SUPREME COURT OF NOVA SCOTIA

Citation: Richards v. Springhill Institution, 2014 NSSC 121

Date: 20140402
Docket: Amherst No. 421982
Registry: Amherst

Between:

Ryan Ricardo Richards

Applicant

v.

Warden (Springhill Institution), Correctional Service of Canada and Attorney General of Canada

Respondents

DECISION

Judge:	The Honourable Justice E. Van den Eynden
Heard:	March 7, 2014, in Amherst, Nova Scotia
Final Written:	April 2, 2014
Counsel:	Ryan Richards, Applicant, self-represented Jill Chisholm, Crown

By the Court:

Introduction

[1] The Applicant Ryan Richardo Richards ("Mr. Richards") filed a *habeas corpus* application under which he challenged his security reclassification. His classification was increased from medium to maximum which resulted in his involuntary transfer. Mr. Richards was an inmate at the Springhill Institution at the time of filing his application. Springhill is a medium security penitentiary. At the date his application was heard on March 7, 2014, Mr. Richards was at the Atlantic Institute in Renous, NB. Renous is a maximum security penitentiary. Notwithstanding his objection, Mr. Richards was involuntarily transferred out of the Province of Nova Scotia before the scheduled hearing date of his *habeas corpus* application before this Court.

[2] As a result of the transfer, the Respondents requested Mr. Richards application be dismissed. Mr. Richards opposed. Accordingly, I heard the Respondents preliminary motion challenging the territorial competence of this Court to hear Mr. Richards *habeas corpus* application. The Respondents argued this Court lost territorial competence upon the transfer notwithstanding the

application was in the face of the Court. In the alternative, the Respondents argued Nova Scotia was not the convenient forum. For the reasons set out in my oral decision rendered on February 20, 2014, I determined this Court had territorial competence. I determined this Court was the convenient forum and retained jurisdiction to complete the hearing of Mr. Richards application.

[3] Although Mr. Richards raised multiple concerns and sought broad relief, the sole issue for determination is whether the deprivation of his residual liberty resulting from his increased security classification and resulting involuntary transfer, is lawful.

[4] Central to the administrative decision to reclassify was the belief Mr. Richards orchestrated and directed two violent stabbing attacks on another offender while at the Springhill Institution. Mr. Richards was not directly involved in the attacks. This belief pushed Mr. Richards into a maximum security classification. The principle witness for the Respondents was Mr. Richards' parole officer, Ms. Renee Henderson. She acknowledged that without this belief Mr. Richards security classification would not have been increased from medium to maximum.

[5] In addition to maintaining his innocence from the outset, Mr. Richards asserted the decision was procedurally unfair and unreasonable; therefore unlawful. He asserted the Respondents failed to provide the required disclosure which prevented him from meeting the case against him; his right to counsel was violated and there was an inadequate investigation and a failure to follow up on important information he provided during the investigation. Mr. Richards also asserted he was targeted and there was an underlying agenda against him.

[6] The Respondents asserted the decision was lawful. There were no deficiencies in the decision making process. Mr. Richards was afforded due process and procedural fairness throughout. There was no violation of his right to counsel and even if Mr. Richards did not have reasonable access to counsel, this would not have impacted the decision to reclassify.

Decision

[7] Mr. Richards' application for *habeas corpus* is granted. For the reasons stated herein, I find the decision to increase his security classification from medium to maximum and the resulting involuntary transfer was unlawful.

[8] Therefore, until further reviewed, his security classification reverts to medium and the Respondent, Correctional Services Canada, must arrange for Mr. Richards to be returned to a medium security institution forthwith.

Overview of the law

[9] The relevant law respecting the issue before me has been thoroughly canvassed in several decisions. Most notably two decisions from the Supreme Court of Canada; in particular, **Mission Institution v. Khela,** 2014 SCC 24; released on March 27, 2014 and **May v. Ferndale Institution** 2005 SCC 82**.**

[10] The Supreme Court of Canada decision in **Khela** was released following the hearing of Mr. Richards *habeas corpus* application. The following legal principles are extracted from relevant cases decided before the Supreme Court of Canada in **Khela** and remain, (as confirmed by the Supreme Court of Canada in **Khela**) an accurate reflection of the state of law:

What must be established and the burden of proof

> (a)A successful application for *habeas corpus* requires two elements: (1) a deprivation of liberty and (2) that the deprivation be unlawful;
>
> An involuntary transfer from a medium to a maximum security institution is a deprivation of an inmate's residual liberty;

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. (**May v. Ferndale Institution 2005 SCC 82**; (paragraph 74 and 75)

Scope of review

(b) As the law now stands, on an application for *habeas corpus* a provincial superior court may consider the reasonableness of a decision in determining whether a deprivation of liberty was lawful. (**Khela v. Mission Institution** 2011 BCCA 450; paragraph 79 and 93);

(c) In conducting a reasonableness review a court examines both the process followed by the adjudicative body and the substantive outcome of the decision. (**Lyons v. Mission Institution (Warden)**, 2012 BCSC 694; paragraph 52);

(d) A decision is reasonable if it falls within a range of acceptable outcomes which are defensible in law and on the facts. (**Lyons**, paragraph 53);

Reasonableness and Deference

(e) Classification and transfer decisions should receive a high degree of deference from reviewing superior court judges. All decisions reviewed on the standard of reasonableness are presumptively entitled to a high degree of deference. (**Thilson v. Mountain Institution**, 2011 BCSC 874; paragraph 50);

If the reasons are transparent, logically defensible, not arbitrary and fall within a range of possible outcomes that are consistent with the statutory and regulatory framework, a judge should accord a high degree of deference. Obviously, some reviewable decisions may call for a lesser degree of judicial deference and a higher evidentiary standard, depending on the issue and how much is at stake. (**Thilson**, paragraph 54);

