SUPREME COURT OF NOVA SCOTIA
Citation: *Devlin v. Canada (Attorney General)*, 2020 NSSC 389

Date: 20201016
Docket: CRAM. No. 499447
Registry: Amherst

Between:

Michael Devlin

Applicant

v.

The Attorney General for Canada, in right of Her Majesty the Queen and Superintendent of the Springhill Institution

Respondents

DECISION

Judge:	The Honourable Justice Jeffrey R. Hunt
Heard:	October 13, 2020, in Amherst, Nova Scotia
Oral Decision:	October 16, 2020
Written Release:	January 29, 2021
Counsel:	Lisa Teryl and Bibhas Vaze, Solicitors for the Applicant Kaitlin Duggan, Solicitor for the Attorney General

By the Court (orally):

Opening Remarks

[1] As I indicated on Tuesday, *habeas corpus* matters, by their very nature, are time sensitive. For that reason, I always attempt to provide an outcome for parties on the day of the hearing. I thank you for your patience in this instance where I opted to take these extra days to deliver my reasons.

[2] This is a motion by the Applicant seeking a *writ of habeas corpus* against the Superintendent of Springhill Institution and Correctional Service Canada ("CSC"). I will very briefly summarize the positions of the parties. I am going to address the evidence and what I have taken from the evidence. It is not my intention here to attempt to summarize or recite all the evidence or submissions. I will touch upon elements and portions of the most pertinent evidence and arguments. I have, however, weighed and considered all the evidence and submissions in arriving at my ruling.

[3] The Applicant, Mr. Devlin, says that his security reclassification:

- was the result of an arbitrary process which proceeded without procedural fairness.

- the security reclassification stemmed from a flawed decision to affect his emergency transfer to a maximum-security institution. Although that emergency transfer did not proceed, he says the process that followed was a mere pretense designed to cover up the fact that the true decision had been made at the time of the emergency transfer attempt;
- he challenges the accuracy, completeness and timeliness of the disclosure he has received from prison administration. He says it is not in compliance with their statutory duties of disclosure.
- specifically, the Applicant argues he has been deprived of the opportunity to meaningfully respond to and challenge the decision of the Warden due to failures in the disclosure process.

[4] The Administration takes the position that the security reclassification is both reasonable and lawful based upon the outcome of their investigation. They say they are in compliance with their obligations under statute and Commissoner's directive.

Burden of Proof

[5] In this matter the Institution has accepted that increased security classification does constitute a deprivation of the Applicant's residual liberty. As a result of this acknowledgment, the burden of proof shifts to the Warden and Institution to prove that the deprivation is lawful and reasonable.

[6] At this point it will be helpful to consider the legal framework within which this application for *habeas corpus* must be decided.

Case Law

[8] The case of *Mission Institution v. Khela*, 2014 SCC 24 ("*Khela*"), a decision of the Supreme Court of Canada, is instructive. It states the following test for an application such as this:

> To be successful, an application for *habeas corpus* must satisfy the following criteria:
>
> > First, the Applicant must establish that he or she has been deprived of liberty. Once a deprivation of liberty is proven the Applicant must raise a legitimate ground upon which to question its legality. If the Applicant has raised such a ground, then the onus shifts to the Respondent authorities to show that the deprivation of liberty was lawful.

[7] In this case, as noted previously, counsel for the Institution acknowledges that the first branch of this test has been met. The Applicant can demonstrate that there has been a residual deprivation of his liberty. For the purposes of this application the Respondent also concedes that the Applicant has raised a legitimate ground upon which to question the legality of the deprivation.

[8] The Court thus moves to the final component of the analysis - can CSC demonstrate that the deprivation is lawful and reasonable?

Governing Principles

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

[10] The applicable standard of review with respect to detention of inmates is reasonableness (*Pratt v. Nova Scotia (Attorney General)*, 2020 NSCA 39). The recent case of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("*Vavilov*"), contains a restatement and partial reformulation of the law respecting review of an administrative decision.

[11] In order for a decision to be reasonable, it requires two elements:

1. The decision's reasoning must be internally coherent; and

2. The decision must be justified in light of the legal and factual constraints that bear on the decision.

[12] Although other grounds for a finding of unreasonableness are possible:

> A decision will be unreasonable, and therefore unlawful, if an inmate's liberty interests are sacrificed absent any evidence or on the basis of

> unreliable or irrelevant evidence, or evidence that cannot support the conclusion.

