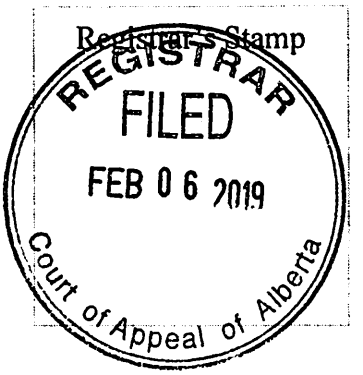
COURT OF APPEAL OF ALBERTA



COURT OF APPEAL FILE NUMBER:	1801-0350AC
TRIAL COURT FILE NUMBER:	1801-10028
REGISTRY OFFICE:	Calgary
APPELLANT:	SHAYNE SHOEMAKER
RESPONDENT:	HER MAJESTY THE QUEEN
DOCUMENT:	**FACTUM**

Appeal from the Decision of
The Honourable Mr. Justice K.D. Yamauchi
Dated the 15th of October, 2018
Denying the Appellant's Application for *Habeas Corpus*

FACTUM OF THE APPELLANT

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Registrar's Stamp

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PART I: OVERVIEW AND FACTS

I. Introduction

[1] This appeal raises issues about the right to procedural fairness in federal correctional institutions for decisions which result in the transfer of inmates. In many cases, these decisions result in significant deprivations to the residual liberty interests of prisoners.

[2] Shayne Shoemaker, ("Shoemaker" or the "Appellant") is a prisoner. The Respondent made decisions resulting in his transfer from a medium to a maximum-security institution. On July 17, 2018, the Appellant applied, pursuant to Rule 3.16 of the *Alberta Rules of Court*,[1] for an order in the nature of *habeas corpus* challenging the decisions.[2] Justice K.D. Yamauchi (the "Chambers Judge") found that the decisions were lawful and dismissed the application.[3]

[3] The Appellant appeals this decision and submits that if it is left to stand, the right to procedural fairness for federal prisoners in Alberta would be rendered all but meaningless. Administrative decision-makers in the correctional setting would not be bound by the tenants of procedural fairness. In fact, they would no longer even be required to adhere to express legislative and regulatory procedures governing their authority. Therefore, the Appellant submits the decision to reclassify and transfer the Appellant to a maximum-security institution cannot stand.

II. Facts

1. The Parties

[4] Shoemaker is a 43-year old first-time federal offender serving a life sentence for a first-degree murder committed 20 years ago. During the events at issue, the Appellant was an inmate at the Drumheller Institution, a minimum and medium security facility.[4]

[5] Correctional Service of Canada ("CSC") is established pursuant to *Corrections and Conditional Release Act*,[5] and governed by the provisions of the *Corrections and Conditional Release Regulations*.[6] It is responsible for carrying out sentences imposed by courts, ensuring safe and humane custody and supervision, and assisting in the rehabilitation and reintegration of offenders. Pattie Krafchuck is the Warden at Drumheller Institution (the "Warden").

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[1] Alta Reg 124/2010 [Rules].
[2] Appeal Record [*AR*] Part 1 – Pleadings – Originating Application for Habeas Corpus at pp 1-8 (Originating Application).
[3] *AR* Part 3 – Final Documents – Written Reasons for Decision of Yamauchi J. Dated 15 Oct 18 (Reproduced in Book of Authorities Tab 1 as published *Shoemaker v Canada (Drumheller Institution)*, 2018 ABQB 851 **[Tab 1]**) [*RD*].
[4] Extracts of Key Evidence of the Appellant [*EKE*] Tab 2 – Affidavit of Shayne Shoemaker dated (August 18, 2018) [Shoemaker Affidavit] at paras 10-12, EKE A226.
[5] SC 1992 c 20 [*CCRA*].
[6] SOR/92-620 [CCRR].

2. The Appellant's History and Correctional Progress

[6] As part of this case, the Respondent filed an extensive Certified Record of Proceedings.[7] The substance of the CRP contains institutional records and CSC assessments and opinions about the Appellant's assessed characteristics, and correctional progress over the course of his 20 years as an inmate. In response, and in support of his application, the Appellant deposed an extensive affidavit, which includes details about his correctional progress as an inmate, rehabilitation, and the impact of the decisions on him.

[7] In his affidavit, the Appellant is candid about his past: "I was a young, stupid kid…I would trade anything to go back and change what I done. But I can't."[8] During the early period of his sentence, while a maximum-security inmate, he was charged with 45 institutional offences. He explained that he expected to die in prison and "didn't really care if [he] did".[9] During that period, the Appellant was stabbed and declared dead, before being resuscitated.

[8] When the Appellant reached his mid 30s, he took a "careful look at [his] life".[10] He realized that something needed to change: "I want a life outside of these walls".[11] The Applicant deposes that a significant turning point in his life was meeting his wife, Holly Shoemaker. Evidence before this Court confirms his rehabilitative progress. A previous correction plan indicated he had completed numerous programs, occupational training, attained a GED, and gained employment within the institution.[12]

[9] His progress was confirmed through regular meetings with CSC representatives, his probation officer, and case management team (CMT). It was observed that he was engaged in his Corrections Plan,[13] motivated and accountable,[14] "quiet on the unit and respectful with staff", and that his wife was "a really positive influence on him".[15] The Appellant's progress was reflected in a medium security classification – in the discretionary range for a minimum-security classification.[16] It had been indicated he would be recommended for minimum security classification,[17] with possibility of escorted temporary absences, in advance of his February 2019 eligibility date for faint hope parole.[18]

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[7] *EKE* Tab 1 – "Filed Certified Record of Proceedings" pp. A001-A224 [*CRP*].
[8] Shoemaker Affidavit at para 14, *EKE* A27.
[9] *Ibid.* at para 16, *EKE* A227.
[10] *Ibid.* at para 17, *EKE* A227.
[11] *Ibid.* at para 18, *EKE* A227.
[12] Shoemaker Affidavit at para 23, *EKE* A228.
[13] *EKE* A128.
[14] Offender Management System [OMS] *CRP*, *EKE* A109.
[15] OMS CRP *EKE* A112.
[16] Shoemaker Affidavit Exhibit F: "Assessment for Decision: Offender Security Level", *EKE* A313; "Security Reclassification Scale: Functional Specification" *EKE* A216.
[17] Shoemaker Affidavit at para 29, *EKE* A233.
[18] Shoemaker Affidavit at para 29, *EKE* A233.

3. Fentanyl Deaths, Serious Allegations, and Segregation

[10] In February 2018, in Drumheller Institution, two inmates died, and others were hospitalized due to fentanyl overdoses. On February 23, the Appellant was placed in administrative segregation. He was later informed this was due to allegations of involvement in trafficking fentanyl. While in segregation, the Appellant made numerous attempts to contact lawyers for assistance, to no avail. Shortly prior to receiving notice of the decision, he was in contact with a lawyer who asked that Shoemaker secure documentation to allow him to complete a retainer and receive legal advice.[19]

4. Assessment for Decision

[11] The substance of this appeal focuses on events that during the week of March 11, 2018, when the CSC assessed the Appellant and transferred him to a maximum-security institution. On March 13, at or around 2:00 p.m., Lee-Ann Harrison ("Harrison"), attended the Drumheller Institution's segregation unit and provided the Appellant with a copy of a document titled "Assessment for Decision" ("A4D").[20] This document provided notice that CSC was considering reaching two decisions.

[a] The first was whether the Appellant's security status would be increased from medium, to maximum security ("Security Reclassification Decision").

[b] The second was whether CSC would transfer him to a maximum-security institution ("Transfer Decision").

[12] The substance of the proposed decisions relates to the fentanyl-related deaths. The A4D cites information provided by 5 confidential sources claiming to support the allegation that the Appellant compromised a staff-member and introduced fentanyl into the population. These are serious allegations of criminal and institutional offences, yet the Appellant was never interviewed by RCMP and no disciplinary proceedings were ever brought against him.

[13] The A4D triggered certain procedural safeguards and a number of express legislative, regulatory, and procedural requirements on CSC. As further explained below, it includes informational requirements, notice and participatory requirements, and rights to counsel.

[14] On this basis, after delivering the A4D, Harrison made an entry in Offender Management System ("OMS"), indicating that the paperwork would be left overnight to allow the Appellant to "go through the report...and ensure all procedural safeguards are met and paperwork signed".[21]

5. 'Rebuttal' with the Warden, Request for Counsel and Transfer Notice

[15] Shortly after Harrison delivered the documents and left to ensure he had time to review them and

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[19] Shoemaker Affidavit at para 43, *EKE* A241.
[20] CRP A013-A022 "Assessment for Decision Dated March 12, 2018" [A4D].
[21] OMS, CRP, *EKE* A115.

sign paperwork, the Warden attended segregation and spoke with the Appellant. There is no evidence before the Court that the Warden advised the Appellant of his right to counsel. The Respondent later claimed this conversation represented a 'rebuttal'.[22] The timing of this 'rebuttal' is significant.