(f) Courts should not routinely question discretionary decision making of prison authorities. That said, information being utilized by prison authorities which impact upon the liberty of inmates must be fair and as accurate as possible. Prison authorities cannot rely upon a shield of deference to condone the usage of improper, inaccurate or unfair information in their decisions. (**Bradley v. Correctional Service Canada**, 2012 NSSC 173, paragraph 62);

Courts should be reluctant to second guess administrative decisions made by prison authorities, in particular, their assessment of risk and how that relates to the safe and effective management of inmates and staff. However, those decisions must not be made arbitrarily or in a fashion which ignores the safeguards of procedural fairness. (**Bradley,** paragraph 67)

Procedural fairness – Correctness

> (g) 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;
>
> 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. (**May**, paragraph 77);
>
> (h) 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. (**May**, paragraph 92);
>
> (i) To ensure the fairness of administrative decisions which impact inmates Section 27(1) of the CCRA imposes onerous disclosure on CSC. That duty, although not the **Stinchcombe** ([1991] 3 S.C.R. 326) standard, is substantial and extensive. If not met; the decision is unlawful. (**May**, paragraph 95 and 100);
>
> (j) In a security reclassification the scoring matrix should be disclosed to the impacted inmate. This information is known to CSC and is in its control. The obligation to disclose cannot be avoided by having inmates responsible for asking for the necessary disclosure. The failure of CSC to voluntarily provide this information at the time of the reclassification decision being made is a breach of its disclosure obligations; (**Bradley**, paragraph 54 to 56);

[11] Given the significance and relevance of the recent Supreme Court of Canada decision in **Khela** to the application before me, it is important to specifically refer to the following passages. First, respecting the scope of the reasonableness assessment, the Court stated the following:

[53] Including a reasonableness assessment in the scope of the review is consistent with this Court's case law. In particular, allowing provincial superior courts to assess reasonableness in the review follows logically from how this Court has framed the remedy and from the limits the courts have placed on the avenues through which the remedy can be obtained.

[65] Ultimately, weighing these factors together leads to the conclusion that allowing a provincial superior court to conduct a review for reasonableness in deciding an application for *habeas corpus* would lead to greater access to a more effective remedy. Reasonableness should therefore be regarded as one element of lawfulness.

[67] Nor does **May** prohibit a provincial superior court from examining the reasonableness of an underlying transfer decision in the context of an application for *habeas corpus* with *certiorari in aid*. In **May**, this Court confirmed that "[a] deprivation of liberty will only be lawful where it is within the jurisdiction of the decision maker" (para. 77). This cannot be read as a signal that only decisions outside the decision maker's jurisdiction will be unlawful. On the contrary, it simply means that jurisdiction is one requirement to be met for a decision to be lawful. On its own, however, this requirement is not sufficient to make a decision lawful. A decision that is within the decision maker's jurisdiction but that lacks the safeguards of procedural fairness will not be lawful. Likewise, a decision that lacks an evidentiary foundation or that is arbitrary or unreasonable cannot be lawful, regardless of whether the decision maker had jurisdiction to make it.

[72] The above reasoning leads to the conclusion that an inmate may challenge the reasonableness of his or her deprivation of liberty by means of an application for *habeas corpus*. Ultimately, then, where a deprivation of liberty results from a federal administrative decision, that decision can be subject to either of two forms of review, and the inmate may choose the forum he or she prefers. An inmate can choose either to challenge the reasonableness of the decision by applying for judicial review under s. 18 of the FCA or to have the decision reviewed for reasonableness by means of an application for *habeas corpus*. "Reasonableness" is therefore a "legitimate ground" upon which to question the legality of a deprivation of liberty in an application for *habeas corpus*.

[74] As things stand, 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, although I do not foreclose the possibility that it may also be unreasonable on other grounds. Deference will be shown to a determination that evidence is reliable, but the authorities will nonetheless have to explain that determination.

[75] A review to determine whether a decision was reasonable, and therefore lawful, necessarily requires deference (Dunsmuir, at para. 47; **Canada (Citizenship and Immigration) v. Khosa**, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59; **Newfoundland and Labrador Nurses' Union**, at paras. 11-12). An

> involuntary transfer decision is nonetheless an administrative decision made by a decision maker with expertise in the environment of a particular penitentiary. To apply any standard other than reasonableness in reviewing such a decision could well lead to the micromanagement of prisons by the courts.
>
> [76] Like the decision at issue in **Lake**, a transfer decision requires a "fact-driven inquiry involving the weighing of various factors and possessing a 'negligible legal dimension'" (**Lake v. Canada (Minister of Justice**), 2008 SCC 23, [2008] 1 S.C.R. 761, at paras. 38 and 41). The statute outlines a number of factors to which a warden must adhere when transferring an inmate: the inmate must be placed in the least restrictive environment that will still assure the safety of the public, penitentiary staff and other inmates, should have access to his or her home community, and should be transferred to a compatible cultural and linguistic environment (s. 28 CCRA). Determining whether an inmate poses a threat to the security of the penitentiary or of the individuals who live and work in it requires intimate knowledge of that penitentiary's culture and of the behaviour of the individuals inside its walls. Wardens and the Commissioner possess this knowledge, and related practical experience, to a greater degree than a provincial superior court judge.