See *Khela v. Mission Institution*, at paras. 34, 52 and 74.

[13] At the time *Khela* was decided, the governing caselaw on the weighing of reasonableness was still *Dunsmuir*. Under that judgment, the focus was on whether the administrative decision in question fell within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" and exhibited "justification, transparency and intelligibility" (*Dunsmuir* at para.47).

[14] The Supreme Court of Canada in *Vavilov* has clarified the approach to assessing the reasonableness of administrative decisions. While the principles in *Dunsmuir* were not discarded, the Court gave more specific guidance about how the reasonableness analysis ought to be conducted.

[15] In particular, the Supreme Court directed that the focus of the reviewing court must be on the decision in question: both the decision-maker's process and the outcome. The reviewing court does not ask whether it would have reached the same decisions (para.83). Nor should a standard of perfection, or a treatment equivalent to what would be found in court decisions, be required - a specialized decision-maker will often use technical language appropriate to

their expertise (paras. 91-93). A decision does not have to look like a court judgment.

[16] Rather, the court is to consider first whether the decision was a product of internally coherent reasoning:

> 102 To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error" . . . However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived"... Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment" . . .
>
> 103 While, as we indicated earlier (at paras. 89-96), formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis . . . A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken . . . or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point . . .
>
> 104 Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".
>
> [internal citations omitted]

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

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

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

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

[20] The reviewing court ought not reweigh or reach its own conclusions as to the evidence that was before the decision maker. The facts continue to be the purview of the decision maker. However:

> The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. (paras. 125-126).

[21] Previously decided *habeas* matters will continue to provide relevant guidance on the exercise of a provincial superior court's discretion in this context.

[22] In *May v. Ferndale Institution***,** 2005 SCC 82 the Supreme Court of Canada explained that, for a deprivation of liberty to be lawful, the decision must be within the jurisdiction of the decision maker, the reasons and record of the decision must support its conclusion in fact and principle and the decision must be justified, transparent and intelligible.

[23] Reviewing the decision on a standard of reasonableness means that deference will be shown to the decision maker. The case law shows that on *habeas corpus* applications, decisions of prison administrators are owed considerable deference by the Courts. The Supreme Court of Canada stated the following in *Khela*:

> To apply a standard other than reasonableness in reviewing such a decision could well lead to the micromanagement of prisons by the Courts. Determining whether an inmate poses a threat to the security of the penitentiary or of the individuals who live and work in it requires intimate knowledge of that penitentiaries culture and of the behaviour of the individuals inside its walls. Wardens and the Commissioner possess this knowledge and related practical experience to a greater degree than Provincial Superior Court Judges.

[24] As a matter of law, I am directed by Courts above me, to conclude that the Wardens and the Commissioner possess knowledge and related practical experience in matters of institutional safety and security. I am to regard their expertise and they are owed deference with respect to their areas of specialized knowledge. I ought not to interfere with the exercise of their discretion without showing reasonable deference to their determinations and conclusions.

[25] The Supreme Court of Nova Scotia in *Cain v. Canada (Correctional Service),* 2013 NSSC 367 summarized the role of provincial Superior Courts, like this one, in reviewing decisions of prison administrators on *habeas corpus* matters. They summarized it as follows:

> 34 In short this Court's role is not to determine whether the administrative segregation and/or the security reclassification was the "proper decision" but rather whether the Respondent had the jurisdiction to make those decisions and whether such decisions were lawful and reasonable in the circumstances taking into consideration the rights and procedural safeguards which Mr. Cain is to be afforded at law.

Other courts have expressed similar sentiments including in the New Brunswick Court of Queens Bench decision in *Samms v. LeBlanc,* 2004 NBQB 140 where the

following comments from the decision of the Federal Court in *Cline* v. *Reynett*, (T-894-81, March 18, 1981) were adopted:

> I would like to add that excepting clear and unequivocal cases of serious injustice with mala fides or unfairness, Judges as a general rule should avoid the temptation of using their ex-officio wisdom in the solemn, dignified and calm atmosphere of the Courtroom and substituting their own judgment for that of experienced prison administrators.

