Action No.: 1801-10028
E-File No.: CVQ18SHOEMAKERS
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

BETWEEN:

SHAYNE SHOEMAKER

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
(DRUMHELLER INSTITUTION, EDMONTON INSTITUTION,
CORRECTIONAL SERVICE OF CANADA)

Defendant

P R O C E E D I N G S

Calgary, Alberta
September 20, 2018

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J. Shiskin (Student-at-law)	For S. Shoemaker
D. Shiroky	For Her Majesty the Queen in Right of Canada
E. Kay	Court Clerk

Discussion

THE COURT CLERK: Order in court, all rise.

THE COURT: Good afternoon. Please be seated.

Before you start, I should point out to you that I've read the materials. I've -- thank you for providing them to me, quite a ways in advance actually. It gave me a -- a good opportunity to get through them. And so, I have read your materials. I don't see a need for you to go through your materials word for word. I suspect that would take probably a couple of days. So, we're here for this afternoon, and hopefully you'll be able to summarize what you're going to give to me. All right?

MR. CRAIG: Thank you, Sir. For the record, last name Craig, first initial J. I appear for the applicant, Shayne Shoemaker. This is my friend David Shiroky appearing for the respondent, Her Majesty the Queen in Right of Canada.

Sir, with leave, this is an articling student from our office, Jill Shiskin. I would ask for your permission to have her sit at counsel table.

THE COURT: Yeah, no problem. Great. Mr. Craig.

Submissions by Mr. Craig

MR. CRAIG: Sir, I believe that we've tried to be as thorough as possible in our written submissions, and I'd expect that there's not a lot of points there that

we haven't covered off.

THE COURT: Right.

MR. CRAIG: And so, in the interest of conserving the Court's time, I guess I would just ask if there was any questions that -- that you'd --

THE COURT: Well, I'm not --

MR. CRAIG: -- happen to --

THE COURT: Well, I guess the most important question that I have is, this is an application for habeas corpus. This is a habeas corpus application, and in -- on page 62 of your brief - 62 and 63 - you provide a very long list of remedies that you're seeking, and I guess my question is the authority that you might provide to me for seeking such a volume of remedies in -- when you're seeking a writ of habeas corpus. I mean, I think my jurisdiction is quite limited with respect to that and, if you think it's broader than what you -- than what you think my role is, then you can tell me under what basis you're making those arguments.

MR. CRAIG: Yes, Sir. If I may have just a moment to review my authorities, there was a case that -- that sought some similar relief that we were seeking. That might be useful to turn to that decision. So, tab 4, paragraph 32 --

THE COURT: Yes.

MR. CRAIG: -- the -- the one that I would just note there at the end is having a copy of the reasons attached to the file is what they ordered in that case. It -- it -- that's just a final item I think that we've requested. I believe in *Khela* -- and that -- that's just a minor detail. That was -- I believe in *Khela* and *May*, the jurisdiction on habeas corpus is to quash the transfer decision, to overturn the transfer decision. I -- I believe they use wording something along the lines of quash it, declare it null and void for want of jurisdiction.

THE COURT: Correct.

MR. CRAIG: And so, I -- I -- I think I understand what you're saying. There is a little bit of something that I've been thinking through in -- in respect to that is you not only have the transfer decision, but you also have a security classification decision, which is a little bit different. So, the transfer decision was an involuntary transfer. There was also increase in the security classification, which in turn --

THE COURT: Sure. But I can't do any of that. I -- I can't make declarations outside of what the -- what *Khela* has told me I can do, which is quash the transfer decision and return Mr. Shoemaker back from whence he came. I don't think I can -- you've asked me for nine prayers for relief, and I'm not sure that I have jurisdiction to deal with eight of those. I have jurisdiction to deal with one. And, by the way, I think that you've made a typographical error in here. I think. Correct me if I'm wrong. But you've said "Directing that the Applicant be transferred to the general population of Bowden Institution".

MR. CRAIG: Yes. That would have been in our written submissions, and that's something we'd -- we'd want to speak to. I -- I guess the -- and again, this ties into the problem that you're noting is what order can this Court grant ultimately that we go through this process and -- and at the end of it is an order. And that needs to be clear. The concern here is -- I guess it would be requesting where he's transferred to. If you -- if you quash the transfer decision, then he's back to Drumheller.

THE COURT: I think that's -- that's all I can do, if I'm going to do that at all. I don't think I can start sending him to different institutions. That is not within my jurisdiction. I think the Crown would have a -- have a right to take that -- take this immediately to the Court of Appeal and say that I have exceeded my jurisdiction in sending him somewhere else. And I can say, Okay, well, you don't like this decision, then we'll send him to PA. I'm not sure --

MR. CRAIG: Right.

THE COURT: I'm not sure you want that.

MR. CRAIG: Yes, Sir. Your point is well taken.

THE COURT: And I'm not sure that's within my jurisdiction.

MR. CRAIG: Yes, Sir. I -- I think I agree with you and I'd be willing to concede that point.

THE COURT: So, the only place I can send him, if I'm going to send him anywhere, would be to Drumheller. I can't send him to Bowden. That's a different institution, Mr. Craig.

MR. CRAIG: Yes, Sir. And I'm just reviewing *Khela* here, and I think this -- this is a very interesting point. Sir, you're correct, in *Khela* they found that the transfer decision was unlawful and then the question is what flows from that. Well, the

decision is overturned. I guess the concern would be what if it was a security classification that pushed him into maximum security and thereafter forced a transfer decision? Would that be akin to -- would that fall under *Khela*?

THE COURT: I think it all falls under -- I think -- again, let me repeat. I think there's only one remedy that I can provide to you, and that is to quash the decision and -- and leave it at that. If I'm quashing the decision, then Mr. Shoemaker goes back to where he was, which is Drumheller. I can't do all of these things you've asked me to do. That is not within my bailiwick, sir.

MR. CRAIG: Right.

THE COURT: Unless you can tell me that it is. But I haven't found any cases that tell me that it is. And I've read all the cases that you've provided to me, I've read all the cases the Crown has provided to me, and I've read some additional cases that come out of both our Court of Appeal, as well as our Queen's Bench. And, as you are probably well aware, we don't see these very often in these parts - we see them mostly in Edmonton.

MR. CRAIG: Yes, Sir.

THE COURT: And so, I have a few decisions from Justice Manderscheid, I've got a couple from Justice Shelley, and I've got one very lengthy one that Justice Gill rendered. There are a number of them that Justice Henderson has -- has rendered quite recently. So, I'm familiar with the jurisprudence in our jurisdiction and I, frankly, unless -- again, unless you can tell me that there is a Court of Appeal or a Supreme Court of Canada decision that tells me I can do all of this stuff, I can't do it, Mr. Craig.

MR. CRAIG: Yes, I understand. So, the remedy based on the extensive law that's been reviewed on your behalf on behalf of the parties, I think -- I think stemming from *Khela* would be that the transfer can only be back to Drumheller, absent some other jurisdiction and that the balance of those remedies would be through the federal system. The habeas corpus is limited to transfer --

THE COURT: Right.

MR. CRAIG: -- decisions.

THE COURT: Correct. Correct.

MR. CRAIG: And, Sir, I guess -- I guess --

THE COURT: But I suspect if you walked out of here with that remedy in your hand that would satisfy your client. I suspect. And he can deal with the other things in some other forum, I suspect.

MR. CRAIG: Yes, Sir. And -- and it is a fair point and -- and in fairness that was something that I turned my mind to over the past days. I would also note Edmonton doesn't see a lot of these. I can tell you that my office hasn't seen a lot of these either, and -- and it is very difficult to work through, but I think they are --

THE COURT: Well, Edmonton has seen a lot.

MR. CRAIG: Oh, sorry, Edmonton has. Our office certainly hasn't.

THE COURT: Oh, okay. All right.

MR. CRAIG: And --

THE COURT: Yeah.

MR. CRAIG: And I guess I would just add that I think these are very important issues. Obviously the amount of time that it's taken to go through this certified record is extensive. You've had an opportunity to review the materials. I'd like to think that I know something about the law. Obviously I haven't been at the bar for very long, but this was a lot of work to work through all of these things from a practical point of view when you're looking at an individual who's been in prison for 19 years, who I think has a degree of affluence that would represent above average, or -- or well above average of other inmates. But my concern is broader at this point. If the right to procedural fairness is to have any meaning in the correctional institution, this -- this -- this is it. You have at most a day to respond to this, to make a meaningful response. You don't have meaningful access to counsel. There's no coverage.

THE COURT: Well --

MR. CRAIG: As far as notice goes --

THE COURT: I found it quite interesting when I was reading through your materials that there seems to be -- and -- and I understand why you're doing this and how it came about, but there seems to be a layering on of your submissions, your written submissions, with the *Charter* jurisprudence that's out there. In particular, with

respect to right to counsel there seems to be that overlaying, and quite frankly a section 7 type of an argument, an overlaying of *Charter* jurisprudence onto this, the habeas corpus, seeking a writ of habeas corpus. And although seeking a writ of habeas corpus is enshrined in the *Charter,* the arguments are completely different in my respectful view. The right to counsel is different in this type of situation than it is, for example, on arrest and detention under 10(b). 10(b) is very narrow - 10 -- 10(b) is worded specifically. It does not refer to an individual who is already incarcerated, it refers to someone who is not and who is attempting to prove his innocence in the context of -- of criminal jurisprudence.

And so, I think that we're dealing with apples and oranges here, and I think that that is why in my reading of *Khela* and some of the other jurisprudence that has flowed from *Khela* and the writ of habeas corpus remedy, there -- there is a different approach to it. It's more in the nature -- and you're -- you're closer to law school than certainly I am, but it's -- it's more akin to a judicial review than it is to a criminal proceeding. The standards of -- the standards of proof are different, I think. And so, I think that we're -- we're dealing with a different animal, although there is that overlaying, I suspect, of some *Charter* jurisprudence.

MR. CRAIG: Right, Sir. And I think that those are some good points. Would you -- will you provide me just a brief chance to respond and make some suggestions?

THE COURT: You can respond -- you can respond as long as you want.

MR. CRAIG: All right. So, the *Charter* has this underlying cohesion. These rights flow together. It's been suggested that all of them, in fact, flow from section 7. But what *Khela* says is that the right to procedural fairness is required, and the right to procedural fairness is protected by the *Charter* and it protects when there's deprivation of life, liberty, or security of the person.

In this case there's a deprivation of liberty, it's clear, and the right to procedural fairness as enshrined by the *Charter* as an expression of section 7, it's flexible and variable depending on the context. So, absolutely, yes.

THE COURT: And that's a good point. I -- I like that point that you've just made, that it depends on the context. You -- you have to look at the context within which the proceeding took place to make a determination as to whether there's been procedural fairness. And I think that's an important point that you make.

MR. CRAIG: Yes. And -- and I guess, Sir, I -- I think we fully agree on that point. The concern at this point would be that the *Charter's* proposed -- and I

don't need to keep using hyperbole, but it's meant to protect against liberty, and there's this idea that liberty in the criminal system when innocence or guilt is at stake is somehow this distinct and entirely different right of different importance outside of the correctional institution.

