Federal Court  Cour fédérale

Date: 20221220

Docket: T-1471-15

Citation: 2022 FC 1763

Ottawa, Ontario, December 20, 2022

PRESENT: Mr. Justice Norris

BETWEEN:

RYAN RICARDO RICHARDS

Plaintiff

and

HIS MAJESTY THE KING

Defendant

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JUDGMENT AND REASONS

I. INTRODUCTION

[1] In 2013 and 2014, Ryan Ricardo Richards was an inmate at three federal penitentiaries in the Atlantic Region. He alleges that during this time he was subjected to a prolonged course of unlawful treatment by Correctional Service Canada ("CSC") employees and officials, including the excessive use of force, unwarranted institutional transfers, and placements in administrative segregation (commonly known as solitary confinement). In this action against the federal Crown, Mr. Richards seeks, among other relief, damages for several private law torts he alleges were committed against him as well as damages for violations of his rights under the *Canadian Charter of Rights and Freedoms*.

[2] The treatment of inmates in federal correctional institutions is governed by the *Corrections and Conditional Release Act*, SC 1992, c 20 ("*CCRA*"), the *Corrections and Conditional Release Regulations*, SOR/92-620 ("*CCRR*"), Directives issued by the Commissioner of CSC, and laws of general application such as the *Charter*, the *Canadian Human Rights Act*, RSC 1985, c H-6, and the common law.

[3] It should be observed at the outset that Mr. Richards (who is self-represented) has a thorough understanding of the laws and policies governing CSC and a keen sense of his rights as an inmate. It is also fair to say that he left no stone unturned when he drafted the pleadings that commenced this action. This is not meant as a criticism. One can certainly understand why, from his point of view, it was prudent to frame the action as broadly as he could. At the same

time, the broad scope and lack of focus of his pleadings created certain challenges for the Crown in defending the action and for the Court in adjudicating it.

[4] In September 2015, Mr. Richards brought two actions against the Crown in which he raised similar allegations against the same parties – the present action under Court File No. T-1471-15 and a second action under Court File No. T-1472-15. On the defendant's motion, on November 24, 2015, Prothonotary Morneau ordered that the two matters be consolidated under T-1471-15. Prothonotary Morneau also struck out a number of the claims in both statements of claim on the basis that Mr. Richards had failed to exhaust the administrative remedies available to him under the offender grievance process. Mr. Richards was directed to file an amended statement of claim in this matter, which he eventually did on June 24, 2016.

[5] The amended statement of claim is still sweeping in its breadth, covering a wide range of private law claims as well as alleged breaches of Mr. Richards' rights under sections 2(a), 7, 8, 9, 10, 12 and 15 of the *Charter*. As well, in addition to monetary damages, Mr. Richards seeks declarations that various provisions of the *CCRA* and the *CCRR* were violated as well as an order of *mandamus* compelling the Commissioner of CSC to make certain changes to his correctional records. Moreover, many of the documents included in the parties' Joint Book of Documents at Mr. Richards' request relate to matters that were struck from the original statements of claim (including numerous complaints and grievances concerning alleged misconduct by CSC in a multitude of respects), relate to matters that fall outside the temporal scope of this action, or are otherwise simply irrelevant.

[6] Once the trial of this matter was underway, however, it became clear that the crux of the action was an incident at Springhill Institution on September 30, 2013, in which Mr. Richards alleges he was subjected to an excessive use of force by CSC employees, his placement in administrative segregation for approximately one week following this incident, CSC's investigation of an unrelated assault allegation in October 2013, and the consequences for Mr. Richards that flowed from that investigation, including a security re-classification, involuntary institutional transfers, and further placements in administrative segregation. These incidents were the focus of Mr. Richards' own testimony as well as his cross-examination of the Crown's witnesses. While he did not expressly abandon his wider ranging claims, he did not press them, either. The Crown framed its defence to the action accordingly.

[7] While the Crown defended the action on a number of grounds, it should be noted that there is no issue that the defendant would be vicariously liable for any wrongful acts found to have been committed by CSC employees or officials: see *Crown Liability and Proceedings Act*, RSC 1985, c C-50, sub-paragraph 3(b)(i).

[8] The trial of this action proceeded over several weeks by way of videoconference. At the time, Mr. Richards was an inmate at Cowansville Institution in Quebec. He participated in the trial virtually from there; counsel for the defendant participated virtually from Halifax. All of the witnesses also appeared virtually.

[9] While it was less than ideal that the trial had to proceed by way of videoconference instead of in person in a courtroom, this was a necessary accommodation in light of the COVID-

19 pandemic and prevailing circumstances at the time. I am satisfied that the parties were able to present their respective cases fully and fairly despite the challenges and limitations of this mode of proceeding.

II. SUMMARY OF FINDINGS

[10] In summary, for the reasons set out in detail below, I have reached the following conclusions:

- Mr. Richards was subjected to an excessive use of force at Springhill Institution on September 30, 2013, when members of the Emergency Response Team ("ERT") sprayed him with OC spray (also known as pepper spray), subdued him with physical handling, restrained him with handcuffs, removed him from his cell, placed him in a shower, and eventually led him to the Administrative Segregation Unit. Their actions constituted the private law torts of battery and false imprisonment. Their actions also violated Mr. Richards' rights under sections 7, 9 and 12 of the *Charter*.

- The placement of Mr. Richards in the Administrative Segregation Unit from September 30, 2013, until October 8, 2013, was an unwarranted and unlawful deprivation of his liberty and security of the person interests. It therefore constituted the private law tort of false imprisonment. It also violated Mr. Richards' rights under sections 7, 9 and 12 of the *Charter*. As well, a strip search conducted in connection with this placement violated his rights under section 8 of the *Charter*.

- A CSC investigation into his alleged involvement in an attack on another inmate at Springhill Institution in late October 2013 led to Mr. Richards being placed in the

Administrative Segregation Unit again, being reclassified from medium to maximum security, and being transferred involuntarily from Springhill to Atlantic Institution. As found by the Nova Scotia Supreme Court in an application for *habeas corpus*, the reclassification and transfer decisions were unlawful. On the basis of the findings of the application judge (which I adopt as my own), this investigation was conducted negligently.

- While Mr. Richards' initial placement in the Administrative Segregation Unit at Springhill on October 29, 2013, was lawful in light of the information available to CSC at that time, there was no lawful basis to keep him there after November 7, 2013. This placement in administrative segregation from that point until his transfer to Atlantic Institution on December 12, 2013, therefore constituted the private law tort of false imprisonment. It also violated Mr. Richards' rights under sections 7 and 9 of the *Charter*. On the basis of the Crown's concession (which I explain in greater detail below), this prolonged placement in administrative segregation also violated Mr. Richards' rights under sections 7 and 12 of the *Charter* independent of any connection to the negligent investigation.

- On January 16, 2014, approximately one month after his arrival at Atlantic Institution, Mr. Richards was placed in the Administrative Segregation Unit. He remained there until April 10, 2014. This placement together with the earlier placement in the Orientation Range constituted the private law tort of false imprisonment. These placements also violated Mr. Richards' rights under sections 7 and 9 of the *Charter*. On the basis of the Crown's concession, the prolonged placement in administrative segregation also violated

Mr. Richards' rights under sections 7 and 12 of the *Charter* independent of any connection to the negligent investigation.

- After his application for *habeas corpus* was granted, Mr. Richards was reclassified as medium security and transferred out of Atlantic Institution. However, instead of being returned to Springhill, he was transferred to Dorchester Institution and placed in the Administrative Segregation Unit there. Mr. Richards remained in administrative segregation at Dorchester from April 10, 2014, until September 22, 2014, when, at his request, he was transferred to Matsqui Institution in British Columbia. Mr. Richards alleges he was subjected to various forms of abusive treatment while at Dorchester. Since he either has or could have availed himself of other effective remedies for his transfer to Dorchester and his treatment there, his causes of action in these respects are not properly before the Court. As well, I am not satisfied that the placement in administrative segregation at Dorchester constituted the private law tort of false imprisonment, principally because Mr. Richards remained there at his own request. I also find that there is an insufficient nexus between that placement and the earlier negligent investigation to ground the defendant's liability in tort for the administrative segregation placement at Dorchester. On the other hand, on the basis of the Crown's concession, I find that the prolonged placement in administrative segregation at Dorchester violated Mr. Richards' rights under sections 7 and 12 of the *Charter*.

- For having been subjected to the foregoing unlawful conduct, Mr. Richards is entitled to the private law remedy of damages as well as damages as a remedy under subsection 24(1) of the *Charter*. I award Mr. Richards damages totalling $165,000. The breakdown of this award will be explained below.

[11] For the sake of clarity, I confirm that, apart from those claims on which I expressly find in Mr. Richards' favour, his action is otherwise dismissed.

[12] More particularly, Mr. Richards alleges, among other things, that CSC failed to accommodate his religious practices (and even wilfully impeded them on occasion) and that it engaged in religious profiling of him. On this basis, Mr. Richards contends that CSC violated his rights to freedom of religion and equality under, respectively, subsections 2(a) and 15(1) of the *Charter*. While I find fault with CSC in a number of ways, I can find no credible evidence that it acted in a discriminatory fashion, as Mr. Richards alleges. That being said, the matters of which Mr. Richards complains in these respects either were or could have been the subject of offender grievances or complaints under the *Canadian Human Rights Act*. Those are the appropriate forums in which to resolve these matters. Likewise, Mr. Richards' allegations of CSC misconduct in connection with his application for *habeas corpus* either were or could have been the subject of offender grievances. Consequently, all of these matters fall outside the proper scope of this action and, accordingly, will not be considered further.

[13] Finally, several of Mr. Richards' claims are framed in terms of breaches of statutory duties, something that, standing on its own, is not recognized as a tort in Canadian law: see *The Queen (Can.) v Saskatchewan Wheat Pool*, [1983] 1 SCR 205; see also see *Gregory v Canada*, 2022 FC 342. Generally speaking, the proper remedy for the breach of a statutory duty by a public authority is judicial review for invalidity rather than an action in tort: see *Holland v Saskatchewan*, 2008 SCC 42 at para 9. That being said, while the failure of correctional officials to follow governing law and policy does not, standing alone, give rise to any form of tort

liability, it can be relevant to the determination of the claims that are properly included in this action: see *Odhavji Estate v Woodhouse*, 2003 SCC 69 at paras 30-31.

III. BACKGROUND

[14] Mr. Richards was born in Jamaica in November 1981. He moved to Canada when he was a child. He is a Canadian citizen. He identifies as a Black man. He is a convert to the Islamic faith.

[15] Mr. Richards completed high school but otherwise has had limited formal education.

[16] Mr. Richards is intelligent, thoughtful, and articulate. He can also be demanding and inflexible. He would probably be the first to admit that he is not always an easy person to deal with, especially in institutional settings.

[17] Mr. Richards has been incarcerated since October 2001, when he was arrested and charged with second-degree murder. He was 19 years of age at the time. Following a jury trial, in February 2003 Mr. Richards was convicted of second-degree murder. He was sentenced to life imprisonment.

[18] In March 2003, Mr. Richards was transferred from a local remand facility in Toronto to a federal penitentiary to serve his life sentence. Since then, he has been an inmate in numerous federal correctional institutions across Canada. Some of the transfers between institutions were at Mr. Richards' request; many others were involuntary.

[19] These institutional transfers have posed many challenges for Mr. Richards, who has repeatedly had to adjust to new settings, as well as for CSC staff, who have had to learn how to work with him afresh after each transfer. Mr. Richards' relationship with CSC has often been highly adversarial and, for better or for worse, this history has followed him from institution to institution.

[20] Mr. Richards himself would probably acknowledge that, with the benefit of hindsight, he has not always chosen the best or most constructive ways to raise his concerns about how he has been treated by CSC. Be that as it may, on more than a few occasions, his complaints have been determined to be well-founded. As well, some CSC staff have understood the challenges Mr. Richards has faced, have seen his potential, and have engaged productively with him. The mutual respect between these particular individuals and Mr. Richards was evident to me throughout the course of this trial.

[21] Mr. Richards' institutional record as a federal inmate is far from unblemished. In 2004, he was convicted of possession of two prohibited weapons and sentenced to imprisonment for three months concurrent to his life sentence. In 2007, he was convicted of aggravated assault on another inmate and sentenced to imprisonment for 18 months concurrent to his life sentence. Numerous other incidents that did not result in criminal charges or convictions but that did give rise to various forms of institutional discipline (including placements in administrative segregation) and institutional transfers are also documented in Mr. Richards' CSC records.

[22] The events that underlie the present action occurred in 2013 and 2014, when Mr. Richards was an inmate at three correctional institutions operated by CSC in the Atlantic Region: Springhill Institution in Nova Scotia, Atlantic Institution in New Brunswick, and Dorchester Penitentiary in New Brunswick. Mr. Richards had been transferred from Ontario to Springhill involuntarily in 2010. He remained in the Atlantic Region until September 2014, when he was transferred voluntarily to British Columbia.

[23] Springhill and Dorchester are designated as medium security institutions; Atlantic is designated as maximum security. At the relevant times, all three institutions had Administrative Segregation Units where inmates could be placed in what is commonly known as solitary confinement.

[24] Apart from the incident involving the ERT officers on September 30, 2013, generally speaking there is little dispute about the events that underlie this litigation or their legal implications. This is because of two important circumstances that provide the context in which the present action was litigated. The first is the disposition of an application for *habeas corpus* brought by Mr. Richards in early 2014. The second is the disposition of other litigation concerning the use of administrative segregation in federal correctional institutions.

A. *Mr. Richards' Application for* Habeas Corpus

[25] As mentioned above, and as will be discussed in greater detail below, in late October 2013, Mr. Richards was placed in administrative segregation at Springhill as a result of the information suggesting that he had been involved in an attack on another inmate. In

December 2013, he was reclassified from medium to maximum security and then transferred involuntarily from Springhill Institution to Atlantic Institution because of this same information.

[26] On November 26, 2013, Mr. Richards filed an application for *habeas corpus* in the Nova Scotia Supreme Court. At that time, the only CSC decision under review was his placement in administrative segregation at Springhill. Subsequently, however, the scope of the *habeas corpus* application was broadened to include the lawfulness of the reclassification decision as well as the resulting involuntary transfer to Atlantic Institution. By the time the *habeas corpus* application was heard, Mr. Richards was no longer in administrative segregation at Springhill, rendering that part of the application moot. (The procedural history of the *habeas corpus* application is set out in a preliminary ruling by the application judge, the Honourable Justice Van den Eynden, confirming the jurisdiction of the Nova Scotia Supreme Court to hear the application even though Mr. Richards had by then been transferred to a correctional institution in New Brunswick: see *Richards v Springhill Institution*, 2014 NSSC 120 at paras 3-16.)

[27] In a decision dated April 2, 2014, the application judge granted the application for *habeas corpus*: see *Richards v Springhill Institution*, 2014 NSSC 121. The Court concluded that the decisions to reclassify Mr. Richards from medium to maximum security and to transfer him involuntarily from Springhill to Atlantic were unlawful. Appeals by the Crown with respect to the jurisdictional ruling and the merits of the *habeas corpus* application were dismissed by the Nova Scotia Court of Appeal on April 30, 2015: see *Springhill Institution v Richards*, 2015 NSCA 40.

[28] As a result of the *habeas corpus* decision, CSC restored Mr. Richards' medium security classification and transferred him out of Atlantic Institution. CSC determined, however, that it was not appropriate to return him to Springhill; instead, Mr. Richards was transferred to Dorchester Institution.

[29] In concluding that the December 2013 reclassification and transfer decisions were unlawful, the application judge made several adverse findings concerning CSC's investigation of the assault allegation against Mr. Richards. Quite properly, in the present proceeding, the Crown did not seek to re-litigate matters determined in Mr. Richards' favour in the *habeas corpus* application. The Crown accepts that it is bound by the application judge's findings. This has narrowed the points in dispute in this regard significantly. The relevant findings will be discussed in detail below.