Summary of Evidence

[26] Counsel for the Institution put forward two affidavits. The Applicant advanced two as well, both from Mr. Devlin.

[27] The makers of the Respondent Affidavits were Daniel Harroun, Institutional Parole Office and Robert Henderson, Unit Manager, Springhill Institution.

[28] No party sought to cross examine the affiants for the opposing side.

[29] I will note in passing there were no confidential affidavits advanced pursuant to section 27(3) of the *Corrections and Conditional Release Act* (*"CCRA"*). Section 27(3) of the *CCRA* authorises the use of such affidavits where the Institution satisfies the Court that confidentiality is required to protect the safety or security of the facility and persons within it. In many cases the Institution

seeks the protection of confidential sources, intelligence or security methods within the Institution.

[30] There is binding authority from the Supreme Court of Canada which comments on the operation of s.27(3) of the *CCRA*. It speaks to the power of CSC to shield sources, to protect confidential information, to protect even investigative techniques which, if disclosed, could reasonably jeopardize safety or security in the Institution. It addresses the legal tension between the Applicants right to know and the demands of confidentiality. The operation of the section has been found to be constitutional.

[31] I have commented previously that it is important the use of confidential affidavits be limited to when they are strictly necessary, and their use can be strictly justified under the legislation.

[32] I am pleased that this objective was adhered to in this case.

[33] With respect to those affidavits that were before the Court, I have assessed Mr. Devlin's two affidavits. In his July 24th filing he states that he has been in prison since he was 17 years old for causing the death of another man. He is now 39 years old. On July 23, 2020 he was informed by unit manager, Robert

Henderson, that he was being immediately transferred to the maximum security institution at Renous, which I may also refer to as Atlantic Institution.

[34] He says he was not provided with a notice of emergency transfer. Mr. Devlin says he had previously been at Renous and transferred to Springhill in March 2020. The Applicant states that unit manager, Henderson, had given him a reason, being that the Applicant was acting out towards officers in connection with the seizure of a tattoo pen and conduct of a cell search, not following directions, "acting up", not exhibiting a medium security attitude and having a deteriorating attitude and issues which were cumulative. He was told all of this necessitated a transfer.

[35] In his July 24 filing, the Applicant states that at no time was he told his actions constituted a security threat. He was not provided the opportunity to have a "normal re-classification process", which he says would have given him an opportunity to be heard. On being told he was subject to immediate transfer he was prohibited from contacting counsel. He reacted by banging his head until he was sent to the psychology unit, which delayed his transfer long enough to permit him to speak to counsel.

[36] In his affidavit of September 10, 2020, Mr. Devlin indicated that on August 31, 2020 he was informed that a decision had been made and he would be transferred to maximum at Renous. He shared his belief that a previous emergency transfer decision had been rescinded after he filed a *habeas* application on July 24, 2020.

[37] Mr. Devlin states in his affidavit that he been seeking the referral decision sheet and notice of emergency involuntary transfer. As of the time of the affidavit he stated it had not been received.

[38] With respect to the non-emergency transfer decision, Mr. Devlin gave evidence that he received paperwork on or about August 4th, when he received the following:

1. The original Assessment for Decision ("A4D");

2. A notice of involuntary transfer. It was locked as of August 31, 2020;

3. Security reclassification scale ("SRS"), which was locked as of August 4, 2020.

He was also given the Specification Guide for the interpretation of the SRS.

[39] He went on to state that it was August 8th when he received the tickets for the seized items from his cell. He notes this search took place after his removal for

the emergency transfer. He complains that despite his request these tickets were not sent expeditiously to his counsel.

[40] The same applies, he says, to the copies of his notes and arguments which he sought to have forwarded to counsel. These eventually accompanied the final transfer decision document, when it was forwarded to his lawyers.

[41] In general, Mr. Devlin states his disclosure was not provided to counsel in a timely way. He points to the amended A4D which was unlocked on August 18, amended, and relocked on August 18. The SRI scale score was corrected. Mr. Devlin states that his lawyers filed a rebuttal to the amended A4D recommendation. This was done August 23. A substantial component of the position advanced by Mr. Devlin is that submission pertained to an alleged failure of disclosure.

