. Recognizing this distinction, the Court in *Miller* concluded that Parliament did not take from the Provincial superior courts the ability to use certiorari-in-aid when exercising the jurisdiction to issue habeas corpus against federal tribunals, a jurisdiction not granted to the Federal Court

(Miller at para. 14).

- [81] As the court observed in May, this leads to two conclusions: one, Parliament did not intend to deprive Provincial superior courts of habeas corpus jurisdiction over federal tribunals; two, that jurisdiction includes the power to compel the production of the tribunal's record to assist in determining whether a deprivation of liberty is lawful, resulting in the release of the applicant. Habeas corpus serves the same function in the Federal Court: that is, production of the record to assist the court in determining whether to quash.
- [82] There are three main distinctions between the jurisdiction of the Federal Court and that of Provincial superior courts over federal tribunals: the Federal Court can quash orders and decisions and the superior courts cannot; the remedy in the Federal Court is discretionary and the release of a person who has been deprived unlawfully of liberty is not; the onus is on an applicant in the Federal Court to establish that a decision or order should be quashed, whereas once an applicant for habeas corpus establishes a deprivation of liberty, the onus is on the other side to establish that the deprivation was lawful - in the present context, that it was reasonable (May at para. 71). In my view, these distinctions do not detract from the conclusion that a court, in considering whether a deprivation of liberty is lawful, is entitled to determine whether the decision to deprive was reasonable.
- [33] That is sufficient, I think, to set out the legal principles delineating how an application for habeas corpus concerning an administrative decision inside a prison should be approached.

V

- [34] There are two procedural matters I should address at the outset. The first is that, although this matter has been brought by an "Application" and filed in the criminal registry, it should properly have been brought as a civil petition for reasons summarized in *Ross v. Riverbend Institution (Warden)*, 2008 SKCA 19, at paras. 26-30, and in particular as found the quote from *R. v. Shubley*, [1990] 1 S.C.R. 3, found at para. 29:

29 In *Shubley*, McLachlin J. (as she then was) stated:

... Was the prison disciplinary proceeding to which the appellant was subject, by its very nature, criminal? I conclude it was not. The appellant was not being called to account to society for a crime violating the public interest in the preliminary proceedings. Rather, he was being called to account to the prison officials for breach of his obligation as an inmate of the prison to conduct himself in accordance with prison rules. If he had been called upon twice to answer to the State for his crime, s. 11(h) [of the Charter] would apply. But section 11(h) does not operate so as to preclude his being answerable to prison officials for a breach of discipline as well as to the State for his crime.

The internal disciplinary proceedings to which the appellant was subject lack the essential characteristics of a proceeding on a public, criminal offence. Their purpose is not to mete out criminal punishment, but to maintain order in the prison. In keeping with that purpose, the

proceedings are conducted informally, swiftly and in private. No courts are involved. They are not, to borrow the words of Wilson J. in *R. v. Wigglesworth*, [[1987] 2 S.C.R. 541] at p. 560: "of a public nature, intended to promote public order and welfare within a public sphere of activity." The answer to the first branch of the *Wigglesworth* test must be that the prison discipline proceedings are not, by their nature, criminal proceedings. They are internal disciplinary proceedings, even though they arise from the same act as gives rise to criminal proceedings.

[Emphasis added]

- [35] Unless the respondents insist upon it, I will not direct that the "Application" be amended to a "Petition". The filing in the criminal registry creates an anomaly, however, that should be corrected, and I direct that this matter be re-filed in the civil registry. This was the practice adopted in *Bacon v. Surrey Pretrial Services Centre (Warden)*, 2010 BCSC 805, and I think there ought to be consistency.
- [36] The second issue that arises is whether the court ought to permit cross examination of Shawna Hopfner, the Assistant Warden, Interventions, at Mission Institution, who swore the principal affidavit for the respondents setting out the information upon which the respondents acted, the decision that was made, and the reasons that were given.
- [37] There are two things to say about this. The first is that Ms. Hopfner's affidavit does not put her credit on the line in the way of a witness who is giving direct evidence of his or her observations or actions. All Ms. Hopfner has done is place before the court the record on which the applicant's transfer either stands or falls.
- [38] The applicant has, at considerable length, asserted that he was unable to adequately respond to the information he was given and that that rendered the process unfair. Whether that is so can be judged on the record, however. The proffer of inadequate information in support of the action taken will simply result in a finding that the action was unjustified and therefore unreasonable.
- [39] I am accordingly not persuaded that in the circumstances the court should stray beyond a review of the case upon which the respondents purported act as set out in the record.