6. Request for Access to Counsel and Signing of Notice of Involuntary Transfer

[16] The following morning, the Appellant submitted an Inmate Request Form.[23] He requested that that documentation be provided to his counsel, as well as further time be provided for a rebuttal.[24] The same morning, Harrison attended the Appellants cell in segregation, and requested that he sign a copy of a Notice of Involuntary Transfer ("NoIT"). The document was dated the previous day, March 13, 2018. She assured him that his signature simply indicated he had received documentation the day before, and that he would maintain his right to legal advice and to make a rebuttal.[25]

[17] Three days later, the Appellant received notice of final decisions approving reclassification to medium-security and imposing a discretionary override to maximum security. Two days later, on March 19, the Appellant was transferred to maximum security at the Edmonton Institution.[26] Over the next three weeks, he made repeated requests to have documentation provided to his counsel, to no avail.[27] On April 10, the Appellant was attacked by three inmates. He suffered a laceration to his head, broken ribs, and retinal damage. He has been advised the damage to his eyes may result in him becoming legally blind.[28]

III. Decision of the Chambers Judge

[18] The Chambers Judge found that the Crown had satisfied its onus of demonstrating that the decisions were procedurally fair and reasonable. In his reasons, the Chambers Judge provided a general summary of the relevant facts but did not resolve issues of credibility between the Appellant and Respondent's versions of events at key junctures. He found that the Appellant's affidavit evidence related to his correctional progress and the impact of the decision, while "interesting", was not relevant.[29] He also made adverse findings as to the Appellant's pleadings,[30] relief sought,[31] and the nature of concerns expressed about the credibility of certain documentation related to the decisions.[32]

[19] The Chambers Judge rejected reasoning in previous decisions,[33] finding that *Charter* rights in the

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[22] *EKE* Tab 4 – "Affidavit of Patti Krafchuk" A356-A359 [Warden Affidavit].
[23] CRP "Inmate Request Form", *EKE* A083.
[24] CRP "Inmate Request Form", *EKE* A083.
[25] Shoemaker Affidavit at paras 146, *EKE* A245.
[26] Warden Affidavit at para 13, *EKE* A359.
[27] Shoemaker Affidavit at paras 180-182, *EKE* A250.
[28] *Ibid.* at para 194, *EKE* A252.
[29] *RD* at para 6.
[30] *Ibid.* at paras 45-52.
[31] *Ibid.* at para 93.
[32] *Ibid.* at para 89.
[33] *Williams v Canada, (Regional Transfer Board, Prairie Region)*, [1993] 1 FC 710, 149 NR 140 (FCA) **[Tab 2]**

criminal context are "of a fundamentally different kind"[34] and "have no direct application to *habeas corpus* proceedings".[35] He found that the Appellant had established a deprivation of liberty. However, he found that the decision was procedurally fair, and reasonable. He found that informational duties and notice requirements were satisfied – whether the procedure "conformed strictly" to the requirements enacted under the legislation, "what really matters is whether, functionally, Mr. Shoemaker knew the basis for his possible transfer".[36] The Chambers Judge also found that the Respondent had "fully complied with its obligations to permit Mr. Shoemaker an opportunity to contact and instruct counsel".[37] The Chambers Judge emphasized deference to CSC,[38] and found that "[m]ultiple sources, including informants who were rated as "*Completely Reliable*," implicated Mr. Shoemaker in…drug trafficking in the Drumheller Institution".[39]

PART 2 – GROUNDS OF APPEAL

[20] The Chambers Judge erred in finding that the Respondent satisfied its onus of demonstrating the transfer and security reclassification decisions were lawful because:

[a] The Respondent had not satisfied the requirements of full disclosure;

[b] The Respondent did not provide adequate notice or participatory rights;

[c] The Respondent did not provide sufficient rights to counsel;

[d] The transfer and security reclassification decisions were not reasonable.

PART 3 – STANDARD OF REVIEW

[21] The standard of review on appeal for questions of law is correctness.[40] The standard of review for the finding of fact, or inferences therefrom, is palpable and overriding error –[41] meaning "clearly wrong" or "unreasonable".[42] The total absence of a foundation for a finding of fact is an error of law.[43] Where a question of law is extricable, an error on a question of mixed fact and law can amount to a pure question of law subject to the correctness standard.[44]

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[34] *RD* at para 67.
[35] *Ibid.* at para 66.
[36] *Ibid.* at para 79.
[37] *Ibid.* at para 84.
[38] *Ibid.* at para 86.
[39] *Ibid.* at para 87 (emphasis added).
[40] *Housen v Nikolaisen*, 2002 SCC 33 at para. 3.
[41] *Ibid.* at paras 10-37.
[42] *HL v Canada (Attorney General)*, 2005 SCC 25 at para 110.
[43] *R v Schuldt*, [1985] 2 SCR 592.
[44] *DM Drugs (Harris Guardian Drugs) v Barry Edward Bywater (Parkview Hotel)*, 2013 ONCA 356 at para 53.

[22] The standard of appellate review for a "decision disposing of an application for judicial review" is whether (1) "the court below identified the appropriate standard of review" and (2) "applied it correctly".[45] The court must "step into the shoes' of the lower court"[46] and focus "in effect, on the administrative decision."[47] In *Sharif v Canada,*[48] an appellate court undertakes "*de novo* review" and is entitled to "redo completely the analysis" of the lower court.[49]

[23] The Appellant submits the standard of review in this case should also be informed by the "paramount obligation" of appellate courts to "oversee the development of the law in the courts of Canada".[50] Such review is supported by the Appellant's case, which is "evasive of review because inmates do not often have the capability or means to litigate".[51]

PART 4 – ARGUMENT
Preliminary Issues
1. *Habeas Corpus* and Access to Justice

[24] A successful application for *habeas corpus* requires two elements: (1) a deprivation of liberty and (2) that the deprivation is unlawful. The onus of establishing the lawfulness of that deprivation rests on the detaining authority.[52] The writ, enshrined under s. 10(c) of the *Charter,* provides an "irrefutable common-law right" to access the Courts to determine legality "of forms and conditions of...detention short of release from prison".[53] *Habeas corpus* provides "an immediate" and "summary way" to challenge the validity of detention,[54] and provides "swift access to justice".[55] The underlying purpose, to defend against unlawful deprivations of liberty,[56] is informed by the high value our society places on individual liberty: "where the potential exists for the loss of freedom for even a day, we...must place the highest emphasis on ensuring that our system of justice minimizes...[its] unwarranted denial."[57]

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[45] *Agraira v Canada (Minister of Public Safety and Emergency Preparedness),* 2013 SCC 36 [*Agraira*] at para 45 citing *Telfer v Canada (Revenue Agency),* 2009 FCA 23 at para. 18.
[46] *Agraira, supra* at para 46, citing *Merck Frosst Canada Ltée c Canada (Ministre de la Santé),* 2012 SCC 3, at para 24.
[47] *Ibid.*
[48] 2018 FCA 205 [*Sharif*] **[Tab 3]**.
[49] *Ibid.* at para 4. The Appellant would note that the SCC has indicated that it will be considering this issue in a trilogy of upcoming appeals: see generally *Bell Canada, et al. v Attorney General of Canada,* 2018 CanLII 40808 (SCC). To the extent that the standard of review and the law in this respect is changed by the SCC in advance of the hearing of this appeal, the Appellant would respectfully request that it reserve the right to make supplementary submissions.
[50] Bora Laskin, "The Role and Functions of Final Appellate Courts: The Supreme Court of Canada" (1975), 53 Can. Bar. Rev. 469 at p 496.
[51] *Sharif, supra* at para 30.
[52] *May v Ferndale Institution,* 2014 SCC 24 [*May*] at para 71 **[Tab 4]**
[53] *Mennes v R,* 1988 CarswellNat 823, 11 ACWS (3d) 313 at para 10.
[54] *Re Storgoff,* [1945] SCR 526 at pp 590-591.
[55] *Mission Institution v Khela,* 2014 SCC 24 [*Khela*] **[Tab 5]** at para 12.
[56] *DG v Bowden Institution,* 2016 ABCA 52 at paras 105-122.
[57] *R v Hall,* 2002 SCC 64 at para 47.

2. Governing Legislative and Regulatory Framework

[25] The administration of prisoners in Canada's federal corrections system is governed by a patchwork of legislative provisions, regulatory instruments, constitutional provisions, and common law rules including the *CCRA*, CCRR, and Commissioners Directives ("CDs").[58] As the SCC explains in *Ewert v Canada* (2018),[59] the underlying purpose governing the exercise of authority by CSC is achieved by two means. First, is through ensuring "the safe and humane custody of offenders".[60] Second, through "assisting in [person's] rehabilitation and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and the community".[61]

[26] CSC makes numerous decisions about inmates in custody. Among the most important decisions made by CSC is the assignment of a security classification of maximum, medium or minimum to each inmate.[62] This requires considering factors such as risk to the public, likelihood of escape, and institutional needs.[63] However, equally important, is the foundational need to ensure rehabilitation and reintegration into the community,[64] an environment conducive to rehabilitative programs and services,[65] and the need to ensure "accessibility to the person's home community and family".[66] Incidental to security classification, CSC develops a Correctional Plan ("CP") for each inmate.[67]

[27] Section 29 of the *CCRA* provides that the Commissioner may authorize the transfer of an inmate from one penitentiary to another in accordance with the CCRR.[68] This authority is limited by the requirement that the penitentiary to which the inmate is transferred provide them with an environment that contains only the necessary restrictions to ensure security, taking into account, among other things, "accessibility to the person's home community and family".[69]

3. Procedural Fairness – A Governing Principle

[28] The scope and content of the powers of CSC are informed and circumscribed by rights set out in the *Charter*, and common-law principles of administrative law and procedural fairness. As the SCC explains in *Cardinal v Kent Institution*,[70] there is a duty of procedural fairness "lying on every public authority

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[58] Issued pursuant to s. 98 of the *CCRA*.
[59] 2018 SCC 30 [*Ewert*].
[60] *Ibid.* para 1.
[61] *Ibid.* para 1.
[62] CCRR ss. 17-18.
[63] *CCRA*, s 30; CCRR s. 18.
[64] *Ewert, supra* at para 1.
[65] *CCRA* s. 28.
[66] *CCRA* s. 28 (b).
[67] *CCRA*, s. 15.1.
[68] *CCRA* s. 28.
[69] *CCRA* s. 28(b).
[70] [1985] 2 SCR 643 [*Cardinal*] at p 653.

making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual."[71] As the SCC confirms, "the standard for determining whether the decision-maker complied with the duty of procedural fairness [is] 'correctness'".[72]

[29] In *Baker v Canada*,[73] the SCC explains that the "values underlying the duty of procedural fairness" are grounded in the requirement that individuals "should have the opportunity to present their case fully and fairly" and that decisions affecting their rights should be made "using a fair, impartial, and open process."[74] Rights to procedural fairness are also enshrined by s. 7 of the *Charter*, by which the notion of "fundamental justice" is "informed in part by the rules of natural justice and the concept of procedural fairness".[75] The duty of procedural fairness applies to all cases of administrative decision-making, but are "eminently variable and [their] content is to be decided in the specific context of each case".[76] However, "*all of the circumstances* must be considered in order to determine the content of the duty of procedural fairness".[77] Two considerations are critical in this case.