[42] On August 31 he says he was provided with the Warden's final transfer decision. It was for a reclassification to maximum security and transfer. Mr. Devlin states that he was not permitted to meet the Warden to make his case in person. He was only permitted a written rebuttal. He says he has not been charged with an institutional allegation of a weapon's offence, despite the transfer decision

being said to be based in deteriorating behaviour and the alleged possession of a 12-inch hand made weapon.

[43] For clarity, Mr. Devlin denies ever knowingly being in possession of a 12-inch hand made weapon as alleged by the Institution.

[44] In terms of his health Mr. Devlin says as follows:

1. He has been diagnosed with post traumatic stress which he relates to experience with inmates and staff in maximum security institutions.
2. He says he has been diagnosed with borderline personality disorder.
3. He maintains that his history reveals that when he becomes distressed, and in periods of mental hardship, he will sometimes resort to self harm, but not harm of others.
4. Mr. Devlin argues that he is program complete, which means he has completed the core programming requirements.
5. He says he has been consistently employed in the institution and enrolled in programming. He would have pursued more programming, but for COVID-19 restrictions.

[45] I have assessed in detail his rebuttal document.

Affidavit – Daniel Harroun

[46] Daniel Harroun has been the Applicant's institutional parole officer since his entry to Springhill Institution in March 2020. Mr. Devlin is a 38-year-old who in May 2001 was given a life sentence for second degree murder. In March 2020, he

was reclassified down to medium security and transferred into Springhill Institution. Mr. Harroun placed before the Court materials he prepared in the course of his role as institutional parole officer.

[47] Mr. Harroun states that he understands the institutional obligation to house offenders in the least restrictive environment reasonably available. To assist in making this determination he applies the factors set out in s.28 of the *CCRA* and, additionally, Commissioner Directives 706: Classification of Institutions and 710-6: Review of Inmate Security Classification, together with Policy Bulletin 451.

[48] Section 28 of the *CCRA* set out the relevant considerations as follows:

- Degree and kind of custody and control necessary for public safety;
- The safety of the inmate;
- Safety of other inmates and staff;
- Security of the institution.

[49] Closely tied to the issue of offender placement is the security classification of offenders. Mr. Harroun acknowledges it is the statutory responsibility of CSC to assign a security classification to offenders in accordance with the *Corrections and Conditional Release Regulations***,** which I refer to as *CCRA Regulations*.

[50] The purpose of security classification is to protect the offender, others in the institution and by extension the public. Section 28 of the *CCRA* requires Corrections to make institutional placement decisions in keeping with this requirements while at the same time placing offenders in the least restrictive environment possible.

[51] Mr. Harroun testified in his affidavit with respect to the security classification process. He put before the Court, Commissioner's Directive 710-6, including Policy Bulletin 451. He acknowledges the *CCRA* requires that offenders be provided reasons for assigning or changing a security classification: see s. 27(2).

[52] Mr. Harroun gave evidence on the situation which applies to Springhill Institution as a medium security institution. Springhill, he testified, is not in a position to house offenders engaging in certain behaviour that have the potential to jeopardize the safety and security of offenders, staff and the Institution in general.

[53] Springhill Institution does not have and is not designed with capabilities present in a maximum-security institution. He related the contrasting levels of control on offender movement and person to person contact available in medium versus maximum environments.

[54] Mr. Harroun directed himself to the Notice of Involuntary Transfer Recommendation. This was the document dated August 4, 2020. That recommendation was stated to be for a reclassification to maximum security, and transfer to Renous. This was stated to be based on the Applicant's deteriorating behaviour and institutional adjustment issues. In summary, there were said to be:

- Deterioration in dealings with staff;
- an allegation of threatening or intimidating behaviour with staff despite warnings;
- location of shank in offender's cell; and
- determination that risk factors were active and reflective of a need for management in maximum security environment.

He indicated that Mr. Devlin was encouraged to submit a rebuttal.

[55] A substantial amount of Mr. Harroun's evidence was taken up in reviewing the amended A4D and its various elements. The relevant A4D is found in the affidavit at Tab B(7). Mr. Harroun made note that the Applicant scored 26 on the SRS which, on the matrix, supports a maximum-security rating. The SRS is a tool only. It is not a substitute for the professional judgment of the responsible authorities. In this case, Mr. Harroun testified that his conclusion was that the SRS result was an accurate reflection of the offender's security needs, as he found them to be.