VI

- [40] Stripped of the avalanche of verbiage in which the decision to transfer is couched, the central justification offered is the discovery of a cell phone in the possession of another inmate that had a number in its directory corresponding to a number on the applicant's institutional file phone list. I think it stands to reason that the possession of a cell phone within the prison is a matter of significant concern for reasons outlined in the material explaining the decision. A cell phone can be used to engage in criminal activity outside and inside the institution, including the importation of drugs or other contraband.

- [41] That said, it is clear that before the cell phone was discovered in the possession of another inmate, there were no serious concerns respecting the applicant, or at least none that had been brought to his attention, either to caution him that his behaviour ought to change or to call him to account. The discovery of the cell phone obviously led the institution to view the applicant's activities in a new light. In the initial Notice, this took the form of generalized statements about "heavy involvement" in the institutional drug sub culture and "negative affiliation and organized levels of criminal activity for monetary gain."
- [42] In the first "Assessment for Decision", given following the applicant's emergency transfer, that is, before he had any chance to respond, positive behaviour is reinterpreted as negative. So, the fact that the applicant had "been attending to his educational upgrading where he [had] continued to get generally favourable program performance reports"; that "[s]ince coming to Mission Institution on 2010/08/02 [he] had not been a management concern", and that he had "previously [been] thought of a making sound progress towards the completion of his Correctional Plan", came to be interpreted as "impression management" and as "manipulative conning behaviour".
- [43] When the applicant was able to respond, he denied possession or use of a cell phone at any time while at Mission Institution. He denied involvement in the institutional drug culture or any gang ties. He offered an alternative explanation for the fact that the prisoner, Nhan Ly, was in possession of a cell phone with a number associated with mutual relatives. This person had only been identified in the institutional documents only as "another inmate".
- [44] The applicant's response prompted the institution to issue an "Addendum to Assessment for Decision" on July 18, 2011. This recited a series of contacts between the applicant and other prisoners going back to September 5, 2010, none of which appeared to be sufficient concern at the time they occurred that they were brought to the applicant's attention. The notation respecting the central event is that "a cell phone with a SIMS card was seized from an inmate SIO information notes that one of the cell phone numbers is linked to Mr. Nguyen." This is followed by a note that "Source states that [the other inmate] was just segregated for being in possession of a cell phone and is in debt to Mr. Nguyen and purposely got caught with the phone due to his debt issues. Source information states the cell phone belonged to Mr. Nguyen and [the other inmate] was holding the cell phone due to debt issues." These contacts are taken as evidence that the applicant "was known to frequently associate with known members of Asian organized crime." The applicant's positive attributes are dismissed as evidence that he is "very adept at hiding his true intentions and associations." He is said to have "demonstrated his ability to portray an image of being a model inmate through an absence of charges, negative drug tests and participation in his correctional plan."
- [45] On August 4, the Acting Warden, Ms. Van Vugt, rendered a "Final" decision before counsel had had an opportunity to address the "Addendum" material. She conceded that the emergency transfer was not supported by sufficient information but proceeded on the basis that, in her view, counsel had had enough time to review the material tendered in the

Addendum (which was meant to address the admitted lack of evidence in the first instance), and proceeded to reiterate that the applicant was being reclassified as a high security risk due to "information linking [him] to a cell phone" and "involvement in the institutional sub culture (drugs/tobacco)", and "association with Asian gangs." Without in any way addressing the material the applicant had submitted to that point in order to meet the case set out against him - which included his denial of possession and use of the cell phone; denial of gang affiliations, and an explanation for how another identified prison could have a cell phone with a number linked to him - the Acting Deputy Warden simply said "I am satisfied this has been addressed" and concurred with the rating that the applicant was a high risk.

- [46] It should be noted that the institution's articulation of the central accusation had been downgraded by this time from "possession" and/or "ownership" of the cell phone to being merely "linked", "tied", or "connected" to the cell phone.
- [47] The positive allegations of "heavy involvement" in the institutional drug subculture, in the "Notice" and the "Addendum" also moderated significantly. Respecting this allegation, the Acting Deputy Warden conceded, "I am not satisfied there is sufficient evidence to suggest an elevation [to a High rating] in this area." However, she went on to say, without particulars as to what she could possibly mean, "Your offending was such that individuals were victimized regardless of your intent. You have been involved in addressing Your Correctional Plan through programming and resided in ISU. Given this information I believe you remain appropriately rated as MODERATE for Risk to Public Safety." She concluded, nevertheless, that:

Specific concerns in your case are directly related to your involvement in the institutional sub culture (drugs/tobacco), associations to Asian gangs and information linking you to a cell phone. While it is noted you were otherwise demonstrating positive behaviour within the institution (involved in your Correctional Plan and residing in the ISU), the concerns outweigh potential gains. It is noted your rebuttals disputed the rating for this area, I am satisfied this has been addressed and therefore I concur with the CMT's rating of HIGH for Institutional Adjustment.