B. *Other Litigation Concerning the Use of Administrative Segregation*

[30] The resolution of parallel litigation concerning the use of administrative segregation in federal correctional institutions has also narrowed the contentious issues in this action.

[31] By way of further background, the *CCRA* had long provided for the placement of federal inmates in administrative segregation. While conditions in administrative segregation units may vary somewhat from institution to institution, fundamentally these units were a "prison within a prison" (*Martineau v Matsqui Disciplinary Board*, [1980] 1 SCR 602 at 622). Sometimes they were used for the safety of the inmate; often they were used for disciplinary purposes or for reasons of institutional safety or security.

[32] Whatever the reason for the placement, individuals placed in an administrative segregation unit would be confined to a small cell alone for 22 hours or more each day. They would be completely removed from the general prison population, they would have little direct contact with correctional staff, and access to programs and amenities (including exercise and fresh air) would be either highly restricted or prohibited entirely. As a result, individuals held in administrative segregation would have little meaningful human contact – hence the use of the term "solitary confinement" to describe this practice.

[33] The harmful effects of prolonged periods in solitary confinement are well-documented and the practice of using solitary confinement has been widely condemned. For example, the *United Nations Standard Minimum Rules for the Treatment of Prisoners* (also known as the *Nelson Mandela Rules*) prohibits solitary confinement for longer than 15 days: see Rules 43-45.

[34] The use of solitary confinement in federal correctional institutions has been challenged successfully in several recent Canadian court proceedings.

[35] In *Canadian Civil Liberties Association v Canada (Attorney General)*, 2019 ONCA 243, 144 O.R. (3d) 641, the Court of Appeal for Ontario struck down sections 31 to 37 of the *CCRA*, which authorized administrative segregation in federal penitentiaries, on the grounds that administrative segregation amounts to solitary confinement and that subjecting an inmate to solitary confinement for longer than 15 days constitutes cruel and unusual punishment contrary to section 12 of the *Charter*. The Court stated that "prolonged administrative segregation [i.e. more than 15 days] causes foreseeable and expected harm which may be permanent, and which

cannot be detected through monitoring until it has already occurred" (at para 5). The Court of Appeal concluded that the *CCRA* lacked the safeguards necessary to prevent inmates from remaining in segregation for more than 15 days and, thus, to prevent grossly disproportionate treatment: see paras 113-15. Notably, the federal Crown had not appealed the finding of the application judge below that the legislation also violated section 7 of the *Charter* because it does not provide for an independent review of the decision to place an inmate in administrative segregation: see *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen*, 2017 ONSC 7491, 140 O.R. (3d) 342.

[36] A few months later, in *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228, 377 C.C.C. (3d) 420, the British Columbia Court of Appeal struck down sections 31 to 37 of the *CCRA* on the grounds that they violated section 7 of the *Charter* by authorizing prolonged administrative segregation (i.e. more than 15 days) that deprives persons of life, liberty or security in a manner that is grossly disproportionate to the law's objectives, and because the provisions did not provide for independent review of administrative segregation decisions.

[37] The Attorney General of Canada was granted leave to appeal both of these decisions to the Supreme Court of Canada but it discontinued the appeals in April 2020. Meanwhile, in November 2019 the relevant provisions of the *CCRA* were repealed and replaced with provisions establishing and regulating the use of what are now termed structured intervention units: see sections 31 to 37.91 of the current Act.

[38] At the same time as these constitutional challenges to the use of administrative segregation were proceeding, class actions on behalf of federal inmates who had been confined in administrative segregation were also underway. For present purposes, the most pertinent of these class actions is *Reddock v Canada (Attorney General).* This action was commenced in the Ontario Superior Court of Justice in 2017. It was certified as a class proceeding in June 2018: see *Reddock v Canada (Attorney General)*, 2018 ONSC 3914. A second class action was also certified in Ontario: see *Brazeau v Canada (Attorney General)*, 2016 ONSC 7836. (A third class action was also underway in Quebec on behalf of federal inmates in that province.)

[39] In *Reddock*, the class is defined to consist of all offenders in federal custody who were involuntarily subjected to prolonged (defined as at least 15 consecutive days) administrative segregation between November 1, 1992 and the present, and were still alive on March 3, 2015. In *Brazeau*, the class consists of offenders in federal custody between November 1, 1992 and the present who were placed in administrative segregation, were diagnosed with or suffered from serious mental illness, and were still alive on July 20, 2013. The members of the *Brazeau* class are excluded from the *Reddock* class.

[40] In March 2019, partial summary judgment in favour of the representative plaintiff was granted in *Brazeau*: see 2019 ONSC 1888. In August 2019, summary judgment in favour of the representative plaintiff was granted in *Reddock*: see 2019 ONSC 5053. In both cases, the motion judge (the Honourable Justice Perell) found Canada liable in damages for breach of the class members' *Charter* rights. In *Reddock*, the motion judge found that Canada was also liable for systemic negligence in the use of administrative segregation, although he awarded only one set

of damages to account for both the breach of the *Charter* and the negligence claim. In both matters, the motion judge awarded a base level of aggregate damages and directed that a process for adjudicating individual claims by class members be established.

[41] The federal Crown appealed the summary judgments in both *Brazeau* and *Reddock*. The central issue in both appeals was the Crown's liability for damages for breaches of sections 7 and 12 of the *Charter*. The finding of liability on the basis of systemic negligence in *Reddock* was also challenged on appeal.

[42] The two appeals were heard together and dealt with in a single decision: see *Brazeau v Canada*, 2020 ONCA 184. The Court of Appeal for Ontario allowed the appeal in *Reddock* on the issue of systemic negligence but otherwise upheld the summary judgment findings on liability and damages. The Crown's liability was also upheld in *Brazeau* but the appeal was allowed with respect to the aggregate damages award and that issue was remitted to the motion judge for reconsideration. That reconsideration was completed later in 2020: see *Brazeau v Canada (Attorney General)*, 2020 ONSC 3272.

[43] Against this jurisprudential backdrop, in the present matter, the Crown does not dispute that prolonged placement in administrative segregation (i.e. greater than 15 days) violates sections 7 and 12 of the *Charter*. Nor does the Crown contest that, at least in principle, Mr. Richards is entitled to damages on this basis for his prolonged placements in administrative segregation. Rather, the Crown contends that, since Mr. Richards did not formally opt out of the *Reddock* proceeding (the deadline to do so absent leave of the Court was September 19, 2018),

he is a member of the class and is therefore entitled to damages in that proceeding. Accordingly, the Crown maintained that Mr. Richards should pursue any relief in this regard through that proceeding (including the individual claims determination process, if he so chooses).

[44] On the other hand, Mr. Richards has confirmed repeatedly and in no uncertain terms that he has had and will have nothing to do with this other litigation.

[45] In a pre-trial motion, the Crown sought an order under subsection 50(1) of the *Federal Courts Act*, RSC 1985, c F-7 ("*FCA*") staying those aspects of the present action relating to Mr. Richards' placements in administrative segregation. On March 1, 2021, I dismissed the motion from the bench for brief oral reasons. Written reasons were provided subsequently: see *Richards v Canada*, 2021 FC 231.

[46] In closing submissions at trial, the Crown renewed its request that this Court defer to the *Reddock* class proceeding for the determination of any damages to which Mr. Richards is entitled due to his prolonged placements in administrative segregation. As I indicated at that time, I was still not persuaded that doing so would be in the interests of justice given the particular circumstances of this case.

[47] The drafting of these reasons has been a very lengthy process. Given the amount of time that had passed since the conclusion of the hearing, last spring the Court invited the parties to provide an update on any relevant developments in the class proceedings.

[48] The Crown provided a helpful summary of the claims determination process that had been established in the class proceedings. In brief, the Crown confirmed that, as a member of the *Reddock* class, Mr. Richards would be eligible for an equal share of the $28 million lump sum award in the class actions. It was estimated that, at a minimum, he would be entitled to an award of approximately $2,200: see *Brazeau v Canada (Attorney General)*, 2020 ONSC 7229 at para 50. Alternatively, through individual claims processes, he could seek damages of either up to or more than $50,000 (the amount claimed would determine the procedure to be followed). As I understand the latter processes, even if Mr. Richards were to advance an individual claim, he would still be entitled to a minimum share of the aggregate award.

[49] Mr. Richards confirmed once again that he had no intention of advancing any claims through the class proceeding.

[50] The Crown also noted that the eligibility period for making a claim as a *Reddock* class member would be closing on September 7, 2022. That deadline has now come and gone. There has been no indication that Mr. Richards changed his mind and submitted a claim in the class proceeding.

[51] While the Crown would obviously have preferred that this aspect of the case be dealt with elsewhere, it nevertheless acknowledged that it was bound by the determinations that prolonged administrative segregation violates sections 7 and 12 of the *Charter* and that this potentially gives rise to an entitlement to damages as a remedy. This has further narrowed the contentious issues in the present action.

IV. THE SEPTEMBER 30, 2013 INCIDENT

A. *The Security Camera Video Recording*

[52] Before examining the September 30, 2013, incident in detail, it may be helpful to begin by describing a key piece of evidence on which several of my factual determinations turn. This is a video recording of events in the area of Mr. Richards' cell at Springhill Institution on the day in question.

[53] The unit in which Mr. Richards' cell was located has two levels. Mr. Richards' cell was on the upper range of the unit. He was the sole occupant of the cell.

[54] There was a fixed security camera in the corridor immediately outside Mr. Richards' cell. A recording made by this camera on September 30, 2013, was preserved by CSC following the incident and was entered into evidence.

[55] The camera provides a view down the length of the corridor on the upper range of the unit. There is no dispute that it does not capture the entire corridor. There is another section of the range behind this camera that was presumably covered by another camera (or cameras). There is no evidence concerning whether any effort was made to secure recordings from any other security cameras on the range or anywhere else Mr. Richards was taken on September 30, 2013. In any event, no such recordings were produced in this trial.

[56] The security camera that made the recording that was preserved is mounted at roughly ceiling height; as a result, the view is from above and on a slight downward angle. The area covered by the camera is well lit with natural and artificial lighting. The video is in colour. The picture quality is reasonably good. There are no apparent gaps in the recording that was preserved. There is no sound.

[57] As it appears in the recording, Mr. Richards' cell door is the one closest to the camera on the right hand side of the frame. The locking mechanism for the cell door is to the left of the door at roughly waist height. The cell door opens inwards. Viewed from the outside, the door swings open from left to right. There is a small observation window in the door. While it cannot be seen on the video, there is no dispute that the window can be covered from the inside by a "blocker" or privacy screen.

[58] The security camera has an unobstructed view of the area immediately outside Mr. Richards' cell as well as down the length of the range. On the left hand side of the image is a metal railing overlooking the floor below. Also on the left hand side is a metal stairway leading down from the upper range to the lower floor. Most but not all of the stairway is visible in the video (the lowest steps are not visible). The camera captures only a small part of the lower floor. While it cannot be seen in the video, there is no dispute that there is a security "bubble" on the main floor below the area depicted in the recording. This is a secure area from which correctional staff monitor the unit.

[59] The video recording has a date stamp of September 30, 2013. At the beginning of the video, the time stamp reads 12:28:00 p.m. At the end, it reads 12:44:00 p.m. Someone from CSC – it is not clear who – made the decision to retain only this part of the recording for the day in question. While nothing relevant occurred in the area covered by the camera after 12:44:00 p.m., relevant events did occur in that area prior to 12:28:00 p.m. Those events will be discussed below. No evidence was presented as to why more of the recording was not preserved.

[60] The ERT members involved in the incident on September 30, 2013, are all clearly visible on the video recording. They are all wearing essentially identical tactical gear consisting of helmets, visors, face masks, body armour, jackets, pants, gloves, and heavy boots. It is generally possible to identify them and tell them apart on the video by the numbers on the back of their uniforms. These numbers have different colours to denote the officer's home institution: red for Springhill and white for Dorchester. (ERT officers from Atlantic had yellow numbers but it does not appear that any of these officers were involved in the incident.) As well, the officers who testified at trial were able to identify themselves in the video and, in some cases at least, their colleagues as well. There is generally no issue as to the identities of the ERT members who had direct involvement with Mr. Richards during the material times on September 30, 2013.

[61] On the video recording, the incident involving Mr. Richards and the ERT members begins at 12:28:57 p.m., when the first three officers arrive at his cell door. The recording captures what happens next but only in part. Crucially, nothing that happens inside Mr. Richards' cell or later in the shower is within view of the camera.

[62] Mr. Richards himself is not visible in the recording until he is led out of his cell at 12:30:15 p.m., after he has been pepper sprayed, subdued by the officers, and handcuffed. He then disappears off camera. He reappears at 12:41:58 p.m., as ERT officers guide him along the hallway, down the stairs, and out of view again. This is the last time Mr. Richards is seen in the video.

[63] While the video recording is highly reliable evidence of what happened within the camera's view, unfortunately it does not capture all the material events or circumstances. Nevertheless, as I will explain below, I find that on the central issue of whether the use of force on September 30, 2013, was justified, the video supports Mr. Richards' account and contradicts the officers' accounts.

B. *The Absence of Other Recordings of the Incident*

[64] As will also be discussed below, Mr. Richards urges me to find fault with the ERT officers and to draw an adverse inference about the credibility of their evidence because they did not record the entire use of force incident with a hand held video camera.

[65] Mr. Richards is quite right that CSC procedures call for video recording from the outset when there is a pre-planned use of force, including when inmates are forcibly removed from their cells. However, the procedures Mr. Richards points to only apply when there is a pre-planned cell extraction or other use of force. While there is no question that Mr. Richards was removed from his cell by the use of force on September 30, 2013, I find that this was not a pre-planned cell extraction in the sense governed by the procedures for such things. Rather, it was the result

of circumstances that arose without warning and escalated suddenly. In other words, at least at the outset, it was a spontaneous use of force. While I also find, as I explain below, that it was the ERT officers themselves who escalated the incident, there is no evidence that this was their intention when they first responded to the emergency cell call. Nor is there any evidence that the officers deliberately failed to obtain a camera in order to avoid having their actions recorded. Thus, I do not fault the officers for not having a hand held video camera with them at the outset of the incident. I do find, however, that there was no good reason for the officers not to obtain a camera to record the incident once it began to unfold as it did, particularly once Mr. Richards was securely in the officers' custody and control. There was ample time and more than enough manpower to do so. This will be discussed further below.

[66] Furthermore, while a hand held video camera was eventually obtained and used to record the post-use-of-force medical assessment of Mr. Richards in the Administrative Segregation Unit, apparently the recording could not be downloaded from the camera and, as a result, no video of that assessment is available. This will be also discussed in more detail below.

[67] It goes without saying that a proper video recording of the incident (certainly as a whole but even in part) would have left much less room for debate about what exactly happened on September 30, 2013. Fortunately for this Court's truth-seeking function, the video from the one security camera was preserved. I will address below the evidentiary implications of the failure to otherwise record the incident.

C. *Events Leading Up to the September 30, 2013 Incident*

[68] In the mid-afternoon of September 25, 2013, a Security Intelligence Officer ("SIO") at Springhill was informed by a source of unknown reliability that the source had observed a .22 caliber bullet in the institution. If true, this could pose a significant risk to the safety and security of inmates and staff.

[69] On the basis of this report, Lorne Breene, the Acting Warden at the time, ordered that the institution be locked down so that a thorough search for the ammunition could be conducted. This would include a physical search of every inmate as well as their cell and personal effects. (The authority to order a search in such circumstances is provided for in subsection 53(1) of the *CCRA*.) While the institution was locked down, inmates remained in their cells 24 hours a day barring exceptional circumstances.

[70] CSC records indicate that the search for the ammunition lasted from September 26 through October 5, 2013. There is no evidence that any ammunition was ever found.