[30] First, as the SCC explains in *Baker* "the more important the decision is to the lives of those affected and the greater its impact on that person or those persons, *the more stringent the procedural protections that will be mandated.*"[78] As the FCA recently confirmed in *Sharif,* where an administrative decision is "important to the affected person, affects the liberty of the affected person" a Court may afford the administrative decision-maker a narrower margin of appreciation. In other words, review may be somewhat more "intense."[79] Potential consequences to consider in determining the intensity of scrutiny of an administrative decision include adverse affects on parole prospects.[80]

[31] Second, is the "terms of the statute pursuant to which the body operates".[81] In most cases, the enabling statute specifically incorporates certain duties on the administrative body. Procedural fairness entails compliance with the procedures established for the administrative decision-maker. This includes not only legislative requirements, but procedures governing its own practice and procedures.[82]

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[71] *Ibid.* at p 653.
[72] *Khela, supra* at para 79.
[73] [1999] 2 SCR 817 [*Baker*].
[74] *Ibid.* at para 28.
[75] *Ruby v Canada (Solicitor General),* 2002 SCC 75 at para 39.
[76] *Baker, supra* at para 21.
[77] *Ibid.* at para 21 (emphasis added).
[78] *Ibid.* at para 25.
[79] *Sharif, supra* at para 11.
[80] *Ibid.*at para 9.
[81] *Baker supra* at para 24.
[82] See for example *Farhat v College of Physicians and Surgeons of Alberta*, 2014 ABQB 731, where the ABQB rejected arguments that a 'policy manual' served only as a guide, and did not need to be followed "to the letter" (*Ibid.* at para 37) and that the failure of an administrative body finding to follow it's own procedures contributed to a finding of violations to the right to procedural fairness (*Ibid.* at para 58).

[32] The *CCRA*, CCRR, and CDs impose numerous safeguards relevant to this case. These safeguards are set out with express reference to procedural fairness, and an overarching "Duty to Act Fairly",[83] as integral to correctional practices requiring that the "decision-making process...be impartial and timely...respect the right of the offender to be heard...the right to make representations...[and] receive...complete information, particularly concerning decisions".[84] The CDs also cite the Duty to Act Fairly with express reference to the rights under the *Charter*.[85]

4. Procedural and Evidentiary Issues

[33] The Appellant submits that, as part of a hearing *de novo*, this appeal can fairly be disposed of based on procedural fairness and the reasonableness of the decisions. However, to the extent their precedential value from certain *dicta* transcends the issues in the immediate case, at risk of detracting from these substantive issues, the Appellant would note as follows.

[34] First, the Appellant is cognisant of judicial concern about a growing number of improper *habeas corpus* applications in this jurisdiction,[86] alongside the concerns of the Chambers Judge about pleadings in this case. The Appellant acknowledges certain technical inconsistencies, but reiterates that our common-law states "it is a serious matter to detain a person in custody illegally",[87] a Court ought to "give the advantage of the doubt to the prisoner",[88] and "will always hearken to a plea for relief from behind the bars of a prison, whether or not it is in scrupulously proper form".[89] To the extent that such concerns about a lack of scrupulousness, below, carry forward to this Court, the Appellant would implore this Court to be cognisant of barriers prisoners face in accessing the courts, the expedited nature of such proceedings, and would this Court for such benefit of the doubt.

[35] Second, the Appellant intends to pursue issues related to the accuracy or credibility of certain documentation, as raised in initial pleadings,[90] written submissions, and oral argument.[91] The Appellant has, and will continue to advance such arguments in a heavily-qualified manner, seeking fair factual determinations of credibility while distancing itself from attributions of allegations of "fraudulent" activity.[92] The Appellant would implore this Court to assess such arguments in a manner promoting obligations of counsel to "raise fearlessly every issue, advance every argument and ask every question,

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[83] CD 700.
[84] CD 700.
[85] s. 16(a).
[86] *Latham v Her Majesty the Queen*, 2018 ABQB 69 at para 1.
[87] *Reid v Drake*, (1867), 4 P.R. (Ont.) 141.
[88] *Ibid.*
[89] *Mennes v R*, *supra* at para 10.
[90] *AR* Part 1 – "Pleadings" – "Originating Application" P3 para 11.
[91] *AR* Part 3 – Transcripts – "September 20, 2018 Afternoon Session" [*Transcripts*] at pp 48-50.
[92] *RD* at para 89 – the Appellant maintains, based on the transcripts of proceedings, that the nature of the arguments advanced may have been misconstrued. Such allegations were not made, contrary to express attributions of the same.

however distasteful, that the lawyer thinks will help the client's case".[93]

[36] Finally, the Chambers Judge declined to consider most of the affidavit evidence of the Appellant. As part of a *de novo* analysis, the Appellant asks this Court in assessing the Appellant's evidence, and its relevance and admissibility, to consider the following principles.

[37] First, to the extent admissibility is contested on procedural grounds, the Appellant submits the rules of practice are the "servants and not the masters of the Courts".[94] Their purpose is to resolve claims "fairly and justly",[95] in the "manner most likely to do justice between the parties".[96] As a reviewing Court, this Court is an "evidentiary gatekeeper".[97] In the context of judicial review proceedings, the rules of admissibility are extremely broad, and parties "should be able to put before a reviewing court all of the material which bears on the arguments they are entitled to make".[98] There is no minimum probative value required for relevance,[99] and given an inclusionary bias,[100] the question is whether the evidence in question, as a matter of logic and human experience,[101] tends to increase the probability of the existence of facts in issue,[102] making inferences 'more or less likely'.[103]

[38] Second, in respect to exclusionary rules, the Appellant's affidavit was sworn in response to information filed by the Respondent in extensive CRP. The CRP was comprised, all but exclusively, of character evidence and hearsay evidence – exhibiting the hallmark concerns about such evidence.[104] A primary consideration in respect to the decisions were the offender's accountability, acceptance of responsibility, motivation, reintegration potential, remorse and victim empathy, and level of external support from family, friends or other community members. This is, by definition, character evidence, being evidence "presented in order to establish the personality, psychological state, attitude, or general capacity of an individual to engage in particular behaviour".[105] This is akin to a situation where character is 'put into issue',[106] where a civil suit alleges what are "in substance criminal acts",[107] or where character evidence bears on a "primarily material issue"[108] and arises as a material fact, and as such is admissible at

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[93] Law Society of Alberta, *Code of Conduct*, Chapter 5 – 5.1 "commentary" at p 75.
[94] *Hamblin v Ben*, 2003 ABQB 459 at para 15.
[95] Rule 1.2.
[96] *Hamblin v Ben*, *supra* at para 15.
[97] *R v Grant*, 2015 SCC 9 at para 43.
[98] *Mosaic Potash Colonsay ULC v USW, Local 7656*, 2016 SKCA 78 at para 14.
[99] *R v Morris*, [1983] 2 SCR 190.
[100] *R v McDonald*, 2017 ONCA 568.
[101] *R v Morin*, [1988] 2 S.C.R. 345.
[102] *R v Arp*, [1998] 3 S.C.R. 339.
[103] *R v Truscott*, 213 CCC (3d) 183 (ONCA).
[104] *University of Saskatchewan v Peng*, 2014 SKCA 9.
[105] David Paciocco and Lee Struesser, (2008), *The Law of Evidence*, (Irwin Law: Toronto) at p 53.
[106] See generally R. v. Cooper, 2000 ABQB 656.
[107] Paciocco and Struesser, *supra, at* p 109, citing *Plester v. Wawanesa Mutual Insurance Co.*, [2006] OJ No. 2139 (CA).
[108] *Ibid.* at p 55.

law.[109] Further, it is settled that "hearsay in administrative proceedings is not *per se* objectionable",[110] particularly where it could have been present at first instance, had the Appellant been provided an opportunity for a meaningful response.

[39] The Appellant is prepared to make any reasonable concessions in respect to the relevance or materiality of affidavit evidence, or portions thereof, but would ask this Court to consider these principles in determining evidentiary issues in this case.[111]

I. The Judge Erred in Finding the Respondent Fulfilled its Disclosure Requirements

[40] The enabling legislation requires CSC to provide 'all information',[112] and principles of procedural fairness impose onerous disclosure obligations. Relevant information including numerous documents was not provided to the Appellant in the decision-making process. The Respondent has not satisfied its onus of showing these requirements were met.