[12] The Supreme Court of Canada in **Khela** confirmed that a breach of the statutory requirements will render a decision procedurally unfair and therefore unlawful. Respecting the applicable standard of review the Court stated:

> [79] … the ability to challenge a decision on the basis that it is unreasonable does not necessarily change the standard of review that applies to other flaws in the decision or in the decision-making process. For instance, the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be "correctness".
>
> [82] As this Court put it in **Cardinal**, one of the cases in the Miller trilogy, "there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual" (p. 653). Section 27 of the CCRA guides the decision maker and elaborates on the resulting procedural rights (**May**, at para. 94). In order to guarantee fairness in the process leading up to a transfer decision, s. 27(1) provides that the inmate should be given all the information that was considered in the taking of the decision, or a summary of that information. **This disclosure must be made within a reasonable time before the final decision is made.**

The onus is on the decision maker to show that s. 27(1) was complied with. (emphasis mine)

[88] When the prison authorities rely on kites or anonymous tips to justify a transfer, they should also explain in the sealed affidavit why those tips are considered to be reliable. **When liberty interests are at stake, procedural fairness also includes measures to verify the evidence being relied upon. If an individual is to suffer a form of deprivation of liberty, "procedural fairness includes a procedure for verifying the evidence adduced against him or her"** (**Charkaoui v. Canada (Citizenship and Immigration)**, 2008 SCC 38, [2008] 2 S.C.R. 326, at para. 56). (emphasis mine)

[89] Section 27(3) authorizes the withholding of information when the Commissioner has "reasonable grounds to believe" that should the information be released, it might threaten the security of the prison, the safety of any person or the conduct of an investigation. The Commissioner, or his or her representative, is in the best position to determine whether such a risk could in fact materialize. As a result, the Commissioner, or the warden, is entitled to a margin of deference on this point. Similarly, the warden and the Commissioner are in the best position to determine whether a given source or informant is reliable. Some deference is accordingly owed on this point as well. If, however, certain information is withheld without invoking s. 27(3), deference will not be warranted, and the decision will be procedurally unfair and therefore unlawful.

[94] ….**Vague statements regarding source information and corroboration do not satisfy the statutory requirement that all the information to be considered, or a summary of that information, be disclosed to the inmate within a reasonable time before the decision is taken**. (emphasis mine)

[96] Further, I agree with the determination of the application judge and the Court of Appeal that the Warden's failure to disclose the scoring matrix for the SRS was procedurally unfair. The appellants argue that the courts below should not have taken issue with the Warden's failure to disclose the scoring matrix, because, unlike in May, the decision to transfer Mr. Khela was not based on the SRS alone, given that the Commissioner overrode the security classification. **Whether the decision was based on that scale alone is irrelevant, however, what is instead of concern is whether the Warden considered the scoring matrix, on which the SRS calculation was based, in making her decision (s. 27).** (emphasis mine)

[13] I now turn to the relevant statutory framework set out in the **Corrections and Conditional Release Act**, S.C. 1992, c.20 **("CCRA")**; the regulations made thereunder **Corrections and Conditional Release Act Regulations ("CCRA**

Regulations"), and supporting **Commissioners Directives** ("CD"). The purpose and principles of the federal correctional system are set out is sections 3 and 4 of the **CCRA**. They include the following objectives:

- The protection of society is the paramount consideration in the correction process;
- Carryout sentences imposed by courts through safe and humane custody and supervision of offenders;
- Measures are limited to only what is necessary and proportionate to attain the purposes on the Act;
- Offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence; and
- Correctional decisions are made in a forthright and fair manner.

[14] Section 24 of the **CCRA** requires Correctional Service of Canada (**CSC**) to take all reasonable steps to ensure any information about an offender that it uses is as accurate, up to date and complete as possible.

[15] Section 27 places an onerous burden on CSC to disclose information to offenders which has been utilized in reaching decisions.

[16] Sections 28, 29 and 30 are relevant to the security classification and transfer of prisoners. Section 28 also embeds the least restrictive consideration when determining an offender's penitentiary placement.

[17] Section 18 of the **CCRA Regulations** stipulate that for purposes of section 30 of the Act an inmate shall be classified as:

> (a) maximum security where the inmate is assessed by the Service as
>
> > (i) presenting a high probability of escape and a high risk to the safety of the public in the event of escape, or
> >
> > (ii) requiring a high degree of supervision and control within the penitentiary;
>
> (b) medium security where the inmate is assessed by the Service as
>
> > (i) presenting a low to moderate probability of escape and a moderate risk to the safety of the public in the event of escape, or
> >
> > (ii) requiring a moderate degree of supervision and control within the penitentiary;

[18] Respecting an inmate's access to legal counsel and legal materials, section 97 of the **CCRA Regulations** provides:

> 97.(1) The Service shall ensure that each inmate is given, on arrest, an opportunity to retain and instruct legal counsel without delay and that every inmate is informed of their right thereto.
>
> **(2) The Service shall ensure that every inmate is given a reasonable opportunity to retain and instruct legal counsel without delay and that every inmate is informed of the inmate's right to legal counsel where the inmate**
>
> **(a) is placed in administrative segregation; or**
>
> **(b) is the subject of a proposed involuntary transfer pursuant to section 12** or has been the subject of an emergency transfer pursuant to section 13.
>
> **(3) The Service shall ensure that every inmate has reasonable access to:**
>
> (a) **legal counsel** and legal reading materials;
> (b) non-legal materials, including:
>
> > (i) Commissioner's Directives, and
> > (ii) regional instructions and institutional standing orders, except those relating to security matters; and

(c) a commissioner for taking oaths and affidavits. (emphasis mine)

[19] Annex B to **CD 710-6 "Review of Inmate Security Classification**" provides the following respecting Institutional Adjustment Ratings:

> Based on the individual adjustment factors and any other relevant considerations, assign a rating of either low, moderate or high:
>
> ***Low*** *- The inmate has demonstrated:*
>
> *a. a pattern of satisfactory institutional adjustment; no special management intervention is required*
>
> *b. the ability and motivation to interact effectively and responsibly with others, individually and in groups, with little or no supervision*
>
> *c. motivation towards self-improvement by actively participating in a Correctional Plan designed to meet his/her dynamic factors, particularly those relating to facilitating his/her reintegration into the community*
>
> **Moderate** - The inmate has demonstrated:
>
> *a. some difficulties causing moderate institutional adjustment problems and requiring some management intervention*
>
> *b. the potential to interact effectively with others, individually and in moderately structured groups, but needs regular and often direct supervision*
>
> *c. an interest and active participation in a Correctional Plan designed to meet his/her dynamic factors, particularly those which would lead to a transfer to a less structured environment and ultimately, to his/her reintegration into the community*
>
> **High** - The inmate has demonstrated:
>
> *a. frequent or major difficulties causing serious institutional adjustment problems and requiring significant/constant management intervention*
> *b. a requirement for a highly structured environment in which individual or group interaction is subject to constant and direct supervision*
> *c. an uncooperative attitude toward institutional programs and staff and presents a potentially serious management problem within an institution.*

[20] **CD 710-2 "Transfer of Inmates"** reiterates the right to counsel provisions as set in section 97 of the **CCRA Regulations.** Specifically, section 15 and section 32 provide as follows:

> 15. **The inmate has the right to contact by telephone, without delay pursuant to section 97 of the CCRR, his/her lawyer** or an individual identified on his/her authorized call list, **to advise the lawyer**/individual **of his/her transfer to another institution.** If the inmate is incapable of making the call, staff will facilitate the request.
>
> ***Involuntary Transfers***
>
> **32. Pursuant to section 12 of the CCRR, the Institutional Head or designate will:**
>
> **b. advise the inmate of his/her right to legal counsel without delay** (emphasis mine)

[21] It is worth noting the following legal rights protected under the ***Canadian Charter of Rights and Freedom***:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 9. Everyone has the right not to be arbitrarily detained or imprisoned.
>
> 10. Everyone has the right on arrest or detention
>
> (a) to be informed promptly of the reasons therefore;
>
> (b) to retain and instruct counsel without delay and to be informed of that right; and
>
> (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

[22] The Supreme Court of Canada in **Khela** noted the importance of **Charter** rights respecting *habeas corpus* applications, in particular:

> [29] Through both the **Charter** and the common law, Canada has attempted to maintain and uphold many of the goals of the ***Habeas Corpus* Act**, which embodied the evolving purposes and principles of the writ. *Habeas corpus* has become an essential remedy in Canadian law. In **May**, this Court emphasized the importance of *habeas corpus* in the protection of two of our fundamental rights:

> (1) the right to liberty of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (s. 7 of the **Charter**); and
>
> (2) the right not to be arbitrarily detained or imprisoned (s. 9 of the **Charter**). [para. 22]
>
> These rights belong to everyone in Canada, including those serving prison sentences (**May**, at paras. 23-25). *Habeas corpus* is in fact the strongest tool a prisoner has to ensure that the deprivation of his or her liberty is not unlawful. In articulating the scope of the writ both in the **Miller** trilogy and in **May**, the Court has ensured that the rule of law continues to run within penitentiary walls **Martineau v. Matsqui Institution Disciplinary Board**, [1980] 1 S.C.R. 602, at p. 622) and that any deprivation of a prisoner's liberty is justified.

Overview of the evidence

Parole officer Ms. Henderson:

[23] Ms. Henderson was Mr. Richards' parole officer and a member of his Case Management Team ("CMT"). She carried out key functions in his security classification review. Those particulars are set out in her detailed affidavit (Exhibit 1).

[24] Ms. Henderson was instrumental in the decision to reclassify; however; she was not involved in the investigation. She had no direct knowledge of the foundation which underpinned the Respondents belief that Mr. Richards orchestrated the attacks.

[25] This held belief was the key driver in the exercise of her five (5%) percent discretion to adjust Mr. Richards Security Reclassification Score ("SRS") which

otherwise fell squarely within the medium security range. Primarily because of this held belief, she determined Mr. Richards Institutional Adjustment rating should be increased from *"moderate"* to *"high"*. A *"high"* rating dictates a maximum security classification.

[26] Ms. Henderson explained that the SRS is a research based computerized tool relied upon by CSC to assist in determining the appropriate level of security throughout an offenders sentence. It examines security risk and in-custody performance. A score is generated. Mr. Richards computed security class score was 26.5 which, as noted, fell within the medium security range.

[27] Ms. Henderson noted that although an important guide, the SRS is not determinative. In the overall assessment of an offenders risk, clinical judgement will normally be anchored by the SRS results; however, there is room for clinical judgement if the assessor (in this case Ms. Henderson) holds the view that the SRS score is not reflective of the inmates level of risk. Such was the case with Mr. Richards. She determined his risk level did not align with his SRS score.

[28] Ms. Henderson completed Mr. Richards A4D (assessment for decision). The A4D assesses risk levels under Institutional Adjustment, Escape Risk and Public Safety. It contains the reasons for security classification decisions. If the SRS falls

short of a maximum security classification the assessor has discretion (within 5%) to adjust the rating. Ms. Henderson exercised discretion and chose the higher of the two possible ratings. Her recommendation was supported by the CMT and the (deputy) Warden. Mr. Richards filed a rebuttal. This rebuttal did not result in a change to his classification. He was advised of his final transfer decision and involuntarily transferred out on December 12, 2013.

[29] Ms. Henderson explained that as a result of his suspected involvement in the attacks, Mr. Richards was placed in involuntary administrative segregation on October 29, 2013. He remained in segregation while the incidents of October 27 and 28, 2013 were investigated and his security classification reviewed. Once reclassified, he was held in segregation until his transfer to the Atlantic Institution.

[30] When questioned, Ms. Henderson conceded that although there were other concerns identified with his in custody performance, absent the belief Mr. Richards orchestrated the attacks; she would not have elevated his Institutional Adjustment as "*high*". It would have remained as "*moderate*" and with a score of 26.5%; Mr. Richards security classification would have remained as medium.