[71] Members of the Springhill ERT were responsible for conducting the search for the ammunition. They were assisted by ERT officers from two other institutions, Dorchester and Atlantic. In total, over 50 ERT members were deployed at Springhill during the lockdown. As well, since the suspected presence of the bullet had led to a work refusal by unionized correctional staff on the basis of workplace safety concerns, ERT officers were also responsible for daily tasks such as delivering meals to inmates, escorting inmates to the shower, and

escorting medical staff who were providing medication or otherwise attending to inmates at their cells.

[72] It is fair to say that the period of the lockdown was very stressful for inmates and CSC staff alike.

D. *Events on September 30, 2013*

(1) The Mid-Day Meal Delivery

[73] Like all other inmates, Mr. Richards had been confined to his cell since the afternoon of September 25, 2013. He was particularly frustrated with how his meals were being delivered to him by ERT officers. According to Mr. Richards, the officers were "playing games" with him when they delivered his meals. Sometimes they would order him to stand in one place while the meal was placed in his cell, other times they would order him to stand somewhere else for no apparent reason. Sometimes his meals would just be tossed into his cell, ending up on the floor. One time, according to Mr. Richards, his meal landed in the toilet. As well, often he was not being given the correct meal (he was on special religious and medical diets and he does not eat meat), leaving him to go hungry.

[74] Finally, at lunch time on September 30, 2013, Mr. Richards had had enough. When his meal was delivered to him he asked to speak to the Unit Manager, Kathryn Paul. The ERT officers delivering the meal refused to get the manager and left. Mr. Richards then pushed the

call button in his cell. When the cell call button is pushed, it triggers an alarm in the bubble on the main floor of the unit. It is meant to be used only in an emergency.

[75] I pause at this point to note that it is an admitted fact that Ms. Paul was on duty on the unit and was present in the bubble at the material times on September 30, 2013. For personal reasons, she was not available to testify as a witness at the trial.

[76] After Mr. Richards pushed the cell call button, some ERT officers came to his cell. Mr. Richards told them he wanted to speak to Ms. Paul. According to Mr. Richards, the officers responded by telling him to "shut your fucking pie hole." They refused to contact Ms. Paul or let Mr. Richards speak to her. They also cautioned him not to push the call button again. There is no evidence as to who these ERT officers were.

[77] None of these events are captured on the video recording entered into evidence because they all would have occurred before the start time of the segment that was preserved. It is most unfortunate that more video evidence was not preserved by CSC.

[78] That being said, it is not necessary for me to determine whether things up to this point happened exactly as Mr. Richards has described them. This is because there is no dispute that the incident in question was precipitated by ERT officers responding to yet another cell call triggered by Mr. Richards.

[79] Mr. Richards testified that he activated the cell call button more than once at the mid-day meal time on September 30th. This is confirmed by contemporaneous CSC records. For example, in his Statement/Observation Report concerning the September 30th incident, Correctional Officer ("CO") Talbot (one of the officers involved in the use of force incident) notes that Mr. Richards had "covered his cell window and repeatedly pressed his cell call." CO Talbot also confirmed this in his trial testimony, stating that before he went up to the cell he had been informed that "the cell call was hit repeatedly" and the window was covered.

[80] Whatever exactly may have been happening during meal deliveries over the preceding days or earlier on September 30th, it is sufficient for present purposes to say simply that I accept Mr. Richards' evidence that by mid-day on September 30th he was frustrated with how he was being treated, that he pushed the cell call button, that the attending officers refused to let him speak to Ms. Paul, that after the officers left he pushed the call button again, and that he lowered the privacy screen on his cell door window. It is this second pushing of the call button that precipitated what happens next.

(2) 12:28:00 p.m. to 12:43:43 p.m.

[81] Five ERT members were directly involved with Mr. Richards in the first stages of the use of force incident: Robert Henderson (#24, from Springhill), William Jobes (#3, from Springhill), Troy Talbot (#34, from Dorchester), Dominique Gosselin (#43, from Dorchester), and Jimmy Sproule (#41, from Dorchester). CO Talbot was the team leader. The Crown called all of these officers as witnesses except CO Sproule (who had very limited contact with Mr. Richards in any event, as the video confirms).

[82] The initial encounter with Mr. Richards involves three officers: Henderson, Jobes and Talbot. The officers testified that immediately prior to the incident, they were attending to other matters on the range. The video recording shows that at 12:28:48, the three walk up the stairs from the main floor together: Henderson first, followed by Jobes and then Talbot. They reach Mr. Richards' cell door in the same order. While this cannot be seen in the video, there is no dispute that the small window in Mr. Richards' cell door is covered from the inside by a privacy screen.

[83] CO Henderson knocks on the cell door and appears to say something to Mr. Richards through the door. CO Jobes takes out a set of keys and begins to unlock the door. CO Talbot takes out a canister of OC spray. With both arms extended in front of him at chest height, CO Talbot aims the OC canister at the cell door, which is still closed.

[84] The three officers are standing shoulder to shoulder directly in front of the door: Talbot is in the middle, Jobes is to his left, and Henderson is to his right. Between the knock on the door and the door starting to swing open after it was unlocked, no more than 10 seconds has elapsed.

[85] CO Jobes pushes on the door to swing it open. Almost as soon as the door starts to open, CO Talbot discharges OC spray into the cell. He discharges a second burst of OC spray a moment later. Mr. Richards cannot be seen on the video but there is no dispute that the OC spray was aimed at him.

[86] At this point, CO Gosselin comes running up the stairs. All four officers then enter Mr. Richards' cell. CO Sproule also comes up the stairs and remains outside the cell looking in. A few moments later, CO Talbot backs out of the cell and stands at the door looking in.

[87] Mr. Richards is led out of his cell at 12:30:15. He is wearing baggy, knee-length shorts and no shirt. His wrists are handcuffed behind his back. He is standing but is doubled over. CO Henderson is holding Mr. Richards by one arm; CO Gosselin is holding him by the other arm. CO Jobes then follows them out of the cell. Mr. Richards is in obvious physical distress.

[88] After a brief pause outside the cell, the officers guide Mr. Richards down the corridor and start taking him down the stairs. They then reverse course and guide Mr. Richards back towards and then past his cell. They go out of view once they pass Mr. Richards' cell. It appears that one of the officers had suggested using the shower next to Mr. Richards' cell to try to wash off the OC spray.

[89] Mr. Richards disappears off-camera at 12:30:51. He re-appears at 12:41:58. There is no dispute that during this time he was placed in a shower on the upper range. While he was in the shower, officers are visible on the video recording from time to time. It appears to have been officers Henderson and Gosselin who attended to Mr. Richards in the shower for at least part of the time; the other three officers stood by in the general vicinity. At one point during this time, CO Talbot can be seen leaving the area, going downstairs, and then returning a few minutes later. CO Jobes can be seen doing the same thing a few minutes later.

[90] Eventually, at 12:41:15, another group of five ERT officers come up the stairs together, bringing the total number of officers to 10. These officers mill about in the area outside Mr. Richards' cell briefly until Mr. Richards reappears after the shower. Two officers from this second group (#8 and #15, who have not been identified but who, given the white numbers on their uniform, appear to have been from Dorchester) take physical control of Mr. Richards, walk him backwards down the stairs, and take him out of view. Mr. Richards' hands are still cuffed behind his back. He is still in obvious physical distress.

[91] Most of the events I have just described are clearly depicted in the video. However, three important things cannot be seen: (1) what Mr. Richards was doing when the door to his cell first opened; (2) how the officers subdued Mr. Richards inside his cell; and (3) how the officers handled Mr. Richards during the decontamination shower and afterwards. Moreover, since there is no sound, there is no recording of what anyone was saying during the incident. Mr. Richards and the officers give diametrically opposing accounts of all of these things.

(a) *The Discharge of OC Spray*

[92] Looking first at the discharge of OC spray, according to Mr. Richards, after he triggered the cell call again, he heard a knock on the door and someone told him to remove the privacy screen from his window. The door then opened suddenly and without warning he was hit in the face with OC spray. On Mr. Richards' account, he was simply standing in his cell when the OC spray was discharged at him. He maintains that he had done nothing to warrant this use of force. On the other hand, according to the officers, the use of OC spray was either a reasonable

and proportionate response to an apprehended threat posed by Mr. Richards or it was necessary to overcome Mr. Richards' refusal to comply with their directions (or both).

[93] The incident clearly escalates with the officers' decision to open Mr. Richards' cell door. While Mr. Richards questions why this even happened and why the officers did not try to deal with the situation in some other way first, I find that, in the circumstances, it was reasonable and appropriate for the officers to open the door. It is important not to judge that decision in light of what happened afterwards. Equally, it does not follow from the fact that the officers were warranted in opening the door that their subsequent actions were also justified.

[94] There is no dispute that Mr. Richards had pressed the cell call button more than once. Ms. Paul, the Unit Manager, was in the bubble and would have noted that the alarm had been triggered again. I find that, as the Unit Manager, she is likely the person who then asked one or more of the ERT officers to go up to Mr. Richards' cell to determine what the problem was. None of the ERT officers had a clear recollection of what exactly they were told when they were asked to check on Mr. Richards but I find it is more likely than not that the first officers who attended had been told that he had activated the cell call button again (after having done so just a short time earlier).

[95] As I have already noted, Ms. Paul did not testify at the trial so we do not have the benefit of her evidence on this point. At the same time, there does not appear to be any dispute about what led the officers to go up to Mr. Richards' cell.

[96] Considering all the circumstances, including what had gone on immediately before, I find it unlikely that, when they went up to his cell, the first attending officers actually believed that Mr. Richards was in medical distress or otherwise required urgent attention. Rather, they would have believed that Mr. Richards was triggering the cell call improperly. At the same time, they could not simply ignore the alarm; they had a responsibility to check on Mr. Richards' welfare and to deal with whatever it was that had caused him to trigger the alarm again. Since Mr. Richards had covered the window in his cell door, the officers had to open the door to check on him. Although it could be said that the officers should have given Mr. Richards more than a couple of seconds to remove the window covering, they had no reason to think that he would have done so if he had been given that opportunity.

[97] While I thus accept that it was reasonable and appropriate for the officers to open Mr. Richards' cell door, I do not believe the officers' accounts of what Mr. Richards was doing when the door opened, nor do I accept their rationales for why they acted as they did once the door was open. Rather, I believe Mr. Richards' account of what happened next.

[98] I make these findings for the following reasons.

[99] First, the officer who discharged the OC spray – CO Talbot – has given materially different accounts of Mr. Richards' behaviour when the door opened. He testified that when the door was opened, Mr. Richards presented himself in a "threatening" and "aggressive" manner and this was why he discharged the OC spray. On the other hand, in the Statement/Observation Report that he completed on the day of the incident, CO Talbot wrote: "The door was partially

opened and the subject was physically uncooperative and non-compliant to direction. OC deployed." There is nothing in the report about Mr. Richards being threatening or aggressive.

[100] Similarly, in a Use of Force Report CO Talbot also completed on September 30, 2013, he described the events at Mr. Richards' cell as follows:

> On the above date and time the subject was non-compliant and physically uncooperative. He covered his cell window and refused to uncover. Subject was given direction but physically uncooperative. OC deployed and physical handling required to gain control and apply cuffs.

[101] As with his other written report on the day of the incident, CO Talbot does not say anything here about Mr. Richards being threatening or aggressive towards the officers. Rather, the clear implication of both reports is that the OC spray and physical handling was used because Mr. Richards had failed to comply with directions from the officers.

[102] I find there to be material discrepancies between CO Talbot's trial testimony and his earlier accounts of the incident. I also find that the officer has now recast his explanation for the use of force because what he wrote in the earlier reports is obviously inconsistent with what the video recording depicts. Critically, the video recording clearly shows that Mr. Richards was given no time to comply with directions between when the door was opened and when the OC spray was deployed. The two things happened virtually simultaneously. This gives rise to serious concerns about the credibility of CO Talbot's trial testimony regarding Mr. Richards' demeanor when the door first opened.

[103] Second, in his trial testimony, CO Henderson describes Mr. Richards as moving rapidly towards the officers when the door was opened. Neither of the officers next to him (Talbot and Jobes) observed this. Moreover, CO Henderson does not say anything about Mr. Richards rushing towards the officers in his Statement/Observation Report on the incident (completed on October 4, 2013). Instead, he describes Mr. Richards as "standing in an aggressive stance and acting in an aggressive manner." No further details are provided in the report. CO Henderson acknowledged that this was "not as descriptive" as his testimony but he insisted he meant the same thing – that Mr. Richards had rushed towards the door. I am unable to accept this explanation for what I find to be a material discrepancy in his accounts. I find CO Henderson's testimony to be a significant embellishment of what he actually observed. It is also significant that the written report provides no details at all to support the bald assertion that Mr. Richards was "standing in an aggressive stance and acting in an aggressive manner" when the door opened. One is also left to wonder how CO Henderson even had the chance to form this impression in the split second between the door opening and the OC spray being deployed.

[104] For his part, CO Jobes testified that he was unable to see Mr. Richards when the door first opened. This is somewhat difficult to believe given that the video clearly shows him standing right at the doorway and pushing on the door to open it. On the other hand, given where he can be seen to be standing in the video recording, his view into the cell may well have been obstructed by the door frame. In any event, since he offers no evidence on what Mr. Richards was doing when the door first opened, his testimony provides no support for the accounts of the other officers.

[105] Third, CO Jobes testified that he recalls CO Talbot giving Mr. Richards directions before deploying the OC spray. This is inconsistent with the video recording. As well, this important detail is not mentioned in the Statement/Observation Report CO Jobes prepared about the incident on October 4, 2013. Indeed, this report is completely bereft of detail, stating only that CO Jobes was "involved in a spontaneous use of force" on Mr. Richards. For his part, CO Talbot, says nothing about giving Mr. Richards directions (apart from the direction to remove the covering from his cell window, which must have been given before the door was opened). For these reasons, I reject CO Jobes' evidence that directions were given to Mr. Richards after the cell door opened and before the OC spray was deployed.

[106] Fourth, as I have already indicated, both of the justifications for using the OC spray that emerge from the evidence of the Crown's witnesses (to deal with an apprehended threat and/or to bring Mr. Richards into compliance with directions from the officers) are belied by the video recording. The video clearly shows that the first burst of OC spray was discharged the very instant the cell door opened. The second followed immediately thereafter. I simply cannot accept that CO Talbot (the officer who discharged the OC spray) had the time to form the belief that Mr. Richards was "presenting" himself in a threatening or aggressive manner before he discharged the OC spray or that this use of force was otherwise justified by Mr. Richards' conduct or demeanor. Notably, CO Talbot never suggests that Mr. Richards was moving in any way – for example, that was rushing towards the officers. It is also patently obvious that, once the door was open, there was no time for any officer to give Mr. Richards directions, let alone for Mr. Richards to have an opportunity to comply, before the OC spray was discharged.

[107] Finally, there is the evidence of CO Gosselin. In his testimony in chief, CO Gosselin offered a clear and detailed account of the incident. With complete confidence, he described what had happened before the OC spray was deployed. He explained that he and CO Talbot had been working together on the lower level of the unit when they were asked to help with a situation on the upper range. When they got up there, another officer who was already at the cell door explained to them that the inmate (Mr. Richards) was refusing to uncover his cell door window. After numerous attempts to obtain compliance with the direction to remove the window covering, the officers finally opened the cell door. Mr. Richards was in a "combative stance." CO Talbot gave Mr. Richards multiple orders to present himself to be handcuffed (according to CO Gosselin, the "rule of thumb" is to repeat an order three times before escalating and CO Talbot did at least this) but Mr. Richards refused to comply. Only then was the OC spray deployed.

[108] CO Gosselin's testimony is remarkable for at least two reasons. One is that the incident occurred nearly eight years earlier yet the officer's (roughly) contemporaneous notes (a Statement/Observation Report dated October 4, 2013) include none of the details set out in the preceding paragraph.