[56] Mr. Harroun's evidence was that, following his arrival at Springhill Institution in March 2020, Mr. Devlin demonstrated a problematic series of deteriorating behaviours.

[57] Mr. Harroun reviewed in the A4D what were referred to as "institutional incidents" involving Mr. Devlin. These can be summarized from the document as follows:

1. March 20 - Refusal of lockup/attempt to intimidate.
2. March 24 - Aggressive with officer and grand standing/failure to follow instructions/getting in face of officer.
3. March 27 - Blow-up over missing medication line, resisting lockup requiring some physical assist back to cell, with some active resistance exhibited, attempted intimidation.
4. April 20 - Issues with routine.
5. May 6 - Non-compliance with COVID-19 routine.
6. May 20 - Placed on high watch for own safety after self harm expression.
7. June 3 - Cell search, location of tattoo paraphernalia "two tattoo guns with murder needles, wire and razor blades", confrontational behaviour associated with seizure of items.
8. June 28 - Disrespectful conduct: "I don't make threats, I am man of action". [Which was taken as threat.]
9. July 13 - Verbal issues with staff, threaten self harm,

psychological referral required.

10. July 16 - Disrespectful and challenging regarding cell search. Positioning self to impact officer movements. Warning given regarding non-alignment with medium security placement.

11. July 23 - Offender discloses to escort officer that weapon present in cell. Subsequent search locates in cell a "12-inch hand made sharp" together with lesser contraband.

[58] Mr. Harroun's view was that the overall presentation of the Applicant was an increasing degree of challenging, threatening and maladapted behaviour. Despite counselling and attempted intervention, he testified in the affidavit there was a failure to modify behaviour on the part of the Applicant.

[59] Mr. Harroun testified in the affidavit that, in coming to his recommendation, he assessed the input of the security intelligence office, health care, mental health services and inputs from Atlantic Institution, including from the SIO (Security Intelligence Office) and assessments and intervention office there.

Unredacted SRS

[60] The witness gave affidavit evidence on the issue of providing disclosure to Mr. Devlin. He described what he said was the delivery of material to the Applicant, including:

1. August 4, 2020, delivery of scoring matrix, SRS score, Notice of Involuntary Transfer and A4D.
2. August 18, 2020, delivery of unredacted scoring matrix at request of Applicant counsel.
3. August 19, 2020, delivery of scoring guide for the SIR "scoring scale", also at counsel request.
4. August 31, 2020, referral decision sheet for offender security level delivered. Referral decision sheet for involuntary institutional transfer.

[61] The Final Decision document was delivered to the Applicant on August 31, 2020. It was included in the affidavit of Daniel Harroun and the Court has reviewed it carefully. In summary, the decision reviewed the institutional assessment of the security needs exhibited by the Applicant. The conclusion of the Warden was that a deteriorating pattern of behaviour was being exhibited, despite warnings and counselling.

[62] The items seized from his cell were reviewed. The edged weapon was obviously a focus of the decision making process. The conclusion was that the overall picture presented by the Applicant impacted safety and security in the Institution. The SRS scale computed a maximum classification, and this aligned with the assessment of the responsible officials. The SCC confirmed the institutional head made the decision to transfer on an emergency basis to a higher security institution. This was based on deteriorating behaviour including the security issues posed by the discovery of the weapon.

[63] The conclusion was reached that Mr. Devlin could not be managed in a medium security institution. After this was communicated to Mr. Devlin, he self harmed to the point the transfer could not be carried out. The Warden notes in her Decision that the emergency involuntary transfer was cancelled and a new process commenced.

Affidavit – Robert Henderson

[64] Mr. Henderson was acting Correctional Manager at Springhill Institution. His affidavit was before the Court. Mr. Henderson gave evidence that he was the correctional manager responsible for units 52 and 5 at the relevant time. He specifically provided evidence with respect to the emergency transfer decision of July 23, 2020. On that date the Warden invoked an emergency involuntary transfer process that would have seen the Applicant transferred immediately to Atlantic Institution.

[65] In accord with CCRA Regulations (s. 13) a Referral Decision Sheet for Involuntary Transfer was prepared. It is in evidence. It sets out the grounds for the emergency transfer. These was stated to be deteriorating behaviour causing serious institutional adjustment issues including threatening and intimidating behaviour towards staff. Under the regulation the transfer may occur with the

offender subsequently being provided reasons in transfer and being afforded the opportunity to make rebuttal or response representations respecting the emergency transfer.