1. The Enabling Legislation Requires CSC Provide 'All Information'

[41] The *CCRA*, CCRR, and CDs provide extensive disclosure obligations for transfer decisions and security reclassification procedures. The *CCRA* expressly states that CSC must provide "all the information to be considered in the taking of the decision or a summary of that information."[113] The CDs confirm that an inmate must "receive complete information... concerning decisions"[114] under the organizing "Duty to Act Fairly".[115]

[42] Before a decision is made, CSC must provide an offender with an 'assessment for decision',[116] and, to "ensure the procedural fairness process is completed", a written NoIT.[117] The NoIT is prescribed as a form which must provide the reasons for transfer, "advise the inmate of his/her right to legal counsel without delay", and "of his/her right to request an extension of up to 10 working days to prepare and submit a rebuttal".[118] An offender is required to acknowledge receipt and sign this document.[119] This

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[109] See by example admissibility of character evidence in defamation cases (*R. v Cooper*, 2000 ABQB 656 p 109) and cases assessing damages for loss of reputation (*Pressler v Lethbridge* (2000), 144 BCAC 1).
[110] *Ocean Port Hotel Ltd. v British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2002 BCCA 311.
[111] The Appellant would note that the unique nature of *habeas corpus* applications has been recognized to attract different procedural considerations, for example, summary procedures and protocols to filter unmeritorious applications (*Latham, supra*). It submits that equally, it is not unreasonable to adopt similar evidentiary procedures to ensure the just resolution of disputes in circumstances such as this.
[112] Save that withheld for security purposes as described below.
[113] s. 27(1).
[114] CD 700 s. 20(g).
[115] CD 700 s. 20(g).
[116] See generally *Brown v Dorchester Institution (Warden)*, 2018 NBQB 179 specifically at paras 20-21.
[117] Guideline – Inmate Transfer Processes – s. 65.
[118] Prescribed pursuant to Guideline – Movement Within Clustered/Multi-Level Institutions s. 8(b) as incorporated in Guideline – Inmate Transfer Processes s. 68 and Annex B.
[119] CRP at pp 065-066, *EKE* A069-A070.

form, along with an inmate rebuttal, must be forwarded to a Regional Coordinator for a final decision.[120]

[43] The CDs also prescribe a Primary Information and an Information Sharing Checklist, both of which are to be accompanied by a Procedural Safeguard Declaration,[121] which the form prescribes to be copied to the offender. Where a 'gist' of security information is provided, it *must* include "dates and places of specific incidents", and the "manner in which" information "became known to authorities".[122] The duty to provide all information is subject only to information withheld under s. 27(3), for security purposes,[123] which requires the CSC still release as much information as possible,[124] and that potential threats are "clearly demonstrated with a reasonable degree of probability"[125] – based on evidence[126] which is included in a sealed affidavit provided to the Court.[127]

2. Procedural Fairness Imposes Onerous Disclosure Obligations

[44] In *May*, and *Khela*, the SCC found that the duty of procedural fairness imposes an "onerous disclosure obligation on CSC".[128] This is "an important safeguard",[129] and which requires disclosure of all information *considered* by the decision-maker, even if not expressly relied on.[130] A prisoner "must know the case" so "they may address evidence prejudicial to their case and bring evidence to support their position".[131]

[45] Canadian courts have consistently upheld the strict requirements governing information withheld pursuant to s. 27(3). For example, in *Russell v Ferndale Institution*,[132] the BCSC found a decision was procedurally unfair where the sealed affidavit contained reference to "various officer statements and reports" and "[n]owhere [was] it sworn that what [had] been produced *is all the material considered.*"[133] General statements indicating involvement in "institutional drug sub-culture" were referenced which did not provide information to "which the applicant could answer".[134] Similarly, in *Khela*, the SCC found that where 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".[135] This is because "[w]hen liberty interests

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[120] Guideline – Inmate Transfer Processes – s.68. See also Annex B.
[121] CD Information Sharing s. 5.
[122] CD 701 Annex C s. 8.
[123] *CCRA* s. 27(3).
[124] CD 701 Annex C
[125] CD 701 s. 25.
[126] CD 701 Annex C 15(b).
[127] *Khela, supra* at para 89.
[128] *May, supra* at para 95.
[129] *Russell v Ferndale Institution*, 2013 BCSC 957 **[Tab 6]** at para 15.
[130] *Khela, supra* at para 83.
[131] *May, supra* at para 92.
[132] *Supra.*
[133] *Ibid.* at paras 16-17, 23.
[134] *Ibid.* at paras 16-17, 23.
[135] *Khela, supra* at para 87.

are at stake, procedural fairness also includes measures to verify the evidence being relied upon".[136]

[46] In *Khela*, the SCC found that it was clear that "the Warden, in making the transfer decision, considered information that she did not disclose".[137] This included information about the reliability of the sources and "*specific statements*" made by sources.[138] As the Court stated, "[v]ague statements regarding source information and corroboration do not satisfy the statutory requirement".[139] It has also been found that notice of a potential transfer decision should include "a list of materials to be considered and a summary of their contents".[140]

The Respondent Did Not Satisfy Its Disclosure Obligations

[47] The Respondent did not satisfy its 'onerous' disclosure obligations. On March 13, 2018, the Respondent provided the Appellant a copy of the A4D and SRS. The A4D indicates that a "Correctional Plan was updated in conjunction with this report", reflecting changes from the previous report.[141] This information was considered in taking the decision, but was not provided in advance of any rebuttal or decision.[142] This was not contested.

[48] There is no evidence that CSC completed, or provided, a copy of the Primary Information Sharing Checklist, Information Sharing Checklist Update, or Procedural Safeguard Declaration in advance of the Appellant's 'rebuttal'. The CRP mentions 4 searches of the Appellant's cell. CSC did not provide post-search reports. If any contraband was found, CSC is required to prepare a post-search report, which is to be made available to an inmate.[143] These reports, if generated, were not provided to the Appellant.

[49] Further, the NoIT was not signed prior to the Appellant's 'rebuttal'. Although the Chamber's Judge referred to this as a "simple document",[144] it is a central safeguard enacted with reference to the *CCRA* and CCRR requirement for transfer. The Appellant deposed that he did not sign this document until March 14, *after* the 'rebuttal' and submitting a formal request that documentation be provided to his lawyer. He was assured, when encouraged to sign the NoIT, that he would retain his right to a rebuttal and legal counsel.[145] This assertion was not contested by affidavit evidence of the Respondent.

[50] To the extent the Respondent contends to the contrary, the Appellant notes that after leaving

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[136] *Ibid.* at para 88.
[137] *Ibid.* at para 92.
[138] *Ibid.* at para 92.
[139] *Ibid* at para 94.
[140] See Canadian Encyclopedic Digest – Prisons II.5 – Transfers; *R v Chester*, 1984 CarswellOnt 56 at para 71.
[141] CRP at p 015, *EKE* A019.
[142] The Segregation Log and the Corrections Plan itself confirm that a copy of the updated Corrections Plan was not provided on March 13, 2018. They were provided on March 16, 2018, *EKE* A094, A082.
[143] CCRR s. 58.
[144] Transcript p 50, l 5.
[145] *RD* at paras 19-20.

documents with the Appellant, Harrison made an entry in the OMS, indicating that the paperwork would be left overnight, in order for the Appellant to "go through the report...and ensure all procedural safeguards are met *and paperwork signed*".[146] Moreover, any assertion that the document was in fact delivered and acknowledged is not credible on the face of the NoIT, which indicates through a 'time-lock' that the document was transmitted and delivered before it was produced.[147] This issue was raised in a heavily qualified manner at all stages of proceedings,[148] but was not substantively addressed by the Respondent or the Chamber's Judge.

[51] Beyond these discrepancies in mandatory informational requirements contrary to the requirements above, the A4D contains vague statements from informants, none deemed completely reliable; material portions of source information do *not* include dates and places of specific incidents, nor the manner in which information became known to authorities. The Appellant submits that the information that was provided in the A4D was also deficient; CSC did not provide all information relied on or considered in taking the decisions.

[52] The Appellant faces the disadvantage of not having knowledge of the contents of the sealed affidavit of Tom Campbell, filed August 8, 2018. However, the A4D indicates that "[t]he following information was taken from the preventative security file", but also that "*[t]here has been other various source information, varying reliability they [sic] corroborate the general information*".[149] It is unclear, on the face, whether this references information which was not included in the A4D. In written submissions, the Respondent also cited the sealed affidavit, asserting the Appellant "introduce[d] fentanyl through a kitchen steward" and that "his wife, along with another offender and their spouse, were involved in the financing of a drug smuggling operation".[150] This information extends beyond what was disclosed to the Appellant in the A4D, particularly in referencing co-conspirators or accomplices. Given an absence of knowledge of the contents of the sealed affidavit, the Appellant would reiterate as the SCC stresses in *Khela*, that upon this Courts review, if such information, or further information was withheld, absent

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[146] Offender Management System, CRP p 011 (emphasis added), *EKE* A015.
[147] The NoIT is endorsed and signed by Harrison, in her official capacity, indicating that on March 13, 2018, the document (1) was transmitted to the offender by hand at exactly 1:50 PM; (2) the Respondent acknowledged receipt at exactly 2:10 pm; and (3) the Respondent signed it at exactly 3:00 pm. The problem is that the system time-lock indicates that the document was "Date and Time Produce" on the same date, March 13, 2018, at exactly 2:59 PM (CRP at p 065-066, *EKE* A069-A070).
[148] The Appellant expressly stated in it's brief that it would "not be proper to make serious allegations" but that such discrepancies were "troubling" (Transcript p 50, l 35) and that the NoIT "cannot be relied on in determining whether the decision was lawful".
[149] CRP at pp 013, 017, *EKE* A017, A021.
[150] "Special Application Brief of the Respondent" [Not reproduced].

clearly demonstrated risk, based on evidence, the decision was procedurally unfair and unreasonable.[151]

[53] The Appellant submits that there is uncontroverted evidence before this Court that the Respondent did not accord even with its own prescribed procedures in providing information. Beyond this, as in *Khela* and *May*, the Appellant was not provided with critical information related to the investigation. As such, the Appellant, facing a serious deprivation of liberty, could not address evidence prejudicial to his case, nor bring evidence to support his position. Therefore, the Appellant submits that the Respondent has failed to satisfy its onus of showing that it has complied with its disclosure obligations set out in its own directives and at common-law, and on this basis alone, the decision was unlawful and cannot stand.