[109] The other remarkable thing is that, despite the officer's obvious confidence in relating his account and his repeated emphasis that all proper procedures were followed, his testimony is inconsistent with the video in almost every material respect. Not the least of these inconsistencies is that the video shows that, contrary to what he testified to so clearly and confidently, the cell door was already open and the OC spray had already been deployed when

he arrived on the scene. Not to put too fine a point on it, I find that CO Gosselin's account of what happened before the OC spray was deployed is a complete fiction.

[110] Significantly, CO Gosselin acknowledged that he had not watched the video before testifying. I would not go as far as saying that he deliberately attempted to mislead the Court about what happened. However, I do find his testimony to be completely unreliable to the extent that it differs from the video (which it does in almost every material respect).

[111] All of these considerations leave me with serious doubts about the credibility and reliability of the evidence offered by the Crown's witnesses to justify the use of the OC spray; indeed, I reject that evidence in its entirety.

[112] On the other hand, Mr. Richards testified clearly and consistently about the moments immediately before and after the cell door opened. He was unshaken in cross-examination on these points. I can find no reason to disbelieve his account of what he was doing when the cell door first opened. I accept his evidence that he was not doing anything that warranted the discharge of the OC spray.

[113] In assessing Mr. Richards' credibility, I have taken into account that he has a criminal record: see *R v Corbett*, [1988] 1 SCR 670 at 685. The offences he committed are obviously serious. However, they are all very dated and none are offences of dishonesty. I find that his criminal record has no bearing on his credibility in any material respect.

[114] I pause at this point to note that in closing submissions counsel for the defendant did not seek to justify this use of force on the basis that it was necessary to bring Mr. Richards into compliance with directions from the officers. This is understandable given that this justification is completely inconsistent with what is clearly depicted in the video recording. Rather, the Crown rested this part of its defence entirely on CO Talbot's evidence that he perceived Mr. Richards to pose a threat to himself and the other officers when the door first opened. For the reasons set out above, I reject this justification for the use of force.

[115] I therefore find, on a balance of probabilities, that the use of force in the form of two discharges of OC spray by CO Talbot was entirely unjustified. It was an excessive use of force.

(b) *The Efforts to Subdue Mr. Richards*

[116] There is no dispute that when the officers entered Mr. Richards' cell, they used force to subdue and restrain him, including physical "handling", a third burst of OC spray, and handcuffs. There is also no issue that these actions were part of the same transaction that began with the initial discharges of the OC spray at the doorway.

[117] Mr. Richards testified that the officers subjected him to excessive physical force and to verbal abuse as they were subduing him inside his cell. For example, he alleges that his head was deliberately hit against the wall and that one of the officers deliberately stepped on the side of his face when he was laying on the floor. All the while, according to Mr. Richards, the officers were speaking to him in mocking tones, saying things like "What up son?" and "What up gangster?" Mr. Richards also alleges that OC spray was sprayed down the front of his shorts,

hitting his penis (although he acknowledges that he does not know if this was deliberate or accidental).

[118] All of the officers denied subjecting Mr. Richards to any form of gratuitous physical or verbal abuse inside the cell. They testified that they used only as much physical force as was necessary to gain control of Mr. Richards.

[119] My concerns with the credibility and reliability of the officers' evidence set out above carry over to their accounts of what happened in the cell. The absence of a video recording of events in the cell leaves the Court at a significant disadvantage in determining what happened. However, even if I were to reject the officers' denials (something I am strongly inclined to do), I would still be unable to resolve the disputed points in Mr. Richards' favour. This is because there is insufficient reliable evidence to support Mr. Richards' account of how he was mistreated. And that is primarily because the events Mr. Richards recounts all occurred after he was struck three times with OC spray at close range and while he was being violently set upon by the officers.

[120] OC spray causes intense discomfort. It makes it very difficult to breathe. It is intended to disorient and debilitate the person at whom it is directed. I have no doubt that the experience of suddenly being hit in the eyes and face by OC spray and then being set upon by four ERT officers was very traumatic for Mr. Richards. I find that he likely struggled with the officers as they attempted to gain control of him, a natural response in the circumstances. The officers were required to use a significant amount of force to subdue him. I accept that Mr. Richards honestly

believes that he was deliberately mistreated by the officers, that they used disproportionate and gratuitous force against him, and that they were verbally abusive as well. I also find, however, that Mr. Richards was not in a position to perceive events accurately at the time they were occurring because of the effects of the OC spray, the generally chaotic and traumatic circumstances that were prevailing at the time, and the anxiety he must have been experiencing. I find that his ability to recall these events accurately is similarly impaired.

[121] In reaching these conclusions, I have taken into account that Mr. Richards made a timely complaint of mistreatment when he was assessed by a nurse around 1:00 p.m. on the day of the incident. (This assessment is discussed further below.) Among other things, he reported that his head had been "bashed in." The nurse noted no signs of trauma to his head at that time. However, another medical assessment later that day (around 4:30 p.m.) by another health care practitioner noted a large lump on the right side of Mr. Richards' forehead.

[122] I have also taken into account that Mr. Richards made a similar complaint of a deliberately inflicted injury to his head (along with other mistreatment) when he was interviewed by Susan Dunne and Carolanne Coon on October 3, 2013. (Ms. Dunne and Ms. Coon were both managers at Springhill at the time. The purpose of the interview was to obtain Mr. Richards' version of the use of force incident.)

[123] For the sake of completeness, I note that the physical consequences of the use of force on Mr. Richards are also documented in health care notes on October 1, 2013 (including those relating to an emergency transfer to a local hospital that day to investigate Mr. Richards'

complaints of severe abdominal pain) and on October 13, 2013 (when Mr. Richards reported an ongoing burning sensation on his penis since the use of force incident).

[124] Mr. Richards' timely complaints of abusive treatment reinforce my view that he honestly believes he was mistreated by the officers in the ways he alleges. However, they cannot overcome the disadvantageous position in which he found himself when it came to accurately perceiving and recalling what happened during the critical moments of the incident.

[125] That being said, even though I am not satisfied that it was done deliberately, on the basis of his trial testimony and the corroborative medical notes, I do find that Mr. Richards suffered an injury to his head during the use of force incident. Whether he suffered the injury in his cell or (as discussed below) in the shower is immaterial because, in either case, it clearly occurred in the course of the same transaction that began with the discharge of the OC spray. However, as I have explained, there is insufficient reliable evidence to establish that the officers inflicted this injury deliberately or gratuitously.

[126] Finally in this connection, Mr. Richards recalls that, while he was being subdued in his cell, one or more officers frisk-searched his shorts. Mr. Richards also believes that it may have been at this point that OC spray was discharged onto his penis (although as I have already noted, he acknowledges that he cannot say whether this was deliberate or accidental). For their part, the officers agreed that it would be proper procedure in the circumstances to have done a pat down search for weapons; however, none of them had a clear, independent recollection of whether this

was done or, if it was done at all, where this happened (i.e. in the cell or in the corridor once Mr. Richards had been removed from his cell).

[127] While the evidence is somewhat equivocal about where and even if this happened, I find that the officers did do a quick pat down search of Mr. Richards' shorts before he was placed in the shower. Everyone appears to agree that this would have been done and Mr. Richards does recall it occurring at some point. I also find, based on the video recording, that this search probably took place in the corridor after Mr. Richards had been removed from his cell. The pat down search was part of a continuous transaction of physical handling by the officers. None of that physically handling should have occurred. However, I am unable to find that this particular intrusion on Mr. Richards' physical and personal integrity was exacerbated by the manner in which the search was conducted. Furthermore, while there is no dispute that OC spray was deployed a third time while Mr. Richards was being physically handled by the officers in his cell, I am unable to find that it was sprayed down his shorts deliberately.

[128] I accept Mr. Richards' evidence that his genitals were contaminated with OC spray and that this caused ongoing discomfort for several days. While there is insufficient evidence to find that this was done deliberately – as I have noted, Mr. Richards himself concedes that it may have happened accidentally – it is nevertheless the case that this was a significant adverse consequence of the unwarranted use of force.

[129] In sum, I find that the officers' physical handling of Mr. Richards in and immediately outside the cell is a continuation of the unlawful use of force that began with the discharge of the

OC spray at the cell doorway. The physical handling was *per se* excessive because it was entirely unwarranted (it having been precipitated by the unwarranted discharge of the OC spray). Given the manner in which this handling was done, this was a significant interference with Mr. Richards' physical and personal integrity. As a result of course of events over the entire incident up to this point, Mr. Richards suffered the significant but temporary discomfort caused by the OC spray and the general trauma (both physical and mental) of being handled violently by the ERT officers in his cell. He also suffered a not insignificant physical injury as a result of the use of force on him on September 30, 2013 – namely, an injury to his head that caused swelling (although not, fortunately, any long term damage). As I have said, I am unable to find, on a balance of probabilities, that the specific forms of intentional and gratuitous physical and verbal abuse Mr. Richards has alleged actually occurred. In particular, I am unable to find that the injury to his head was inflicted deliberately. Nevertheless, I underscore that this injury (like the contamination of his genitals) would never have occurred but for the unlawful use of force that began with the discharge of the OC spray.

[130] It also bears emphasizing at this point that a video recording of the use of force against Mr. Richards in his cell would have left little if any room for debate about how the officers had conducted themselves. Nevertheless, the situation escalated quickly and, as I have already stated, I do not fault the officers for not having a camera with them when the use of force incident began. Thus, it would not be appropriate to draw an adverse inference about the credibility of their accounts of what happened in the cell for this reason alone. However, even if I were to draw an adverse inference on this basis, this still would not provide a foundation for finding that the abusive conduct alleged by Mr. Richards actually occurred.

[131] There is an inescapable irony to this outcome given that Mr. Richards' compromised state while the officers engaged with him in his cell was the direct result of what I have found to be an unlawful use of force by those same officers – namely, the unjustified use of OC spray and physical handling. Nevertheless, this result must follow given that Mr. Richards bears the burden of proving the aggravating facts on which he relies on a balance of probabilities. For reasons entirely beyond his control, he is unable to discharge this burden with respect to his specific allegations of gratuitous mistreatment by the officers.

[132] Finally, it could be said that Mr. Richards bears some responsibility for what happened to him given that he had covered his cell door window and repeatedly triggered his cell alarm improperly. While this may be true, it does not mitigate the wrongfulness of the officers' conduct or the defendant's liability. Correctional officers – especially those assigned to Emergency Response Teams – must deal appropriately and lawfully with offenders, even when they are misconducting themselves. They must be held to account when they fail to do so.

(c) *The Decontamination Shower and Afterwards*

[133] There is no issue that, between 12:30:51, when he disappears off camera, and 12:41:58, when he reappears, Mr. Richards was placed in a shower on the upper range. Mr. Richards does not dispute that at least part of the reason the officers put him in the shower was to try to wash the OC spray off of him. He contends, however, that the course of gratuitous physical and verbal abuse that began in his cell continued in the shower. He was essentially helpless in the shower because his arms remained handcuffed behind his back. He claims that he was first doused with scalding hot water, then with cold water. He claims that the officers "bounced" his head off the

wall of the shower stall several times. He claims that the officers deliberately forced his head back so that water would run into his mouth and nose and make him feel like he was drowning. He also claims that as he was being taken to the segregation unit after the decontamination shower, officers threatened him with a beating.

[134] Based on the video recording and the officers' testimony, I find that three officers attended to Mr. Richards while he was in the shower: first Henderson and Gosselin, then Jobes (who spelled off Gosselin at some point). CO Talbot remained in the area of the shower (although not for the entire time). All the officers deny that Mr. Richards was mistreated in any way while he was in the shower. They testified that their only goal was to rinse off the OC spray and they did this as best they could in the circumstances. They agree that Mr. Richards remained handcuffed with his arms behind his back during the shower but maintain that this was a necessary safety and security precaution.

[135] I begin by noting that Mr. Richards was critical of the officers' decision to use the shower on the range to decontaminate him rather than taking him to a secure shower elsewhere in the institution, which would have permitted them to remove the handcuffs. I find, on the contrary, that this was a reasonable step in all the circumstances. Mr. Richards was continuing to experience the effects of the OC spray and it was reasonable for the officers to attempt to decontaminate him as promptly as possible. Indeed, the Commissioner's Directive dealing with the use of chemical and inflammatory agents (CD 567-4) provides that decontamination procedures should be followed "as soon as possible" after such agents are used. That being said,

of course this step would have been entirely unnecessary had OC spray not been unlawfully deployed against Mr. Richards in the first place.

[136] As noted above, the video recording establishes that two members of another ERT team escorted Mr. Richards from his range to the segregation unit after the decontamination shower. According to Mr. Richards, these officers threatened him with further physical harm. Neither of these officers testified in this proceeding. As a result, there is no evidence apart from Mr. Richards' testimony as to what happened when he was taken from his range to the segregation unit.

[137] For the reasons already stated in relation to what occurred in Mr. Richards' cell, I am unable to resolve the disputed claims about what happened in the shower and afterwards in Mr. Richards' favour. Indeed, the experience of finding himself in the shower could only have further disoriented and upset Mr. Richards, leaving him even less capable of providing a reliable account of what happened. The experience of having the OC spray washed out of his eyes and off his face while his arms were restrained behind his back must have been especially difficult to undergo. As I stated above, it is evident from the video recording that, even once he was out of the shower, Mr. Richards was still in significant distress.

[138] I would add this, however. CD 567-1, the Commissioner's Directive concerning the use of force that was in effect at the time, provided that a video recording "will be made . . . as soon as possible once a spontaneous use of force is underway" (paragraph 21(b)). This Directive also

provided (at paragraph 31) that any decontamination procedure following the use of chemical agents should be video recorded.

[139] By the time Mr. Richards was in the shower, there was simply no excuse for not having obtained a hand held camera to record what was happening, including the decontamination shower and Mr. Richards subsequently being escorted from his range to the segregation unit. There was ample opportunity and manpower to do so. On any reasonable understanding, the use of force event was still ongoing during this time. Cameras were available. As the Commissioner's Directive makes clear, they are meant to be used to record such incidents whenever it is possible to do so. There is a very good reason for this: a video recording can be the best evidence of what happened. Recording what was happening during the shower and subsequently would have provided a significant measure of protection for Mr. Richards and, frankly, for the officers too. It would also have left much less room for debate about what, exactly, had happened in the shower and afterwards.

[140] In closing submissions, counsel for the defendant characterized the failure to obtain a camera at this point as one of the more glaring policy violations in this case. I agree.

[141] In these circumstances, a negative inference about the credibility and reliability of the Crown's evidence concerning what happened in the shower and afterwards is warranted. But drawing this inference does not assist Mr. Richards' case when it comes to the aggravating circumstances he alleges. This is because rejecting the denial of an allegation of mistreatment does not create affirmative evidence that the mistreatment occurred. In the circumstances of this

case, that affirmative evidence had to come from Mr. Richards himself. And as I have explained, I am unable to find that he was in a position to provide sufficient reliable evidence to meet his burden of proof on these disputed aggravating facts.

[142] In sum, while I am unable to find that the specific forms of intentional physical and verbal mistreatment Mr. Richards alleges took place in the shower and afterwards occurred, I do find that the physical handling of him in the shower and afterwards, like the physical handling of him while he was still in his cell, was a continuation of the unlawful use of force that began with the discharge of OC spray at the cell door. Mr. Richards' liberty continued to be subject to significant restrictions. The physical handling of him in the shower was a significant intrusion on his physical and personal integrity. None of this would have happened but for the initial discharge of the OC spray. The entire course of conduct on the part of the ERT officers was completely unwarranted.

(3) The Post-Use of Force Medical Assessment

[143] The two unidentified ERT officers who took custody of Mr. Richards after the decontamination shower brought him directly to the Administrative Segregation Unit.