[66] Mr. Henderson sets out in his affidavit the following sequence of events. Mr. Devlin was taken to the Admissions and Discharge Office and was advised by Mr. Henderson of the transfer intention. Mr. Devlin did comply with the mandatory strip search without issue. He was told the transfer would happen within the hour. Mr. Devlin sought a call to counsel. Mr. Henderson says he told him he would be provided with the opportunity as soon as Mr. Henderson presented him with the decision sheet which had to be obtained from a nearby building. After being advised of the transfer intention, Mr. Devlin first voiced an intention towards self harm. Subsequently, and in the relatively short time when the decision sheet was being retrieved, the Affidavit relates that Mr. Devlin did engage in acts of self harm.

[67] Correctional officers intervened. Health care and mental health became involved. Following assessment, Mr. Devlin received his telephone consultation with counsel. Mr. Henderson opted not to provide Mr. Devlin with a copy of the decision sheet because of his mental health status and the fact that he was to be hospitalized.

[68] Mr. Henderson says the Applicant was subsequently placed on “high watch” which, under policy, could not then allow the transfer to continue.

[69] That concludes my overview of the Affidavits. The following are some immediate observations.

[70] The Applicant has clearly articulated his belief in the illegitimacy of the process followed by the Institution and for grounds for this belief.

[71] The Affidavits from Mr. Harroun and Mr. Henderson are more detailed then those of the Applicant but this in and of itself as not surprising as they have access to resources which are more conducive to orderly record keeping and the presentation of a more detailed narrative.

Analysis

[72] To assist my discussion of the issues to be addressed, I want to turn now to an application of the factors from the *Mission Institution v. Khela*, decision, as viewed through the lens of *Vavilov*. Once again, those factors were as follows:

1. Did CSC have the jurisdiction to make the decision they did?
2. Was the decision justifiable in relation to the relevant factual and legal constraints that bear on the decision?
3. Was procedural fairness afforded to the Applicant?

Jurisdiction

[73] Section 30 of the *CCRA* (together with s.18 of the Regulations) set out the regime to be followed by the Institution with respect to re-classification. The process of re-classification is impacted as well by Commissioners Directive 710-6 which is titled "Review of Offender Security Classification". I have reviewed these items together with the Policy Bulletin issued following the SCC decision in *Khela.*

[74] Having reviewed all these materials and having considered the positions of the parties, I am satisfied that the Institution had the jurisdiction to take the steps they did.

[75] The more critical part of the analysis is to determine whether the decision was lawful and reasonable in all the circumstances.

Lawful and Reasonable

[76] I want to refer to paragraph 74 of the *Khela* decision which stated as follows:

> As things stand a decision will be unreasonable and, therefore, unlawful if the inmates liberty interests are sacrificed absent any evidence or on the basis of unreliable or irrelevant evidence or evidence that could not support the

> conclusion. Deference will be shown to a determination that evidence is reliable, but the authorities will nonetheless have to explain that determination.

Emergency Transfer

[77] I want to directly address the issue of the initial attempt at an emergency transfer. To recanvas the positions of the parties – the Applicant says the decision was an arbitrary one and all the subsequent steps were directed towards justifying what was an unjustifiable arbitrary decision.

[78] The Respondent says the decision is largely irrelevant except as a piece of the narrative. This decision, according to the Warden in her decision (page 3 of 6):

> ..was cancelled and a new decision-making process was commenced – a non-emergency involuntary transfer.

[79] I have assessed the submissions of the parties. I have concluded as follows:

- The emergency transfer decision is open to attack. It is hard to see the precipitating elements that rendered the situation emergent. These were not fully canvassed perhaps because it was cancelled and did not proceed.
- It is possible the reason for cancellation is that someone in authority concluded it was unsustainable as it stood. It is also possible the health situation was the entire reason. The record is not fully developed enough for the Court to make that determination.
- However, the more critical question is – having terminated the emergency transfer process is the Institution prohibited from commencing and

conducting a non-emergency involuntary reclassification exercise. I have concluded that it cannot be prohibited from doing so.

