



Court File No: S232405
Vancouver Registry

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, JANE DOE

DEFENDANTS

RESPONSE TO CIVIL CLAIM

Filed by: the Attorney General of Canada ("AGC") on behalf of the Correctional Service of Canada and Warden of Kent Institution.

OVERVIEW

1. CSC administers federal penitentiaries across Canada. Among these facilities are Kent Institution – located in British Columbia – and Donnacona Institution – located in Quebec – where the plaintiff, Mr. Darren Sundman, was incarcerated.
2. On February 19, 2021, Mr. Sundman was transferred from Kent Institution to Donnacona Institution. Mr. Sundman was the subject of a strip search immediately before the transfer.
3. This claim is about whether the actions of CSC employees during the strip search violated Mr. Sundman's *Charter* rights, or constitute battery, negligence, or misfeasance.

4. The AGC admits that a strip search was conducted and force was used on Mr. Sundman, but denies wrongdoing in respect of the allegations that Mr. Sundman has made.

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 - Defendants' Response to Facts

5. The facts alleged in paragraphs 1-3, 4-6, 12, 14, 28, and 33 in Part 1 of the Notice of Civil Claim are admitted.

6. The facts alleged in paragraphs 7-11, 13, 15-17, 18, 20-27, 29-31, 32, 34-36, and 37-42 in Part 1 of the Notice of Civil Claim are denied.

7. The facts alleged in paragraph 19 in Part 1 of the Notice of Civil Claim are outside the knowledge of the Defendant.

Division 2 - Defendants' Version of Facts

Defendants in the Style of Cause

8. The Style of Cause and paragraphs 4-6 of the Notice of Civil Claim name the Attorney General of Canada ("AGC"), Correctional Service of Canada ("CSC"), and Warden of Kent Institution as Defendants in this action.

9. The Defendants say that the AGC is the proper institutional / government defendant in accordance with the *Crown Liability and Proceedings Act*, RSBC 1985, c-50.

10. The Defendants say that CSC and the Warden of Kent Institution are not appropriate defendants in this matter under the *Crown Liability and Proceedings Act* and should be struck from the claim.

11. The Defendants say that the unidentified CSC employees named as John/Jane Doe defendants are not proper parties for whom a response may be filed unless/until the Notice of Civil Claim is amended to identify them.

Background

12. Mr. Sundman is serving a life sentence for second degree murder. This is his first federal sentence, and commenced on July 5, 2018.

13. Mr. Sundman was initially incarcerated at Kent Institution, a maximum security federal penitentiary located in Agassiz, British Columbia.

14. On February 19, 2021, Mr. Sundman was the subject of an involuntary transfer from Kent Institution to Donnacona Institution in Quebec.

The Transfer

15. On December 3, 2020, Mr. Sundman was served with a Notice of Involuntary Transfer, informing him of his impending transfer to Donnacona Institution.

16. On February 19, 2021, in preparation for Mr. Sundman's transfer to Donnacona Institution, the Kent Institution Emergency Response Team ("ERT") was deployed to assist in removing Mr. Sundman from a cell in the Structured Intervention Unit ("SIU"). This was because Mr. Sundman had jammed his cell door closed such that it could not be opened.

17. In response to paragraphs 10 and 12 of the Notice of Civil Claim, ERT members utilized a prying tool to open the cell door partway. Once the door was approximately halfway open, ERT members requested that Mr. Sundman remove the objects obstructing the door, and he complied.

18. In response to paragraphs 13 and 15 of the Notice of Civil Claim, the ERT members escorted Mr. Sundman to the common area of the SIU. The ERT members then transferred custody of Mr. Sundman to SIU staff. Mr. Sundman was then escorted by members of the Kent Institution SIU staff team to the Admissions and Discharge ("A&D") area. Mr. Sundman complied and there were no issues with the escort process.

19. Upon arrival at A&D, Mr. Sundman was taken to the designated strip search area. This is a room in a section of A&D blocked off by a curtain, behind which individuals may be strip searched. Due to the structure of the room, it is not possible to view the strip search area from the A&D cells even if the curtain was removed.

20. Mr. Sundman was strip searched by two CSC officers in advance of his transfer, with the remaining members of the escort team remaining in A&D beyond the curtain. Mr. Sundman was initially compliant with the strip search.