[144] A post-use of force health care assessment was conducted by Amanda Wood, a registered nurse employed by CSC, in the segregation unit. The Crown called Ms. Wood as a witness. As well, her nursing notes from the day in question were entered into evidence.

[145] Ms. Woods conducted her assessment at approximately 1:00 p.m. on September 30, 2013. As set out above, she noted Mr. Richards' complaints of mistreatment at the hands of the ERT officers but she did not observe any signs of physical injury. Arrangements were made for a further assessment in Health Services. This second assessment took place at approximately 4:30 p.m. on September 30, 2013.

[146] As required by CD 567-1, paragraphs 34-35, the post-use of force health care assessment conducted by Ms. Wood was recorded using a hand held video camera. While there does not appear to be any issue that the recording was done by an ERT officer, neither that officer nor their home institution has been identified (at least, not in any evidence before me).

[147] As I have already noted, the recording of the health care assessment was lost. No first hand evidence was presented at trial as to what, exactly, happened to the recording.

[148] The only explanation in the record for the loss of the recording is found in a report about the September 30, 2013, use of force incident prepared by Greg MacLeod, the Coordinator of Correctional Operations at Springhill. This report, which is dated October 18, 2013, explains the loss of the recording as follows:

> The health care assessment was conducted by Nurse A Wood on 2013-10-30 at 12:55. It however was not captured on video. Teams from Atlantic, Dorchester and Springhill were on site to assist in the Section 53 Search. Each institution uses different cameras and when our SMO [Security Maintenance Officer] tried to download the data it was lost. Infomatics were called in to assist but were unable to retrieve the data.

[149] Mr. MacLeod did not testify at the trial. As a result, there is no evidence about the sources of information on which he relied in making these statements in the report.

[150] Needless to say, the loss of the video recording of the health care assessment is very troubling. To repeat the obvious, there are very good reasons why a Commissioner's Directive requires that post-use of force health care assessments be videotaped. The recording that was made could have provided highly reliable evidence of Mr. Richards' physical and mental state and of the things he said immediately after the use of force incident. It would also have included Ms. Wood's verbal synopsis of the assessment as soon as she completed it: see CD 567-1, paragraph 32. In all the circumstances, one can certainly understand Mr. Richards' suspicion that someone with CSC destroyed the recording deliberately. There is, however, no evidence on which I could find that the loss of the recording was anything other than inadvertent.

[151] It is also important to note that Mr. Richards does not contest the completeness or accuracy of Ms. Wood's notes of the assessment or her trial testimony (which, given the passage of time, was based almost entirely on those notes in any event). If it were available, the video recording would certainly have provided a more detailed record of the health care assessment. It would also have provided highly probative evidence of Mr. Richards' physical and mental state at the time. However, in final analysis, that assessment is of limited relevance to the issues that have to be resolved in this case. To the extent that it is relevant to those issues, Ms. Wood's notes and her trial testimony provide a sufficient basis for any findings I must make. More generally, the loss of the video recording has not prejudiced Mr. Richards in any material way when it comes to demonstrating the impact of the use of force on him. This is because, on the

basis of the available evidence, I fully accept that the incident was highly traumatic and upsetting for him and that it caused temporary but serious physical injuries and discomfort.

E. *Mr. Richards' Legal Claims in Relation to the Use of Force on September 30, 2013*

(1) Private Law Claims

[152] As I will explain, on the basis of the findings of fact set out above, I am satisfied that Mr. Richards has established on a balance of probabilities that, on September 30, 2013, CSC employees committed the torts of battery and false imprisonment.

[153] The legal elements of these torts are not in dispute.

[154] A battery "is the intentional infliction of unlawful force on another person" (*Norberg v Wynrib*, [1992] 2 SCR 226 at 246). Mr. Richards has established that, from the outset of the incident beginning with the first discharge of the OC spray through to its conclusion with his placement in administrative segregation, ERT officers applied physical force to him. All of that force was applied intentionally. There is no suggestion that this force was not of such a nature as to otherwise constitute battery – for example, because it was *de minimis*: see *Non-Marine Underwriters, Lloyd's of London v Scalera*, [2000] 1 SCR 551 at para 16. The burden then shifts to the defendant to prove any defence it may have: *Scalera* at para 8.

[155] For its defence, the Crown relies on subsection 25(1) of the *Criminal Code*, RSC 1985, c C-46. When it applies, this provision provides peace officers with a defence to a claim of

battery: see *Fleming v Ontario*, 2019 SCC 45 at para 116 ("*Fleming SCC*"). However, peace officers cannot rely on subsection 25(1) to justify the use of force if they had no legal authority for their actions: see *Fleming SCC* at para 117. I find this to be the case here. The actions of the ERT officers lacked any legal justification and, in any event, the officers used more force than was necessary in the circumstances. I find that the discharge of the OC spray and the ensuing physical handling of Mr. Richards (including the decontamination shower) were not a reasonable and proportionate response to an apprehended threat posed by Mr. Richards because, as I have explained, I do not accept that he posed any threat whatsoever to the officers when they opened his cell door, nor do I accept their evidence that they perceived him to pose a threat. Accordingly, subsection 25(1) of the *Criminal Code* does not provide a defence. The tort of battery is therefore established. (To the extent that the elements of the distinct tort of assault may also be present, I find that they are entirely subsumed by the tort of battery.)

[156] Turning to false imprisonment, to establish this tort, Mr. Richards must first prove that he was deprived of his liberty against his will by the ERT officers. There is no issue that this was the case, beginning with the first physical handling of him in his cell and continuing until he was placed in administrative segregation. The onus thus shifts to the defendant to justify this deprivation of liberty. On the basis of the determinations set out above, I find that the Crown has failed to do so. Indeed, I find that the significant interference with Mr. Richards' liberty was entirely unjustified.

(2) Constitutional Tort Claims

[157] Mr. Richards contends that the conduct of the ERT officers violated several of his rights under the *Charter*. On the basis of the factual determinations set out above, I largely find in his favour in this regard.

[158] First, the significant force applied to Mr. Richards by the ERT officers violated his right not to be subjected to any cruel and unusual treatment guaranteed by section 12 of the *Charter*. The test for establishing a breach of section 12 is a "high bar" and "very properly stringent and demanding" (*R v Boudreault*, 2018 SCC 58 at para 45). It requires establishing that the punishment or treatment is not merely disproportionate or excessive but is so excessive as to "outrage standards of decency" and be "abhorrent or intolerable to society" (*Boudreault* at para 45). I am satisfied that the ERT officers' treatment of Mr. Richards from the beginning to the end of the use of force incident on September 30, 2013, meets this stringent test. Crucially, the use of pepper spray in the complete absence of any valid reason to do so is outrageous and abhorrent.

[159] Second, the unwarranted interference with Mr. Richards' liberty during the incident violated his right not to be arbitrarily detained guaranteed by section 9 of the *Charter*.

[160] The section 9 guarantee "expresses one of the most fundamental norms of the rule of law. The state may not detain arbitrarily, but only in accordance with the law" (*Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 88). In *R v Grant*, 2009 SCC 32, the Court

states that, broadly put, the purpose of section 9 of the *Charter* is "to protect individual liberty from unjustified state interference" (at para 20). Section 9 "guards not only against unjustified state intrusions upon physical liberty, but also against incursions on mental liberty by prohibiting the coercive pressures of detention and imprisonment from being applied to people without adequate justification" (*ibid.*). In *R v Le*, 2019 SCC 34, the Court explains that underlying this purpose "is an uncontroversial principle that is inherent in a free society founded upon the rule of law: '. . . government cannot interfere with individual liberty absent lawful authority to the contrary'" (at para 152, citation omitted).

[161] In *Kosoian v Société de transport de Montréal*, 2019 SCC 59, the Court also emphasizes that, in a society founded on the rule of law, "it is important that there always be a legal basis for the actions taken by police officers" (at para 38). In exercising their powers, "police officers are therefore bound by strict rules of conduct that are meant to prevent arbitrariness and unjustified restrictions on rights and freedoms" (*Kosoian* at para 39). Given the significant coercive powers exercised by correctional officers and other correctional authorities, these fundamental principles must apply equally to them. As Justice Dickson (as he then was) stated in *Martineau*, "The rule of law must run within penitentiary walls" (at 622).

[162] While liberty interests are necessarily attenuated for offenders detained in a penitentiary, they are far from extinguished: see *R v Miller*, [1985] 2 SCR 613 at 637. The interference with Mr. Richards' residual liberty interests by the ERT officers in the absence of lawful justification or authority meets the test for arbitrariness: see *Grant* at paras 55-57.

[163] Third, the unwarranted interference with Mr. Richards' liberty and security of the person during the incident also violated his right to liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice guaranteed by section 7 of the *Charter*.

[164] *Re BC Motor Vehicle* Act, [1985] 2 SCR 486, states that sections 8 to 14 of the *Charter* "are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice" (at 502). Thus, as *Grant* reiterates, the section 9 guarantee against arbitrary detention "is a manifestation of the general principle enunciated in s. 7 that a person's liberty is not to be curtailed except in accordance with the principles of fundamental justice" (at para 54). Almost by definition, then, an arbitrary detention such as occurred on September 30, 2013, is a limitation on liberty that is not in accordance with the principles of fundamental justice. Furthermore, the excessive use of force by the officers posed a very real threat to Mr. Richards' security of the person that was not in accordance with any principle of fundamental justice: see *R v Nasogaluak*, 2010 SCC 6 at para 38. Section 7 was therefore violated in this respect as well.

[165] Having found that none of the actions that occasioned these violations were authorized by law, the question of whether they may be justifiable limits on *Charter* rights under section 1 does not arise.

[166] On the other hand, I am not satisfied that Mr. Richards' rights under section 10 of the *Charter* were violated during the use of force incident, as he alleges in his amended statement of

claim. Mr. Richards led no evidence to support this allegation. This, in turn, may explain why the Crown did not engage with this claim either. In these circumstances, it is neither necessary nor appropriate to examine this issue further.

V. THE SEPTEMBER 30, 2013, PLACEMENT IN ADMINSTRATIVE SEGREGATION

A. *Introduction*

[167] Mr. Richards was formally admitted into administrative segregation at approximately 3:00 p.m. on September 30, 2013. He remained there until October 8, 2013, when he was released from administrative segregation and returned to general population following the Fifth Working Day Review. (Under paragraph 21(2)(a) of the *CCRR* in force at the time, the Segregation Review Board was required to conduct a hearing within five working days of an inmate's confinement in administrative segregation to determine whether continued confinement there was warranted.)

[168] Mr. Richards states that he was strip searched on arrival at the Administrative Segregation Unit. No one has suggested otherwise. It is not clear whether this strip search was video recorded, as required by CD 567-1, paragraphs 29-30. In any event, no such video recording was tendered in evidence at trial.

[169] The decision to place Mr. Richards in administrative segregation is documented in the "Involuntary Segregation Placement" report completed by Jeff Earle on September 30, 2013, and provided to Mr. Richards at the time.

[170] The legal authority cited to support the placement is paragraph 31(3)(a) of the *CCRA*. At the time, subsection 31(1) of the *CCRA* provided that the purpose of administrative segregation "is to maintain the security of the penitentiary or the safety of any person by not allowing an inmate to associate with other inmates." Subsection 31(3) provided as follows:

31(3) The institutional head may order that an inmate be confined in administrative segregation if the institutional head is satisfied that there is no reasonable alternative to administrative segregation and he or she believes on reasonable grounds that	**31(3)** Le directeur du pénitencier peut, s'il est convaincu qu'il n'existe aucune autre solution valable, ordonner l'isolement préventif d'un détenu lorsqu'il a des motifs raisonnables de croire, selon le cas :
(a) the inmate has acted, has attempted to act or intends to act in a manner that jeopardizes the security of the penitentiary or the safety of any person and allowing the inmate to associate with other inmates would jeopardize the security of the penitentiary or the safety of any person;	**a)** que celui-ci a agi, tenté d'agir ou a l'intention d'agir d'une manière compromettant la sécurité d'une personne ou du pénitencier et que son maintien parmi les autres détenus mettrait en danger cette sécurité;
(b) allowing the inmate to associate with other inmates would interfere with an investigation that could lead to a criminal charge or a charge under subsection 41(2) of a serious disciplinary offence; or	**b)** que son maintien parmi les autres détenus nuirait au déroulement d'une enquête pouvant mener à une accusation soit d'infraction criminelle soit d'infraction disciplinaire grave visée au paragraphe 41(2);
(c) allowing the inmate to associate with other inmates would jeopardize the inmate's safety.	**c)** que son maintien parmi les autres détenus mettrait en danger sa sécurité.

[171] The segregation placement report informed Mr. Richards that he had acted in a manner that jeopardized the security of the penitentiary or the safety of any person in the following way: "During meal delivery on 2013/09/30 by the ERT you became aggressive." This justification is repeated in several other CSC documents relating to Mr. Richards' placement in segregation.

[172] As set out above, I do not accept that Mr. Richards became aggressive with the ERT officers on September 30, 2013. On the contrary, I have found that the entire engagement between Mr. Richards and the ERT officers that day was precipitated by an unlawful use of force by the ERT. Thus, I do not accept that Mr. Richards acted in a manner that jeopardized the security of the penitentiary or the safety of any person warranting his placement in administrative segregation. On the other hand, it is clear that Mr. Richards was informed of the reason for his placement in administrative segregation. He was also informed of his right to retain and instruct counsel in connection with that placement.

B. *Mr. Richards' Legal Claims Regarding the Administrative Segregation Placement*

(1) Private Law Claims

[173] On the basis of the determinations set out above, I am satisfied that Mr. Richards has established on a balance of probabilities that his placement in administrative segregation from September 30, 2013, until October 8, 2013, constitutes the tort of false imprisonment. There is no issue that a placement in administrative segregation affects the residual liberty interest of a penitentiary inmate: see *Mission Institution v Khela*, 2014 SCC 24 at para 34. Further, for the reasons set out above, I find that the Crown has not established that this deprivation of liberty

was justified. On the contrary, given that it was precipitated by the unlawful conduct of the ERT officers, it was entirely unjustified.

[174] In his amended statement of claim, Mr. Richards also appears to allege that this placement in administrative segregation constituted a tort on the part of CSC more broadly – namely, misfeasance in public office. While it is far from clear whether Mr. Richards was still advancing this claim (in this particular respect, at least), I will address it nevertheless.

[175] Having regard to the elements of that tort (see *Odhavji Estate* at paras 22-32), I am not satisfied that it has been proven. As Justice Iacobucci explains in *Odhavji Estate* (at para 30), the underlying purpose of the tort is "to protect each citizen's reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions." A successful malfeasance claim "requires the plaintiff to establish that the public official engaged in deliberate and unlawful conduct in his or her capacity as a public official, and that the official was aware that the conduct was unlawful and likely to harm the plaintiff" (*Ontario (Attorney General) v Clark*, 2021 SCC 18 at para 22).

[176] In the present case, none of the required elements of the tort are present. To the contrary, I find that in all the circumstances it was reasonable for the officials responsible for placing Mr. Richards in administrative segregation and then keeping him there until he was returned to general population on October 8, 2013, to have relied on the information provided to them by the ERT officers about what had happened on September 30, 2013. While I have found that that placement was unlawful, the reasonable reliance of other CSC officials on information provided

by the ERT officers falls well short of what is required to establish the tort of misfeasance in public office.

(2) Constitutional Tort Claims

[177] For the same reasons as I have found that the placement in administrative segregation constituted the tort of false imprisonment, I also find that it violated Mr. Richards' rights under sections 7 and 9 of the *Charter*. There is no need to repeat the analysis under sections 7 and 9 set out in the preceding section in relation to the use of force incident. That analysis applies equally to the placement in administrative segregation.