[31] Of significant note, when questioned, Ms. Henderson acknowledged that Mr. Richards asked for video footage to be reviewed which he believed would support

his steadfast assertion that he did not direct or orchestrate the attacks. In particular, Mr. Richards provided information that on October 27th the day of the first attack, he was aggressively confronted and threatened by another inmate. The effect was this inmate had a plan to get Mr. Richards out of Springhill.

[32] Ms. Henderson confirmed she passed this information along to the Security Intelligence Office (SIO) who conducted the internal investigation of the attacks. The date is not entirely clear when she received this request from Mr. Richards; however, it is clear from the evidence, the request was received well before any final decision was made respecting his reclassification and subsequent transfer.

[33] A confidential affidavit was filed by Ms. Henderson. Appended to it were the investigative reports SIO gathered and relied upon to conclude Mr. Richards allegedly orchestrated or directed the attacks. As noted, Ms. Henderson was not involved in the investigation. It was carried out primarily by security intelligence officer Ardena Austin. Ms. Henderson relied upon Ms. Austin's conclusions respecting the belief Mr. Richards was involved as alleged.

[34] Mr. Richards was not provided all reports obtained in the investigation. The limited "gist" he was provided throughout the decision making process is set out in the following paragraphs 35 to 40.

[35] Upon being placed in segregation on October 29, 2013 Mr. Richards was provided the following rationale:

> "*An initial review indicated that you may have been involved in a serious assault on another inmate on the evening of 0ct/28/2013. There is an active investigation into the assault at the present time*" (Exhibit 1, Tab A)

[36] In preparation for his five day segregation review hearing – the following information was shared with Mr. Richards on October 30, 2013:

> "*Although not currently identified as a main instigator, your role into the serious assault on another inmate on the evening of October -10 -28 is currently being investigated. There is an ongoing internal as well as criminal investigation*." (Exhibit 1, Tab C)

[37] The fifth working day segregation review was conducted on November 4, 2013. The outcome was to maintain Mr. Richards in segregation. The reason given:

> *"Mr. Richards was placed in involuntary segregation on October 29/2013 after a serious assault occurred. Although he was not identified as a main instigator, there is security intelligence information suggesting he may have been involved. At this point there is an active investigation occurring in regards to these events." (Exhibit 1, Tab C)*

[38] In her affidavit (Exhibit 1, para 46) Ms. Henderson states:

> *"On November 8th, I met with Mr. Richards along with Correctional Manager Kathryn Paul to explain the circumstances surrounding his continued placement in segregation. He was informed that it was determined through the investigation into the assault (stabbing) that although he was not directly involved in the actual assault there was security intelligence information he orchestrated the assault."*

[39] In preparation for his 30 day segregation review hearing held on November 28, 2013, Mr. Richards was provided with the required "*Sharing of Information*

Institutional Review" form (Exhibit 1, Tab G). It had no additional details about the events he was believed to have orchestrated. Neither did the report generated from his 30 day segregation review (Exhibit 1, Tab I). Mr. Richard attended his review hearing and the report notes:

> *"He strongly disagrees and noted he was in his cell and stayed away from the situation. ...Mr. Richards denies any involvement in the assault. He noted that he has worked hard in his sentence to improve and has been in SI for 3 years. He does not wish to go to Atlantic and is concerned that because of "hearsay" from other offenders, he can be transferred to maximum security."*

[40] On November 28, 2013, Mr. Richards was provided a copy of his A4D and SRS. Ms. Henderson completed Mr. Richards A4D on November 21, 2013 (Exhibit 1, Tab F). The SRS was completed on November 7, 2013 (Exhibit 1, Tab E). She recommended Mr. Richards be classified as maximum. His A4D contained the following reasons and "gist" respecting the allegations and findings against him to support his high institutional adjustment rating (which is what pushed his rating over the edge to maximum):

> *"Subject was placed in segregation in the early morning hours of 2013-10-29 as he was believed to be involved in a serious assault on another inmate on the evening of 2013 -10-28……*
>
> *He has completed programming to address his dynamic factors and in comparison to earlier in his sentence his behaviour has improved. Although not noted to be directly involved, the SIO department has sufficient information to conclude that he was the orchestrator of a serious assault on another inmate on 2013 – 10 -28. This demonstrates a continuation of his offence cycle and ongoing negative institutional behaviour…..*

> *Mr. Richards scores as a medium security offender within the 5% discretionary range of maximum security. CMT are recommending maximum security based on subject's high institutional adjustment rating. ...*
>
> *At the completion of the institutional investigation into SBI assault, it was determined by the SIO department, that offender Richards was the driving force behind the assault. It is believed that offender Richards had enough influence over the aggressors involved in two assaults, after the first attempt failed to gain serious injury, that he manipulated the offenders noted in incident 20132100000631/641, to make a second attempt causing serious bodily injury. Reader is referred to SIR dated 13.11.03 and protected COSOR's for further background information. The gist of the information gathered indicates that offender Richards was noted to be manipulating others in population by pitting one against another. It is believed that he directed others to assault an offender who he had a personal issue with and who he attempted to have taken care of without being directly involved in the actual assault. He is believed to be the orchestrator of these assaults as a means to an end. ....*
>
> *... the SIO department have serious concerns most specifically with the fact that offender Richards had enough influence over the offenders to orchestrate the serious assault of another offender. This is not considered to be a medium security mentality and the violence cannot be tolerated in a medium security setting.*
>
> *It should be noted that writer confirmed with SIO A Austin on 2013- 11-28 that information gathered surrounding the assault (stabbing) 0n October -1—28 has been gathered from more than three sources that are deemed reliable by the SIO department. ....*
>
> *In comparison to earlier in his sentence he has improved his behaviour as there has been a significant reduction in his involvement in violent incidents of late. That being said, CMT are concerned given the information noted above with respect to his involvement and role in a recent serious assault, it is evident that, albeit not as pronounced as in the past, there is a continuation of a pattern of negative and violent behaviour."*

[41] That is the extent of the specifics Mr. Richards received in order to respond to the serious allegations against him. He made compelling arguments as to how the foregoing limited and generic disclosure severely impaired his ability to respond and meet the case against him.

