

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY

MAR 24 2023

No. **S. 232405**
Vancouver Registry

In the Supreme Court of British Columbia

Between



DARREN SUNDMAN

Plaintiff

and

CORRECTIONAL SERVICE CANADA, ATTORNEY GENERAL
OF CANADA, WARDEN OF KENT INSTITUTION, JOHN DOE #1,
JOHN DOE #2 and JANE DOE

Defendants

NOTICE OF CIVIL CLAIM

This action has been started by the plaintiff for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff(s) and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff(s),

- (a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
- (b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or

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- (d) if the time for response to civil claim has been set by order of the court, within that time.

Part 1: STATEMENT OF FACTS

The Parties

1. The plaintiff, Darren Sundman ("**Mr. Sundman**"), is currently a federal inmate at Donnacona Institution ("**Donnacona**") located in Donnacona, Québec and operated by Correctional Service Canada ("**CSC**").
2. From in or about the fall of 2018 to on or about February 19, 2021, Mr. Sundman was a federal inmate at Kent Institution ("**Kent**") located in Agassiz, British Columbia and operated by CSC.
3. Mr. Sundman has an address for service in this proceeding at 1800-510 W Georgia Street, Vancouver, British Columbia V6B 0M3.
4. The defendant, CSC, is the correctional service in and for Canada pursuant to the *Corrections and Conditional Release Act*, SC 1992, c 20 (the "**CCRA**").
5. The defendant, the Attorney General of Canada (the "**Attorney General**"), is His Majesty in Right of Canada and is named in these proceedings pursuant to the *Crown Liability and Proceedings Act*, RSBC 1985, c C-50. The Attorney General's address for service is c/o Department of Justice, 900-840 Howe Street, Vancouver, BC V6Z 2S9.
6. The defendant, the Warden of Kent Institution (the "**Warden**") is the institutional head of Kent and an employee of CSC.
7. The defendants, John Doe #1 and John Doe #2, are individuals whose identities are not yet known who were, at all material times, members of CSC's Emergency Response Team ("**ERT**") and employees of CSC.
8. The defendant, Jane Doe, is an individual whose identity is not yet known who was, at all material times, the Correctional Manager at Kent and an employee of CSC.
9. John Doe #1, John Doe #2 and Jane Doe are collectively referred to herein as the "**Unknown Defendants**".

February 19, 2021 Incident

10. On or about February 19, 2021, Mr. Sundman was awoken by members of CSC's ERT, including John Doe #1 and John Doe #2, for the purposes of arranging Mr. Sundman's involuntary interregional transfer from Kent to Donnacona.
11. Mr. Sundman first learned of his planned transfer to Donnacona in or about the summer of 2020, shortly after being placed in a Structured Intervention Unit ("**SIU**"). Mr. Sundman

objected to his planned transfer to Donnacona. As a result of his impending transfer, Mr. Sundman attempted to take his own life.