[178] In the absence of any valid reason for this placement, it also violated Mr. Richards' rights under section 12 of the *Charter*. Placing an individual in administrative segregation for just over a week, not because of their own misconduct but because of the entirely unwarranted actions of correctional officers, is outrageous and abhorrent.

[179] Finally, the strip search of Mr. Richards upon his admission to the Administrative Segregation Unit violated his right to be secure against unreasonable search or seizure guaranteed by section 8 of the *Charter*. Strip searches are a significant invasion of privacy and are inherently humiliating and degrading for detainees; they also constitute significant injury to an individual's intangible interests, regardless of the manner in which they are carried out: see *R v Golden*, 2001 SCC 83, at paras 83 and 90; and *Vancouver (City) v Ward*, 2010 SCC 27 at para 64. This is true even in settings such as correctional institutions, where strip searches are undoubtedly more common than elsewhere.

[180] My finding that the strip search of Mr. Richards on September 30, 2013, was unreasonable and therefore contrary to section 8 of the *Charter* follows from my determination that there was no lawful basis to place Mr. Richards in administrative segregation in the first place. To be clear, the general practice of strip searching inmates when they are placed in administrative segregation is not in issue before me and I offer no comment on it.

VI. THE INVESTIGATION OF THE OCTOBER 2013 INCIDENT

A. *The Assault Allegation*

[181] On the evening of October 28, 2013, an inmate at Springhill Institution was physically attacked and seriously injured by several other inmates. The same inmate had been attacked the day before but was not injured. On the basis of information provided by confidential sources shortly after the incident, CSC concluded that there were grounds to believe that Mr. Richards had instigated the attacks. For his part, Mr. Richards adamantly denied any involvement. He maintained that the confidential sources had falsely implicated him in the attack in an effort to get him transferred out of Springhill.

B. *Administrative Segregation Placement at Springhill Institution*

[182] On the basis of information that he had had something to do with the attacks, Mr. Richards was placed in administrative segregation on October 29, 2013. The Involuntary Segregation Placement report authorizing this placement cites the following authority for taking this step:

> You are being placed in administrative segregation according to subsection 31(3)(a) of the Corrections and Conditional Release Act because there are reasonable grounds to believe: "that (i) the inmate has acted, has attempted to act or intends to act in a manner that jeopardizes the security of the penitentiary or the safety of any person, and (ii) the continued presence of the inmate in the general inmate population would jeopardize the security of the penitentiary or the safety of any person."

[183] I note that the authority cited there tracks the language of an earlier version of section 31 of the *CCRA*, one that had been repealed and replaced in June 2012 by the version set out in paragraph 170, above. Be that as it may, a close analogue to the authority cited in the placement decision is found in the version of paragraph 31(3)(a) of the *CCRA* in force at the material time (again, see paragraph 170, above). Thus, I am prepared to accept that, broadly speaking, the legal authority relied on for this placement was to protect the security of the institution or the safety of any person. Furthermore, as will be seen in a moment, CSC officials also acted out of concern to preserve the integrity of an investigation, another ground for placement in administrative segregation found in the version of section 31(3) of the *CCRA* in force at the time.

[184] The Involuntary Segregation Placement report goes on to explain the basis for the placement as follows:

> An initial review has indicated that you may have been involved in a serious assault on another inmate on the evening of 2013/10/28. There is an active investigation into this assault at the present time.
>
> Confinement to your Cell is not an option. If you have been involved in this serious assault, you would be able to continue with this type of assaultive behavior as you would have to leave your Cell to go for meals.
>
> Mediation into this serious assault is not an option as the victim was seriously injured and not all parties to this assault are known at this time.

> A change of Cell/Range/Unit is not an option as this would permit/allow you to continue with this assaultive behaviour.
>
> Your presence in the general population could interfere with the ongoing investigation.
>
> There is no alternative to segregation at this time.

[185] CSC records indicate that, by the next day (October 30, 2013), Mr. Richards was not considered "a main instigator" of the assault but his involvement continued to be investigated. The Fifth Working Day Review decision (dated November 4, 2013) states that although Mr. Richards "was not identified as a main instigator, there is security intelligence information suggesting he may have been involved" in the assault.

[186] A synopsis of information to be presented at Mr. Richards' 30 Day Segregation Review stated that, according to information gathered by the SIO Department, Mr. Richards had orchestrated the assaults on the other inmate. This view is reflected in other CSC documents, which state that shortly after the assault, the SIO Department concluded on the basis of information received from confidential sources that Mr. Richards was the "driving force" behind the assaults.

[187] CSC documents state that, according to Ardena Austin, the SIO responsible for the investigation, "the information gathered surrounding the assault (stabbing) on 2013-10-28 has been gathered from more than three sources that are deemed reliable by the SIO department." As disclosed to Mr. Richards at the time, the gist of this information was that he had manipulated other offenders by pitting them against one another and that he had directed others to assault the victim because of a "personal issue" with him. On the basis of this information, the SIO

believed Mr. Richards "to be the orchestrator of these assaults as a means to an end." It appears that the SIO Department had obtained the information from the confidential sources no later than November 3, 2013.

[188] In light of this information, Mr. Richards' Case Management Team (which included his parole officer) recommended that his security classification be increased to maximum and that he be transferred involuntarily to Atlantic Institution. It was also recommended that Mr. Richards be maintained in administrative segregation at Springhill until that transfer could occur. The latter recommendation was adopted in the 30 Day Review decision (dated November 28, 2013). (At the time, paragraph 21(2)(b) of the *CCRR* provided that the Segregation Review Board must conduct a hearing at least once every 30 days in relation to an inmate who remained involuntarily confined in administrative segregation.)

[189] As a result, Mr. Richards remained in administrative segregation at Springhill until his transfer to Atlantic Institution on December 12, 2013.

C. *Reclassification to Maximum Security/Transfer to Atlantic Institution*

[190] Shortly after Mr. Richards came under suspicion for his alleged involvement in the assault on the other inmate, CSC began taking steps to revise his security classification from medium to maximum. If approved, this would facilitate his transfer to Atlantic Institution, which was also being recommended.

[191] The basis for the reclassification and transfer recommendations is set out in an Assessment for Decision dated November 21, 2013, prepared by Mr. Richards' parole officer at Springhill, Renee Henderson. As she explained in that report, although Mr. Richards continued to be rated as medium security on CSC's Security Reclassification Scale, his score fell within the range for a discretionary override that would permit him to be classified as maximum security instead of medium. Ms. Henderson recommended this override on the basis of the information from the SIO Department about Mr. Richards' alleged involvement in the attacks on the other inmate. Ms. Henderson also recommended that he be transferred involuntarily to Atlantic Institution as a result of this reclassification. In particular, she was of the view that Mr. Richards' involvement in the assaults on the other inmate pointed to high institutional adjustment risk factors that warranted maximum security classification and an involuntary transfer despite his otherwise being rated as medium security.

[192] The reclassification to maximum security and the involuntary transfer to Atlantic Institution were approved in early December 2013.

[193] Mr. Richards was transferred to Atlantic on December 12, 2013. He was held initially in what is referred to there as the Orientation Range, a placement that in practice involved conditions not unlike those in administrative segregation.

[194] Mr. Richards was eventually approved for placement in what is referred to at Atlantic as "open" population (as opposed to "general" population, which had a different meaning at Atlantic compared to other institutions). Mr. Richards refused this placement, being of the view

that he did not fit the profile of open population offenders in that institution given that he had been erroneously reclassified as maximum security and that "open" offenders at Atlantic were often sex offenders. As a result of this refusal, Mr. Richards was placed in administrative segregation on January 16, 2014. He remained there until his transfer to Dorchester Institution on April 9, 2014.

D. *Restoration of Medium Security Classification/Transfer to Dorchester Institution*

[195] In her April 2, 2014, decision, the *habeas corpus* application judge concluded that the decision to increase Mr. Richards' security classification from medium to maximum was unlawful. She therefore ordered that, until further reviewed, Mr. Richards' security classification "reverts to medium" and that CSC "must arrange for Mr. Richards to be returned to a medium security institution forthwith" (at para 8).

[196] As a result of this decision, CSC began making arrangements to transfer Mr. Richards from Atlantic Institution to a medium security institution. These arrangements will be described further below.

[197] Mr. Richards was transferred involuntarily to Dorchester Institution on April 9, 2014.

E. *The Findings of the* Habeas Corpus *Application Judge*

[198] For the application judge, the sole issue to be determined in the *habeas corpus* application was whether the deprivation of Mr. Richards' residual liberty interest resulting from

his increased security classification and the ensuing involuntary transfer from Springhill to Atlantic was lawful. She concluded that it was not. More particularly, she found that the reclassification and transfer decisions were unreasonable and were made in breach of the requirements of procedural fairness.

[199] The application judge found that central to CSC's decision to reclassify Mr. Richards was the belief that he had orchestrated the attacks on the other inmate. Indeed, at the hearing of the *habeas corpus* application, Mr. Richards' parole officer, Ms. Henderson, agreed that, but for this belief, Mr. Richards' security classification would not have been increased.

[200] Notably, the application judge was provided with a confidential affidavit from Ms. Henderson. That affidavit included the investigative reports that the SIO, Ms. Austin, had gathered and relied upon to conclude that Mr. Richards had orchestrated the attacks.

[201] The application judge found that it appeared that Ms. Austin had "wrapped up" her investigation on or about November 7, 2013. (This conclusion is consistent with the evidence before me.) The application judge also noted that Ms. Henderson had no first-hand knowledge of the incident. Ms. Henderson's beliefs about Mr. Richards' involvement were based entirely on the information provided to her by Ms. Austin.

[202] The application judge concluded that Mr. Richards was not afforded procedural fairness in connection with the reclassification and transfer decisions, principally because CSC failed to disclose all the information he required in order to know and meet the case against him. The

application judge also found that CSC had breached Mr. Richards' right to counsel in connection with the reclassification and transfer decisions.

[203] The application judge also concluded that there was no reasonable basis for increasing Mr. Richards' security classification and then transferring him to a maximum security institution. I would summarize her central findings in this regard as follows:

- The reclassification and transfer decisions depended on the information from the SIO, Ms. Austin, concerning Mr. Richards' alleged involvement in the attacks on the other inmate.

- The information from Ms. Austin depended heavily on information provided by confidential sources.

- Ms. Austin failed to take reasonable and necessary steps to verify the information provided by the confidential sources. She simply presumed they were reliable because they had provided reliable information in the past. She did not know (because she did not ask) on what basis the sources had formed the opinion that Mr. Richards was behind the attacks on the other inmate. She did not even know (because she did not ask) whether the sources had first-hand knowledge of the matter or had learned of it in some other way.

- CSC failed to pursue potentially exculpatory information and evidence that Mr. Richards had alerted it to very early in the decision-making process.

- The information in the confidential affidavit from Ms. Henderson (which included the SIO reports of information provided by the confidential sources) is insufficient to reliably ground the allegations against Mr. Richards.

- In short, there were "simply too many material shortcomings in the decision making process" such that "the decision is unreasonable and therefore unlawful."

[204] As discussed above, the Crown does not take issue with these findings in the present action. In view of this, I adopt these findings as my own.

F. *Mr. Richards' Legal Claims Relating to the Investigation of the Assault Allegation*

(1) Private Law Claims

[205] Mr. Richards contends that the flawed investigation of the assault allegation constituted the tort of negligent investigation as defined in *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 ("*Hill*"). While the Crown does not admit that this tort has been made out, it acknowledges very fairly that it is open to me to map the findings of the *habeas corpus* application judge onto the elements of that tort. Doing so, I am satisfied that all of those elements have been established and, accordingly, I find in Mr. Richards' favour.

[206] First, given its role in investigating allegations against offenders and the potential ramifications of adverse findings, I find that the SIO Department, including Ms. Austin, owed Mr. Richards a duty of care. The Court's findings in this regard in *Hill* with respect to police officers apply equally here: see paras 19-65.

[207] Second, the standard of care is that of a reasonable SIO in all the circumstances (cf. *Hill* at para 73). I find that the investigation of the assault allegation fell below this standard. It is not necessary to catalogue all the flaws in the investigation. It suffices to highlight one of the critical failings identified by the *habeas corpus* application judge – namely, the complete failure to verify the information provided by the confidential sources. There can be no question that when prison authorities rely on information from confidential sources to make decisions that have a significant adverse impact on an offender, they must verify the information being relied upon: see *Khela* at para 88. That did not happen here. This was not a minor error or a mere error in judgment.

[208] Third, Mr. Richards suffered compensable damage that is causally connected to the breach of the standard of care owed to him. The wrongful deprivation of liberty "has been recognized as actionable for centuries and is clearly one of the possible forms of compensable damage that may arise from a negligent investigation" (*Hill* at para 91). This is equally true of the wrongful deprivation of the residual liberty of inmates in a correctional institution: see *Hill v British Columbia*, 1997 CanLII 4136, 148 DLR (4th) 337 (BCCA) at paras 18-19 and the cases cited therein. As I will explain, I find that this wrongful deprivation occurred in relation to part of Mr. Richards' placement in administrative segregation at Springhill and the entirety of his time at Atlantic but not his time at Dorchester.

[209] Looking first at the administrative segregation placement, to repeat, a placement in administrative segregation affects the residual liberty interest of a penitentiary inmate (*Khela* at para 34). Mr. Richards was placed in administrative segregation on October 29, 2013, because

of information that he had been involved in a serious attack on another inmate the day before. This information came from confidential sources who the SIO Department considered to be reliable based on past experience. In my view, it was not unreasonable for CSC to place Mr. Richards in administrative segregation on the basis of that information. Put another way, Mr. Richards has not persuaded me that the investigation up to that point breached the standard of care owed to him. Given the exigencies of the situation, including the need to preserve security in the institution and to protect the integrity of the investigation, it was reasonable for CSC to act on the basis of information that was considered *prima facie* reliable. As stated above, the standard of care was breached by the failure to take any steps to verify the information provided by the confidential sources. That failure manifested itself only with the passage of time.

[210] The *habeas corpus* application judge found that the SIO Department investigation was concluded on or about November 7, 2013. In light of this, I find that by that date, the SIO Department must be taken to have decided that nothing would be done to verify the information provided by the confidential sources. Consequently, it is at this point that, in connection with the placement in administrative segregation, Mr. Richards begins to suffer compensable damage that is causally connected to the breach of the standard of care owed to him. Put another way, I find that, but for the negligent investigation, Mr. Richards would not have continued to be held in administrative segregation at Springhill after November 7, 2013. He continued to suffer this particular injury until he was transferred to Atlantic on December 12, 2013.

[211] The flawed investigation of the assault allegation also led directly to his reclassification and transfer to a maximum security institution. Mr. Richards has established that, but for the negligent investigation, he would not have been reclassified and transferred.

[212] A transfer to a higher security institution affects an offender's residual liberty interest: see *May v Ferndale Institution*, 2005 SCC 82 at paras 76-77, and *Khela* at paras 34 and 74. This sacrifice of Mr. Richards' liberty interests constitutes compensable damage. Mr. Richards' liberty interests were further adversely affected by his placements at Atlantic – first in the Orientation Range, then in administrative segregation. I do not find that the nexus to the flawed investigation was severed by the fact that Mr. Richards refused to enter open population at Atlantic. That he was even required to make this choice is a direct consequence of CSC's flawed investigation; he should never have been put in this position. It is only fair that CSC be held responsible for this.

[213] On the other hand, I do find that the nexus between the flawed investigation and the adverse impacts on Mr. Richards' liberty interests was severed with the favourable *habeas corpus* ruling. While that ruling could not undo what had already happened, it did reset the conditions of Mr. Richards' detention in a legally significant way. Thus, under this head of liability, the period during which Mr. Richards suffered compensable damage attributable to the flawed investigation covers the entirety of his time at Atlantic but it does not extend to his placement at Dorchester.