And that's part of the concern here is you're looking at an individual who, based on an increase in his security classification or a transfer, could -- it -- it -- it is a gaol within a gaol, and -- and I understand my friend is taking exception to some of the materials that have been set out in the -- in the affidavit, but we don't see what goes on within these walls. Five years in maximum security, if you look at the actual deprivation of liberty in that case, it has to be contextual and it has to look at the impact of that on the individual, which is significant in this case. And -- and that's the point that stems from procedural fairness --

THE COURT: But -- but that's not -- that -- again, you're stepping outside of my role. My role is to look at the decision that was made and to make a determination as to whether it was lawful.

MR. CRAIG: Yes.

THE COURT: And I'm -- you've given me a lot of information in Mr. Shoemaker's affidavit that I'm not sure is relevant to my consideration of whether it falls within the *Khela* test.

MR. CRAIG: Right. And there's two branches in the *Khela* test. The first is that it must be procedurally fair, the second is that it must be reasonable, as you're fully aware. And procedural fairness incorporates all of these rights, at -- at minimum, the right to be heard, the right to counsel, the right to receive adequate notice, the right to disclosure to some extent, and absolutely it's dependent on the context. But the reason that this is relevant is because *Khela* specifically incorporates section 7 of the *Charter* insofar as procedural fairness. Section 7 has said that -- it's been held that section 7 protects at minimum rights to procedural fairness. Now, it may go further than that, but the way -- the reason that that's relevant is in incorporating the notion of procedural fairness. In cases like *Baker*, the Supreme Court has made it clear that it's very contextual, absolutely, but it can't be applied strictly. That was the point that came out of *Baker*. You need to look at the individual cases and the impact of the deprivation of liberty on the individual, because that's what determines the scope and content of the right to procedural fairness.

And the argument, drawing from -- from Mr. Shoemaker's affidavit and from the cases cited, is in order to adopt that contextual approach, you need to look at the individual case, at the impact of this on -- on this individual. And obviously you look at other things. You look at the express provisions of the statutory framework, or governing regulatory framework, and

I can speak to that, but in this case I just -- I can't get my head around the guidelines specific -- and -- and even if we're -- we're -- we're completing discounting that there's any right to procedural fairness over and above what's set out in the specific provisions of the correction -- of the correctional regulations, there's non-compliance with their own regulations at -- at every stage of procedural fairness. The -- the -- the directives expressly incorporate the duty to be fair.

And -- and I understand the point that you're making is there is something different between a writ for habeas corpus and what would be a remedial action under section 7 of the *Charter,* which would presumably go to the Federal Court. But the question there is that, is there a principle distinction? If you're looking at the nature of *Charter* rights, what they're meant to protect, you're looking at the scope and content of the duty to procedural fairness. Can you really draw that distinction, which is essentially --

THE COURT: But just -- but just a second. Just a second.

MR. CRAIG: Yes.

THE COURT: Slow down first.

MR. CRAIG: Yes.

THE COURT: You're going 100 miles an hour.

MR. CRAIG: Yes.

THE COURT: And -- and so -- but -- but we're looking at procedural fairness in the context of an administrative decision -- and I'm -- I'm not meaning to disrespect what we're dealing with here, but it's in the context of an administrative decision in -- in a particular environment. We're not looking at it from the perspective of the police making a decision to arrest somebody. We're -- we're looking at something -- at somebody who is presumed to be innocent. Right? I mean, that's the section 11 aspect. But we're looking at something a little bit different here. We're looking at a -- an administrative decision in a -- in a particular environment. And so, we can't -- by -- by trying to sort of fold in general *Charter* rights into that, I think is -- is not the right approach. We have to look at it from the context -- I think the better analogy, and one that *Khela* refers to, is the review that is undertaken by Courts with respect to administrative tribunals, and there -- there has to be transparency, you know, there has to be all of those things. In fact -- in fact, that's what *Khela* specifically refers to is that same *Dunsmuir* type of test and type of analysis that this Court has to undertake.

So, I think we have to look at it more from the perspective of a judicial review of an administrative tribunal's decision instead of trying to fold the criminal law into something that is just a judicial review type process.

MR. CRAIG: And, Sir, I guess the concern there is again the purposive nature of the document that is the *Charter,* and -- and the concern is if analysis is of that nature, does that mean that we're effectively saying that the *Charter* doesn't extend into the environment in this -- in -- into the prison environment in the same way that it would into any other investment. Absolutely, as we've said, there are restrictions. It is a different nature of a decision, but there is a significant deprivation of liberty and -- and the concern is if we curtail those rights or read *Khela* as confining it to this narrow issue, or the context of procedural fairness as being extremely --

THE COURT: Okay.

MR. CRAIG: -- minimal -- yes.

THE COURT: Well, then let's go -- let's go to *Khela*. You -- you -- you point out to me where I can go beyond what -- what I'm referring to. Because when I look at *Khela*, it talks about procedural fairness, and -- and -- and that's fair enough. Procedural fairness, I think -- I think we're all on the same page as to what procedural fairness is. Right?

MR. CRAIG: Yes.

THE COURT: And -- and whether it's in the context of -- of this type of administrative hearing or a criminal matter, there still has to be procedural fairness. In a criminal matter it's a little bit different because we have the *Stinchcombe* requirements, we have -- you know, for disclosure. We have the -- the right to counsel as -- as enshrined in -- in 10(b). We have the right to know why we're being arrested in 10(a). We have all of those rights as contained in there. But I think that overlaying all of this is procedural fairness, and I think that *Khela* specifically speaks to that, and I'm with you on that. I'm okay with that. And I'm sure Crown is. Procedural fairness is the -- is the cornerstone of what we're dealing with here. And -- and so, when you say, well, we've got to enshrine the *Charter* principles into -- into this and deal with it from a procedural fairness perspective, I don't think you have to go that far, Mr. Craig. I think the procedural fairness overarches the whole process. And so, I'm not sure we need to go to the *Charter* side of the balance sheet, is how I read *Khela*.

MR. CRAIG: Sir, the *Williams* decision then -- would -- would it be the Court's decision that *Khela* has more or less overruled *Williams*? *Williams* was the

one where they suggested that right to counsel -- that -- that it incorporated similar considerations to the *Charter.*

THE COURT: Well, I'm bound by *Khela*.

MR. CRAIG: Right.

THE COURT: I'm not necessarily bound by the -- bound by the Federal Court of Appeal.

MR. CRAIG: And I guess again if we're all in agreement that the right to procedural fairness applies --

THE COURT: Well, I hope your friend is nodding his head. Is he? Are you nodding your head on that?

MR. SHIROKY: With respect to what we submitted in our written brief, we admit that procedural fairness is a proper consideration under *Khela*.

THE COURT: Absolutely. Absolutely. I don't think anybody is disputing that.

MR. CRAIG: So, I guess from there we'd have to go to *Baker*, when we're talking about procedural fairness. And if I could just direct you --

THE COURT: You've referred to it in your -- in your brief, sir.

MR. CRAIG: Yes. And, as I said, I hope not to review these in depth, because I understand that they've been reviewed. So, there was a heading titled "Procedural Fairness". I believe this would have started -- just give me a quick minute here.

THE COURT: Page 31?

MR. CRAIG: Page 31.

THE COURT: Not that I've memorized your brief.

MR. CRAIG: I -- I would hope not, Sir.

THE COURT: Although I must say I've been living with it for the past few weeks, and so, I have read it with some thoroughness. So ...

MR. CRAIG: Well, I'm sorry to hear that. We --

THE COURT: No, don't be.

MR. CRAIG: We had -- we had -- we were in the same situation, so ...

THE COURT: No, don't -- don't -- don't be sorry about that. I found it -- I found it interesting and well written. So ...

MR. CRAIG: Thank you, Sir.

So -- and -- and I don't--

THE COURT: Paragraph 111.

MR. CRAIG: Yes.

THE COURT: Again, not to memorize your -- your brief, but it's paragraph 111.

MR. CRAIG: And so, I -- I don't want to roll into hyperbole or grandstand or anything like that, but the overarching concern here is underlying the law there is this -- we've rejected this archaic notion of the law as a system rules, and -- and we now see this system of principles, both in theories of jurisprudence -- and the Supreme Court has acknowledged that. And I think you're right that they need to be separated, but the question is to what extent. And again, the concern here is to what extent should the *Charter* extend into the prison setting. And when you get to the bottom of the underlying principles, that is really what we're talking about. If you talk about the scope and content of the -- of the right to procedural fairness, it talks about what effect the decision will have on someone's liberty. And it's extremely contextual. So, when you're talking about things like liberty, that are expressly protected by section 7 of the *Charter*, you look at people like Mr. Shoemaker. How has this affected their life? And -- and when you get that notion of liberty into there and the effect on the individual, you can't consider that in isolation of the *Charter* just because it's an administrative decision, just because it's in a correctional institution.

THE COURT: Well, we don't -- we don't have -- again, sir --

MR. CRAIG: Yeah.

THE COURT: -- with all due respect, we don't have to go as far as the *Charter*, because *Baker* itself says:

> The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

So, what you're saying to me with respect to section 7, we don't have to go that far because *Baker* itself, which doesn't deal with *Charter,* is saying exactly that.

MR. CRAIG: I understand your --

THE COURT: You see what I'm saying?

MR. CRAIG: I understand the points the Court -- yes.

THE COURT: And so -- so, what I'm saying -- but -- but there is a caveat there, and the caveat is "fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision".

So -- so, that's where the contextual aspect of it comes in, but it's not the contextual aspect of considering what Mr. Shoemaker's personal situation is, it's the contextual aspect of looking at what the institution is dealing with and how it manages its affairs from within. Do you see what I'm saying? It's -- it -- I think they're different. You're asking me to go beyond what *Baker*, but more importantly what *Khela* is telling me to do.

MR. CRAIG: And, Sir -- so, I think what follows from what you're saying then, that we suggest that there are certain procedural safeguards that should apply in this case under the three grounds - rights to notice, rights to disclosure, and rights to counsel. And I think that would be my friend's argument also is that, given the institutional setting, the fact that this is an administrative -- and that procedural fairness would suggest that the content is significantly less than what we're arguing it should be.

THE COURT: I -- I -- I think that's what your friend is arguing, yes.

MR. CRAIG: And your question for me, I -- I think is, should the *Charter* come into this, or to what extent, and to -- to what extent are you bound by the

Supreme Court and what they've said in -- in *Khela* and *May* --

THE COURT: Oh --

MR. CRAIG: -- and *Baker* --

THE COURT: Oh, I'm bound completely. I am bound completely.

MR. CRAIG: Yes.

THE COURT: So ...

MR. CRAIG: So, the question then is have they completely closed the door to considering the *Charter* in the context of procedural fairness, I guess would be the concern. And if not, what implications would that have in this case? What -- what effect should the *Charter* have in this case?

THE COURT: Well, I guess that from -- and -- and I want you to understand I'm not debating this with you. I'm just sort of giving you my thoughts on it and --

MR. CRAIG: Yes. Yes, Sir.

THE COURT: -- letting you -- letting you pare any of my thoughts down. But -- but when we're dealing with the -- the *Charter* is a different animal, as you can appreciate. I mean, you do criminal law. You understand. And I'm sure that -- you haven't argued in front of me, but I'm sure you've argued in front of my colleagues that the *Charter* in the context of a criminal proceeding is -- is what it is. It is really the thing that -- that is really -- if -- in some senses runs our criminal law jurisprudence. I think -- I think that's a fair comment.