21. A strip search is conducted on inmates being transferred between institutions in accordance with the *Corrections and Conditional Release Act* section 48(1)(b) and Commissioner's Directive 566-7 in order to ensure inmates are not smuggling contraband between institutions.

22. In response to paragraph 14 of the Notice of Civil Claim, the Federal Crown admits that Commissioner's Directive 566-7 states "a strip search, whether routine or non-routine, will be conducted in a private area, out of sight of others, by a staff member of the same sex, and in the presence of a witness."

23. In the course of the strip search, one of the two officers located an approximately six-inch length of sharpened metal hidden inside Mr. Sundman's shoe, which was passed to the attending Correctional Manager waiting outside.

24. In response to paragraphs 15 and 16 of the Notice of Civil Claim, during the course of the strip search when Mr. Sundman removed his underwear at the request of the officers, a small cell phone approximately the size of a thumb fell on the floor. The officers also observed a USB charging cable and USB charging wall plug. The attending officers instructed Mr. Sundman to leave the items on the floor.

25. In response to paragraph 17 of the Notice of Civil Claim, Mr. Sundman became non-compliant at this point and the two attending officers had to physically restrain him. The officers requested assistance from the officers

waiting outside, some of whom entered the room to assist with restraining Mr. Sundman.

26. Once Mr. Sundman had been restrained, the USB charging cable and USB wall port were retrieved and the officers ended the strip search. The cell phone was not retrieved.

27. Mr. Sundman was returned to the custody of the ERT, who escorted him out of the institution for the transfer to Donnacona.

28. In response to paragraph 21 of the Notice of Civil Claim, Mr. Sundman's escort from SIU to A&D, and A&D to the transfer were recorded, but the strip search itself was not.

Grievances and CSC's Review of the Incident

29. In response to paragraphs 29-31 of the Notice of Civil Claim, on May 5 2021, the Acting Correctional Manager of Operations authored a preliminary review of the use of force that occurred in Mr. Sundman's transfer on February 19, 2021.

30. In response to paragraphs 37-38 of the Notice of Civil Claim, on July 13, 2021, the Office of the Correctional Investigator ("OCI") wrote a debrief letter to the Warden of Kent Institution covering matters of interest in a recent virtual visit to the institution. Under the heading "Comments/ Recommendations" and subheading "Use of Force", the Investigator discussed Mr. Sundman's strip search on February 19, 2021.

31. In response to paragraphs 32-36 and 49-41, Mr. Sundman filed an initial grievance on April 15, 2021. On May 6, 2021, the Warden of Kent Institution wrote an initial response, denying Mr. Sundman's grievance. Mr. Sundman submitted a final grievance, and on May 26 2022, the Assistant Commissioner upheld his grievance in part.

Division 3 - Additional Facts

After the Transfer

32. In response to paragraphs 24-26 of the Notice of Civil Claim, after his departure from Kent, on February 19, 2021, Mr. Sundman was placed in a dry cell (a cell for individuals who are believed to have ingested or hidden contraband in a body cavity) at the Quebec Regional Reception Centre.

33. In response to paragraph 27 of the Notice of Civil Claim, on February 23, 2021, Mr. Sundman was visited as a follow-up to the use of force. At this time, he refused to go to the hospital or receive medical treatment, and he signed a form indicating he understood the consequences of this decision.

34. In response to paragraphs 24-27 of the Notice of Civil Claim, on February 24, 2021, Mr. Sundman was transferred from the Quebec Regional Reception Centre to a dry cell at Donnacona Institution.

35. On February 25 and 26, 2021, checks with a metal detector confirmed the presence of a metallic object inside Mr. Sundman.

36. A Post Use of Force Physical Assessment was conducted on February 26, 2021, at Donnacona Institution. At this time, Mr. Sundman did not identify any injuries as a result of the force used upon him.

37. On February 27, 2021, Mr. Sundman passed the cell phone during a bowel movement and it was recovered by CSC officers.

38. In response to paragraphs 24 and 26 of the Notice of Civil Claim, Mr. Sundman was in a dry cell from February 19, 2021, to February 27, 2021.

Part 2: RESPONSE TO RELIEF SOUGHT

1. The Defendants consent to the granting of the relief sought in NONE of the paragraphs of Part 2 of the Notice of Civil Claim.
2. The Defendants oppose the granting of the relief sought in ALL paragraphs of Part 2 of the Notice of Civil Claim.
3. The Defendants take no position on the granting of the relief sought in NONE of the paragraphs of Part 2 of the Notice of Civil Claim.