II. The Respondent Did Not Afford Notice or Participatory Rights

[54] The Applicant submits that the Respondent failed to provide reasonable notice to the Applicant of the decision, or a reasonable opportunity to respond or participate in the decision. Evidence indicates that it provided the Appellant mere moments to respond to the allegations. The Respondent has failed to adhere to both (a) the express legislative and regulatory provisions governing the decision-making process, and (b) fundamental tenants of procedural fairness established at common-law and under the *Charter*. On this basis, the decision is procedurally unfair, and cannot stand.

1. The Enabling Legislation Requires Reasonable Notice and Participation

[55] Section 12 of the CCRR specifically provides that the institutional head "shall ensure" that the inmate is provided notice and "a *reasonable* opportunity to make representations".[152] Section 27(1) of the *CCRA* specifically provides that the decision maker shall provide all information "a *reasonable period* before the decision is to be taken".[153]

[56] Guideline 710-2-3 "Inmate Transfer Processes", is enacted with specific reference to s. 12 of the *CCRA*, and to the *Charter*. The organizing 'Duty to Act Fairly' confirms that an offender "has the right to make representations" in respect to transfer decisions.[154] In determining what constitutes "reasonable" notice, said Guideline indicates that the institutional head or designate "*will* ensure the procedural fairness process is completed" by, among other things, providing the A4D and "any other information used in the decision-making process", and by "*providing the inmate two working days to respond in person or in writing to the proposed transfer*".[155] It also provides for an *extension* of up to 10 working days,[156] and

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[151] Moreover, it was represented in the Respondent submissions and by the Chambers Judge, that there is information from two "completely reliable sources", which is inconsistent with information set out in the A4D. This may also suggest information was not provided in the A4D but is contained in the Sealed Affidavit.
[152] CCRR s. 11 (emphasis added).
[153] *CCRA* s. 27(1) (emphasis added).
[154] CD 700.
[155] s. 65.
[156] Guideline – Inmate Transfer Processes – s. 28.

prescribes that in-person rebuttals be documented in a "Casework Record – Rebuttal".[157]

2. Procedural Fairness and the *Charter* Require Meaningful Participation

[57] Procedural rights and the *Charter* confirm the importance of fair notice and participatory rights. They also inform how these provisions should be interpreted by this Court.

[58] The SCC has described the "right to be heard" as an "elementary principle...of natural justice",[158] dating back to "the origins of our democratic institutions", "part of our most cherished legal heritage" and "fundamental in our law".[159] The right to be heard necessarily requires not only information that will be relied upon in reaching a decision, but a reasonable opportunity to make submissions and meaningfully participate in the decision-making process. As the SCC explains in *Baker*, the "purpose of the participatory rights contained within the duty of procedural fairness is to ensure...an opportunity for those affected by the decision *to put forward their views and evidence fully* and have them considered by the decision-maker."[160] The SCC confirms that for persons affected by "decisions or proceedings" or "administrative acts", adequate notice provides the opportunity to "*effectively* to prepare their *own* case and to answer the case".[161]

[59] As Professor David Mullen explains, this requires that "those affected have sufficient advance notice of the hearing to enable them to prepare properly and attend or otherwise *take part effectively in whatever process is being used.*"[162] As the SCC explains, "[a]t the heart of this analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly".[163] For example, J.M. Ross J. found that the applicant's attendance at a 'meeting', which was in fact a hearing, was procedurally unfair due to a lack of *adequate* notice explaining the nature and implications of the hearing.[164] Further, the content of the duty of fairness in respect to notice is informed by the importance of the decision to the individual(s) affected. Where the impact of the decision is significant, the SCC has confirmed that a "high standard of justice" is required,[165] and the "scope of the right to be heard should be generously construed".[166]

3. The Respondent Did Not Provide Sufficient Participatory Rights

[60] The Chambers Judge found that the Appellant "cannot identify how he was denied the opportunity

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[157] Guideline – Inmate Transfer Processes – s. 28.
[158] *Kane v University of British Columbia*, [1980] 1 SCR 1105 at p 1113.
[159] *Supermarchés Jean Labrecque Inc. v Québec (Tribunal du travail)*, [1987] 2 SCR 219 at paras 146, 148.
[160] *Baker*, *supra* at para 22 (emphasis added).
[161] *Supermarchés Jean Labrecque Inc. v Québec*, *supra* at para 153 (emphasis added).
[162] Mullen, David, (2003), *Administrative Law*, (Toronto: Irwin Law) at p 250 (emphasis added).
[163] *Baker*, *supra* at para 30.
[164] 2006 ABQB 873 [*ASFR*] at para 32.
[165] *Kane v University of British Colombia*, *supra* at p 1113.
[166] *Moreau-Bérubé c Nouveau-Brunswick*, 2002 SCC 11.

to make his argument".[167] This is not for the Appellant to prove. It is for the Respondent to establish, through evidence. The Appellant's evidence was that he had mere moments to review the documents before speaking with the Warden. The Warden confirms that she attended segregation the same day the A4Ds were provided, but does not mention at what time.[168] An entry by Harrison indicates that she left the paperwork at 3:00.[169] The segregation log indicates that Krafchuk's only visit was at 3:10 pm.[170] Further, contrary to assertions in her affidavit, the Segregation Log, dated March 13th, indicates she would "*interview* Shoemaker" with respect to his transfer.[171] An untitled, undated addition to the CRP contains a hand-notation indicating an in-person rebuttal,[172] but it appears that no "Casework Record – Rebuttal" was prepared.[173]

[61] The Appellant would highlight, but not belabour, technical inconsistencies in documentation. It acknowledges that it is not the role of this Court to exercise of management responsibilities in the prison system. But it does fall on this Court to ensure that decisions are lawful. In so doing, it is required to interpret the express legislative requirements of what constitutes a '*reasonable* opportunity to make representations', and that information be provided 'a *reasonable period* before the decision is to be taken'. The SCC clearly states that such an interpretation should be informed by the impact of the decision on his life and liberty interest. The greater the impact, the greater content to procedural fairness, a 'higher standard of justice', and a 'generous construction'.

[62] The Appellant submits, on any interpretation, a few moments, or even an hour, while in administrative segregation, to review an extensive A4D, SIO information, references to a correctional plan covering two decades, a security classification assessment, and other documentation, without assistance from counsel, cannot be construed as the legislative standard of 'reasonable' notice or participation. Much less does this accord with the most elementary principle of natural justice – the right to be heard. Perhaps definitively, the notice provided does not even accord with the *express* guideline of *two working days* to respond, with the possibility of a 10-day extension. A possibly solicited response, barely exceeding the expression of concerns or distress, and a 'profession of innocence' – or as the Chambers Judge indicated, despite "strict compliance" with merely an opportunity to "say his piece in response"[174] – with no meaningful preparation or access to counsel, cannot be construed to satisfy the

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[167] *Ibid.* at para 78.
[168] Warden Affidavit at para 7, *EKE* A357.
[169] Offender Management System, CRP at p 111, *EKE* A115 (emphasis added).
[170] CRP at p 084, *EKE* A088.
[171] Segregation Log, 2013/03/13, CRP at p 088, *EKE* A092 (emphasis added).
[172] Untitled document, CRP at p 060, *EKE* A064.
[173] Guideline – Inmate Transfer Processes – s. 28.
[174] *RD* at para 79.

statutory standard of "reasonable" notice or participation.

[63] The Appellant submits that to find this to be the standard for procedural fairness and participation in the decision-making process or conformity with the legislative standard of 'reasonable' participation or notice would render the right to be heard in the correctional setting all but meaningless in respect to decisions that have profound impacts on inmates' lives. The Appellant submits that the Respondent did not afford him procedural fairness, and on this basis alone, the decision was unlawful.

III. The Chambers Judge Erred in Finding the Respondent Provided Reasonable Access to Counsel

[64] It is submitted that, closely related to the failure to afford the rights to full disclosure and reasonable notice, the Respondent failed to both inform the Appellant of his right to counsel and provide the him with access to counsel.