So -- so, I think that's a given, and I don't know if anyone in this room is going to argue the otherwise -- argue otherwise. But the question then is -- becomes where do sections 7, 8, 9, 10, 11 - where do those fall within this type of issue? And the question -- and -- and my -- I think it's arguable that they don't really. There is a right to counsel, but it's a right to counsel in the context of a prison setting. There's a right to be advised as to what remedies the institution is seeking. But that's not coming from the *Charter*, that's coming from the institutional setting and the right to procedural fairness, as you just mentioned.

So -- so, the right to counsel -- and you've given me all -- you've given me an -- the argument

that you would probably otherwise give if you were arguing a 10(b) in front of me. The right to counsel in a prison setting is something different from the right to counsel on arrest and detention, unless you can tell me otherwise.

MR. CRAIG: Well, I think we've come to the conclusion possibly that *Williams* has been overruled. I think *Williams* was a good decision and I agree with it. That was the decision where they found that he had a right to counsel and that it was informed by the *Charter*, and I'd be interested to see how those authorities -- or the authorities that were cited in support of that proposition. I would definitely -- I mean, obviously I'm here to advocate for my client, and it's -- it's -- I -- I think I -- I -- absolutely, Sir, I pick up on the issue that you're saying, and I think it's a really important issue, and -- and it's -- it's a very important issue -- issue in this appeal and just in general. To what extent does the *Charter* apply in the prison setting? I think that that's -- rights to procedural fairness, I think we all agree they do, but to the extent that the right to procedural fairness extends into the prison setting, to what extent does the *Charter* extend into the prison setting, albeit it might apply in other context, if there's a review to the Court of Appeal or those sorts of things, and they go through the year-long grievance process, but in the context of habeas corpus to what extent does the *Charter* inform the rights to procedural fairness within a correctional institution?

THE COURT: Well, habeas corpus, I mean, that -- the difficulty that we have, I think, is that habeas corpus, the -- the right to habeas corpus has been circumscribed by *Khela*. I mean, I think that if you go back to, you know, the 13th century, I think it was a bit -- bit of a different animal. I'll -- I'll leave Justice Wakeling to -- to tell us what -- what historically all of that meant, although there is a decision where he talks about the history of habeas corpus. But -- but I think it -- it started off as something completely different. And -- and it would be no different from if you walked out of here and a sheriff picked -- a sheriff stopped you and threw you into gaol because he heard something about you that he didn't -- he wasn't really -- and so, he throws you into gaol. You would have -- you -- you would be making an application for a writ of habeas corpus to have you released because there's no right to hold you in -- in gaol. And that's historically what it was, and then it's kind of evolved into what -- what we have today. And I'm not sure where I'm going with this, but I'm just -- it's just one -- it's -- it's evolved and it's -- it's evolved into something that in the first instance started to be very broad, then it's been narrowed. It's really been circumscribed by virtue of decisions such as *Khela*.

MR. CRAIG: And more recently by frivolous litigants up in the Edmonton area.

THE COURT: Maybe.

MR. CRAIG: Okay.

THE COURT: Maybe. Maybe. But just -- I -- I just want you to be clear that I know exactly what you're talking about when you're talking about *Williams.* I'm reading from your brief at paragraph 184 where you give us the quote and highlighted the statement from *Khela* that says -- or from *Williams* that says: (as read)

> It seems to me that the authorities were under a positive duty both to inform the appellant of his right to counsel and to provide him with a reasonable opportunity to exercise that right as soon as they had decided to place him in administrative segregation and to transfer him to high maximum security.

Now, I -- I -- I have a feeling I know what your friend is going to argue with respect to that, and -- and I'll tell you what I think it is, and you can give me your counter to it. I think what he's going to argue is Mr. Shoemaker was given this -- was given this right. And so, if I were to rule against you, I'm not overruling *Williams*. In fact, if I were to agree with your friend, there's been a compliance with *Williams.*

MR. CRAIG: And, Sir, I imagine that would be based on the fact that, even if there was implementational duties, that he did at some point have a chance to contact a lawyer --

THE COURT: Correct.

MR. CRAIG: -- on the phone, and whether or not he was --

THE COURT: Both informational and implementational.

MR. CRAIG: Yes.

THE COURT: Yes. Right, both -- the two strands of it. And -- and I think that's what your friend's going to argue. So, my question then is, how do you counter that?

MR. CRAIG: Well, I guess the concern is there were the cases that talk about how -- how you need to stay -- and again, this is all -- we're down the hypothetical now that --

THE COURT: Yeah.

MR. CRAIG: -- the full rights to counsel do apply, which I don't -- I don't imagine my friend and I would disagree on. At what point does Legal Aid come into the picture? I mean, I've talked about what's taken you, me and my friend days to work through. How does an inmate navigate that?

THE COURT: You know, I'm going to -- I -- I know that I usually don't allow counsel to interrupt other counsel, but I'm going to allow it in this instance --

MR. CRAIG: Oh, I -- absolutely.

THE COURT: -- because I -- because I think I know the answer to that question.

MR. SHIROKY: My friend's made a number of arguments today. I think for the purposes of judicial review, habeas corpus style applications, there are briefs that set out arguments, and I think we're well beyond (a) what my friend is arguing in his written arguments and other issues that are raised from the bench that need to be addressed by my learned friend, but I think we're well beyond the scope of what we're here to argue, which is the lawfulness of the decision when we're talking about the scope of Legal Aid. And while it's certainly an interesting discussion, I -- I think that it -- it's well beyond -- the -- access to Legal Aid is one thing, access and (INDISCERNIBLE) to instruct counsel is another, if that makes sense. And again, this is still my friend's time and I'm not trying to step on his record. I just did briefly -- I -- I don't know if "object" is the right term - want to state that insofar as my friend is bringing these new arguments, I do think they go well outside the scope of what we're actually here to review today.

THE COURT: Fair enough.

MR. CRAIG: My friend's point is well taken. I was referring in my brief to the decisions that said that you -- you don't need to make the -- the accused or whoever is in that situation - again I'm falling back to the language - aware of the right to counsel, but also aware of rights to resources such as Legal Aid.

THE COURT: Well, no. I mean, I -- I guess perhaps this is where your friend takes issue with this, is that -- and this is really coming back to -- coming back to the discussion about the *Charter* and it's applicability to the case at bar, and that is it's my view -- it's your friend's view, I'm guessing, and it -- certainly I haven't read any cases that tell me otherwise, *Brydges* does not apply in this instance.

MR. CRAIG: *Brydges* being the decision about informing of the right to Legal Aid?

THE COURT: Informing of the right to free counsel and so on and so forth. It -- that is a *Charter* right. That is not a right that's -- that arises in this context.

MR. CRAIG: And it's not incident to section -- it's been found not to be incident to section 10 of the *Charter,* and that's even if we're going back a step and assuming that the full rights are incorporated.

THE COURT: Okay. Sorry, I'm -- I missed your point there.

MR. CRAIG: No. I -- I -- I understand your point.

THE COURT: Yeah. Yeah.

MR. CRAIG: Yes, I'm just working through it.

THE COURT: Yeah. So, let's -- let's get back on track.

MR. CRAIG: Yes.

THE COURT: I mean, as you can tell, I'm -- this is a very interesting discussion and one we don't see very often, but -- from an academic perspective I find it fascinating, but let's get back to the case at bar.

MR. CRAIG: Okay. And --

THE COURT: Okay?

MR. CRAIG: And, Sir, I think that that's where I wanted to go.

So, we went through a broad narrative of events in the affidavit and an initial preliminary exception if we are turning to the facts now, which I won't belabour because we've set them out in great detail in both the affidavit and the written brief, is there was some mention about what's appropriate evidence in an affidavit in an application or an originating application, whether or not things like hearsay, character evidence -- Mr. Shoemaker focuses on a lot of the things that he heard while he was in administrative segregation on his character, and I think there were some exceptions taken to the -- taken to that. And my concern as I thought through some of those issues was well, first and foremost, are these sorts of applications really well suited for civil procedure? That's -- that's a whole separate issue. But in this case this isn't really -- this isn't an originating application for a derivative action or to recognize a foreign judgment. It's just so different in nature. So, my concern is with a certified record,

what is put into evidence and accepted as such. It's entirely hearsay. It's entirely character evidence. And the concern, if that is going to be an issue that's raised about the affidavit and the contents of the affidavit, is how do you respond to it? How does any inmate respond to it if -- if they're not able to raise those issues?

THE COURT: Well, that's what the grievance procedure is all about, isn't it?

MR. CRAIG: Well -- and -- and the grievance procedure then would be for security classifications or for other -- well, not security, but for other issues falling within the federal system. But in *Khela* they made it clear that you are able to access the Court for these. The question is whether the rules of civil procedure particularly governing affidavits would -- would entirely restrict an inmate from making any answer to the allegations.

THE COURT: Well, it's not a question of what you're filing, it's a question of the content of what you're filing and whether it's relevant to what's in front of the Court.

MR. CRAIG: Right.

THE COURT: Remembering that the test in *Khela* is very narrow. And things like Mr. Shoemaker getting beat up in the Edmonton Max - not relevant. Not relevant to what I've got in front of me. It's a concern. I'm concerned for his safety, but that's not what I'm here for.

MR. CRAIG: Well, and Sir, respectfully -- and I do not -- I don't want to go back into the procedural fairness arguments, but just tying the relevance and -- if you look at the *Baker* decision, it looks at the impact on the individual. We submit even if that's broadly relevant to the liberty interest that's at stake, the impact of the decision on this individual and -- and frankly the impact of these sorts of decisions on any individual who's in this situation when we're --

THE COURT: That's not what *Baker* says --

MR. CRAIG: Yeah.

THE COURT: -- Mr. Craig.

MR. CRAIG: Okay.

THE COURT: *Baker* is narrower than that. You look at the -- the effect on the individual when it's appropriate to the statutory institution and the social context of the decision - of the decision. So, that's -- so, we are looking -- we're not looking prospectively, we're looking more, if you want, retrospectively because that's the basis on which the decision was made in the first instance.

MR. CRAIG: I understand. The Court's point is taken.

THE COURT: Again, I -- look, I -- I feel sympathy for Mr. Shoemaker, but that's -- I'm not here, with the greatest of respect, to feel sympathy for him in his current circumstance. I'm here dealing with a very narrow issue, and the very narrow issue is can -- should -- can or should I grant a writ of habeas corpus in this instance. That's all it is and the *Khela* test is what's applicable for me.

MR. CRAIG: Yes. So, the relevant issues then from the affidavit would be to the reasonableness of the decision and then procedural fairness, however it's interpreted, based on the discussions we've had.

THE COURT: Correct.

MR. CRAIG: Okay.

THE COURT: Correct.

MR. CRAIG: So, turning back to your point then expressly from *Baker* about the institutional context, I believe there were statements in *Baker* about how the specific institution -- how you look to the enabling legislation to look at what procedural safeguards should be in place.