[42] Mr. Richards filed a Rebuttal to his A4D on December 1, 2013. It is lengthy, 11 pages, and addressed to the Warden Mr. Jeff Earle. It is appended to Ms. Henderson's affidavit (Exhibit 1, Tab J). At page 10 and 11 Mr. Richards states:

> "As for my placement in segregation for my alleged involvement in the stabbing 2013-10-28, I maintain my innocence and will get to the bottom of why I am being centred out even if it is a decade from now. The truth always comes to light. You know this is prison you can put out any rumour and everyone will talk about it in a matter of minutes. All it takes is one person to tell the IPSO anything they feel about someone they don't like and then tell it to someone in the population once it gets to the other confidential informants they run with it.
>
> Mr. Earle, I know you are a very smart man observe the first page of my A4D completed 2012-11-07 just over a week after I came to segregation. In paragraph 2 it says I was placed in segregation in the early morning of 2013-10-29 after I was believed involved in an assault on the evening of 2013-10-28. I submit (respectfully) that someone ahead of time possible on the morning of the 28th gave information against me to cover their tracks (before and after the stabbing happened...
>
> I respectfully ask you to do what is just and not max me, I have come too far this would ruin my life, and possibly place me in danger or in a predicament where I may have to result to violence to defend my life."….(Exhibit1, Tab J).

[43] Notwithstanding Mr. Richards multiple requests for full disclosure, including formal requests for access to information, and his request that prison administration examine the video footage of October 27, 2013 which he maintained was critical to establishing his defence, the evidence is clear, Mr. Richards received no further information respecting the allegations against him.

[44] The SIO investigation reports were appended to a Confidential Affidavit deposed to by Ms. Henderson. Although the reports contain more information than that provided to Mr. Richards; they are also seriously lacking in detail to support the allegations against Mr. Richards. I find it contains broad sweeping opinions (from undisclosed confidential sources) upon which findings were based. Under scrutiny, it raises serious concerns with the reasonableness of the conclusions drawn by the Respondents respecting Mr. Richards' alleged involvement in the two stabbing attacks.

[45] Respecting the disclosure of the Scoring Matrix to Mr. Richards, Ms. Henderson testified CSC is not obligated to provide the Scoring Matrix. That said, she believed it a good practice to do so. She recalled Mr. Richards requesting a copy. Although Mr. Richards denied receiving a copy while at the Springhill Institution, Ms. Henderson gave evidence that he received a copy on December 12, 2013. I note that date is well after his reclassification and final transfer decision was made.

[46] Ms. Henderson stated that she was of the view Mr. Richards was afforded due process throughout the disclosure making process and he was informed of and had a reasonable opportunity to contact his counsel.

Evidence of Ms. Austin

[47] Adrena Austin is a Security Intelligence Officer at the Springhill Institution. She was primarily responsible for the investigation of the subject stabbing attacks on October 27 and 28, 2013. Ms. Austin confirmed that the attachments to the confidential affidavit contain the complete documents generated during the investigation. It appears that she wrapped up her investigation respecting Mr. Richards on or about November 7, 2013.

[48] The incident Mr. Richards is suspected of directing involved an initial attack on an inmate on October 27, 2013 and a second attack on the same inmate October 28, 2013. Several inmates were directly involved. There is no evidence of any direct involvement by Mr. Richards. The four other inmates directly involved had their security reclassifications reviewed and were all increased to a maximum security classification.

[49] In short, Ms. Austin received information she believed to be reliable from three main confidential sources. Those sources expressed the opinion that Mr. Richards directed the attacks and gave some general information as background.

[50] When questioned Ms. Austin acknowledged:

(a) She did not question or verify whether these sources received this information first hand.

(b) She did not know (because she did not ask them) on what basis did they form their opinions. There was no probing or questioning to determine the foundation for the opinions expressed. For example, no particulars of when conversation occurred and with whom.

(c) Ms. Austin acknowledged that it would be fair to say she relied heavily on the opinions expressed by the confidential sources. She believed them to be reliable (because they had been in the past) and did not therefore ask more specific questions to verify the opinions expressed.

(d) None of the four inmates directly involved implicated Mr. Richards in the attack. Ms. Austin did not specifically ask the several inmates directly involved in the attack any questions about Mr. Richards directing or orchestrating the attack. She did not see any utility in doing so.

(e) During her testimony she was asked about the information Ms. Henderson passed along to the SIO (see paragraph 32 herein). Ms. Austin expressed surprise about the existence of such information. She testified she was unaware of this information. To her knowledge there was no record of this information with Security Intelligence. She unequivocally testified that had she received this information she would have followed up on the request and viewed the video footage of the incident Mr. Richards noted.

(f) There is no evidence the request by Mr. Richards was acted upon by anyone during the course of the investigation or any time prior to his involuntary transfer on December 12, 2013.

(g) When questioned she acknowledged that Mr. Richards had made a formal Access to Information request; wherein he was trying to get access to information he felt was crucial to his defence. She testified that she gathered the requested information and turned it over to the internal prison staff member responsible for such requests. She had no idea where it went from there.

Evidence of Ms. Paul

[51] Kathryn Paul is the Unit Corrections Manager at the Springhill Institution and a member of Mr. Richards' Case Management Team. When questioned, she acknowledged she was present with Ms. Henderson when Mr. Richards advised of the incident between himself and another inmate which reportedly occurred on October 27, 2013. She confirmed he asked that the video footage be reviewed.