1. The Enabling Legislation Requires Access to Counsel Without Delay

[65] The legal framework governing transfer decisions expressly incorporates the right to counsel and prescribes specific strict requirements. Section 97 of the CCRC states that where an inmate is "subject to an involuntary transfer" the CSC "*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...right".[175] The Transfer of Inmate Guidelines, which also requires a NoIT confirming an understanding of this right, specifically references s. 97 of the CCRC. In fact, s. 7 of CD 084, governing "Access to Legal Assistance" *specifically* references ss. 7 and 10(b) of the *Charter*, confirming that "following *notification* of a proposed involuntary transfer", an inmate must be provided an opportunity to "retain and instruct counsel by telephone".[176] In fact, it specifically defines "without delay" as "immediately unless there are compelling circumstances preventing immediate action and in those circumstances, the delay cannot be more than 24 hours".[177]

2. The *Charter* and Procedural Fairness Impose Strict Requirements

[66] As the United States Supreme Court explains in *Powell v Alabama*,[178] "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel".[179] The right to counsel is of particular importance where persons who face deprivations of liberty at the hand of the state are at a position of disadvantage; access to counsel is necessary to ensure that they are "treated fairly".[180] This is because, "[e]ven the intelligent and educated layman has small and sometimes no skill in the

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[175] CCRR s. 97 (emphasis added).
[176] CD 084 s. 9.
[177] CD 084 s. 10.
[178] (1932) 287 US 45 (United States Supreme Court) at paras 68-69.
[179] *Ibid.* at para 68.
[180] *R v Taylor*, 2014 SCC 50 at para 22.

science of law".[181] As such, "the more complex the legal and factual issues...the greater will be the obligation on the decision maker to allow for representation".[182]

[67] The Appellant concedes that the full panoply of *Charter* rights does not apply in every respect to administrative decisions such as this. However, the Appellant stresses that these rights are *expressly* adopted by the framework governing the decision-making process. Further, the requirement that all of the circumstances be considered in determining the rights to procedural fairness entails looking at the *substance* of the decision. As Professor Mullen explains, "where serious interests are at stake, such as...liberty in the correctional setting, the courts have commonly recognized an entitlement to representation."[183]

[68] *Charter* rights to counsel are embroidered in the regulatory framework, and mirror rights of procedural fairness and the right to counsel under s. 10 of the *Charter*. The CCRC mirrors the language of s. 10(b) of the *Charter*, and CDs specifically *cite* the right – in addition to s. 7 of the *Charter*, which requires that deprivations of liberty accord with principles of fundamental justice. The SCC has found that transfer to maximum security represents a deprivation of residual liberty interest. On this basis, the Appellant submits that the relevant legislative provisions and framework be informed by *Charter* jurisprudence.[184]

[69] In *Williams v Canada*,[185] as in this case, the inmate was not provided access to counsel, despite express acknowledgments that it would not have been unreasonable to facilitate access by telephone. The Court found that in the circumstances, "s. 10 of the *Charter* is also in play", and that "the authorities were under a positive duty both to inform [him] of his right to counsel and to provide him with a reasonable opportunity to exercise that right as soon as they had decided to...transfer him to high maximum security".[186] The Court found that this included a duty to "offer...the use of a telephone", and that the infringement was "gross and cannot possibly be justified in the circumstance".[187] He even found he would have exercised authority under s. 24(1) of the *Charter* to set the transfer decision aside.[188]

[70] The Chambers judge rejected the reasoning in *Williams*, and found that "*Charter* s 10(b) has *no application* in the circumstances of the case at bar".[189] Notably, in *British Columbia Civil Liberties*

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[181] *Supra* at paras 68-69.
[182] Mullen, *Administrative Law*, *supra* at p 262.
[183] *Ibid.* at p 262.
[184] See *R v Bartle*, [1994] 3 SCR 173 [*Bartle*].
[185] *(Regional Transfer Board, Prairie Region)*, 1993 CarswellNat 1 (FCA) [*Williams*].
[186] *Ibid.* at paras 27, 29.
[187] *Ibid.* at paras 29-30.
[188] *Ibid.* at para 31.
[189] *Ibid.* at para 80 (emphasis added).

Association v Canada, (2018)[190] the Respondent in fact conceded, and the Court found that placement in administrative segregation constituted new detention that engages s. 10(b) including "both the informational and implementational components".[191]

[71] Under s. 10(b) of the *Charter*, informational duties require that the right be explained in a "timely and comprehensible manner",[192] to allow for a "meaningful choice".[193] Further, the SCC has consistently confirmed that the *Charter* right to counsel cannot be waived lightly. As in *R v Clarkson*,[194] it must be made with "eyes wide-open" and a person must "knowingly, intelligently and with a full understanding of the implications, waive his constitutional rights to counsel",[195] with an awareness of "legal specificities of his or her own case", and "broad understanding of the whole matter" while being "capable of comprehending [the] full implications" of that waiver.[196]

3. The Respondent Did Not Provide Reasonable Access to Counsel

[72] It is submitted that the Respondent cannot satisfy its burden of proving that the Applicant was afforded reasonable access to counsel in this case.

[73] The Appellant submits that the content of procedural fairness requires a significant right to counsel. Based on the Appellant's affidavit, the decision represents a profound interference with residual liberty interests. He lost his employment, rehabilitative opportunities, and proximity and access to family. An interpretation of a "reasonable opportunity" should accord with the wording of the provisions, and with *Charter* rights referenced.

[74] The legislation governing the decision-making process indicates that the service of the NoIT is the triggering event – s. 7 of CD 084 indicates access to counsel is to be provided without delay "*following* notification", i.e. the NoIT. Upon notification there are two distinct duties set out in the regulations and CDs. First, CSC shall *ensure* an inmate has a reasonable opportunity to *retain* counsel. Second, CSC shall *ensure* an inmate has a reasonable opportunity to *instruct* counsel.

[75] The mere assertion that an inmate had been advised, at some remote point before notice is provided, of the right to instruct counsel, is not sufficient. The manner in which these rights are interpreted must accord with the complexity of the materials, and the interests at stake. The uncontested evidence before this Court is that the Appellant did not access a telephone between the notification and meeting with the Warden. No evidence from the Warden indicated that at any point in the brief moments between receiving

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[190] *(Attorney General)*, 2018 BCSC 6.
[191] *Ibid.* at paras 422-423.
[192] *Bartle, supra* at para 20.
[193] *Bartle, supra* at para 22. Implementational duties also require an explanation of the available Legal Aid services.
[194] [1986] 1 SCR 383 [*Clarkson*].
[195] *Clarkson, supra* at para 24. See also *Korponay v AG Can.*, [1982] 1 SCR 41 at para 49.
[196] *Ibid.* at para 24.

the NoIT and speaking with the Warden, any person took any positive steps, as required to *ensure* that he was able to *retain* and *instruct* counsel, explained that right, or took efforts to implement it. This was notwithstanding previous correspondence and statements by the Appellant, recorded in the OMS and in proceedings before segregation review,[197] clearly indicating that was attempting to retain counsel.

[76] At the point the A4D was provided to the Applicant and formal notice was given, the Warden was required, by law, to *ensure* he was *informed* of his right to retain and instruct counsel and provided a *reasonable* opportunity to do so. She did not. The core of the issue was captured insightfully the by a hypothetical posed by the Chambers Judge during oral arguments: "so what would the big deal have been to put him in a phone room and say, "Go ahead, call counsel?"'[198] The Appellant submits that this question is not met with a satisfactory answer in this case. As in *Williams*, where a 'gross' disregard to the right to counsel was found, there was nothing that would have prevented allowing him to contact council.

[77] Further, to the extend the Respondent argues that merely speaking with the Warden, was somehow sufficient for him to effective *waive* his rights to counsel or absolve her of her legal obligation to *ensure* he had a reasonable opportunity to do so, this is not reasonably based in the express provisions of the legislation, nor the principles which underlie the right to counsel. Further, even assuming the NoIT was provided, or signed, which is not credible on the evidence, merely ticking a box indicating he had been afforded an opportunity to access counsel, having been served with the notice moments before, could not reasonably be an indication that he had, in fact, appraised himself of that right, having never left his cell or been offered a telephone.

[78] In short, the Appellant submits that it is not necessary for this Court to manage prison policy, or even look outside of the provisions of the enabling legislation to reach a determination in this case. The Appellant submits that applying the real meaning of the law neutrally and objectively, logically and dispassionately,[199] in this case, the standard was not met. The law is clear. The Appellant was required to *ensure* the Appellant had a reasonable opportunity to *retain* and *instruct* counsel. This did not occur. Moreover, to defer to the standard adopted by correctional officials in this case as representing "reasonable access to counsel", would make the right to counsel in the correctional setting meaningless. On this basis alone, the Appellant submits that the Respondent cannot satisfy its onus of proving procedural fairness was satisfied, and the transfer decision must be overturned.

IV. The Decision Was Unreasonable

[79] The Appellant submits the decision in this case does not fall in the range of reasonable outcomes

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[197] Offender Management System, CRP p 112, *EKE* A116.
[198] Transcript p 40, ll 35-38.
[199] *Sharif, supra* at paras 50-52.

defensible in fact and law, and therefore cannot stand.

1. Reasonableness

[80] To be lawful, an administrative decision must be reasonable. It must fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" and exhibit "transparency, justifiability and intelligibility".[200] Reasonableness takes its "colour from the context".[201] In *Sharif*, the FCA explains that in the institutional context, it is always necessary to strike a balance between competing aims.[202] The institutional context "governs the relationship between the pressing imperatives of the state and the fundamental rights of inmates detained by it".[203] As such, it is an area where "legal norms are best defined clearly, not left to uncertainty, speculation and later litigation".[204]

2. Balancing Competing Aims

The Appellant concedes that prison officials are afforded deference in making decisions in the institutional setting; however, deference is not absolute. The Appellant would note, as did the FCA in *Sharif*, that it falls on the Courts to "obey the law in a democracy governed by the rule of law".[205] It falls on this Court to oversee the decision-making process in cases involving the exercise of state authority in depriving individual liberty, to ensure compliance both with express legislative provisions and with the rule of law and constitutional standards. While the result may "happen…to be against what the prison authorities may want" in a particular case, it does not entail that such intervention is "rash [or] uninformed".[206]

3. Review is More 'Intense' for Transfer and Reclassification Decisions

[81] In determining what constitutes a 'reasonable' decision, it has been confirmed that decisions "of strong import to individuals…can narrow the margin of appreciation to be afforded to the decision-maker".[207] As such, "the intensity of review under the reasonableness standard…should be relatively strict because of the potential consequences".[208] In *Sharif*, the FCA notes, it is acceptable to consider potential consequences, such as the loss of privileges, institutional employment, and parole prospects.[209]