So, in this case, if we focus on procedural fairness for just a moment - and I am aware of the time - the first point that we raised was about whether or not disclosure, full disclosure, had been provided. Regardless of whether the scope of the content of procedural fairness, I think what Baker says is that at minimum a tribunal must follow its own procedure. All relevant information must be provided to the offender. And --

THE COURT: Subject to 27(3).

MR. CRAIG: Subject to 27(3). Aside from that, all relevant information. First of all, the practicality of getting this to an inmate within -- it's not surprising that everything wasn't there, given the expedited nature of this, but if you look at the information, amount of information that we have now, and the amount of information --

and granted, not all of that would be directly relevant to the transfer decision, but you -- you can -- for example, something as simple as the corrections plan, that's relevant to a security classification. That wasn't given to him until Friday. Serious, serious concerns about even the notice of assessment for involuntary transfer that's dated after the date it was printed -- it's dated an hour before the date it was printed - these sorts of things. There -- there's all sorts of documentation there.

THE COURT: You're looking at substance more than -- more than when it was presented to him. You're looking at substantively what was he presented with.

MR. CRAIG: Right.

THE COURT: Not when he was presented with it. He ultimately had the materials and it's quite interesting -- because I went through the certified record of proceeding -- proceedings and -- and it's very repetitive. I mean, there's not much new information in that few hundred pages. I kept thinking maybe I sort of dropped it and started reading exactly the same thing that I had read 15 minutes ago, and then 20 minutes ago. I mean, it's extremely repetitive. There's not much new. If you -- if you culled through that and put all the new stuff in there, it would probably be about 30 or 40 pages --

MR. CRAIG: It would have --

THE COURT: -- at most.

MR. CRAIG: -- saved a lot of paper.

THE COURT: Yes, you would.

MR. CRAIG: For --

THE COURT: Or yes, the Crown would.

MR. CRAIG: All right. All relevant information - that's what the commissioner's directives say, all relevant information. The number of the cases we noted, with the exception of one relevant document - it's not just the gist of the information, all relevant information. And -- and I understand and I don't want to keep coming back to procedural fairness, but even accepting procedural fairness and no *Charter,* based on the procedural fairness cases that we've looked at, not only does the express statutory framework, regulatory framework, directives governing them says all relevant information as considered in *Khela*, procedural fairness suggests, you know -- procedural fairness supports it. Procedural fairness aside though, we can go to this -- and I don't want to -- you've read it. I

don't want to walk you through the specific provisions, but what's most important to me is all relevant information and the decisions that have looked at that, and I'm just --

THE COURT: But -- but --

MR. CRAIG: Yes.

THE COURT: -- let's just talk for a minute about relevant. We have to remember if we back away from this whole thing, we know why Mr. Shoemaker was transferred from Drumheller to Edmonton Max. We know the -- the gist of the reasons. And when I look at the record that was provided to me, and specifically page 013, for example, which I'm assuming was repeated several times, but if you look at page 013, this is -- this is really the -- I'll just wait until you can see it. The -- from about a quarter of the -- a quarter of the way down, source reliability and so on --

MR. CRAIG: Yes.

THE COURT: -- if you go down there, that is the gist of what the concerns were of the institution. Now, I have read something that you haven't read.

MR. CRAIG: Yes.

THE COURT: Okay?

MR. CRAIG: The elephant in the room. Yes.

THE COURT: Yes. It's not an elephant, it's -- it is what it is, and Justice Dunlop said I could read it. So, I have read it and then I immediately put it back into its envelope and sealed it and I put a notation on the -- on the envelope when I opened it and when I closed it. So, I have read it. And when I read through the sealed affidavit, this gives far more information than I thought the Crown would give you. This gives more than I thought. And frankly, I am guessing that if Mr. Shoemaker read that, he'd have a pretty good idea of the sources because it gives a lot of information. And there -- there is more information in the sealed affidavit, but that's the gist of it, and the gist is pretty specific.

MR. CRAIG: Right.

THE COURT: So, you -- you may think that there's something hiding behind the elephant, but there's not much hiding behind the elephant, I can tell you that.

MR. CRAIG: Your point is taken. So --

THE COURT: I mean, if -- if you're -- there was some reference to the fact that we need clarity with respect to when, where, and so on. That kind of information is exactly why we have 27(3). All right?

MR. CRAIG: Yes.

THE COURT: Because that would -- I think that would -- looking at the information that I did read, that would sort of make it pointless to have 27(3) at all.

MR. CRAIG: Yes.

THE COURT: Right?

MR. CRAIG: Yes.

THE COURT: So, be assured.

MR. CRAIG: Is it all right if we speak about the confidential informants for just a quick moment --

THE COURT: Sure.

MR. CRAIG: -- since we're there?

THE COURT: Sure.

MR. CRAIG: So, there's something that -- I think there was some sort of confusion between my friend's brief and my brief. As far as the informants go, we have them classified, and I believe there was four informants, by my recollection, and that one of them was believed reliable, two of them were reliability unknown. Okay. So, none of them were completely reliable. None -- none of them were deemed completely reliable.

THE COURT: No, that's not true.

MR. CRAIG: Oh, and -- and that could be -- that could be wrong and that might be the source of the confusion between what I have and --

THE COURT: I'm not sure. There were two of them that were completely reliable, if I recall correctly, sir.

MR. CRAIG: This is page 9. It does mention that in my friend's brief, and that's why I was noticing the discrepancies. Right. So, if we go to the bottom pages, page 90 of the certified record --

THE COURT: Page what?

MR. CRAIG: Ninety. So, there's black numbers in the bottom right. Or if we could go -- sorry, it should be -- yeah. Well -- okay.

MR. SHIROKY: I believe my friend is referring to page 13, which is where we are.

THE COURT: Oh.

MR. CRAIG: This one?

MR. SHIROKY: Yeah, page 13.

MR. CRAIG: Okay.

MR. SHIROKY: That's from a different record effectively. It's -- the documents get reproduced in a number of different --

MR. CRAIG: Yeah.

MR. SHIROKY: -- formats

MR. CRAIG: Yes. Yes, they do.

MR. SHIROKY: That's (INDISCERNIBLE).

MR. CRAIG: Okay. All right. So, if you go through the sources here from what I believe he would have received, one says considered reliable --

THE COURT: Where are you looking?

MR. CRAIG: So, if -- there's two lines and then there's another paragraph.

THE COURT: Yes.

MR. CRAIG: And then there's a line after that.

THE COURT: Source reliability codes?

MR. CRAIG: Yes.

THE COURT: Yes.

MR. CRAIG: And then if you go down to underneath where it says "Shoemaker", if you're not blind by that point.

THE COURT: No, I'm fine.

MR. CRAIG: And so, that would say considered reliable. So -- so, my concern there is what -- what's actually stated is one of them is considered reliable, the next is source unknown reliability, the one after that is source unknown reliability, the next is source unknown reliability, and then the last is source believed reliable, which isn't actually even a classification under the directives.

So -- so, part of the concern here is I don't think that there's any completely believable informants here.

THE COURT: Well --

MR. CRAIG: And that was just because it was raised in my friend's brief at page 4 where it says, information, two from completely reliable, information from one completely reliable, and then information from three unknown reliable. I'm just looking for the compete -- completely reliable, because I didn't see them on what we had.

THE COURT: Well, I'm sure you friend will speak to that, but I --

MR. CRAIG: And -- and as I say, it was just a clarification because --

THE COURT: Yeah. No, no, fair enough, and I guess the other point that I'll make with respect to this is I have read the sealed affidavit.

MR. CRAIG: Yes.

THE COURT: So, I know the sources, and -- yeah. And that goes to the reasonableness of the warden's decision. And again, you have that disadvantage of not being able to see the -- the affidavit, but I can tell you again, I was quite surprised when I read this -- read this. I thought that there would be much less information provided to you than what is contained in there.

MR. CRAIG: Yes, Sir.

THE COURT: Shocking. So ...

MR. CRAIG: Well, there was the decision that we cited about -- a decision where they didn't include all the information from their investigation, even in the sealed affidavit.

THE COURT: Sure. But that's distinguishable from this case. They did provide me with a sealed affidavit and all the information that --

MR. CRAIG: Oh, no. And --

THE COURT: -- they were relying on.

MR. CRAIG: And the question would be whether or not complete information was included in the affidavit, I think was the issue in the one case. That the judge read, not that we read.

THE COURT: Right. But that's up to me to decide.

MR. CRAIG: Yes.

THE COURT: And that goes to the reasonableness of the decision.

MR. CRAIG: Yes.

THE COURT: Right? And -- and again, it's hard for you to be punching shadows here because you don't know.

MR. CRAIG: Yes.

THE COURT: But I do. I know what I've read, and that goes to the reasonableness of the warden's decision, in my -- in my view, sir.

MR. CRAIG: And, Sir, I've tried my best to be thorough, to work through these things. I think that's one of the things that I would raise is the reliability, if a lot turns on that. Obviously you've read the affidavit, the sealed affidavit. I don't think Mr. Shoemaker would have had an opportunity to. And I'm concerned about going through every single fact, every single ground of appeal. I think it's clear there are three grounds of appeal. And I just want to make sure I'm making effective use of court time, at the same time while making sure that -- that my client has the confidence that everything is being raised here, that there's not something that's going to be overlooked. You read the certified record the same way that I have. Is there a smoking gun in there? Maybe. But I -- I --

THE COURT: Well, no, no, just a minute.

MR. CRAIG: Yeah.

THE COURT: I've read the certified record, but I've read more than you've read.

MR. CRAIG: Okay.

THE COURT: Okay? Fair enough?

MR. CRAIG: Yes, that's correct.

THE COURT: Yes. And -- and, by the way, I think that your client can be assured that you have overturned whatever needs to be overturned, and I can -- I can tell you that on the --

MR. CRAIG: Yes, Sir.

THE COURT: On the record I'm telling you that you've covered the things that you need to cover.

MR. CRAIG: Yes, Sir. And my friend too I think is -- I -- I -- I'd just like to thank him. This is a new area of the law and obviously we dug in and we did the best we could with the time we had, but I think his submissions were very thoughtful. And I mean at the end of all this, obviously these are unfamiliar issues for at least some of the Courts down here, but -- but I do know that these things will be coming up more in the future. The question for me at least is that these are important junctures. It kind of asks us how are these things going to go in the future, and in turn how are these people going to be treated? And -- and even if we're limiting it to the scope of procedural fairness, what sort of

protections are in here for these people, and --

THE COURT: Every case is different.

MR. CRAIG: Yes.

THE COURT: Every case is different. So, I think that *Khela* gives us the -- the foundation on which to build our jurisprudence, but in the end, just like you were taught in law school, every case is reliant on its own facts and these are especially so. There are some themes that I've seen in -- from Justices Gill and Henderson and Shelley and Manderscheid. There are some themes, but every case is different. I mean, this one is very close to *Khela*. It is very close to *Khela*. And there are a couple of others that my colleagues have -- have written on. So ...

MR. CRAIG: I guess the one thing that I've noticed -- and -- and I a hundred percent agree that every case turns on its own facts, and you get out of law school and you don't appreciate that, and then you get buried with a certified record.