[214] The deficiencies of the assault investigation also entail that the ensuing interferences with Mr. Richards' residual liberty interests (his placement in administrative segregation at Springhill and his transfer to Atlantic) are unjustified. As a result, there is a basis to conclude that the tort of false imprisonment has been established in these respects as well. In the particular circumstances of this case, however, I find that this tort is largely if not entirely duplicative of the tort of negligent investigation given that the injury in question is a loss of liberty.

[215] Finally, Mr. Richards contends that the flawed assault investigation also constituted the tort of misfeasance in public office. Once again, I am not satisfied that the elements of this tort have been established. While the investigation was certainly flawed in the ways identified by the *habeas corpus* application judge (whose findings I have adopted as my own), there is no basis on which to find that the responsible parties intentionally injured Mr. Richards through deliberate unlawful conduct in the exercise of their public functions.

(2) Constitutional Tort Claims

[216] Mr. Richards' rights under sections 7 and 9 of the *Charter* were engaged by his placement in administrative segregation at Springhill. For the reasons set out above, I am satisfied that the placement from October 29, 2013, until November 7, 2013, was lawful. Consequently, that part of the placement did not violate his rights under sections 7 or 9 of the *Charter*. However, from November 7, 2013, onwards, the administrative segregation placement was the result of the seriously flawed assault investigation and, as such, was arbitrary in the requisite sense. Applying the general principles set out above, I find that this part of the placement violated both sections 7 and 9 of the *Charter*.

[217] There is no evidence that Mr. Richards was strip searched when he returned to the Administrative Segregation Unit. In any event, given that the initial placement was lawful, and in the absence of any legal challenge to the general practice of strip searching offenders upon admission into administrative segregation, if he was in fact strip searched, I would find that this did not infringe section 8 of the *Charter*.

[218] Mr. Richards' rights under sections 7 and 9 of the *Charter* were engaged by the reclassification and transfer decisions: see *Khela* at para 57. Given its connection to the flawed assault investigation, his transfer to Atlantic Institution violated sections 7 and 9 of the *Charter*. In reaching this conclusion, once again I rely on the general principles concerning sections 7 and 9 set out above.

[219] Furthermore, as I have already discussed, the defendant does not contest that prolonged placements in administrative segregation (i.e. longer than 15 days) violate sections 7 and 12 of the *Charter*. I find that Mr. Richards was placed in administrative segregation for two prolonged periods – from October 29, 2013, until December 12, 2013, at Springhill; and from January 16, 2014, until April 9, 2014, at Atlantic. Thus, I find that during these periods his rights under sections 7 and 12 of the *Charter* were violated independent of any connection to the flawed investigation.

[220] Moreover, I find on the evidence before me that there was no material difference between the conditions in administrative segregation and the conditions in the Orientation Range at Atlantic, where Mr. Richards was held from December 12, 2013, until January 16, 2014.

Accordingly, I find that the period of time during which Mr. Richards was held in the Orientation Range violated his rights under section 12 of the *Charter*. On the other hand, the section 7 violation conceded by the Crown relates to the lack of effective review mechanisms for placements in administrative segregation. There is no basis to find that the placement in the Orientation Range suffered from the same defects. Consequently, I do not find that that placement violated section 7 of the *Charter*.

[221] Finally, it is in connection with the investigation of the assault allegation that Mr. Richards alleges that CSC officials engaged in religious profiling of him that violated his rights under subsections 2(b) and 15(1) of the *Charter*. As I stated at the outset, I can find no evidence that this was the case. It is true that aspects of Mr. Richards' religiosity and his practice of the Islamic faith were of interest to CSC at the initial stages of the investigation. It is also true that some of the comments recorded in CSC documentation reflect a degree of stereotypical thinking. Nevertheless, I find that there was a reasonable basis for Ms. Ardern to be concerned about a potential nexus between the assaults and Mr. Richards' involvement with other Muslim inmates (some of whom were involved in the assault on the other inmate), that she conducted a *bona fide* investigation of this potential connection, and that she gave full weight to the insights of the Muslim chaplain at Springhill – insights that, on balance, were favourable towards Mr. Richards. Concerns about Mr. Richards' religious beliefs and practices then played no further role in the investigation.

VII. THE TRANSFER TO DORCHESTER INSTITUTION

A. *Introduction*

[222] As set out above, as a result of the April 2, 2014, decision allowing the *habeas corpus* application, Mr. Richards' security classification reverted to medium. As well, CSC was ordered to arrange for his return to a medium security institution forthwith.

[223] CSC decided not to return Mr. Richards to Springhill. Instead, over his objection, it decided to transfer him to Dorchester Penitentiary. When he learned that this was being considered, Mr. Richards requested that, if he were to be transferred to Dorchester, he be placed in administrative segregation immediately. He made this request because of his concern that he did not fit the usual profile of offenders at that institution (a large number of whom were sex offenders) and because of the stigma that he believed would be associated with being placed among them given that he himself was not a sex offender.

[224] Mr. Richards was transferred involuntarily to Dorchester on April 9, 2014. As he had requested, he was immediately placed in administrative segregation. He remained in administrative segregation at Dorchester until he was transferred voluntarily to Matsqui Institution on September 22, 2014.

B. *Mr. Richards' Legal Claims Relating to Dorchester Institution*

[225] Mr. Richards was held in administrative segregation at Dorchester from April 9, 2014, until September 22, 2014.

[226] As discussed above, I find that his detention at Dorchester falls outside the scope of that for which the Crown is liable due to the negligent investigation into the assault allegation.

[227] Furthermore, since Mr. Richards was placed in administrative segregation at Dorchester at his own request, I find that the defendant has discharged its burden of demonstrating that this restriction on his liberty was justified. As a result, Mr. Richards has failed to establish the tort of false imprisonment in respect of that placement.

[228] I also find that the elements of the tort of misfeasance in public office have not been established in connection with the decision to transfer Mr. Richards to Dorchester. While Mr. Richards disagreed strongly with that decision, and while his objections may very well have been well-founded, there is no basis whatsoever on which to find that the responsible parties intentionally injured Mr. Richards through deliberate and unlawful conduct in the exercise of their public functions. In any event, to the extent that Mr. Richards objected to the transfer decision, this is properly the subject of an offender grievance, not a tort claim.

[229] On the other hand, given the Crown's concession, I do find that the prolonged period in administrative segregation at Dorchester violated Mr. Richards' rights under sections 7 and 12 of the *Charter.*

[230] Mr. Richards contends that while he was in administrative segregation at Dorchester he was subjected to a course of verbally abusive treatment by one guard in particular. The Crown does not contest that Mr. Richards was subjected to unprofessional treatment by that guard. The Crown contends, however, that this was properly and fully dealt with through grievances and complaints brought by Mr. Richards.

[231] As I have already stated, I agree that the distinct claims Mr. Richards advances in connection with his mistreatment while at Dorchester do not fall within the proper scope of this action. That being said, I do not understand the Crown to dispute that Mr. Richards' very unfortunate experiences while in administrative segregation at Dorchester are relevant to the determination of any *Charter* damages the Court may see fit to award in that connection. I agree that this is the proper approach.

VIII. REMEDIES

A. *Introduction*

[232] There is no issue that the defendant is vicariously liable for the wrongful conduct I have found was committed by CSC employees. More particularly, there is no issue that the defendant is liable for the private and/or public law harms I have concluded were inflicted on Mr. Richards

over the course of four distinct series of events: (1) the September 30, 2013, use of force incident; (2) the placement in administrative segregation at Springhill from September 30, 2013, until October 8, 2013; (3) the assault investigation and its consequences; and (4) the placement in administrative segregation at Dorchester from April 9, 2014, until September 22, 2014.

[233] The principal remedy Mr. Richards seeks is monetary damages for the private law wrongs he suffered as well as for the violations of his *Charter* rights. I will consider first the appropriate awards for the private law causes of action that have been established and then turn to the question of *Charter* damages.

B. *Private Law Damages*

(1) General Damages

(a) *The September 30, 2013, Use of Force Incident*

[234] The defendant submits that, if it is found liable in relation to the September 30, 2013, use of force incident, an award of $5,000 would be appropriate. I do not agree.

[235] In my view, the circumstances of *Fleming v Ontario*, 2016 CarswellOnt 22152 (SCJ) ("*Fleming*"), are much more analogous to the present matter than the cases relied on by the defendant to support its position. This is the trial level decision in *Fleming SCC*, cited above. The Supreme Court of Canada overturned the Court of Appeal for Ontario and restored the trial judge's findings of liability in favour of the plaintiff. The quantum of damages awarded by the

trial judge for both private and public long wrongs was not addressed by either the Supreme Court of Canada or the Court of Appeal for Ontario.

[236] In *Fleming*, the trial judge found that the plaintiff had been unlawfully arrested by police officers when they pre-emptively prevented him from taking part in a counter-demonstration relating to an Aboriginal land claim dispute in Caledonia, Ontario. Having seen the plaintiff holding a Canadian flag and walking towards the disputed land (which at the time was occupied by Aboriginal individuals and their supporters), several officers arrested him and wrestled him to the ground. While he was being held face down on the ground, the plaintiff's hands were handcuffed behind his back. He was then placed in a police transport van and taken to the local police detachment, where he was placed in a holding cell. The plaintiff was charged with obstructing a peace officer (a charge that was later withdrawn by the Crown). The plaintiff was released from custody approximately four and a half hours after his arrest. Among other things, he suffered a long-term injury to his elbow as a result of being taken to the ground by the officers.

[237] The trial judge found that the plaintiff had been arrested in the absence of any lawful authority. The Supreme Court of Canada agreed: see *Fleming SCC* at paras 101-102. Accordingly, the trial judge found that the arresting officers had committed the private law torts of battery and false imprisonment. Based on all the circumstances, including the plaintiff's injuries and the overall impact of the wrongful conduct on him, the trial judge awarded general damages of $80,000 for the tort of battery. She also awarded $10,000 for the tort of false imprisonment.

[238] I find the trial judge's assessment of the seriousness of the police misconduct at issue in *Fleming* to be very similar to my findings regarding the conduct of the ERT officers in the present case.

[239] In assessing the appropriate quantum of damages, I have also considered *Kosoian*. Although it was a claim for damages under the Quebec Civil Code and in this important respect is distinguishable from the present case, I nevertheless find it to be of some assistance.

[240] In *Kosoian*, the plaintiff was arrested by the police for failing to hold the handrail while descending an escalator in a subway station. After she refused to follow a verbal direction from an officer to hold the hand rail, the officer demanded the plaintiff's identification. When she refused to identify herself, two police officers took the plaintiff by the elbows and led her to a secure room in the subway station. When she continued to refuse to identify herself, the police officers handcuffed the plaintiff with her arms crossed behind her back and forced her to sit in a chair. They searched the plaintiff's handbag without her consent. The officers served the plaintiff with statements of offence for disobeying a pictogram indicating that the handrail should be held and for obstructing the police officers in their duties (she was later acquitted of these charges). The police officers released the plaintiff after approximately 30 minutes.

[241] The plaintiff brought an action for private law damages for her unlawful arrest and detention. The courts below rejected her claims, finding that the defendants had not incurred any civil liability for their actions. The Supreme Court of Canada reached a different conclusion,

finding in favour of the plaintiff because the officers had arrested and detained her in the absence of any lawful authority. The Court awarded the plaintiff damages in the amount of $20,000.

[242] In awarding damages to the plaintiff, Justice Coté stated the following for the Court:

> In a free and democratic society, no one should accept — or expect to be subjected to — unjustified state intrusions. Interference with freedom of movement, just like invasion of privacy, must not be trivialized. When she took the escalator in the Montmorency subway station that evening, Ms. Kosoian certainly did not expect to end up sitting on a chair in a room containing a cell with her hands cuffed behind her back, nor did she expect to have her personal effects searched by police officers. I have no difficulty believing that such an experience caused her significant psychological stress.
>
> (*Kosoian* at para 139)

[243] The Crown cites the awards in *Berketa v Regional Municipality of Niagara Police Services* Board, 2008 CanLII 2147 (Ont. SCJ) ($25,000) and *Crampton v Walton*, 2005 ABCA 81 ($20,000) as indicative of the high end of the range of damages awarded in circumstances similar to those of the present case.

[244] While I agree that there are some similarities between those cases and the present one, there are also many important differences. I find that in the present case there are significant distinguishing features that warrant a quantum of damages greater than was awarded in the cases relied on by the Crown, an award that falls closer on the scale to the damages awarded in *Fleming*. It is also noteworthy that, despite lacking many of the aggravating features present in *Berketa* and *Crampton*, the award in *Kosoian* is not dissimilar to the awards in those cases. This suggests that the scale of appropriate damages is higher than the Crown submits.

[245] There is no need to repeat all of my findings above concerning the conduct of the ERT officers and its impact on Mr. Richards. Having regard to all of the relevant considerations, including the quantum of awards in comparable cases, I find that damages in the amount of $50,000 for the tort of battery are appropriate. Mr. Richards' status as an offender serving a sentence in a federal penitentiary does not lessen in any way his personal right to be free of unwarranted state interference with bodily and personal integrity or his entitlement to appropriate damages for such an intrusion. Even though he did not suffer lasting physical injuries, I find that the clear lack of legal authority to use force on Mr. Richards and the sustained and significant intrusion on his bodily and personal integrity are especially important considerations justifying this award.

[246] Turning to the tort of false arrest, there is substantial if not complete overlap between this tort and the tort of battery. Accordingly, I would award aggregate damages in relation to both torts of $50,000.

[247] In making this award, I have taken into account the aggravating features of this case. As I have explained above, I found that Mr. Richards could not prove many of the aggravating circumstances he alleged. Nevertheless, I do find certain aggravating circumstances to be present. In particular, I find that the battery and false arrest occurred in humiliating and undignified circumstances: see *Norberg* at 263. This is apparent from the video recording alone.

[248] In fairness to the other officers, for the most part, they were simply responding to a situation that was precipitated unnecessarily by the unwarranted discharge of pepper spray by

CO Talbot. The entire use of force incident could have been avoided if CO Talbot had not acted as he did. The conduct of all of the officers is therefore inextricably connected to this initial unlawful act by CO Talbot. The discharge of the OC spray was a significant harm in and of itself. The actions of the other officers compounded this injury and added new ones. Mr. Richards is entitled to be compensated appropriately for the serious adverse impacts of the entire use of force incident.

(b) *The Placement in Administrative Segregation at Springhill from September 30, 2013, until October 8, 2013*

[249] Following his placement in administrative segregation on September 30, 2013, Mr. Richards remained there until October 9, 2013, when he was returned to general population. This was solely and directly the result of the unwarranted use of force on Mr. Richards by the ERT officers. It was a significant intrusion on his liberty interests. I also accept that the placement in administrative segregation must have had adverse psychological effects on Mr. Richards, certainly while it was ongoing and likely afterwards as well.

[250] Having regard to all the relevant considerations, an award of $7,500 for the tort of unlawful imprisonment in this respect is appropriate.

(c) *The Assault Investigation and Its Consequences*

[251] As a result of CSC's negligent investigation into his alleged involvement in the October 2013 assault on another inmate, Mr. Richards was wrongfully held in administrative segregation at Springhill from November 7, 2013, until December 12, 2013; he was wrongfully

reclassified from medium security to maximum security; he was wrongfully transferred from Springhill to Atlantic; and he was wrongfully held at Atlantic from December 12, 2013, until April 9, 2014. While at Atlantic, he was held first in the Orientation Range before being placed in administrative segregation. As I have noted, conditions in the Orientation Range are not significantly different from those in administrative segregation.

[252] Throughout this entire five month period, Mr. Richards suffered significant deprivations of liberty and serious disruptions to his life. It is beyond dispute that these placements must have had a significant adverse psychological impact on him, at least while they were ongoing and likely afterwards too. CSC's negligence caused profound and prolonged harm to Mr. Richards.