[52] She testified she provided Mr. Richards with the Scoring Matrix he had been asking for on December 12, 2013. This was well after the date the reclassification and transfer decision was made.

[53] She felt Mr. Richards had ample opportunity to contact counsel. When questioned, she acknowledged he had been asking for an opportunity to contact his counsel. She further acknowledged that he made a formal written inmate request to contact his lawyer at a certain time on Thursday afternoon to coincide with his lawyer's schedule. That formal request was made the same day he received his Notice of Involuntary Transfer Recommendation. That request was denied. The request (Exhibit 4) states the denial was addressed with Mr. Richards on December 9, 2013; a fact which Mr. Richards disputes. I note that, in any event, even the December 9th date was well past the date the reclassification and transfer decisions were made respecting Mr. Richards's liberty interest.

Evidence of Mr. Richards

[54] In his testimony, Mr. Richard focused on:

1. The failure to disclose information;
2. The violation of his right to counsel; and
3. The overall unreasonableness of the decision to reclassify and transfer.

[55] Respecting the failure to disclose, Mr. Richards testified he did not receive adequate disclosure and as a result, he could not fairly respond to or meet the case against him. The deficiencies in disclosure he identified included the following:

(a) He did not receive specifics of the allegations as to how he supposedly directed or orchestrated the attacks;

(b) He requested particulars of any video footage of this incident and requested other documentation so he could better understand the allegations against him. This did not result in any further disclosure;

(c) The failure of the Respondents, in particular, SIO, to view the video footage from October 27, 2013 (the day of the first attack) wherein he was reportedly confronted by another inmate. Mr. Richards maintained this information was crucial to his defence. Mr. Richards maintained he was threatened several times by this inmate and this inmate made it clear that he had the power and would see to it that Mr. Richards was moved from Springhill. Mr. Richards reported the video footage would verify his reports.

[56] I accept Mr. Richards made multiple verbal requests for disclosure. In addition he made formal written requests for disclosure (Exhibit 3) under which he articulated the Respondents obligation to disclose under Section 27 of the **CCRA**. He also articulated their obligation to ensure the information used against him is accurate.

[57] Notwithstanding his multiple requests for additional disclosure respecting his alleged involvement with the attacks, he was provided no further details. The limited *"gist"* of the information provided, so he could *"meet the case against him"* is set out in paragraphs 35 to 39 herein.

[58] Respecting the violation of his right to counsel, Mr. Richards addressed the functional limits on contacting counsel while in segregation. Mr. Richards was placed in segregation on October 29, 2013 and was held there until his transfer date

on December 12, 2013. Segregation is materially a more restricted environment than open population.

[59] Mr. Richards testified to his repeated requests to make phone contact with his counsel, which requests were not successful. He then submitted a formal written request to contact counsel (Exhibit 4). This request was made on November 28, 2013, the day he received his Notice of Involuntary Transfer Recommendation (Exhibit 1, Tab H). Mr. Richards' counsel is in Ontario and is also a law professor. There are only certain times he is available. Mr. Richards made this fact known to prison administration and due to the time difference and scheduling limits, Mr. Richards requested he be able to make his legal calls on Thursday afternoon after 2:00 or 2:30 p.m.

[60] Mr. Richards testified (and I accept) that he never received a reply to his formal written request while he was at Springhill. He received a response while at the Atlantic Institute. His request was denied because it was found to be *"not operationally possible"*. In the response no reasons were offered to explain why that might be the case.

[61] Mr. Richards also testified that he did not check off certain sections of the acknowledgement form which appears at the end of the Notice of Involuntary

Transfer Recommendation (Exhibit 1, Tab H & K). The acknowledgement section is reproduced below. Mr. Richards testified and I accept his testimony, that he only checked the first item and did not check the remaining items. He maintains they were checked by Ms. Henderson.

OFFENDER'S ACKNOWLEDGMENT OF RECEIPT

__ I acknowledge that I have received a copy of this notice.

__ I have been advised of my right to retain and instruct counsel.

__ I have been provided with a reasonable opportunity to retain and instruct counsel.

__ I DO NOT wish to make representations with respect to the proposed transfer, in the next two (2) working days.

__ I DO wish to make representations with respect to the proposed transfer, IN PERSON in the next two (2) working days.

__ I DO wish to make representation with respect to the proposed transfer, IN WRITING, in the next two (2) working days.

__ I request an extension of time to submit a rebuttal to the proposed transfer.

_____ Y M D 1515

Offender's signature 13/11/28 time

Offender refused to sign

_____

Witnessing CSC Staff member signature

[62] Mr. Richards testified that the practice is, and what was followed in his case, was that his parole officer, Ms. Henderson, attended the segregation unit and gave

him a copy of the transfer documents. His copy was folded over and stapled. He was asked to sign Ms. Henderson's copy to acknowledge receipt and the first item confirming his acknowledgment is checked. Mr. Richards maintains that any other items checked were subsequently filled in by Ms. Henderson. Including, the second and third acknowledgment respecting legal counsel.

[63] This is not the first time inmates have expressed concern with this practice to this Court. I have heard this complaint before in another *habeas corpus* application. That aside, solely on the evidence before me, I reject the Respondents' contention that Mr. Richards did in fact check the acknowledgments respecting counsel.

[64] I find that for Mr. Richards to acknowledge he had "*been provided with a reasonable opportunity to retain and instruct counsel*" would be inconsistent with the evidence. Mr. Richards was well versed in his right to counsel. In fact, he reminded the Respondents of his right to counsel under the **Charter** in his written requests to secure a time to phone his counsel. This, coupled with the evidence respecting Mr. Richards past reliance on legal counsel, his apparent ongoing relationship with counsel and his diligent efforts while in segregation to find a way to phone his counsel, is not consistent with him checking off that he was provided

a reasonable opportunity to contact counsel. In fact, the evidence supports he was vocal about his frustration of not being able to contact his counsel and he wanted this problem solved.