I do -- I do think that the decisions we make in immediate cases do have implications for other cases distant and -- distant, proximally and temporally. And so, while the Court obviously isn't here to set policy, I just -- we -- we -- I -- I -- we would submit that these are issues that should be considered carefully. I have every confidence they will be, but in the background should be that there are these people in here, that their lives are going on, and -- and obviously -- sorry for the rhetorical flourish, but that -- that was what Dostoevsky says is you can measure the degree of civilization in a society by looking at its prisons. And -- and I think Mr. Shoemaker is -- is a case that deserves attention in this respect, and I think it will have implications for other people in similar situations for accountability, for access to the Courts, for what these rights mean to these people that are in here that we sometimes forget about.

And -- and -- and that's my soapbox, and I'm sure my friend will have a lot to add. But is there anything else that I could assist with?

THE COURT: No. Thank you very much., sir. I appreciate your comments.

MR. CRAIG: Thank you very much., Sir.

THE COURT: I'm just going to take -- let's take five minutes, all right, before you launch in. Thanks.

THE COURT CLERK: Order in court, all rise.

(ADJOURNMENT)

THE COURT CLERK: Order in court, all rise.

THE COURT: All right. Thank you for that. Please be seated. And thank you for getting dressed up for us today. I appreciate that.

MR. SHIROKY: I do apologize for being overdressed, My Lord. There was some actual conversation between my friend and I before, but I showed up like this and he -- he showed up ungowned. In Edmonton my understanding is that there's a mixed procedure and sometimes gowning is required and sometimes it isn't. So, the information I got was that I had to look very fancy --

THE COURT: Well, you look good, sir.

MR. SHIROKY: -- and so, I apologize for appearing overdressed.

THE COURT: Not a problem, Sir.

Submissions by Mr. Shiroky

MR. SHIROKY: A lot's been said both in writing and in these proceedings today. So, I'll try to try stay to the core of the application fairly briefly. And -- and, My Lord, you mentioned from the bench what this is about. Were the decisions that resulted in the applicant's transfer to the Edmonton Institution lawful? That's it. That's the question that is before the Court.

The applicant is properly incarcerated. As the Court pointed out during my friend's submissions, this isn't a question of a fresh arrest or of a man undergoing a criminal trial. This is a civil application to review an administrative process. Now, the respondent submits that the answer to the core question, were these decisions lawful, the answer is yes. The acting warden's decision to classify the applicant as a maximum security inmate was both procedurally fair and reasonable. The applicant has not demonstrated a breach of procedural fairness based on the evidence that's before this Court, and has not demonstrated that the decision is unreasonable. As such, the decision should stand. It should not be disturbed.

Now, given the content of my friend's submissions and the comments from the Court, I was prepared to go into a bit about what habeas corpus under rule 3.16 is. Is that necessary?

THE COURT: I don't think so.

MR. SHIROKY: Okay. I will note, just based on a comment that my friend made during his submissions today as to whether or not the civil rules properly apply here. I note that in applicable acts and regulations in his originating application he has cited *Alberta Rules of Court* rules 3.15 and 3.24, and those are the rules that bring us here today. And so, my friend's comment that the civil rules in some way don't fit these proceedings, is -- is incorrect. We are here and governed by the *Rules of Court*. I bring that up in part because of some comments that were made generally with respect to the CTR -- I'm sorry, the -- the certified record of proceedings, the CRP. It's called the CTR in Federal Court. I apologize.

The -- it is a bit repetitive. And that's in part kind of the point. These are the documents that are referred to in the decision by the decision-maker. These are the documents that are referred to in the assessment for decision. The assessment for decision is the document that was provided to Mr. Shoemaker, that you referred to at page 13 of -- of the record, that contains that summary of the information from the sources and why it was considered reliable.

So, again, the -- the certified record is, you know, required in these proceedings and it would be a failure of the Crown's obligation to comply with -- I believe it's rule 3.1(a) with respect to the certified record of proceedings if we did not provide a fulsome record. And I -- I do acknowledge that it is a bit repetitive, but if it's referred to in the decision, it's my view as counsel that we need to provide that information both to the Court for review and to my friend so that he can properly prepare his arguments. Now --

THE COURT: I -- I just -- just one point of clarification, and that is that we are dealing with a civil proceeding here. This is not a criminal proceeding.

MR. SHIROKY: Yes.

THE COURT: And I think we -- we have to be clear on this. I mean, it's -- it's a bit mysterious because habeas corpus finds its way into both the *Rules of Court*, as well as into the *Charter*, but just because it finds its way into the *Charter* does not mean that this is a criminal or quasi-criminal proceeding. This is a civil proceeding. Hence I got the message from our civil coordinator, Ms. Ashley Perry, and not from Ms. Susan Quesnelle, who deals with the criminal matters. So, even from within the Court we recognize it as being a civil matter.

MR. SHIROKY: Now -- I apologize, My Lord, I didn't mean to interrupt.

THE COURT: No, that's fine. No, I was done.

MR. SHIROKY: So, we've actually provided a case from the British Columbia Supreme Court which I acknowledge is not binding, but I do hope that it's found to be persuasive. It's at tab 13. I'm not going to take the Court line and verse through it, but the general gist in *Bachynski* is an acting board's decision is an administrative decision, as you've pointed out, not a criminal judgment. The core of the decision is not whether or not Mr. Shoemaker is innocent of the accusation that he smuggled Fentanyl into the -- into the Drumheller institution, but rather the decision considers a number of factors such as the safety and the security of the institution, the safety of the applicant and other inmates at the institution, people that are under the care of the Federal Government as inmates, people who have been incarcerated after being convicted of crimes. The decision also takes into account the safety of the public and the ability for the institution to properly operate and mange its inmates. And I mention that only just to highlight again that at -- at its core these are administrative decisions.

THE COURT: But -- but the -- you forgot to add one thing which I think is also reflected in the record that you provided to me, and that is the safety and security of Mr. Shoemaker.

MR. SHIROKY: Yes. I apologize, I did think -- I thought I had mentioned that.

THE COURT: When -- when being transferred, for example, to the Edmonton institution. So, that -- that was something that the warden considered as well, from what I see.

MR. SHIROKY: Yes. And in the decision that factor is considered in the sense of prior to transferring any inmate the proper procedure is to look at whether or not there are incompatibles, whether or not there are any psychological barriers. I won't belabour the point, but it's our respectful submission that those things were considered.

Now, I'll note that we do admit that there is a deprivation of liberty. I think it would be ridiculous for me to sit here before the Court -- stand rather, and say to you, My Lord, there is just as much liberty in maximum security as there is in medium security. I think that that would be ridiculous to say. It's clear that there's a deprivation of liberty. So, the question is, has the applicant raised a legitimate ground to question the legality of his deprivation? The answer in our respectful submissions is no. And two, in the alternative, if he has, has the respondent shown that the deprivation was justified in the surrounding circumstances. That's effectively the test.

I had also prepared to discuss the question of standard of review. It seems like My Lord has reviewed the case law and is familiar with the idea. Would you still like me to go through the idea of standard of review?

THE COURT: No. The -- the ultimate decision is reasonableness and whether it was procedurally fair or met those tests. It's correctness. I think that that seems to be fairly sound.

MR. SHIROKY: So, the only brief comments I'd make with respect to standard of review is with respect to reasonableness. A contextual approach is required. The purpose of these reviews is not to micromanage Canada's prison system. That's the whole purpose for administrative law, if that makes sense, to make sure that not everything needs to be managed expressly by the Court. And so, the question is, given the evidence, the sealed affidavit, the certified record, the affidavit of the warden, Patty Kraffchuk (phonetic), the acting warden, was the decision reasonable? Does it fall within the *Dunsmuir* test of the parameters of reasonableness? And briefly with respect to procedural fairness, the decision should not be disturbed, in our responsible submissions, if there was no breach. It's our submission that there wasn't. But if there was a breach, the Court could -- in *Khela*, the Supreme Court states that a reviewing Court goes further. So, if there is a technical breach or if there is a breach of policy that does not impact the fairness of the result of the decision, then the decision should not be disturbed.

Now, it's our respectful submission that there is not even that technical breach in these cases, but again, a contextual approach in habeas corpus is -- is the approach suggested by the Court in *Khela* and in the numerous recent decisions out of Edmonton in the Alberta Court of Queen's Bench that -- that set out the standard of review in habeas corpus.

THE COURT: But talk to me for a minute about -- about the contextual nature of that. I mean, what are we looking at here? Because you heard my discussion with Mr. Craig concerning how he wants me to approach -- approach this matter contextually. I sort of said, Well, that's kind of not what this -- the role of this Court is, i.e. to stand in the shoes of Mr. Shoemaker, but to look at it in the context of the institutional decisions and decision-making, and so, that's -- so, I think there -- there is a difference obviously.

MR. SHIROKY: Yes.

THE COURT: I mean, you -- contest the nature of the affidavits provided by Ms. Holly Dixon/Shoemaker (phonetic) -- Dennis/Shoemaker (phonetic) because of some of the things that they said.

MR. SHIROKY: I think when I refer to the contextual approach, that is the context I'm referring to, the context of the operation of a correctional facility, and -- and furthermore with respect to the question of procedural fairness, which is reviewed on correctness, there is still that additional context of what we're reviewing here is an administrative decision and, as noted in *Khela* at paragraph 90, I believe -- oh, no, it's noted, sorry, in -- at tab 13 in paragraph 90. That's a different decision that I've referred to, but the -- the -- the question is was there a breach, one. If the answer is no, then procedural fairness is satisfied. If there is a minor procedural breach that does not impact the fairness of the decision, then that's the context I'm referring to. There's a further analysis in these cases.

With respect to evidentiary matters, I'm not going to belabour the points that I have made in my written submissions. There are problems with the affidavits provided by the applicant. And I think the Court picked up on those in my friend's submissions. The end result is that it's the respondent's submission that a number of the irrelevant and inadmissible portions of each affidavit, it's our respectful submission that Ms. Shoemaker's affidavit is whole inadmissible as it's entirely based on hearsay and, while there are exceptions in the law to hearsay, my friend cannot even meet the necessity test. These are statements that -- again, they're -- paragraph upon paragraph in the affidavit is "Shayne has advised me," and "I do believe". Well, Mr. Shoemaker provided an affidavit. And so, the necessity test isn't met in the sense that if this evidence had to come through him to his wife to provide in an affidavit, why is it not in the voluminous affidavit that was provided by the applicant? So, there are questions also about the relevancy of the information, but I did want to just briefly highlight that point.

With respect to the sealed affidavit, this affidavit, as the Court knows, was provided pursuant to the instructions in *Khela*. I understand that it's a difficult position for my friend to be in not being able to see it, however, it's our respectful submission that the sealed affidavit correctly and properly sets out what the information was, why it was considered to be reliable, and why it was withheld from the applicant. And --

THE COURT: And -- and from whom the information was garnered.

MR. SHIROKY: Yes.

THE COURT: I think that's important. And, I mean, I -- again, I read the -- I've read the affidavit and -- and, you know, I was actually surprised with the information that was provided in the certified record.

MR. SHIROKY: Well, under *Khela* and under the -- the cases that fall from *Khela,* the respondent does have an obligation to provide the gist of the information.

And I think in this case far more was given than you'd see in a more borderline case, if that makes sense. The -- the end result with respect to the quality of the evidence, the respondent's position is if there is a conflict between what's stated in the applicant's affidavit versus the certified record of proceedings, or the warden's affidavit, the respondent's evidence should be preferred.