- Now, in adopting this position, I do have to indicate that when an abortive emergency transfer is part of the narrative background of a matter, as it is here, there should be no surprise that the Court in assessing the subsequent process may naturally have a heightened sensitivity in its scrutiny of the subsequent process. It must be seen that what comes after is not simply a hollow exercise or a pretense designed to cover up the fact that the true decision is already made.

[80] Having concluded the Institution cancelled the earlier emergency process and commenced on a non-emergency involuntary reclassification process, I conducted a review of that decision.

[81] The Affidavit of Daniel Harroun is central to this determination. Some conclusions on that Affidavit are required:

- I conclude it is thorough and provides an intelligible roadmap to what transpired in this matter.
- I reject any suggestion that the reclassification process described there was a mere pretense. I find it was a genuine and complete process.
- I accept the Affidavit as complete and accurate.

[82] On the basis of that Affidavit:

- There is a logical basis to conclude the Applicant's behavior was deteriorating.

- The Institution is permitted to assess whether an offender has a "medium security" mindset or not where that is reflective of whether he can be maintained in the Institution given their overall mandate for safety and security.

- The documentation process was normal and appropriate. The Institution does not have an obligation to share on a day by day or interaction by interaction basis the officials running log of behavioral incidents or observations.

- The SRS was conducted as it was designed. I do not find it was carried out in an arbitrary or unreasonable fashion. The SRS generated a score indicative of a maximum-security classification. More importantly the professional judgment of the responsible officials was consistent with the outcome of the actuarial tool. The actuarial tool is never on its own determinative.

- In summary, following his relocation to Springhill Institution, the Applicant did not modify his behavior to that expected of a medium security offender, this was despite intervention from responsible staff.

[83] I was not persuaded by the Applicant's evidence and argument to the effect that he did not receive a genuine reclassification exercise conducted under the terms of the relevant Commissioner's Directive. I find to the contrary.

[84] I conclude the decision was reasonable, in the terms of *Vavilov*, and justifiable in relation to the relevant factual and legal constraints that bore on the decision. Having concluded that the security reclassification was made for reasons grounded in safety and security considerations which I find to be valid, I conclude the decision was lawful and reasonable. Simply put, where an

offender is assessed under the proper process, employing appropriate inputs, and is found to be a maximum level security risk - he cannot then be safely or appropriately managed in a medium level institution.

[85] I am mindful that it is not my role to determine what decision I would have made in the circumstances. In making the decision they did, the Warden and administration must take into account many factors, including most prominently the safety and security of persons in the Institution. This decision is a nuanced decision within which they are to be considered as possessing specialized skill and experience. This presumption can be overcome in appropriate circumstances where their decision ceases to be justifiable in light of the legal and factual constraints that bear on the decision. I find this is not the case here.

[86] With the exception of the initial and eventually abortive emergency transfer process, the reasoning of the decision maker was clear and understandable. The pathway and steps they took are evident to the Court.

[87] I have subjected the steps taken to that extra common sense scrutiny I discussed earlier, designed to satisfy myself that the non-emergency transfer process was not a mere façade coming as it did after the cancelled emergency process. I am satisfied it was not. It was thorough and complete. It was

conducted in an appropriate way and in accordance with applicable Commissioners Directives.

[88] The core of the Warden's decision may be found, at least in part, as follows:

> …you are well aware of the incidents listed in the documentation provided to you, and you were counselled on numerous occasions but your behavior has continued to deteriorate even with all of the interventions provided to you. It is apparent that there continues to be the need to address these factors – staff here have tried to curb your negative behavior to no avail, demonstrating a lack of motivation towards your correctional plan. In short, your rebuttal paints a picture that is simply not borne out by reality. It is clear at this time that you need a highly structured environment that cannot be provided in a medium security institution…

[89] I have assessed the whole of the Warden's Decision. I have now assessed a fair number of these documents in different cases. I can offer the observation that this one does not have the look of a 'copy and paste job', to use the colloquial. It does specifically engage with the issues raised by Mr. Devlin. Obviously it does not reach the conclusion sought by him, but there is a clear response to and grappling with the issues he raises. Overall, I observe it is more specific and more individually responsive than some.