There are current indicators of involvement in the drug subculture, possible gang association and ties to a cell phone found within the institution. Given the current indicators, I concur with the CMT and assess you as MODERATE for Escape Risk.

(para. 19)

[Emphasis added]

- [48] This decision was set aside by the institution on September 28, 2011. Counsel for the applicant made further submissions on October 3, 2011. In this submission, which is reproduced at para. 24 herein, the applicant set out his concerns about the information on which he had purportedly been transferred. On October 11, 2011, he tendered the letter from the inmate who was in possession of the cell phone (reproduced at para. 25 herein).

- [49] In a new "Final" decision, the Acting Deputy Warden reiterated her concession that the original material given to the applicant had been inadequate. She reads the further submissions of the applicant as evidence that he and his counsel "have a firm understanding of the information as it relates to concerns regarding associations and the institutional drug subculture and the possession/ownership of a cell phone", and concludes, "[a]s such I do not agree with the submission presented". This appears to be a tacit recognition that the person from whom the cell phone was taken was the person identified by the applicant, since there is no suggestion that he has drawn the wrong conclusion about who that person is.
- [50] The Acting Deputy Warden again agrees that there was insufficient evidence to conclude that the applicant has "gang affiliations or criminal associations". I pause to note that this thoroughly undermines the cogency and reliability of the first Assessment, which boldly asserted that "[a]fter a thorough investigation the Security Intelligence Officer determined that Mr. Nguyen was using the cellular phone to participate in the institutional drug subculture." Not so thorough, apparently.
- [51] The applicant's substantive response was dealt with as follows:
- 6) In the rebuttal provided by your counsel, it was noted another inmate was prepared to discount your involvement with the cell phone and was prepared to provide information in writing which would place sole ownership on this other individual. The letter was received on 2011-10-11 and has been considered as part of the decision making process. The veracity of this claim cannot be verified and the reliability of any support from other incarcerated individual cannot be confirmed. It is unclear what influence may be behind the interview with the respective incarcerated individual provided subsequent to your removal from Mission Institution general population.

(para. 26)

- [52] There is no suggestion of any effort to address the information provided which would be a complete defence to the question of ownership or linkage to the applicant if it turned out to be true. The Acting Deputy Warden makes no attempt to reconcile the information about the cell phone they received from the applicant and Mr. Ly with the information they got from their sources. As reported, the source-given story does not make sense. It does not explain how, if Mr. Ly was in debt (which he denies) he wanted to be caught with the cell phone. In failing, in any way, to come to terms with the different versions of these events before her, except to say that, for unexplained reasons, the applicant's claim "could not be verified" the Acting Deputy Warden failed to address the issue upon which her interpretation of all of the other material turns.
- [53] It is also not clear what the Acting Deputy Warden is actually conceding when she says that there is insufficient information to conclude that the applicant had "gang affiliations or criminal associations", because elsewhere in the text she continues to say "there is adequate evidence to suggest you were involved in the institutional subculture"; that there are "concerns related to the institution subculture, and concerns related to associations"; that

there are "current indications of suspected gang associations"; and that there are "concerns related to illicit activity".

- [54] The evidence related to the actual ownership and possession of the cell phone and the possibility of an innocent, coincidental explanation for the one number that is identified as on the applicant's institutional list, is never addressed. Rather, conclusions are stated and adopted with no reasons or grounds in support:

The concerns regarding your connection to the seized call phone also remain valid [how?]. The SIO department has concluded that the information discovered on the cell phone includes contacts [plural, again?] which they have concluded belong solely to you [how?].

- [55] There is simply no attempt to put the version of events given by the sources against the applicant's explanation, and to weigh the evidence in order to come to an accurate conclusion as to whether or not the cell phone was, in fact, linked to the applicant.