With respect to the reasonableness of the decision, a decision will be unreasonable if -- and this is quoting from *Khela* at paragraph 74, "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," that's the test for reasonableness.

THE COURT: Sorry. What -- what -- that's from *Khela*?

MR. SHIROKY: *Khela* at paragraph 74.

THE COURT: Thank you.

MR. SHIROKY: So -- so, that's the test of reasonableness. If you're looking at the decision at the end of the day, is it contradicted by the record? Is it contradicted by the elements in the sealed affidavit? It's our respectful submission that the answer to that question is no, the decision was reasonable.

In this case, a review of the two decisions, both the security-related decision and the transfer-related decision, the acting warden's decisions were based on the following - the fact that between February 17th and 28th there were two inmate deaths and six overdoses at the Drumheller institution because someone smuggled in Fentanyl. That -- those deaths and those overdoses led to subsequent investigation which implicated the applicant as the suspected source of the Fentanyl. This investigation involved information from a number of sources, which include the ones that are mentioned in the sealed affidavit, three of which are assessed as completely reliable by the security intelligence officer - completely reliable. My friend seems to indicate that in the -- the assessment there is an improper characterization of the evidence, and on a plain reading of the assessment position I don't believe that that's the case. It clearly states that these sources are considered to be reliable, or these sources are believed to be reliable, or the reliability are -- are cited -- are assessed as unknown. It's -- it's set out in the information that was provided in the assessment for decision. The -- the -- the contents of this information, the allegations that were being made, and how reliable these statements were considered to be by the staff.

THE COURT: And I think that -- I don't know, correct me if I'm wrong, but I'm not sure I can dig any deeper than that. In other words, because this is more akin to a judicial review, I have to look at the evidence that the warden has provided to me

and the evidence that's contained in the sealed affidavit, and I, to a certain extent, have to take that at face value. I -- I'm not sure I need, or I should dive into it any deeper than that. They're the experts.

MR. SHIROKY: That's correct, Sir.

The case law that I've provided, there are a number of cases that were provided, but essentially say the purpose of judicial review generally or a habeas corpus that's akin to a judicial review is not to re-weigh the evidence that was before the decision-maker. That's why at the beginning of my discussion with reasonableness the question that was posed in *Khela* is, is there an absence of evidence? Is it unreliable or irrelevant evidence that was relied upon, or evidence that cannot support the conclusion? Not could it have been weighed differently. Furthermore, the Supreme Court and the Alberta Court of Queen's Bench - a number of decisions which again are included in our materials - have stated that it's the administrators of an institution, who have the specific knowledge of how that institution is managed and operates, that are in a better place to assess the reliability of informants or confidential sources, compared to a reviewing Court looking at the -- the after-the-fact certified record, if that makes sense.

And so, I agree with you entirely, My Lord. The purpose here is not to re-weigh the evidence or to dig deeper, as you put it, but rather to look at the evidence that's before Your Lordship, look at the decisions, and see whether or not it falls within that *Dunsmuir* test of reasonableness.

THE COURT: The -- but I think there -- what makes this slightly different from a judicial review in the purest sense is that we don't go beyond the certified record. In other words, we don't do as the *United Nurses* case says and look at things that weren't said. I'm not sure how else to frame it, but that's what *United* -- yeah, you're familiar with it.

MR. SHIROKY: Yes.

THE COURT: What *United Nurses* says is that you fill in the gaps if there are gaps, but here I'm not sure that we go that far.

MR. SHIROKY: *United Nurses* in terms of filling in the gaps is more with respect to the sufficiency of reasons is my reading. So, if you read the decisions and there are questions as to what conclusions are actually being reached, then the Court can make logical inferences. With respect to the sufficiency of evidence, I think that's an entirely different argument. Essentially, the record is what the record is. And unless the applicant can point to something in the record that contradicts the warden's finding, or that a piece of

information was relied on by the active warden, I apologize, that was irrelevant or unreliable, or -- or anything of that nature that was relied on that affected the -- that impacted the decision, then the decision is reasonable.

And in this case, we have three completely reliable sources. We have the applicant's rebuttal, which was considered and was essentially a denial of the accusations and a stated preference to remain at medium security. I'm summarizing there, but that is effectively, even if you read his affidavit today, what he is saying.

The warden had to weigh those pieces of evidence. You have the informants on one hand and you have an individual who says, "Well, I didn't do it." At the end of the day, it's the warden's decision on a standard of reasonableness to determine which of those is either more reliable or credible, or which of those pieces of evidence is preferable, and that's what I'm getting at with respect to this argument with regards to the re-weighing of evidence.

So, the evidence was weighed by the acting warden, and the conclusion that was reached in our respectful submission was reasonable if you look at the full totality of the record, the allegations that were made, the sources of those allegations, the assessment of the reliability of those sources versus the effectively bald allegation, or assertion rather I should say, of the applicant, the -- the rumour mill is out to get him essentially. And at the end of the day, the warden did weight those considerations and, as a result, on a reasonableness test the decision should stand in our respectful submission.

I apologize. With respect to re-weighing the evidence, I should refer the Court to specific cases that are in our materials - *MacKinnon* at tab 16 and *Clark* at tab 18 essentially state that the purpose of applications like this one is not to re-weigh the evidence. And I -- I won't belabour that point, as I've gone into it.

With respect to some of the submissions that my friend made today, I think that a lot of what is being asked here today is to go beyond what this application really is and go into a micromanagement of the Correction Service. And I understand that my friend is trying to do the best for his client, but at the end of the day the purpose of this application is to assess the lawfulness of the decision on a reasonableness standard. It -- it -- it does not go into that micromanagement. In fact, the jurisprudence strongly indicates that that would be improper.

So, unless there are any further questions with respect to reasonableness --

THE COURT: Okay.

MR. SHIROKY: I do -- I -- I do have more.

THE COURT: Okay. I thought you might.

MR. SHIROKY: And I apologize for that, but I do.

THE COURT: Yeah. You got me all excited there. I thought we were done.

MR. SHIROKY: So, with respect to procedural fairness, it's -- it's the respondent's position we agree with Your Lordship, a decision can be made on this case without getting into the *Charter*, and the reason I say that is procedural fairness is concerned about an individual's rights to -- not *Charter* rights necessarily, but an ability to respond and participate meaningfully in an administrative decision-making process. And so, the acting warden's decisions are governed by the *CCRA* and its regulations, not the *Criminal Code*. And again, as the Supreme Court has noted, as the Alberta Court of Queen's Bench has noted, reviews of these administrative decisions are not akin to criminal proceedings. The administrative decisions themselves are not akin to criminal proceedings. There's no question of innocence. The question is the management of a prison and the resulting impact it has on an individual's residual liberty. Because there's no question that the applicant is properly incarcerated. He is serving an indeterminant sentence for murder. That -- that question has been answered.

So, with respect to the *CCRA* and its regulations, section 27 of the *Act*, which is included at tab 1 - and again I won't take the Court line and verse through the actual section - section 27 entitles the application -- the applicant to the information that will be considered in making the decision, with the exception of information that could be withheld for safety, security, or investigative reasons. Now, the Supreme Court in *Khela* has noted, and I believe also in -- in the decision of *Mission* --

THE COURT: *Mission v. May*?

MR. SHIROKY: Hm?

THE COURT: *Mission v. May*?

MR. SHIROKY: Yes, that's correct, Sir.

THE COURT: Yeah. Yeah.

MR. SHIROKY: That effectively this isn't *Stinchcombe* style of disclosure. The certified record of proceedings doesn't need to be presented to an inmate every single time they want to transfer him or her to a different institution or change his

security classification. Rather, the informational component of section 27 can be satisfied with the assessment for decision, provided the assessment for decision is sufficiently detailed to allow an individual to respond. And the assessment for decision was provided to the applicant prior to his in-person rebuttal, and it's our respectful submission that the assessment for decision meets that informational component.

So, the next relevant section is with respect to the regulations, which are at tab 2. Section 12 entitles an inmate to an opportunity to make representations in person in response to a proposed transfer. Now, section 12 also states that if they would like an inmate can instead request written representations.

The regulations are clear. Again, this is meant to be an efficient administrative process. You get your chance for rebuttal. It's our respectful submission that the regulations do not entitle you to endless rebuttals until the desired outcome is reached, which is effectively what we're dealing with here. We have an applicant who, in his own affidavit, in -- at paragraph 143, states that when the warden came to speak to him, quote, "I wanted to speak to her. I wanted to look into her eyes and express my innocence." So, there was an understanding that he wanted to rebut these allegations that were being made against him. And a lot of the arguments that are being made with respect to the sufficiency of the rebuttal, if I can put it that way, are essentially ex post facto excuses, or alternatively, are an individual who gave their in-person rebuttal, was aware that it was his in-person rebuttal, provided the denial that he wanted to provide, and after he found that that denial was not sufficient to outweigh the numerous credible and reliable sources that say that he did the thing that he is being accused of essentially - not in a criminal sense but in an administrative sense - once it had been clear to him that that wasn't enough, well, then suddenly now I want more rebuttals. Every time I see the warden I would like to have my rebuttal now. To deny that you received a rebuttal after you have received it doesn't mean that it didn't happen effectively.

THE COURT: But I guess the question -- and this sort of brings us back to the sufficiency of what -- what he was allowed to do. Let -- let me -- this is maybe not a fair example, but let's say that your friend made an application, any application - made an application under whatever, the *Civil Enforcement Act* - and he comes in and he phones you that morning and says, I'm going to make an application under the *Civil Enforcement Act* and I want such-and-such a remedy. And you say, Well, it would have been nice to have notice. He says, no problem, I'm going to court, you'd better be there. So, he comes to court and makes his application. I hear his application because he's had days to prepare for it. You stand up and say, I want an adjournment because I haven't considered this. I haven't had a chance to consider it. I say, no, no, you -- you know the law, you know the rules. I'm going to give you a chance to rebut what he's saying and -- and you stand up and say, Well, I just don't think it's fair, or I want my adjournment, or something to that effect, and I said -- and I say to you, sir, you've had your rebuttal, I'm ordering in favour of Mr. Craig.

MR. SHIROKY: Yeah. There are -- see --

THE COURT: That may be a bad example, but is it --

MR. SHIROKY: There's some factual --

THE COURT: Yeah.

MR. SHIROKY: -- some distinguishing facts with respect to this case and --

THE COURT: Sure.

MR. SHIROKY: -- the hypothetical you provided.

THE COURT: Yeah.

MR. SHIROKY: First, there's no indication until after the rebuttal was given that an adjournment was being requested and, in fact, there is no request for an adjournment. There's only the comment that he is going to contact counsel, which he did in fact do.

Furthermore, the -- an application before Your Lordship or in Master's Chambers, in any court proceeding, we're governed by its rules. A certain amount of notice is required to be given, unless there's a specific exigent circumstance that gets you outside of those rules. There are rules here, as well.

Now, the policies in place here do state that an inmate can have up to two days to prepare a response, but again, when you have an individual who states, "I'm ready to go, I want to tell you, I want to look into your eyes and express my innocence," it's -- it's not up to the warden to say, whoa, whoa, whoa, we need to wait a second. It's -- it's the applicant's -- it's the applicant essentially who engaged the rebuttal process, in our respectful position, based on the evidence.