Duty of Fairness

[90] The final part of the test asks me to consider whether CSC has complied with its procedural duties and the requirement of fairness. A review of s. 27

CCRA and the applicable case law (see for example *May v. Ferndale*, 2005 SCC 82) amply demonstrates that the CSC bears the onus of establishing that there has been a compliance with the substantial and extensive disclosure requirements of the statutory scheme and the common law.

[91] In *May v. Ferndale*, the Supreme Court of Canada indicated that the *Stinchcombe* principles of disclosure do not apply in this administrative context. The Court also held at para. 92 that:

> In the administrative context, the duty of procedural fairness generally requires that the decision-maker discloses the information he or she relied upon. The requirement is that the individual must know the case he or she has to meet. If the decision-maker fails to provide sufficient information, his or her decision is void for lack of jurisdiction.

[92] In this case the Warden relied on the written reports and recommendations of the institutional officials reflected in the disclosure.

[93] The Applicant must be provided with sufficient disclosure to know the case he has to meet. The issue at the hearing is the reasonableness and the seriousness of the belief on which the decision would be based. The participation of the Applicant has to be rendered meaningful in relation to that issue. Transfer decisions made without such disclosure will have been unlawful.

[94] I want to directly address the issue of the alleged weapon. Mr. Devlin denies that he knowingly possessed a 12-inch handmade weapon. He did not deny telling a guard on July 23 that there was a weapon in his cell. The denial is to the specifics, including the length of what the authorities discovered in the search that followed his disclosure.

[95] Mr. Devlin says he requires a photograph and chain of custody of the item in order to mount a rebuttal. I have concluded this is not the case. He has presented his rebuttal effectively. I have his denial of knowingly possessing a 12-inch handmade weapon. It is settled law that the nature and degree of disclosure in these matters does not approach the *R. v. Stinchcombe* standard. There is much authority to this effect. I have assessed the case law presented by the Applicant as well, including *MacNeil v. Kent Institution, 2017 BCSC 30* and *Nguyen v. Mission Institution, 2012 BCSC 103* and *Russell v. Ferndale Institution,* 2013 BCSC 957, all cases on which Mr. Vaze was counsel, as incidentally he was on *Khela*. I am satisfied that the global disclosure delivered to the Applicant here is reasonable and sufficient so as to allow him to appreciate the case to be met and to allow him to meaningfully respond. It was open to the Warden to not accept his assertions and denials.

[96] I have concluded the Institution did meet their procedural duties under the governing statute and regulations. Mr. Devlin fully knew the case he had to meet and provided extensive and complete rebuttal to the Warden. He mounted a complete attack on the decision in this matter.

[97] There are a substantial number of cases which distinguish qualitatively between differing degrees of procedural irregularities. Not every irregularity will amount to a finding of procedural unfairness: See for instance *Wiszniowski v. Dorchester Institution*, 2016 NBQB 146; *Bromby v. Warden of William Head Institution*, 2020 BCSC 119.

[98] I can also reference the decision in *Cain v. Canada (Correctional Service), 2013 NSSC 367*. In this case the issue of procedural irregularities had been raised very strongly by the Applicant and those issues were at the center of the dispute in that application. The Court had the following to say:

> 47 Mr. Cain has raised procedural and due process concerns. Although the process followed by the Respondent, that being CSC, might not be perfect, I find that overall on balance Mr. Cain's segregation placement was handled in a manner that in the circumstances of this case was generally compliant with the Respondent's obligations at law including ensuring due process and procedural fairness was appropriately afforded to Mr. Cain.

[99] I find that I can adopt this analysis and rationale in the present case as well.

Conclusion

[100] I have concluded that the decision of the Warden with respect to reclassification was a reasonable outcome. Substantively and procedurally the decision is lawful and reasonable. The reasoning pathway is clear, and the decision is intelligible and justifiable in light of the facts and circumstances.

[101] In the wording of *Vavilov*, the decision is justifiable in relation to the relevant factual and legal constraints that bear on the decision.

[102] For all these reasons, the *habeas corpus* motion will be dismissed.

[103] With respect to costs. It is not my practice to award costs in *habeas corpus* matters. Obviously, there may be circumstances where they would be appropriate. This matter however does not fall into that category. Accordingly, the dismissal on the merits will be without costs.

[104] I ask that counsel to the Minister please produce a Dismissal Order for issuance by the Court.

J.