12. Prior to the ERT's arrival, Mr. Sundman blocked the door to his SIU by packing clothing and other items in front of the door. The ERT employed a prying tool to open the door to Mr. Sundman's SIU.
13. After exiting his SIU, Mr. Sundman was physically restrained and escorted by members of the ERT to Admissions and Discharge ("A&D"), along with other federal inmates being transferred to various other institutions at the same time as Mr. Sundman, for the purposes of being strip searched prior to their respective transfers.
14. Pursuant to CSC's Commissioner's Directive ("CD") 566-7 – Searching of Offenders, all strip searches will be conducted in a private area, out of sight of others.
15. Mr. Sundman was escorted into a washroom, with no door, in A&D. The ERT removed the physical restraints from Mr. Sundman and instructed him to remove all clothing for the purposes of the strip search.
16. During the course of Mr. Sundman's strip search, and while fully nude, Mr. Sundman dropped a small cell phone, a USB cable and a USB charging block from his buttocks (the "Items"). Mr. Sundman grabbed the cell phone, keeping the cell phone in his hand.
17. Immediately following the dropping of the Items, and while still fully nude, the ERT threw Mr. Sundman to the floor, handcuffed him behind the back with his face on the floor. While Mr. Sundman was restrained, the ERT recovered the USB cable and the USB charging block from the floor.
18. While Mr. Sundman was restrained, members of the ERT, including John Doe #2, spread Mr. Sundman's buttocks cheeks. John Doe #1 proceeded to insert two fingers into Mr. Sundman's anus and dig around in Mr. Sundman's anal cavity (the "Incident"). Neither John Doe #1, nor any other member of the ERT, recovered any object from Mr. Sundman's anal cavity.
19. As a result of the Incident, and during the Incident, Mr. Sundman felt significant pain and soreness in his buttocks and buttocks cheeks, as well as pain and bruising on his face and chest.
20. The Incident occurred in A&D, amongst the other federal inmates being transferred from Kent with Mr. Sundman. More specifically, the Incident occurred in a washroom with no door, and therefore in full view of any individual that may be located at the A&D desk or in the A&D area.
21. While Mr. Sundman's escort from his SIU to A&D and his subsequent exit from A&D into a transport vehicle were recorded by a member of the ERT using a handheld camera, the Incident was not recorded.

22. Mr. Sundman did not receive any medical care at Kent following the Incident, in breach of section 73(1) of the *Corrections and Conditional Release Regulations*, SOR/92-620, which requires staff members with knowledge of an incident of use of force leading to the injury of an inmate to immediately call health care staff to the scene.
23. The use of force on Mr. Sundman before and during the Incident was not pre-approved by the Warden.

Transfer to Donnacona

24. Following his departure from Kent, Mr. Sundman was placed in a dry cell at the Québec Regional Reception Centre (the "**Reception Centre**") for approximately 10-11 days.
25. As a result of the physical, psychological and emotional pain and injury Mr. Sundman suffered due to the Incident, Mr. Sundman attempted to take his life. Mr. Sundman restricted his breathing using a shirt and fell unconscious before he was found by staff at the Reception Centre and provided with basic medical care.
26. Upon his arrival at Donnacona, Mr. Sundman was placed in a dry cell for approximately three weeks, during which he was not permitted outside, had no access to his personal belongings, had no clothes except for his underwear and was only permitted one shower.
27. At no point while at Kent, the Reception Centre or Donnacona did Mr. Sundman receive medical care for the injuries he sustained as a result of the Incident.

Grievance and CSC's Review of the Incident

28. On or about February 19, 2021, following the Incident, a Post-Search Report was completed in which it was confirmed that a "routine strip search in which the use of force was required" was conducted on Mr. Sundman.
29. On or about February 20, 2021, the Correctional Manager of Operations (the "**Correctional Manager**") confirmed in an incident report that use of force was used on Mr. Sundman during the Incident by way of "physical handling".
30. The Correctional Manager initiated a preliminary review of the Incident. While conducting this review, the Pacific Region Transfer Team Coordinator confirmed to the Correctional Manager that she had been informed an inmate had inserted a cell phone in his buttocks, but that she "told the staff to leave it, get him dressed and place [sic] in the body belt".
31. On or about March 5, 2021, the Correctional Manager completed a preliminary review of the Incident in which she found the use of force was not proportionate to the situation, that it is "not appropriate to retrieve an item from an inmate's posterior" and cited infractions of the following CSC CDs: 567, 567-1 and 568-1.
32. On or about April 29, 2021, Mr. Sundman filed a final grievance with CSC in which he reported and grieved the Incident (the "**Grievance**") to the Warden.

33. Pursuant to Guideline 081-1 to the CSC's CD 081 – Offender Complaints and Grievances,

Any grievance related to a reported use of force incident, or the use of force review process, will be registered as a final grievance. If the incident grieved has not been recorded in OMSR as a confirmed use of force, the submission must be registered at the lowest possible level [*emphasis added*].

34. Despite the Post-Search Report and the Correctional Manager's preliminary review of the Incident both confirming the Incident as a use of force, the Warden registered Mr. Sundman's claim as sexual harassment and downgraded it to an initial grievance.