Now, the warden does take the applicant into an interview room to talk about the -- the circumstances of his proposed transfer, and he provides his rebuttal after being -- after being told essentially that this would be your chance to do it essentially. There's no request to provide written reasons, there's no request to -- to take more time with the assessment for decision until after the rebuttal has been considered by the acting warden.

Furthermore -- and this, I guess, goes a bit in terms of my -- my friend's argument with respect to access to counsel. Section 97 does state that an inmate needs to be given the -- this is in section 97 of the regulations, I should say, that an inmate needs to have the opportunity to retain and instruct counsel. But again, there's an obligation on an inmate to request that. If you look at the actual evidence that's before you, Sir -- you brought up 10(b) within the context of a segregation decision. At -- at page 21 of the certified record of proceedings --

THE COURT: Okay.

MR. SHIROKY: And I will -- I will --

THE COURT: Page 21?

MR. SHIROKY: Page 21, and I will take you there very briefly.

THE COURT: All right.

MR. SHIROKY: This is pages 21 and 22. This -- this document -- and we're looking at the tail end of the initial segregation decision essentially. And at the end of the segregation decision, it's part B: I have been advised of my right to retain and instruct legal counsel without delay. I confirm that I do not need to communicate with my lawyer now, but I may do so at a later time. And the applicant requests counsel with respect to the segregation on the 27th of February. And it's signed by the applicant on the very next page. So, when he was put into segregation, it was made clear that he had a right to counsel at that time with respect to the segregation decision.

Moving on to the decision itself, it's -- I do apologize, it is a very long record.

THE COURT: And repetitive.

MR. SHIROKY: So, at page 111, this is the casework record log in chronology order that in part deals with interactions that staff have with the applicant. And at March 9th, a parole officer visits in segregation, Shoemaker was made aware that A-for-D (phonetic) for transfer is being completed. He was made aware that a transfer to another site is being pursued. So, there's notice there at the beginning well in advance of this rebuttal that an A-for-D is being prepared and a transfer is being considered. And if you look at -- and I hate to flip around from document to document, but that's exactly what I'm doing. At page 13, which Your Lordship referred to earlier, at the top of the page - and I'll quote from the document: (as read)

> The security intelligence file was reviewed on the 3rd of March,

> 2018. The interaction with the SIO's have been ongoing since the placement in segregation. The SIO provided a gist of information on March 9th, 2018.

So, the SIO on that date when the applicant was advised that this A-for-D was being pursued and that this possible decision was being considered was provided the gist of the information. So, there's no being taken by surprise here in our respectful submission. We have an individual who is provided with -- with information prior to providing a rebuttal that he indicated that he was ready to make. It was only once he did not get the outcome that he wanted that the sufficiency of this rebuttal started being questioned.

And again, the phone records are also included in the certified record of proceedings, which indicate that while Mr. Shoemaker was in segregation between the time in February he was placed in the segregation up until his transfer to the Edmonton institution, he made somewhere around 23 phone calls. He contacted two lawyers. He contacted Legal Aid. And while this isn't in the record, I can advise that in the Drumheller institution Legal Aid information is available and is posted. So, that would seem to be indicated by the applicant actually contacting Legal Aid while he's sitting in segregation.

So, my friend's comments with respect to access to counsel are in some ways missing the factual point, which is while he was in segregation he had access to phones, he had access to those phones to call counsel, and repeatedly availed himself of that opportunity. So, from a procedural fairness standpoint, while the assessment for decision is provided on the 13th, and the rebuttal takes place later that day, insofar as my friend would like to try to import section 10(b) into an administrative proceedings, which is, in our respectful view incorrect and improper, there's no impact on the procedural fairness. Had the applicant made a request to contact counsel, the record indicates that those requests were being properly addressed and responded to. There's no denial -- and there are cases that are provided by my friend and that are cited by my friend where an individual has said, No, you can't use the phone. And that's not the case here. There's an availability of access to counsel, and as a result there's no breach of procedural fairness.

With respect to this specific issue, are there any questions that you have, My Lordship?

THE COURT: Not right at the moment. Well, I do have one, and that is -- and -- and this comes up in every case where we have a 10(b). I know that we're not *Charter*, but I --I'm just making this point, and that is, so what would the big deal have been to put him in a phone room and say, Go ahead, call counsel?

MR. SHIROKY: He did go to a phone room.

THE COURT: No, no, I'm -- after he got the A-for-D.

MR. SHIROKY: So, that's actually also addressed both in the record and in the affidavit of the acting warden. So, there is a phone record that indicates on the 14th, you know, I have spoken with counsel. I want my rebuttal again effectively. The acting warden, on her patrols through segregation up and until his transfer to Edmonton, had repeated conversations with the applicant with respect to the pending - the decision had been made by the 16th, I believe - with respect to the pending transfer. And again, the only information that's coming out of the applicant is "I didn't do it", the exact same information that was considered at the time the decisions were being made.

So, it's our respectful submission that, you know, it isn't a question -- again, the regulations don't provide for endless rebuttals. Once you've provided it, that's -- that's your opportunity to state your case, if that makes sense. Nevertheless, the acting warden continues to comment and to -- to discuss this matter with the applicant. So again, on a question of procedural fairness, it's our respectful submission that on a correctness standard the decision should stand.

So, as a brief summary, barring any questions, My Lord, the acting warden met with him on the 13th. The applicant indicated that he was ready to express his innocence at that time. He was given the opportunity to do so. Only after he was told that the acting warden preferred the source information over his denial did the adequacy of the rebuttal start coming into play. Even now with the full record provided to the applicant, all he says is that he didn't do it, which again is the exact thing considered by the acting warden in weighing the evidence on a reasonableness standard in the decision - the information that was before the acting warden at the time the decision was made, both the source information and the denial. The denial was weighed against the sources and the sources were preferred. Those things are to be assessed on a reasonableness standard.

With respect to procedural fairness, the applicant had access to counsel, was able to avail himself of that, the applicant was provided information, both the gist of what would be in the A4D on March 9th and in the A4D the day that the rebuttal was made. On a correctness standard, the decision should stand. That the acting warden preferred the reliable results of an investigation does not entitle the applicant to endless rebuttals outside what is prescribed for in the legislation. That the acting warden didn't accept his denial at face value does not mean he was not afforded the opportunity to provide a rebuttal. The applicant has not demonstrated a breach of procedural fairness. The applicant has not demonstrated that there is evidence that contradicts this decision, that this decision was unreasonable. In the alternative -- in the alternative, if there is a breach of procedural fairness, which again is not admitted, the Court then again needs to look at the context. And the context here is, even with the full record before the applicant, even with a several hundred page -- sorry, hundred

paragraph affidavit, the comment is "Well, I didn't do it." And that is, again, the exact same information that was before the acting warden.

As the decisions are reasonable and the decision-making process was in our respectful position conducted in a procedurally fair manner, the decisions ought not to be disturbed.

Subject to any questions, those are my submissions. I did -- we both provided submissions on the issue of costs, and I do know that normally those happen at the close of my submissions in some proceedings, but I know other Courts prefer once we've sort of finish the substantive argument. I'm prepared to speak to it whenever you like.

THE COURT: Well, I'm guessing that both of you -- because this is a civil proceeding, that the general rules apply.

MR. SHIROKY: Yes.

THE COURT: Whoever wins get their -- gets their costs.

Submissions by Mr. Shiroky (Costs)

MR. SHIROKY: Yes. The respondent relies on the case of -- I think it's either Voicey (phonetic) or Voisay (phonetic) which is at tab 28 of our materials. We're requesting costs in the amount of $1,000, which, reviewing the jurisprudence, appears to be the normal amount that's awarded even when an individual is self-represented, and that would be payable at a -- at the rate suggested in -- in Voicey which is $5 every two weeks while he remains incarcerated and then payable in full in the event that he is released.

My friend made some submissions with respect to *Charter* costs, which I believe are more relevant to criminal matters. There was no real detailed explanation as to what was being sought in that regard, but I don't know that the *Charter* costs are a necessary consideration. Costs follow the cause in civil matters, and here we are before Your Lordship with a civil matter.

Insofar as my friend is suggesting that additional or enhanced costs are payable in the event that his application is successful, there's been absolutely no submissions on that point, either in writing or today before Your Lordship. Either way, costs follow the cause and nothing out of the ordinary is -- is to be expected by either party with respect to costs. And the ordinary costs for an award to the respondent is, in our respectful view, $1,000.

THE COURT: All right. I do have one question or comment, and that is you heard my discussion with Mr. Craig concerning *Williams* --

MR. SHIROKY: Yes.

THE COURT: -- and the right to counsel outlined in *Williams*. What are your thoughts on that?

MR. SHIROKY: Could the Court be slightly more specific about the -- the point that you'd like me to reference?

THE COURT: Well, I -- I gave that quote from *Williams.* If I could put my paws on it again -- again, not thinking -- not memorizing Mr. Craig's brief, but just give me one second. Yes. *Williams* says -- this is on page 49 of his brief, paragraph 184.

MR. SHIROKY: What paragraph in the decision?

THE COURT: Paragraph 184 -- oh, of the *Williams* decision?

MR. SHIROKY: Yes.

THE COURT: In paragraphs 27 through 29, but it's 27 I'm specifically interested in.

MR. SHIROKY: Thank you.

THE COURT: Where the Court says:

> It seems to me that the authorities were under a positive duty both to inform the appellant of his right to counsel and to provide him with a reasonable opportunity to exercise that right as soon as they had decided to place him in administrative segregation and to transfer him to high maximum security.

So, he's saying, well, does that mean that *Khela* overrules the right to counsel articulated in *Williams*? And I think I gave my response, but I want to hear your response to that.

MR. SHIROKY: My general response would be I don't know that that's a matter that the Court needs to discuss in this case, and what I -- decide, is -- is my point. First, the difference -- there is a difference between being put into segregation and being transferred, if that makes sense. There is -- and -- and again, that's why I directed the Court to the segregation decision initially where it states - and the Court -- the -- the applicant acknowledges with an 'X' - I am advised of my right to counsel on segregation. I don't want

to use it right now. I'll -- he exercised it on the 27th of February, after being placed into segregation.

So, with respect to 10(b) flowing from his placement into segregation prior to his transfer, the evidence is quite clear.

Next, with respect to -- I don't want to put it as the informational component - it's clear from the phone records that the applicant was aware of his ability to contact a lawyer. Lawyers were contacted. The phone records are clear. Mr. Craig was contacted. Legal Aid was contacted. There's a -- a third lawyer whose name I can't recall off the top of my head whose name is in the phone logs. A number of phone calls were made, including to counsel. So, from a practical standpoint again for the question of procedural fairness, in effect it's clear that the applicant was aware and was able to access the phone at the Drumheller institution when he was requesting to. I don't know that I have any more to say --

THE COURT: So, in other words --

MR. SHIROKY: -- beyond that.

THE COURT: -- even if *Williams* applied to this instance --

MR. SHIROKY: It's --

THE COURT: -- the -- the authorities abided by what *Williams* instructed them to do.