[253] In determining the appropriate award for the wrongs inflicted on him during this period of time, I have considered that Mr. Richards has already been granted a significant form of relief through his successful application for *habeas corpus*. As a result of that application, his medium security classification was restored and he was transferred out of Atlantic. On the other hand, the relief granted in the *habeas corpus* application does not address in any way the administrative segregation placement at Springhill or the conditions of detention at Atlantic.

[254] Having regard to all the relevant considerations, an award of $75,000 for the tort of negligent investigation is appropriate. Since there is substantial if not complete overlap between the tort of negligent investigation and the tort of false imprisonment in this regard, I would award aggregate damages in the amount of $75,000 for both torts.

(2) Special Damages

[255] The evidence suggests that Mr. Richards lost employment income when he was placed in administrative segregation at Springhill and as a result of being transferred to Atlantic, where he was also placed in administrative segregation. While I do not doubt that this was the case, this loss has not been quantified in any way. There is no evidence of any other pecuniary losses or expenses incurred by Mr. Richards as a result of the defendant's wrongful conduct. Consequently, I find that there is no basis on which to make an award of special damages.

(3) Punitive Damages

[256] Unlike compensatory damages, which are awarded primarily to compensate a plaintiff for pecuniary and non-pecuniary losses suffered as a result of the defendant's conduct, punitive damages are designed to serve the purposes of retribution, deterrence, and denunciation: see *Whiten v Pilot Insurance Co*, 2002 SCC 18 at para 43; *Fidler v Sun Life Assurance Co of* Canada, 2006 SCC 30 at para 61; and *de Montigny v Brossard (Succession)*, 2010 SCC 51 at paras 51-52. To attract punitive damages, "the impugned conduct must depart markedly from ordinary standards of decency" (*Fidler* at para 62). Punitive damages are the means by which the court "expresses its outrage at the egregious conduct of the defendant" (*Hill v Church of Scientology*, [1995] 2 SCR 1130 at para 196). They "straddle the frontier between civil law (compensation) and criminal law (punishment)" (*Whiten* at para 36). Punitive damages are to be awarded against a civil defendant only "in exceptional cases for malicious, oppressive and high-handed misconduct that offends the court's sense of decency" (*Whiten* at para 36, internal quotation marks removed). They are warranted only where "the combined award of general and

aggravated damages would be insufficient to achieve the goal of punishment and deterrence" (*Hill* at para 196).

[257] Apart from the conduct of the ERT officers on September 30, 2013, none of CSC's conduct that has given rise to liability comes close to meeting this threshold. As for the ERT officers, while their misconduct was very serious (a point I will return to below), I am not satisfied that it meets the very high threshold warranting punitive damages.

C. *Damages as a* Charter *Remedy*

(1) General Principles

[258] Subsection 24(1) of the *Charter* provides that anyone whose *Charter* rights 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." As was observed in *Mills v The Queen*, [1986] 1 SCR 863 at 965, "It is difficult to imagine language which could give the court a wider and less fettered discretion" to craft individual remedies for *Charter* breaches. Indeed, the provision confers "the widest discretion on a court to craft remedies for violations of *Charter* rights" (*R v 974649 Ontario Inc*, 2001 SCC 81 at para 18). Subsection 24(1) "guarantees that rights are upheld by granting effective remedies to claimants, and is crucial to the overall structure of the *Charter* because a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach" (*Henry v British Columbia (Attorney General)*, 2015 SCC 24 at para 64, internal quotation marks removed).

[259] *Ward* established a four step analysis for determining when monetary damages are an appropriate and just remedy for a *Charter* violation.

[260] First, the claimant must establish that a *Charter* right has been breached. "This is the wrong on which the claim for damages is based" (*Ward* at para 23).

[261] Second, the claimant must show why damages are an appropriate and just remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication, and deterrence. Achieving one or more of these objects "is the first requirement for 'appropriate and just' damages under s. 24(1) of the *Charter*" (*Ward* at paras 25 and 31).

[262] The function of compensation "recognizes that breach of an individual's *Charter* rights may cause personal loss which should be remedied" (*Ward* at para 25). In most cases, this is the most prominent of the three functions an award of damages may serve (*Ward* at para 27). Compensation focuses on the claimant's personal losses – that is, physical, psychological and pecuniary losses as well as harm to intangible interests such as distress, humiliation, embarrassment, and anxiety. In so far as this is possible, it seeks to restore the claimant to the same position as if his or her rights had not been violated (*Ward* at para 27).

[263] The function of vindication "recognizes that *Charter* rights must be maintained, and cannot be allowed to be whittled away by attrition" (*Ward* at para 25). Vindication affirms constitutional values. As an object of constitutional damages, vindication "focuses on the harm the *Charter* breach causes to the state and to society" (*Ward* at para 28).

[264] The function of deterrence "recognizes that damages may serve to deter future breaches by state actors" (*Ward* at para 25). Like vindication, it serves a societal purpose. It "seeks to regulate government behaviour, generally, in order to achieve compliance with the Constitution" (*Ward* at para 29). As an object of *Charter* damages, deterrence "is not aimed at deterring the specific wrongdoer, but rather at influencing government behaviour in order to secure state compliance with the *Charter* in the future" (*ibid*.).

[265] At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and that damages are thus inappropriate or unjust. A complete catalogue of countervailing considerations remains to be developed but two in particular were addressed in *Ward* – the availability of alternative remedies and concerns for good governance (*Ward* at paras 33-43).

[266] Finally, if after the third step damages are still judged to be an appropriate and just remedy, their quantum must be assessed. The test of "appropriate and just" applies to the amount of damages just as much as to the initial question of whether damages are a proper remedy (*Ward* at para 46). Further, the three functions of *Charter* damages – compensation, vindication, and deterrence – are also relevant to the amount of damages that should be awarded. Their presence and force will vary from case to case. Generally, compensation will be the most important object, with vindication and deterrence playing "supporting roles" (*Ward* at para 47). However, "cases may arise where vindication or deterrence play a major and even exclusive role" (*ibid*.).

(2) The Principles Applied

[267] Turning to the present case, the first step of the *Ward* framework has been satisfied – Mr. Richards has established violations of his *Charter* rights that give rise to his potential entitlement to the *Charter* remedy of damages. As well, the only countervailing consideration raised by the Crown (apart from the argument that the whole issue of Mr. Richards' prolonged placements in administrative segregation should be dealt with in the class proceeding, an argument I have already addressed) is the sufficiency of non-*Charter* remedies. There has been no suggestion that other individual *Charter* remedies would be appropriate and just in this case. Thus, the determination of whether damages are an appropriate and just remedy for the violations of Mr. Richards' *Charter* rights and, if so, their quantum turns on whether they are justified functionally in light of the private law damages that are being awarded to him.

(a) *The September 30, 2013, Use of Force Incident*

[268] In my view, the general damages being awarded to Mr. Richards for the torts of battery and unlawful arrest obviate any need to award compensatory *Charter* damages. *Charter* damages on this basis would duplicate the damages awarded under the private law causes of action, something that is to be avoided (*Ward* at para 54).

[269] Rather, this is a case in which vindication and deterrence play a major role.

[270] As *Ward* explains, when determining the quantum of damages for purposes of vindication or deterrence, the seriousness of the breach is an important guide. The seriousness of

the breach "must be evaluated with regard to the impact of the breach on the claimant and the seriousness of the state misconduct" (*Ward* at para 52). As the Court has discussed in the context of subsection 24(2) of the *Charter*, when considering the seriousness of *Charter*-infringing conduct, a court's task is to "situate that conduct on a scale of culpability" (*R v Paterson*, 2017 SCC 15 at para 43). This scale or spectrum of culpability ranges from inadvertent or minor violations to wilful or reckless disregard of *Charter* rights: see *Grant* at para 74; see also *Ward* at para 72. Generally speaking, "the more egregious the conduct and the more serious the repercussions on the claimant, the higher the award for vindication or deterrence will be" (*Ward* at para 52).

[271] In my view, the conduct of the ERT officers – in particular, that of CO Talbot, the team leader – demonstrated a reckless disregard for Mr. Richards' *Charter* rights. This falls at the high end of the scale of seriousness of *Charter* breaches. As a result, an award that meaningfully vindicates Mr. Richards' *Charter* rights and that will deter similar violations in the future is called for.

[272] In addition, there are three other considerations that support an award of *Charter* damages for purposes of vindication and deterrence in this case.

[273] First, as an inmate in a penitentiary, there was a significant power imbalance between Mr. Richards and the correctional officers. Like Mr. Richards, other inmates are also particularly vulnerable to abuses of authority by correctional officers. Remedies that meaningfully vindicate *Charter* rights and deter future violations are thus of particular importance in the correctional

context. In granting such remedies, the Court plays an important role in ensuring that the rule of law runs within penitentiary walls and that correctional institutions are not *Charter*-free zones.

[274] Second, given the inherent challenges of bringing *Charter* claims by offenders against correctional officers before a court, when such claims have been established, the Court must provide a meaningful remedial response.

[275] Third, while I would not necessarily go as far as saying that the ERT officers in question deliberately provided misleading evidence to justify their actions during the use of force incident, I have found that they tailored their evidence in material ways that could have frustrated the Court's truth seeking function. This also increases the need for a meaningful response from the Court: see *R v Harrison*, 2009 SCC 34 at para 26.

[276] Weighing all of these considerations in light of the objectives of vindication and deterrence, I conclude that damages in the aggregate amount of $10,000 is an appropriate and just remedy for the violations of Mr. Richards' rights under sections 7, 9 and 12 of the *Charter* occasioned by the actions of the ERT officers on September 30, 2013.

(b) *The Placement in Administrative Segregation at Springhill from September 30, 2013, until October 8, 2013*

[277] On the basis of the same considerations, I would award *Charter* damages in the aggregate amount of $2,500 for the serious violations of Mr. Richards' rights under sections 7, 8 and 9 occasioned by his placement in administrative segregation following the use of force incident.

[278] While the correctional officials who approved this placement lacked the same degree of culpability as the ERT officers, the placement is inextricably connected to the use of force incident. It should never have happened. But for the *Charter*-infringing conduct of the ERT officers, Mr. Richards would not have been taken to the Administrative Segregation Unit. And but for the information provided by the ERT officers – information I have concluded was not true – he would not have been kept there. As a result, the need for a meaningful remedial response carries over from the use of force incident to the administrative segregation placement. Furthermore, the administrative segregation placement included a strip search. As I have already stated, strip searches "are inherently humiliating and degrading regardless of the manner in which they are carried out and thus constitute significant injury to an individual's intangible interests" (*Ward* at para 64). While compensation is not in issue given the private law damages being awarded for false imprisonment for this administrative segregation placement, additional *Charter* damages in the amount I have indicated are necessary to serve the important purposes of vindication and deterrence.

(c) *The Assault Investigation and Its Consequences*

[279] I am satisfied an award of *Charter* damages in relation to the flawed assault investigation and its consequences for Mr. Richards would not be appropriate or just given the private law damages he is being awarded. I reach this conclusion even with respect to Mr. Richards' prolonged placements in administrative segregation at Springhill and Atlantic, placements which violated his rights under sections 7 and 12 of the *Charter* independent of any connection to the flawed investigation. I have taken the length and the conditions of these placements into account in determining the appropriate quantum of private law damages. I am satisfied that those

damages provide appropriate and just compensation for Mr. Richards for both the private and public law wrongs he suffered. As well, while the failings of CSC in these respects were serious, I find that they do not call for *Charter* damages on grounds of vindication or deterrence. Thus, there is no basis to award additional damages under the *Charter* for the constitutional wrongs Mr. Richards suffered as a result of the flawed assault investigation.

(d) *The Placement in Administrative Segregation at Dorchester from April 9, 2014, until September 22, 2014*

[280] It is important to recall that I have concluded that Mr. Richards has failed to establish any private law torts in connection with his transfer to Dorchester Institution, including his placement in administrative segregation there. Consequently, he is not entitled to any private law damages in this connection. As a result, it is only through his successful claim that this placement violated his rights under sections 7 and 12 of the *Charter* that Mr. Richards can recover any damages in this regard.

[281] Here, compensation is the most significant objective of any award of *Charter* damages. The objectives of vindication and deterrence play only minor supporting roles (especially considering that the administrative segregation regime has now been abolished).

[282] As noted above, the Crown advised that, at a minimum, Mr. Richards would be entitled to approximately $2,200 in damages as a member of the *Reddock* class if he were to bring a claim in that proceeding.

[283] Having regard to the length of time Mr. Richards was held in administrative segregation at Dorchester (some four and a half months) and the conditions of that detention (including the serious and sustained verbal abuse by the one correctional officer in particular), I have concluded that *Charter* damages in the amount of $20,000 would be appropriate and just.

IX. PRE- AND POST-JUDGMENT INTEREST

[284] Mr. Richards has requested that the defendant pay pre- and post-judgment interest on any award that he may receive. Since his causes of action arose in two provinces – Nova Scotia and New Brunswick – his entitlement to pre- and post-judgment interest falls to be determined under, respectively, subsections 36(2) and 37(2) of the *FCA.* Under both provisions, the Court may set the rate of interest that it considers reasonable in the circumstances. As well, under subsection 36(5) of the *FCA*, the Court may disallow pre-judgment interest for particular periods of time and for any part of the amount on which interest is payable.

[285] Exercising my discretion under these provisions in light of all the circumstances (including the significant variations in interest rates since this action was commenced), I have concluded that pre-judgment interest at a rate of 2% *per annum* and post-judgment interest at a rate of 4% *per annum* should be awarded.

[286] Furthermore, the *Charter* damages award of $12,500 in respect of the September 30, 2013, use of force incident and the ensuing placement in administrative segregation should be excluded from the calculation of pre-judgement interest: see *Boily v Canada*, 2022 FC 1243 at para 301. As well, the period between the filing of the original

statements of claim on September 1, 2015, and the filing of the amended statement of claim on June 24, 2016, should be also excluded from the calculation of pre-judgment interest. This leaves a period of 6.5 years for which Mr. Richards is owed pre-judgment interest.

[287] Accordingly, I award Mr. Richards pre-judgment interest in the amount of $19,825.

X. COSTS

[288] For the most part, Mr. Richards has been self-represented in this action. He was represented by counsel for brief periods of time. However, he has not submitted any evidence of fees paid or owing to his former counsel. Nor has he provided any evidence that he had to forgo remunerative employment in order to bring this action forward. On the other hand, I accept that he has had to incur out-of-pocket expenses in the form of various disbursements connected to this action including filing fees, photocopying costs, and mailing costs. While these disbursements have not been itemized, given his particular circumstances, it would not be reasonable to expect Mr. Richards to have done so.

[289] Considering all the circumstances, I award Mr. Richards costs in the lump sum amount of $500 inclusive of taxes.

XI. CONCLUSION

[290] I will end these reasons where I began. This action did not get off to a smooth start. Nevertheless, once the trial was finally underway, Mr. Richards presented his case in a focused,

effective, and respectful manner. His conduct throughout the trial was exemplary and I commend him for this. I also commend Ms. Drodge and Ms. Hall-Coates for the manner in which they defended this action on behalf of the Crown. Throughout, they conducted themselves with scrupulous fairness to Mr. Richards and in accordance with the highest standards of professionalism.

JUDGMENT IN T-1471-15

THIS COURT'S JUDGMENT is that

1. The action is allowed in part.
2. The defendant is ordered to pay the plaintiff damages in the amount of $165,000.
3. The defendant is ordered to pay the plaintiff pre-judgment interest in the amount of $19,825.
4. The defendant is ordered to pay the plaintiff post-judgment interest on the total of these amounts ($184,825) at a rate of 4% *per annum* as of the date of this judgment.
5. The defendant is ordered to pay the plaintiff's costs in the lump sum amount of $500 (inclusive of all applicable taxes).

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1471-15
STYLE OF CAUSE:	RYAN RICARDO RICHARDS v HIS MAJESTY THE KING
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
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