35. On or about May 6, 2021, the Grievance was denied by the Warden (the "**Initial Grievance Response**").

36. In the Initial Grievance Response, it is noted that sexual harassment within CSC is defined as "any verbal comment or non-verbal gesture(s) or contact of a sexual nature by CSC staff, whether on a one-time basis or in a continuous series of incident, that might reasonably be expected to cause offence or humiliation". Although the Warden noted that, if proven, the allegations contained in the Grievance would meet this definition, the Warden ultimately concluded that the Incident did not meet the definition of sexual harassment.

37. On or about July 13, 2021, the Office of the Correctional Investigator ("**OCI**") released a report of its investigation of the Incident. The OCI confirms, among other things, that:

- (a) there are no approved force options for removing an item from an inmate's mouth or body cavity;
- (b) upon observing [Mr. Sundman's] actions, this would have been sufficient grounds and reasonable belief to ensure direct monitoring and authorize a dry cell placement upon his arrival at his final destination;
- (c) staff members should have deployed an additional handheld video camera to fully capture the inmates involvement up until they left [Kent] for their transfers;
- (d) Mr. Sundman's strip search (which became a non-compliant strip search) was not wholly video recorded; and
- (e) given that [Mr. Sundman was] reportedly trying to delay [his] transfer...staff should have reasonably expected the inmate...might become non-compliant at any point.

38. In conclusion, the OCI found that:

no force should have been used in an attempt to try and retrieve any items Mr. Sundman was able to insert into his body cavity. Any physical handling that was used to retrieve the cellphone charger and charging block, that is if he did manage to conceal these items, was inappropriate, unnecessary, and disproportionate. In the same vein, any physical handling that was used to try to remove the cellphone was inappropriate, unnecessary and disproportionate as he was apparently successful in forcing the object into his rectum and officers ultimately were not able to retrieve the phone as Sundman told officers where he put the phone.

39. On or about August 5, 2021, legal counsel for Mr. Sundman submitted a final national grievance with the Director General of CSC with respect to the Incident and the Initial Grievance Response (the "**Initial Final Grievance**"). Legal counsel for Mr. Sundman submitted an addendum to the Initial Final Grievance on or about April 20, 2022 (together with the Initial Final Grievance, the "**Final Grievance**").
40. On or about May 26, 2022, the Director General of CSC produced the Offender Final Grievance Response (the "**Final Response**"), which maintained the classification of the Incident as sexual harassment.
41. In the Final Response, the Director General of CSC confirms that "not all intervention strategies were appropriate and proportionate in the circumstances". Although the Final Response upheld the Final Grievance in part, no corrective actions were implemented at Kent as a result of the Final Response.

Causation and Damages

42. As a result of the Incident, and the actions of the defendants, and each of them, Mr. Sundman sustained physical injuries and other loss and damage and in particular has sustained:
- (a) Multiple abrasions and bruises;
 - (b) Pain and injury to the buttocks;
 - (c) Suicidal thoughts;
 - (d) Suicide attempts;
 - (e) Depression;
 - (f) Anxiety and apprehension;
 - (g) Nervous shock, fear and upset; and
 - (h) Such further and other injuries as counsel may advise.

Part 2: RELIEF SOUGHT

1. Mr. Sundman seeks the following relief against the defendants:
 - (a) A declaration that Mr. Sundman's sections 7, 8 and 12 *Canadian Charter of Rights and Freedoms* (the "**Charter**") rights have been breached;
 - (b) Damages pursuant to section 24(1) of the *Charter*;
 - (c) General damages;
 - (d) Aggravated damages;
 - (e) Punitive damages;
 - (f) Costs;
 - (g) Interest pursuant to the *Court Order Interest Act*, RSBC 1996, c 79; and
 - (h) Such further and other relief as to this Honourable Court may seem just.

Part 3: LEGAL BASIS

1. Mr. Sundman pleads and relies on the provisions of the *CCRA*, the *Negligence Act*, RSBC, 1996, c 333 and amendments thereto and the *Charter*.