Part 3: LEGAL BASIS

1. In response to the whole of the Notice of Civil Claim, the AGC says that at all material times, the Federal Crown and/or his servants and agents, took all reasonable care and precautions in the circumstances with respect to the care provided to Mr. Sundman while at Kent Institution, the Quebec Regional Reception Centre, and Donnacona Institution.
2. In further response to the whole of the Notice of Civil Claim, the AGC says that the agents, servants and employees of the Federal Crown fulfilled their statutory mandate as set out in the *Corrections and Conditional Release Act* 1992, c.20 (CCRA) and the *Corrections and Conditional Release Regulations* SOR/92-620 (CCRR) associated therewith in a *bona fide*, proper, reasonable and conscientious manner and in accordance with the law.
3. Further, the AGC says that any failure to fulfill the statutory mandate as set out in the CCRA or the CCRR, which is not admitted, does not constitute a cause of action in law as there is no legally recognized nominate tort of breach of statute nor does breach of a statutory duty constitute a breach of any private law duty of care.
4. The AGC does not admit that any duty owed to Mr. Sundman by the AGC or by any Federal Crown servant – as asserted in the Notice of Civil Claim or

otherwise – was breached by an act or omission of any employee, servant or agent of the Federal Crown.

5. The AGC says that the conduct and actions of the employees, servants or agents of the Federal Crown were at all times reasonable and proper in the circumstances, performed in good faith and without malice and do not provide a basis for an award of damages including exemplary, aggravated or *Charter* damages.

6. The AGC says that the conduct and actions of the employees, servants or agents of the Federal Crown with respect to medical care provided to Mr. Sundman were in all material respects and at all material times reasonable and proper in the circumstances.

7. In response to the whole of the Notice of Civil Claim, the AGC does not admit that any of Mr. Sundman's *Charter* rights were violated by a servant of the Federal Crown, or otherwise.

8. In the alternative, any such breaches are saved by section 1 of the *Charter*.

9. There are no facts alleged that would justify an award of damages under section 24 of the *Charter*.

10. In the alternative, an award of damages would not fulfill the functions of compensation, vindication, or deterrence.

11. In the further alternative, countervailing factors militate against an award of *Charter* damages and render them inappropriate and unjust.

12. The AGC says that, if a duty of care or the plaintiff's *Charter* rights were breached by an employee, servant, or agent of the Federal Crown as asserted in the Notice of Civil Claim or otherwise, then such breach and any resulting injury, loss, damage or expense to Mr. Sundman was caused or contributed to by his own negligence.

13. Particulars of Mr. Sundman's negligence are, *inter alia*:

- a. not taking any, or reasonable, care within his control for his own safety having regard to all of the circumstances;
- b. attempting to conceal items of contraband that he knew or ought to have known should not have been in his possession;
- c. attempting to frustrate the lawful efforts of CSC officers to seize the items of contraband Mr. Sundman had in his possession;
- d. not participating in offered medical treatment; and
- e. such further and other particulars of negligence as shall become known.

14. The AGC says that if any employee, servant or agent of the Federal Crown acted or failed to act as set out in the Notice of Civil Claim, which is not admitted, then the AGC says that none of the acts or omissions were the proximate cause of any injury, loss, damage or expense allegedly suffered by Mr. Sundman.

15. The AGC says that any injury, loss, damage or expense as asserted in the Notice of Civil Claim was not a reasonably foreseeable consequence of an act or omission of an employee, servant or agent of the Federal Crown.

16. The AGC says that any injuries, losses, or expenses that Mr. Sundman may have sustained could have, by the exercise of due diligence, been reduced through appropriate actions on his part, and the AGC says that Mr. Sundman did not mitigate his damages, the particulars of which include:

- a. not following the advice, directions or recommendations of his physicians and other medical professionals; and
- b. such other means as may be determined.

17. The Defendant relies upon, *inter alia*, the following statutes and regulations:

- (a) *Corrections and Conditional Release Act*, SC 1992, c 20;
- (b) *Corrections and Conditional Release Regulations*, SOR/92-620;
- (c) *Crown Liability and Proceedings Act*, RSC 1985, c C-50;

- (ii) all other documents to which the party intends to refer at trial, and
- (b) serve the list on all parties of record.