VII

- [56] There is another aspect to this case which counsel did not address, but which I raised in the brief hearing held to discuss the implications of the Court of Appeal's decision in Khela.
- [57] If one looks at the statutory and regulatory provisions set out herein at paras. 6 to 8, one sees a template for a procedure meant to give inmates, whom the institution believes should be transferred, an opportunity to be heard and to persuade the institution that a transfer is unjustified. Section 28 of the CCRA makes it clear that the inmate is to be confined in the least restrictive environment consonant with public and personal safety and the security of the institution. He or she is entitled to notice and to an opportunity to review the information (or a summary of the information) to be considered, and an opportunity to be heard in person or in writing, before the decision is made. He or she is entitled to written notice of the final decision and reasons for that decision.
- [58] All of this is set out in the CCRA and the Regulations in terms that suggest a fair and measured manner of proceeding in cases of this kind. The concerns that justify transfer to a higher security institution are clearly not, in and of themselves, justification for immediate transfer, since those are the matters that are the subject of the process set out in s. 27 of the CCRA and s. 12 of the Regulations.
- [59] The effect of the applicant's immediate transfer was to turn the process on its head. The transfer took place, and the Notice and Assessment for Decision followed. Before the applicant had any opportunity to answer the allegations against him, a complete set of motives was imputed to him. He was said to be "not taking accountability for his past actions." It is impossible to understand how the institution could purport to know what was in the applicant's mind when he was not allowed a chance to give an account. These "past actions" are, of course, the same past actions that were ultimately conceded not to be a firm basis for any sanction. It is then said that this behaviour (that is, apparently, secretly holding

a pro-criminal value system, and failing to take accountability for innocuous behaviour) not only damages Mr. Nguyen's credibility (at a point where he had not had a chance to put his credibility in issue) but "goes to undermine the efforts of other offenders" (there are no particulars of how his secret beliefs and innocuous past actions could have such an effect). The assessment then speaks of the damage to other inmates from having to deal with the stress caused by the applicant's activities (there are no examples or particulars) and to impute "bullying, temptation to use drugs, and fear of reprisals as consequences of the applicant's activities. No particulars are given. The only possible inference is that there weren't any, and that the institution simply imputed to the applicant a series of imagined consequences based on its worst fears about where possession of a cell phone might lead, which had nothing to do with anything the applicant had actually done.

- [60] As we have seen, three "Final" decisions were issued, two of which were rescinded for failure to make adequate disclosure. The whole process lost its shape and integrity early on and became an exercise in rationalizing, in the face of a crumbling evidentiary foundation, a specious decision to transfer on an emergency basis. In the third "Final" decision, the Acting Deputy Warden simply avoided coming to terms with the central evidentiary question. The specific link to the applicant of one telephone number, explained by him and by the person who had the cell phone, was not substantively addressed.
- [61] The record taken as whole shows no basis for immediate transfer and for the disruption of the process set out in the CCRA and the Regulations. The institution had impounded the cell phone and nothing in the material suggests any emergency. Thereafter the several decisions made by the authorities demonstrate that the evidence they had at the time of the initial transfer was overstated - the applicant never possessed the cell phone - and that allegations of gang ties and criminal associations could not be justified. Despite these concessions, however, these allegations continued to be reiterated, and, in a patent attempt to shore up this weak evidentiary foundation, innocuous and even positive behaviour was re-characterized as an "impression management."
- [62] I fully accept the observation of Willcock J. in *Caouette v. Mission Institution*, 2010 BCSC 769, at para. 89 that:
- [89] The Warden need not act as investigating officer on behalf of the applicant. Either the Warden has sufficient grounds for ordering a transfer or the Warden does not. There is no basis for a review of the Warden's decision on the grounds that further investigation ought to have been conducted.
- [63] It is not sufficient for the applicant merely to deny the allegations and give an alternate version of events and expect the institution to conduct an investigation. That is not the case here, however. The applicant has produced evidence it was the responsibility of the institution to weigh and consider fairly. There is simply no evidence that such a process was undertaken. Rather the institution continued to swaddle a small amount of evidence in clouds of justification, much of which, paradoxically, repeated what had been acknowledged

to be unreliable. The entire process was unreasonable, from the applicant's peremptory relocation without a hearing, through the three "Final" decisions. It is not possible on the record before the court to discern a reliable path to the conclusions drawn by the institution, given the institution's manifest failure to discriminate between the evidence it had and the hypothetical consequences it attributed to the applicant throughout.

[64] Accordingly, I order the applicant released from his placement in maximum security, and direct that he be reassessed in light of the principles set out in the CCRA. I do not purport to direct any particular placement as to do so would be to infringe upon the discretion properly exercisable by the Correction Service of Canada.

"T.M. McEwan"

The Honourable Mr. Justice McEwan

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Prepared on 29 October 2026 · Esheria