Charter Breaches

2. The defendants' conduct has violated Mr. Sundman's rights under sections 7, 8 and 12 of the *Charter*:
 - (a) Section 7: Right to Life, Liberty and Security of the Person
3. Section 7 of the *Charter* provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".
4. By Unknown Defendants' failure to follow CSC policies and conducting an inappropriate, excessive and unlawful use of force and sexual assault, and the Warden and CSC's failure to adequately investigate the Incident, Mr. Sundman was deprived of his right to life, liberty and security of the person.
5. The right to life is engaged and infringed by state-imposed conditions that cause an individual to engage in suicidal behaviour or attempt to end their own life. The right to liberty is engaged and infringed by state-imposed conditions that increase the severity of the term of incarceration imposed by the court. The right to security of the person is engaged and infringed by state-imposed conditions that expose an individual to physical, psychological, social and spiritual trauma arising out of rape and sexual assault.

6. Further, the Unknown Defendants failed to carry out Mr. Sundman's sentence through safe and humane custody and by using the least restrictive measures consistent with the protection of society, staff members and offenders, in breach of the *CCRA*.
7. The actions of the defendants were arbitrary and resulted in grossly disproportionate effects, contrary to the principles of fundamental justice.
8. Mr. Sundman has suffered physical and psychological injury as a result of the actions of the defendants.

(b) Section 8: Unlawful Search and Seizure

9. Section 8 of the *Charter* provides that "everyone has the right to be secure against unreasonable search or seizure".
10. Mr. Sundman was subjected to an unlawful body cavity search in breach of the *CCRA* and *CSC* policies. The body cavity search was unreasonable and breached Mr. Sundman's right to privacy and bodily integrity.

(c) Section 12: Cruel and Unusual Treatment or Punishment

11. Section 12 of the *Charter* provides that "everyone has the right not to be subjected to any cruel and unusual treatment or punishment".
12. Mr. Sundman was subjected to both cruel and unusual treatment and punishment.
13. The actions of the Unknown Defendants, the employees of the *CSC* and federal government, deprived Mr. Sundman of this right.

(d) Section 24(1): Remedies

14. Section 24(1) of the *Charter* provides that "anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances".
15. As a result of the defendants' breach of Mr. Sundman's sections 7, 8 and 12 *Charter* rights, Mr. Sundman seeks damages as the appropriate remedy for the above-mentioned breach of his *Charter* rights. All three functions of an award for damages pursuant to section 24(1), namely, vindication, compensation or deterrence, are engaged. A *Charter* damage award in this case is necessary to:
 - (a) express society's condemnation of the defendants' conduct;
 - (b) provide an incentive for the defendants to respect inmates' *Charter* rights in the future;
 - (c) advance safety in Canada's prisons by ensuring compliance with laws governing our prisons;

- (d) provide more fulsome compensation for the costs of successful litigation;
- (e) encourage plaintiffs to act in the public interest by bringing claims concerning flagrant *Charter* violations; and
- (f) achieve the goals of specific and general deterrence.

Negligence

16. At all material times, the defendants, and each of them, knew, or ought to have known, that the Incident was unlawful and would result in damage to Mr. Sundman.
17. The Unknown Defendants are employees of CSC and, in turn, of the federal government. As such, they owe a duty of care to the inmates at Kent to take reasonable steps to ensure the inmates' safety and to protect them from foreseeable harm. They are required to carry out their duties in a professional, effective manner and with due regard to the health, safety and welfare of the inmates and act as a reasonably prudent corrections officer would in the circumstances.
18. The Unknown Defendants breached these duties and were otherwise negligent in that they failed to properly conduct a search of an inmate pursuant to the *CCRA* and in breach of CSC's CDs.
19. Further, a duty of care is owed to all inmates at Kent by the Warden to ensure their safety and protect them from all foreseeable harm, and to ensure any decisions or actions taken that impact the inmates are carried out in a lawful, safe and humane manner.
20. The Warden breached these duties and was otherwise negligent in that they permitted the ERT to behave in an unlawful manner in excess of their authority, failed to adequately monitor and supervise the ERT and failed to properly investigate the Incident.
21. The CSC and the Attorney General owe duties to all federal inmates to ensure they are safe and treated humanely, to maintain policies in furtherance of this purpose, to adequately train staff to implement the *CCRA* and CDs and to properly investigate inmate grievances.
22. The CSC and the Attorney General breached these duties to Mr. Sundman. As a result, they are directly liable for failing to ensure Kent implemented and complied with the CDs and failing to properly address the Grievance and the Final Grievance. The CSC and the Attorney General are vicariously liable for the actions of its employees, agents and representatives, namely the Warden and the Unknown Defendants.
23. As a consequence of the breaches committed by the defendants, and each of them, and as a consequence of the negligence of the defendants, and each of them, Mr. Sundman has suffered loss and damage, as above.