[65] Furthermore, respecting (Exhibit 1, Tab K), Ms. Henderson testified that after she met with Mr. Richards she "unchecked" (by scratching out the check mark and initialling the change) on the fourth item which acknowledgment stated:

> I do not wish to make representations with respect to the proposed transfer, in the next two (2) working days.

[66] This unilateral change would be consistent with Mr. Richards assertion that apart from him acknowledging the first item (receipt of a copy of the Notice) the balance of items were checked post his signature.

Conclusion

[67] I now turn to the core issues of whether Mr. Richards was afforded the procedural fairness and due process he was entitled to at law; and whether the decision to reclassify and involuntarily transfer was reasonable.

[68] The stakes were high for Mr. Richards. His residual liberty interests were impacted by his reclassification. Mr. Richards also expressed concern that such

reclassification may continue to impact his interests down the road when other administrative decisions respecting his custody or release were being considered

Procedural Fairness

[69] I find Mr. Richards was not afforded procedural fairness. There were several material breaches along the path of decision making which lead to a denial of natural justice. Specifically, I find the following:

Disclosure

1. Mr. Richards did not receive the Scoring Matrix when it should have been provided. Disclosure must be made within a reasonable period of time before the final decision under review is made. I find that obligation was not met by the Respondents. There was an attempt to provide it on December 12, 2013, the day Mr. Richards was literally being involuntarily transferred. If Mr. Richards did receive the Scoring Matrix on that day, which is questionable on the evidence, disclosure was too late.
2. The obligation to disclose under s.27(3) of the **CCRA** is an onerous obligation. It cannot be met or rectified by late disclosure post reclassification and transfer decisions being made.
3. It is clear from the evidence that although the SRS is not determinative, it is an important tool in the process and it was taken into consideration. An exercise of the five percent (5%) discretion to increase the score so that it falls in the maximum range does not eliminate the obligation to disclose the Scoring Matrix. Without timely access to the Scoring Matrix and information respecting the calculation mythology, Mr. Richards's ability to respond was compromised.

4. The information provided to Mr. Richards respecting why it was believed he directed and orchestrated the attacks was, at best, thin and very generic. The *"gist"* disclosed to him was so generic and devoid of specifics that it effectively made it impossible for Mr. Richards to both adequately understand the case against him and respond.
5. Although there was some additional information contained in the confidential affidavit, some of which under closer scrutiny could have been provided, the evidence contained in the confidential affidavit is also lacking sufficiency to reliably ground the very serious allegations against Mr. Richards.

[70] As noted by the Supreme Court of Canada at paragraph 88 in **Khela**, when liberty interests are at stake, procedural fairness also includes measures to verify the evidence being relied upon. If an individual is to suffer from a deprivation of liberty, procedural fairness includes a procedure for verifying the evidence adduced to the inmate.

[71] In this case Security Intelligence Officer, Ms. Austin, relied heavily on the opinions expressed and information provided by the confidential sources. There was in effect no verification of the evidence against Mr. Richards or at least no reasonable verification. I refer to Ms. Austin's acknowledgments set out in paragraphs 50 herein.

[72] Furthermore, I find Mr. Richards made diligent efforts to access information that he felt was relevant. During the critical period of decision making he did not receive any response to his requests. Even more significantly was the failure to

follow up and review the video footage of October 27, 2013, which Mr. Richards brought to the attention of his parole officer, Ms. Henderson and case manager, Kathryn Paul. Both members of his Case Management Team. Ms. Henderson confirmed she passed this information on to SIO. The lead investigator, Ms. Austin, was not aware; had she been, she would have acted upon such information. The evidence is clear, this step was not conducted.

Right to Counsel

[73] Mr. Richards also made diligent efforts to exercise his right to counsel. I find his efforts were frustrated by the Respondents and he was not afforded his right to retain and instruct counsel within a reasonable time. This amounted to a breach of Mr. Richards' **Charter** right which right is also reflected in the **CCRA Regulations** and Commission Directives.

[74] Mr. Richards's *habeas corpus* application could succeed on any of the above-noted material individual breaches of procedural fairness. Collectively, they are serious breaches; such that there was a clear denial of procedural fairness and natural justice. Accordingly, I find the decision to reclassify and involuntarily transfer unlawful.

Reasonableness

[75] Under the standard of a reasonableness review, I find the decision to reclassify and involuntarily transfer Mr. Richards unreasonable and as a result, unlawful.

[76] The administrative decision is unfair and not sustainable in the circumstances of this case. It is not defensible on the facts and law. Primarily for the reasons outlined above, in particular, the deficiencies with the investigation as it relates to Mr. Richards suspected involvement, and the failure to act on potential important information provided by the applicant which might have positively impacted his situation. For these reasons the decision is not sustainable. In other words it does not fall within a range of acceptable outcomes, based on the facts and law.

[77] I am mindful of how dangerous prisons can be at times. Prison administration is challenged in getting out in front of the violence and dangerous situations which occur too often in prisons. Sometimes the violence is spontaneous. Sometimes it is deliberately planned. I am mindful of the specialized knowledge administration possess in both identifying and mitigating risk in a prison setting. There is a degree of deference to be afforded; a high

degree of deference. That said, deference is not a complete protective shield. In this case, there are simply too many material shortcomings in the decision making process. Taken in total, it leads to a finding that the decision is unreasonable and therefore unlawful.

[78] Even if I were wrong in the application of the reasonableness standard to the facts of this case, Mr. Richards' *habeas corpus* application would be granted because the decision under review lacked the safe guards of procedural fairness.

Van den Eynden, J.

04.02.14