4. The Precise Issue in Question

[82] The first stage of analysis requires this Court "to identify the *precise issue* before the administrative

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[200] *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.
[201] *Sharif, supra* at para 9; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 at para 18.
[202] *Sharif, supra* at para 37.
[203] *Ibid.* at para 30.
[204] *Ibid.* at para 30.
[205] *Sharif, supra* at para 51.
[206] *Sharif, supra* at para 52.
[207] *Walchuk v Canada (Minister of Justice)*, 2015 FCA 85 at para 33.
[208] *Sharif, supra* at para 9.
[209] *Ibid.* at para 9.

decision-maker and the decision-maker's legal power to decide it".[210] The precise issue in this case is whether the Appellant's transfer and reclassification was justified based on prescribed statutory considerations in accordance with the underlying aims of the correctional regime. While there are numerous technical provisions related to transfer decisions and inmate classification, the Appellant would emphasize that all must be interpreted in accordance with the overarching purposes of the corrections system, and the foundational need to ensure rehabilitation and reintegration into the community.[211] While security is a pressing concern, primary consideration in respect to such decisions also relate to an offender's accountability, acceptance of responsibility, motivation, reintegration potential, remorse and victim empathy, "level of external support from family, friends or other community members", and the need to ensure an environment conducive to rehabilitative programs and services. These are critical factors, and the failure to properly balance them is a factor which may result in a finding that a decision was unreasonable.[212]

[83] For example, in *Demaria v Canada*,[213] a transfer decision based on an inmate phone call to a member of Parliament expressing concern about decisions made by prison officials was found to be arbitrary and unlawful. That the prison authorities failed account for the impact of the decision on the prisoner's family relationships was also relevant. As the Court noted, the choice of institution to which the inmate was transferred, failed to account for the fact that the inmate "has a legal wife and two children" who lived in close proximity, "relevant prison reports" indicating frequent visits, and that they were a "very positive influence in his life".[214]

5. A Decision-Maker Cannot Circumvent Disciplinary Provisions

[84] The determination of whether the decision exhibits justification, transparency, or is defensible in law, should be informed by whether it directly contravened or circumvented proper procedures for sanctioning conduct. The *CCRA* states "Inmates *shall not* be disciplined otherwise than in accordance with sections 40 to 44 and the regulations".[215]

[85] The Appellant would note that the *CCRA* s. 43(3) indicates that an inmate shall not be found guilty unless guilt is established "beyond a reasonable doubt". In the institutional setting, it has been confirmed that strict standards adopted by the SCC in decisions such as *R v W(D)*,[216] must be consistently and

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[210] *Canada (Attorney General) v Boogaard*, 2015 FCA 150 at para 36.
[211] *Ewert, supra* at para 1.
[212] See *Khela, supra* at paras 73-74.
[213] *(Regional Transfer Board)*, 1988 CarswellNat 2, [1988] 2 FC 480 (FC TD) **[Tab 7]** [*Demaria*].
[214] *Ibid* at para 22.
[215] *CCRA* s. 39.
[216] [1991] 1 SCR 742, 63 CCC (3d) 397.

'rigorously' applied.[217] Sanction for disciplinary offences also expressly incorporates sentencing provisions which mirror those under the *Criminal Code*,[218] embodying principles such as individualization, proportionality, and restraint.[219] As the FCA states in *Sharif*, these provisions of the *CCRA*[220] set out a "mandatory legislative recipe for the imposition of a sanction" and "[t]he failure of an administrator to follow a mandatory legislative recipe renders an administrative decision outside the range of acceptability and, thus, unreasonable."[221]

6. The Decision was Unreasonable

[86] The Appellant submits that the review of the decision should be intense, and that a very narrow margin of appreciation should be afforded to the decision-maker. On this basis, the Appellant submits that the affidavit evidence of the Appellant is material and relevant to the degree of deference owed to the decision maker, and the 'intensity' of review.

Review of the Decision Must be Intense

[87] Nominally, as the Chambers Judge emphasized, and the Respondent repeatedly asserts, the decision to transfer the Appellant was an administrative one. But reasonableness takes its colour from the context. Simplifying classification and nature of the decision in this manner is a gross oversimplification of the *substance* of the decision, the liberty interests at stake, and the implications of the exercise of state power and need for accountability in such decisions.

[88] The Appellant is serving a life sentence and has been for nearly 20 years. In his affidavit he explains his institutional progress and increased insight, which are corroborated by his case management team and other documentation in the CRP. He had a close relationship with his wife, who was a positive influence and in relatively close-proximity. On the horizon were prospects of ETAs and parole. The freedom of movement, recreation programming, employment, peers, and liberal family access he enjoyed at Drumheller Institution are no longer available. As in *Sharif*, the effect of allegations of the most serious nature have all but negated this progress or any prospects of parole. The effect of the inclusion of these allegations will, *de facto*, lead to many additional years of incarceration in maximum security conditions, depriving him of future opportunities and prospects. It puts him at risk of violence, in an environment where he had previously suffered life-threatening injuries.

The Failure to Bring Disciplinary Charges Renders the Decision Unreasonable

[89] The initial reason for placement in segregation was that the accusations "could *lead* to a criminal

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[217] *Ayotte c Canada (Procureur général)*, 2003 CAF 429 at para 14.
[218] See CCRR s. 34.
[219] See generally s. 34.
[220] In particular s. 39.
[221] *Sharif, supra* at para 34, citing *Canada (Attorney General) v Almon Equipment Ltd.*, 2010 FCA 193.

charge or...a serious disciplinary offence".[222] Thereafter the reason was changed to the assertion of "involvement in the institutional drug subculture", posing a risk to security.[223] In the A4D, the final conclusion was that he in fact trafficked in fentanyl. However, neither before, nor after the A4D was provided were disciplinary proceedings brought, criminal charges laid, or the Appellant even interviewed by the RCMP. The Appellant's security reclassification indicates that he has no serious or minor disciplinary offences.[224]

[90] Were such proceedings brought, numerous procedural safeguards, as discussed, would have come into play. The absence of such proceedings raises questions about the credibility of the evidence against the Appellant. But what is more troubling, is the administration of *de facto* discipline of the most severe nature, while circumventing such provisions and safeguards specifically legislated by Parliament. The imposition of sanctions through transfer decisions violates the express mandatory legislative prohibition that an offender *shall not* be disciplined except in accordance with the relevant provisions and safeguards. The Appellant submits that, for this reason alone, the decision lacks transparency and justifiability, and it not defensible in law. It renders the decision unreasonable.

Allegations Are Not Substantiated Even on a Deferential Standard

[91] Even assuming it were possible to circumvent mandatory disciplinary provisions, the information related to claims of fentanyl trafficking is not reliable. The Appellant asserts that, given an opportunity for a rebuttal, including the opportunity to avail himself of legal advice and provide exculpatory evidence, he would have been able to further illustrate this.

[92] The SIO investigation set out in the A4D was based exclusively on confidential source information. The Respondent provided this Court with a sealed affidavit[225] detailing information that various sources had provided.[226] The A4Ds included a summary of source information that was withheld under *CCRA* s. 27(3). In accordance with a practice directive,[227] the informants are classified in one of 4 categories of reliability.[228]

[93] The Respondent indicated two sources were "Completely Reliable".[229] The Court found, based on

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[222] CRP at p 010, *EKE* A014.
[223] CRP at p 010, *EKE* A014.
[224] CRP at p 057, *EKE* A060.
[225] Pursuant to *CCRA* s. 27(3).
[226] Sealed Affidavit of Thomas Campbell (the "Sealed Affidavit") – RD para 9.
[227] CD568-2.
[228] • Unknown Reliability – Unable to assess the reliability of the information.
• Doubtful Reliability – Information is believed unlikely at the time.
• Believed Reliable – Information that gives every indication that it is accurate but has not been confirmed.
• Completely Reliable – Information is substantiated or confirmed by one or more independent sources; is logical and consistent with other corroborated information.
[229] "Respondent Special Application Brief" [Not Reproduced].

the evidence that "[m]ultiple sources, *including informants who were rated as "Completely Reliable"* implicated Mr. Shoemaker in the institutional drug subculture, which included drug trafficking in the Drumheller Institution".[230] Barring incomplete disclosure in the A4D, this is a palpable and overriding error.

[94] The A4D appears to identify 5 sources.[231] Not *one* is identified as completely reliable.[232] The first source is described as 'considered reliable',[233] which is not a known classification under the SEO scale.[234] This information was provided on March 1, 2018 after the Appellant was in segregation. The extent of the information provided by this source is that a staff member had shared a "personal use" quantity of a specific brand of medication and the implicated employee had the same brand name medication.

[95] A second source is described as "believed reliable" – information that may be accurate but has not been confirmed. This source indicates the compromised staff member had introduced "meth-soaked paper."[235] Therefore, the only two sources where it is possible to make any determination of reliability reference a brand name medication, and methamphetamine, thereby undermining the assertion of *fentanyl* trafficking.

[96] The remaining three sources are classified as "unknown reliability" – it was not possible to assess the reliability of the information. Their information was that there is still fentanyl in the population, that there will be other lockdowns, that the Appellant was 'friendly' with the compromised staff member, and that money was being exchanged through e-transfer to the Appellant's wife. The Appellant indicated, in his affidavit, that he would have been prepared to provide bank statements to rebut this claim, given an opportunity.

[97] Given the requisite 'intense' review, and even given significant deference, there is no verification across any of these sources. As the SCC indicated in *Khela*, when liberty interests are at stake, this requires measures for verification and to assess reliability.[236] Even were it possible to rely on this evidence in justifying transfer of the Appellant, absent mandatory safeguards governing adjudication, the conclusion that the Appellant was trafficking fentanyl is not substantiated.