Battery

24. The actions of the Unknown Defendants, namely intentionally and excessively throwing Mr. Sundman to the ground, and John Doe #1 inserting his fingers into Mr. Sundman's anal cavity, constitute a harmful and offensive contact to Mr. Sundman. Mr. Sundman did not consent to this harmful and offensive contact.
25. The Unknown Defendants wrongfully and intentionally committed sexual assault and battery on Mr. Sundman in a malicious, reprehensible, unjustified manner, with disregard of Mr. Sundman's well-being, causing Mr. Sundman to suffer injury, loss and damage.

Misfeasance in Public Office

26. The Warden and the Unknown Defendants committed the tort of misfeasance in public office in that they deliberately and unlawfully used their position of power to cause damage to Mr. Sundman to whom they owe a duty of care. The Warden and the ERT team members, including the Unknown Defendants, subjectively knew, by virtue of the CDs, that they were acting unlawfully in excess of their powers and that their conduct was likely to harm Mr. Sundman.

Aggravated and Punitive Damages

27. Such above-noted conduct with respect to the Incident was harsh, vindictive, malicious and reprehensible in nature and therefore warrants an award of aggravated and punitive damages, rendering the defendants, and each of them, liable to pay aggravated and punitive damages in order to:
- (a) express society's condemnation of the defendants' conduct;
 - (b) provide an incentive for the defendants to respect inmates' *Charter* rights in the future;
 - (c) advance safety in Canada's prisons by ensuring compliance with laws governing our prisons;
 - (d) provide more fulsome compensation for the costs of successful litigation;
 - (e) encourage plaintiffs to act in the public interest by bringing claims concerning flagrant *Charter* violations; and
 - (f) achieve the goals of specific and general deterrence.

Plaintiff's address for service: 1800 – 510 West Georgia Street
Vancouver, British Columbia
V6B 0M3

Place of trial: Vancouver

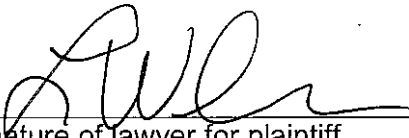
The address of the registry is:

The Law Courts
800 Smithe Street
Vancouver, British Columbia
V6Z 2E1

Norton Rose Fulbright Canada LLP

per:

Date: 24/Mar/2023



Signature of lawyer for plaintiff

Lindsey Wilson

Rule 7-1 (1) of the Supreme Court Civil Rules states:

1. Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.

APPENDIX**Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:**

Negligence, battery, misfeasance in public office and breaches of section 7, 8 and 12 of the *Charter* as a result of an unlawful search in seizure while in custody.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters
- investment losses
- the lending of money
- an employment relationship
- a will or other issues concerning the probate of an estate
- a matter not listed here

Part 3: THIS CLAIM INVOLVES:

- a class action
- maritime law
- aboriginal law
- constitutional law

- conflict of laws
- none of the above
- do not know

Part 4:

Corrections and Conditional Release Act, SC 1992, c 20

Corrections and Conditional Release Regulations, SOR/92-620

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11

Court Order Interest Act, RSBC 1996, c 79

Negligence Act, RSBC 1996, c 333