MR. SHIROKY: It's -- it's the respondent's view that the *Williams* test would be an overly strict burden to place on an administrative decision-maker within the context of a transfer decision. With respect to a segregation decision, which is again not the decision that's before Your Lordship, the segregation decision is not being --

THE COURT: No.

MR. SHIROKY: -- challenged.

THE COURT: No.

MR. SHIROKY: It's just the transfer.

THE COURT: Yeah.

MR. SHIROKY: With respect to the segregation decision, which is I think what *Williams* is in part talking about, that initial placement into segregation, that was complied with. So, insofar as it does apply to the -- to the within case, and it was not displaced by *Khela*, the respondent again did not breach anyone's right to procedural fairness. Again though, this decision predates *Khela*. It is a Federal Court decision. It is not binding on this Court, unlike *Khela*, and I think the approach that's viewed by the Supreme Court in *Khela* is one again of looking at the entire process as an administrative proceeding, and judging it on that basis as opposed to throwing someone in gaol for the first time with a criminal accusation.

I hope I've addressed the Court's questions.

THE COURT: I think so. Thank you.

MR. SHIROKY: Thank you very much.

THE COURT: Thank you very much --

MR. SHIROKY: Those are all my submissions.

THE COURT: -- Mr. Shiroky. Thank you.

Any rebuttal?

MR. CRAIG: Yes.

THE COURT: Okay. Just a second, I have to get --

MR. CRAIG: Just really quick.

THE COURT: I have to get my white paper instead of my yellow paper. I use different coloured paper, so -- okay.

MR. CRAIG: So, I'm not usually big on redirect. All the -- it wouldn't be redirect on rebuttal. I'm cautious to use the term. I think my friend and I have covered off most of the points. Our positions are what they are. I -- I was just concerned and I wanted to make sure I clarified some points that I think -- I think are -- are not accurate. And -- and I'm not saying that in a pejorative sense. I think it could just be the way they're worded.

So, my friend had mentioned that an inmate could have up to two days for rebuttal. If you

go to page 70 in my brief - I can't imagine it's -- how does that get to 70 pages. Yeah. So, page 70, guideline 7-10-03-3 --

THE COURT: M-hm.

MR. CRAIG: -- says the institutional header designate will provide the inmate two working days to respond in person or in writing. So, it's not up to two days, it's they will. It's imperative.

MR. SHIROKY: I --

MR. CRAIG: Yeah. No, no. Sorry, I -- let's -- let's just sort it out because --

MR. SHIROKY: Sure, if my friend's inviting me to comment on it. The -- the point -- "will provide" doesn't imply that you have to wait two days. It means that you need to -- if -- if two days are requested, that's the amount of time that needs to be provided. If within those two days someone says I'm ready to go, then that is when the rebuttal happens. That's the point I'm trying to make there.

MR. CRAIG: Okay.

THE COURT: The other part of this is that these are guidelines.

MR. CRAIG: Yes.

MR. SHIROKY: Yes.

THE COURT: They're not legislation and they're guidelines. They're nothing more than that.

MR. CRAIG: Right.

THE COURT: Right? So --

MR. CRAIG: A fair point. I just wanted to make sure that, at least in my interpretation, it was imperative or -- as opposed to "up to", but my friend's point is taken.

THE COURT: Yeah.

MR. CRAIG: The second is throughout the course of argument there's some discussion about how the applicant hasn't established a breach of procedural fairness. It may just have been a misnomer, but the applicant is on the Crown to -- or the -- the onus is on the Crown to prove that the -- that the duties of procedural fairness were followed, and that stems from *Khela*.

As far as -- as far as -- yeah. As far as Mr. Shoemaker's affidavit, I didn't do it. It's 100 pages. It's -- it's there. There are -- there are things that I think go beyond, but I didn't do it. The main -- the main thing is I wanted to make sure we were clear about the guidelines.

The last thing, again there was mention of completely reliable informants. Our position on that remains that if you look at (INDISCERNIBLE) directives, 568-2 that's on 71, it doesn't meet any of those criteria. And -- and again, I -- I (INDISCERNIBLE).

The only thing I would speak to is costs. If you could just give me a quick second.

Submissions by Mr. Craig (Costs)

MR. CRAIG: So, costs in the cause, I agree. Basis for enhanced costs, something that wasn't raised directly -- that was raised directly by the applicant, but wasn't -- I don't think it was responded to in the respondent's brief, that would be page 65 of the certified record, which we didn't discuss. And I'll the Court to make of that what it will, but --

THE COURT: Oh, just a second before --

MR. SHIROKY: On the certified record? Costs?

MR. CRAIG: No, no, no, just -- that's the one we talked about --

THE COURT: What am I making of this?

MR. CRAIG: So, if you'll have a look, this was the notice of assessment for involuntary transfer.

THE COURT: Yes.

MR. CRAIG: This was the one that was -- he signed his right to legal counsel. He did it on the 13th.

THE COURT: Okay.

MR. CRAIG: So, if you have a look at the document, whenever a document is generated through the system -- and this was explained in the section of our brief. Whenever a document is generated through the system and it's printed, it's time-locked for that time. So, the -- the -- the reason that this is important is because this is a notice of involuntary transfer.

THE COURT: Right.

MR. CRAIG: It's required and there was conflicting affidavit evidence about when it was provided. The concern in this case that we did put in our brief and wasn't responded to is it's time-locked at 2:59, and she has it dated and signed the -- the -- it would have had to have been signed before it was actually printed. So, there's concerns there. And we did explain them in our brief.

THE COURT: But what -- what does that have to do with the substance of the decision?

MR. CRAIG: Well, that has to do with costs. If there was a document that was falsified as part of the process, the Court would have to reach their own determination on that.

MR. SHIROKY: If there was an allegation that we included false documents in the record, that was definitely not clear to me in the written argument.

MR. CRAIG: Okay. So -- and this is just -- we hadn't spoken to the matter of costs.

MR. SHIROKY: And I -- just given the document that my friend has pointed out, it's signed by the offender.

MR. CRAIG: Right.

MR. SHIROKY: And the time of that signature is 3 PM. So, I don't know what we're discussing --

THE COURT: Well --

MR. SHIROKY: -- necessarily.

THE COURT: Yeah.

MR. CRAIG: Well -- well, just give me a quick minute.

MR. SHIROKY: No, I -- I -- I understand.

MR. CRAIG: Okay. So, this is a notice of involuntary transfer -- notice of assessment for involuntary transfer. And I -- I can walk you through my brief to page 9. You'll just have to follow me through on this, because we did touch on this in our written submissions, but this was something that was concerning to me throughout the process, given the importance of this document to the process.

THE COURT: Okay.

MR. CRAIG: So, if you go to page 65 of the certified record and page 9 of my brief --

THE COURT: M-hm.

MR. CRAIG: The dispute over this document is Mr. Shoemaker received -- said he received it on the Tuesday or -- or it was asserted that he received it on the Tuesday. This was in his affidavit also. She said he received it on the Wednesday, or it was -- information was received on the Wednesday. If you look at the date and time produced, it says 2:59. If you look at Leanne Harrison's (phonetic) signature, it says it was signed at 1:50 - she's very specific about the time - which means it would have had to have been signed before it was actually printed. And it would have had to have been signed -- it would have had to have been delivered before it was actually printed, and he would have had to have signed it after it was printed. And we did touch on that in our brief, is that there's concerns about the credibility of that document actually being provided, when it was provided. We did go into detail in that. It wasn't responded to. We just kind of left it where it was. But if we're speaking to costs, if there was a key document in there that the Court finds there's some question about its validity, I think that would be something that was relevant to costs. And I -- and I understand we made it clear in our affidavit that we weren't making any allegations. It could merely be an oversight. But given the importance of the document, we just ask that the circumstances surrounding the time log and the time on that statement be considered.

And -- and, as I say, we had given notice in our brief, didn't receive a response. We were pretty specific in one of our sections talking about it. But we're -- time is running short, so ...

MR. SHIROKY: I -- I understand this is my friend's reply and I'm not generally entitled to say --

MR. CRAIG: No, I'm --

THE COURT: Well, you're not entitled to say anything, but I'm just curious about how you respond to this -- this simple document.

MR. SHIROKY: I think it's a red herring, would be the very jiffy response. Now, the way things are imported into a prison system indicates there are certain -- things get time-locked when they're entered into a system, if that makes sense, not when a document is produced. If there are changes made to it by scanning it in say after it's been signed, for instance, there -- I -- I can't speak to what it -- what administrative or office purpose that time speaks to, but the allegation that at -- on the basis of a time stamp of 12:59 that somehow this document is forged --

THE COURT: 1459.

MR. SHIROKY: 1459, I apologize -- 1459 is forged because he signed it at 1500 hours is a total bald allegation. I don't think that that's what the time stamp indicates. There are a number of references to documents with respect to time stamps. I can't speak to how -- and again, if my friend wanted to pursue this, perhaps we could have led affidavit evidence as to what those time stamps mean. I don't have that information at my fingertips at the moment.

My friend now states that, well, maybe this document is falsified, that doesn't go to the merits of the case, it just goes to costs. I'm not sure I understand that argument. If there's an allegation being made that we provided fake documents to bolster a decision, I mean that's a very serious allegation.

MR. CRAIG: And I have to rise at this point, Sir. That is definitely not the allegation. I've made it very clear in our written submissions --

MR. SHIROKY: Great.

MR. CRAIG: -- that this was something that we were concerned about, that we find it troubling that a document claimed to have been produced, signed before it was even produced. I find that troubling.

THE COURT: But there are --

MR. CRAIG: That's --

THE COURT: There may be explanations for that and --

MR. CRAIG: And -- and there may be. We raised it in our brief, and it wasn't addressed.

MR. SHIROKY: It was not addressed because I didn't think it merited addressing, if that makes sense. It's a bald allegation --

THE COURT: Okay.

MR. SHIROKY: -- that is not supported by the evidence.

THE COURT: Right.

MR. SHIROKY: I don't know what else to say rather than -- it just -- it seems very strange that my friend at the end of this is stating that there's potentially false documents in the record, but just for the purpose of costs. I don't know that I understand that, so I've done my best to respond.

THE COURT: Thank you. All right. I'm reserving on this, folks.

This is a habeas corpus application, so I will be dealing with it as quickly as I can. I -- I may have to be doing it in absentia because I am in Edmonton next week and then I'm out of town for the three weeks that follow. But I'm going to -- I might try to get this done even whilst being out of town. I might try to work on it because it is -- I recognize the haste with which I have to deal with this. So, I'll deal with it as quickly as I possibly can.

I don't think I have to -- this is a civil matter, I don't have to call you back in. You'll get my decision in due course. All right? Thank you all very much --

MR. CRAIG: Thank you, Sir.

THE COURT: -- for your submissions. I appreciate it.

MR. SHIROKY: Thank you very much, Sir.

THE COURT: Thank you. Madam clerk, thank you.

THE COURT CLERK: Order in court, all rise.

PROCEEDINGS ADJOURNED

Certificate of Record

I, Elena Kay, certify that this recording is the record made of the evidence in the proceedings in Court of Queen's Bench held in courtroom 1504 at Calgary, Alberta on the 20th day of September, 2018, and that I was the court official in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Carolyn Cruickshank, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

Carolyn Cruickshank, Transcriber
Order: AL-JO-1001-7043
Dated: October 18, 2018