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[230] *RD* at para 10.
[231] The A4D is unclear as to whether the first 'source' is in fact one or two individuals, but on the Appellant's reading, without knowledge of the Sealed Affidavit, it appears to be a single source (CRP at p 013, *EKE* A017).
[232] This was based on the A4Ds and the information provided to the Appellant. To the extent that this is based on other information, possibly in the Sealed Affidavit, it was not provided to the Appellant, which would further confirm a finding that the Respondent failed in its informational duties (CRP at p 013, *EKE* A017).
[233] A4D, CRP at p 013, *EKE* A017.
[234] Contrary to oral arguments of the Respondent, the Appellant submits that 'considered' reliable is not equivalent to 'completely reliable'. This is confirmed by the nature of this information.
[235] This is a reference to methylamphetamine – or N-methamphetamine.
[236] *Ibid.* at para 88.

The Precise Issues in Question

[98] Finally, the 'precise issue' in question was not whether the Appellant had trafficked fentanyl in the institution, it was whether his transfer and reclassification were justified based on considerations of security and control, and rehabilitation. Even assuming substantiated claims, whether the Appellant had engaged in the trafficking of illicit substances was but *one* factor to consider in transfer or reclassification. This is reflected in the fact that the SRS still placed the Appellant at a medium security classification. However, the Chambers Judge focused almost solely on these allegations. Apparent on the face of the A4D and final decisions is the fact that the allegations were the material reason for the decisions. The assessment of the Appellant's "performance and behaviour while under sentence" was coloured by and premised on the assumption that the allegations had been substantiated, and the acts in question proven.

[99] In this respect, puzzlingly, the A4D indicates that the purpose for transfer is the need to "alleviate admin segreg status".[237] But the leap from relief of administrative segregation status to the need for transfer and reclassification is not logical nor intelligible. The A4D indicates that "all alternatives to segregation have been explored".[238] The referral sheets did not, at any point, indicates that it properly took into account "the need for an environment conducive to rehabilitative programs and services", or the need for minimal restrictions. Further, it claims that "[t]he proposed transfer will allow [the Appellant] to remain in close proximity to his community supports".[239] This is not logically supported by the evidence. The Appellant's wife, working as a waitress, and caring for young children, deposes that the Appellant's primary community support, his family, reside in Calgary. Edmonton is a far greater distance from Calgary, making visits and support much more difficult. As in *Demaria*, there was a medium security institution, Bowden, where no incompatibles were mentioned, which was *closer* to his wife and family. But for the discretionary override, the Appellant remained at a medium security classification. At no point was this discussed as an alternative to transfer to a maximum-security institution in Edmonton, nor was the Appellant's previous history at Edmonton Institution, including a near-death incident, considered.

[100] The Appellant submits that, for all these reasons, the decision to transfer the Appellant and override his security classification were unreasonable, and therefore unlawful.

PART IV – CONCLUSION

[101] In conclusion, in reviewing the decisions in this case, this Court need not, and in fact, must not, undertake a general management of the administration of prisons or prison affairs. However, it does fall

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[237] CRP at p 005, *EKE* A009.
[238] CRP at p 011, *EKE* A015.
[239] CRP at p 17, *EKE* A021.

on this Courts to ensure that correctional authorities "obey the law in a democracy governed by the rule of law".[240] The SCC has repeatedly confirmed that, as a society, what underpins our correctional practices, is not only to ensure safety, but facilitate rehabilitation, and to assist in rehabilitating offenders in society as law-abiding citizens.[241] To serve these ends, it stands to reason that those tasked with instilling an appreciation of the importance of law abidance, themselves obey the law.

[102] As such, what this Court can do, and in this case, what the Appellant submits that this Court must do, is apply the real meaning of the law, as pronounced by Parliament, neutrally and objectively, and logically. In so doing, it falls on this Court to determine whether prison officials followed the law as part of the decision-making process. If they did not do so, their decision was not lawful.

[103] The Appellant submits that the decision-making process by which the Appellant was transferred and reclassified reflects a flagrant disregard not only for inherent and fundamental common-law principles of fairness, but even express legislative and regulatory provisions governing the exercise of decision-making authority. The decisions were procedurally unfair and unreasonable. Mandatory informational requirements were not met, and the Appellant was not provided with sufficient information to answer serious allegations made against him. He was provided mere moments to prepare and respond these allegations, contrary even to institutional requirements. He was not advised of his right to retain or instruct counsel, contrary to express legislative and regulatory guidelines. Moreover, the Respondent failed to adhere to mandatory legal and procedural requirements for inmate discipline, relied on evidence that was uncorroborated and unreliable, and failed to consider fundamental legislative considerations in it's transfer decisions.

[104] Fyodor Dostoevsky states that "the degree of civilization in a society can be judged by entering its prisons."[242] If this decision is left to stand, and this Court endorses the standards adopted in this case, the rights of prisoners to be treated fairly in respect to critical decisions affecting their liberty would be rendered illusory. As former Chief Justice Beverley McLachlin states, "[t]he most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve".[243] Prisoners are "people entitled to basic human rights",[244] and retain "all of [their] civil rights, other than those expressly or impliedly taken from him by law".[245] Our system is equally a failure if it does not provide

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[240] *Sharif, supra* at para 51.
[241] *Ibid.* para 1.
[242] *The House of the Dead* (1862) as translated by Constance Garnett; as cited in Fred R. Shapiro, *The Yale Book of Quotations* (New Haven: Yale University Press, 2016) at p 210.
[243] The Honourable Beverley McLachlin "The Challenges We Face" Remarks of the Right Honourable Beverley McLachlin, P.C. (2014) Online < https://www.scc-csc.ca/judges-juges/spe-dis/bm-2007-03-08-eng.aspx> (Accessed May 14, 2018).
[244] *Ibid.* at para 72.
[245] *R v Solosky*, [1980] 1 SCR 821 at para 13.

meaningful access to justice for prisoners, through ensuring the fair and lawful exercise of state authority in respect to critical decisions that impact their liberty interests. For these reasons, the Appellant respectfully submits that the decisions of the Respondent cannot stand.

V. RELIEF SOUGHT

[105] The Appellant acknowledges that, in granting an order, it is not the role of a court to supervise the "exercise of management responsibilities in the prison system except within the legal parameters of a *habeas corpus* application".[246] But particularly where *Charter* rights are at stake, there is no right without an effective remedy. The SCC has repeatedly confirmed that remedies on judicial review are discretionary.[247] It also been found that, in order to protect against repeated misconduct on the part of corrections, a judge can give guidance to corrections on avoiding similar illegalities in the future.[248]

[106] In *Khela*, the SCC upheld an order stating that "the *habeas corpus* is granted" and "declaring that" the prisoner "be released from custody" at the maximum-security institution and "returned to custody in a medium security institution to be dealt with therein as the prison authorities consider to be appropriate".[249] In this case, given the Appellant's discretionary override to maximum security, an order transferring him without an order in respect to his security classification would place him in a medium-security institution at a maximum-security rating – either making his placement at Drumheller Institution unlawful, or resulting in his immediate transfer back to a maximum-security institution.

[107] Faced with such challenges, since *Khela*, Courts have found that reclassification decisions amount to a deprivation of residual liberty and are properly the subject to *habeas corpus* review in appropriate circumstances.[250] For example, in *Gogan v Canada*,[251] the NSCA found that the Chambers Judge erred in finding that a maximum security classification did not represent a deprivation of a residual liberty interest, and that a finding that superior Court did not have jurisdiction to consider the issue, undermined the purpose of the protections extended by a writ of *habeas corpus*.

[108] In general, if this Court accepts that the decision to transfer the Appellant, and override his security classification were unlawful, the Appellant would urge this Court to grant a meaningful remedy, that, while respecting suitable deference to correctional authorities in the exercise of management responsibilities, vindicates the importance of the liberty interests at stake.

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[246] *Khela v Mission Institution*, 2011 BCCA 450 at para 62.
[247] *MiningWatch Canada v Canada (Minister of Fisheries & Oceans)*, 2010 SCC 2; *Mobil Oil Canada Ltd. v Canada-Newfoundland (Offshore Petroleum Board)*, [1994] 1 SCR 202, 111 DLR (4th) 1.
[248] *Charlie v British Columbia (Attorney General)*, 2016 BCSC 2292.
[249] *Khela v Mission Institution, supra;* upheld by the SCC in *Khela, supra* at para 98.
[250] *Brauss v Canada (Attorney General)*, 2016 NSSC 269; *Gogan v Canada (Attorney General)*, 2017 NSCA 4.
[251] *Ibid.*

[109] On this basis, the Appellant submits that the appropriate order would be as follows:

[a] Allow the Appeal, overturn the decision of the Chambers Judge and allow the application for judicial review;

[b] Order that Shayne Shoemaker be released from the Edmonton Institution and returned to custody in a medium security institution, under a medium security classification, to be dealt with therein as the prison authorities consider to be appropriate; and

[c] Cost for this application;

[d] Such further relief as this Honourable Court may deem just.[252]

All of which is respectfully submitted,
this 6th day of February, 2019

Jared Craig, for the Appellant,
Shayne Shoemaker.

Estimated time of argument: 30 minutes

[252] The Appellant would note that reclassification as a medium security inmate would not preclude notice of a further reclassification decision, but such a decision would presumably be required to conform with the requirements of procedural fairness that govern the rendering of that decision, for example, the requirement of a disciplinary hearing with requisite legal safeguards. The Appellant is prepared to provide further submissions as to remedy, if requested by this Court, pending this Court's determination of the application.

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