Federal Court Cour fédérale

Date: 20221219

Docket: T-149-13

Citation: 2022 FC 1755

Toronto, Ontario, December 19, 2022

PRESENT: Associate Judge Trent Horne

BETWEEN:

WILLIAM A. JOHNSON

Plaintiff

And

HIS MAJESTY THE KING

Defendant

JUDGMENT AND REASONS

I. Overview

[1] The plaintiff is an inmate at Warkworth Institution, a medium security federal prison in Ontario.

[2] The plaintiff claims that he is allergic to second-hand smoke. He says that he has been exposed to forms of second-hand smoke that has caused him daily pain and suffering. He has

brought this action against the Crown for damages for breach of his *Charter* rights, punitive damages, and also damages for psychological distress.

[3] The Correctional Service of Canada owes the plaintiff a duty of care to ensure that his living conditions are safe, healthful, and free of practices that undermine his sense of personal dignity. The Correctional Service of Canada met that duty of care. I have no admissible or reliable evidence that the plaintiff was exposed to second-hand smoke from any source during the relevant period. The plaintiff's *Charter* rights have not been infringed. The action will therefore be dismissed.

II. The Evidence

[4] Six witnesses gave evidence at trial. This is a simplified proceeding, so the evidence in chief was adduced by way of affidavit (*Federal Courts Rules*, SOR/98-106, subrule 299(1) ("Rules")).

[5] The plaintiff's evidence consisted of his own affidavit, and an affidavit sworn by Gary Walker, another inmate at Warkworth Institution ("Warkworth"). The plaintiff was cross-examined; Mr Walker was not. The plaintiff also read in the written examination for discovery he conducted of the defendant (Rule 288). The defendant's discovery representative was Tim Gunter, now the Deputy Warden at Warkworth.

[6] The defendant called three fact witnesses: Mr Gunter; Kimberly McClinton, an Indigenous Liaison Officer ("ILO") employed by the Correctional Service of Canada ("CSC");

and Kelley Filion. Ms Filion was a staff nurse at Warkworth from 2004 to 2017, and is now the Acting Chief of Health Services at Warkworth. The defendant also called Brian Beech, who was qualified as an expert in occupational hygiene. All four of the defendant's witnesses were cross-examined.

[7] The parties also prepared a joint book of 127 documents, which was marked as an exhibit. There is an agreement between the parties that the documents in the joint book are true copies, but there is no agreement or order that the documents in the joint book can be received for the truth of their contents.

III. The Plaintiff's Incarceration

[8] Before his criminal trial, the plaintiff was incarcerated in provincial jails. Documents originating from the Ontario Ministry of the Solicitor General and Correctional Services dated November 1995, and included in the joint book of documents, indicate that the plaintiff is allergic to smoke, and was prescribed Zoloft, an anti-depressant. The plaintiff states in his affidavit that Zoloft was prescribed to cope with mental anguish, including being placed in segregation to escape second-hand smoke.

[9] Prior to 2008, smoking was permitted within all federal correctional institutions.

[10] The plaintiff entered the federal correctional system on October 16, 1997 at Millhaven Institution. He spent a short period of time at Millhaven Institution, and then a short period of time at Kingston Penitentiary, before being transferred to Warkworth. While at Kingston

Penitentiary, the plaintiff wrote to “medical personnel” and stated that he has a severe allergy to cigarette smoke. This letter also stated that he has to be housed in a segregation unit away from smoke because of the medical problems he suffered while being subjected to smoke. The joint book of documents includes a memorandum from Court Escort Officers to Health Services at Kingston Penitentiary stating: “Please be advised that this inmate is allergic to smoke and should be housed and transported in a smoke free environment.”

[11] The plaintiff was transferred to Warkworth on September 23, 1999. Immediately upon arriving at Warkworth, the plaintiff completed an “Inmate Request” form, stating: “I am allergic to cigarette smoke and need a non-smoking living environment.” He asked if he was put on the “80 man” list.

IV. The EMU

[12] There are five living units within Warkworth. One of them is Unit 5, also known as the Eighty Man Unit or EMU. The EMU accommodates older inmates, and inmates with health issues. Other inmates from different living units cannot enter this compound without permission from staff.

[13] The EMU is shaped like a “+” sign; it has four hallways of cells with a central open area. It is a two storey building. The plaintiff’s cell, D10, is on the second floor, at the top of the “+” in the right hand corner. This cell has a large window that can be opened and closed at the plaintiff’s choosing.

[14] Outside, the EMU has a small courtyard (approximately 140 square feet) which contains benches and picnic tables. The plaintiff admitted on cross-examination that his cell is in the area furthest away from the courtyard.

[15] While smoking was generally permitted in federal correctional institutions at the time the plaintiff arrived at Warkworth, the EMU was designed to be an environment free of tobacco smoke, and also tobacco smoking paraphernalia such as lighters, matches, and rolling paper. Warkworth published general rules of conduct for the EMU, and inmates assigned to that unit were required to sign a form agreeing to comply with the rules and regulations that applied to the EMU. Among other things, this form and the attached rules specifically identify tobacco and smoking paraphernalia as contraband. The form advises that any inmate found smoking or in possession of tobacco and smoking paraphernalia will be removed from the unit. The plaintiff signed a copy of this form on November 10, 1999.

V. Smudging

[16] The plaintiff alleges that he has been harmed by exposure to second-hand smoke from two sources. His first, and dominant, complaint relates to smudging ceremonies conducted by Indigenous offenders.

[17] The nature and importance of the smudging ceremony is described in Ms McClinton's affidavit. Smudging is a ceremony that is used to pray over and purify oneself and/or a physical space. It is also used as an act of unity to open ceremonies or circles in order to prepare participants for healing and sharing. The smudging ceremony involves the burning of sacred

medicines, which can include cedar, sage, sweetgrass, and semma, to create a sacred smoke. Small amounts of some sacred medicines are traditionally placed into a shell and then burned. Semma, or traditional tobacco, is considered to be a sacred medicine by many Indigenous peoples. Traditional tobacco is natural and unprocessed tobacco.

[18] Smudging is done at least once per day, and can be used more often depending on the situation an individual may find themselves in. This includes health issues, needing to calm down due to excessive anxiety, or when having spiritual issues in a space and needing to cleanse the area. Smudging is used to create cleansing so that participants have a good mind, a good physical presence, and a good spiritual presence. The ceremony is typically conducted in groups. The group aspect of smudging is important to ensure that all present are cleansed, and that all are equal.

[19] When the plaintiff arrived at Warkworth in 1999, the rules of the EMU did not expressly prohibit religious or spiritual practices that may emit smoke; technically, Indigenous offenders were permitted to smudge within their cells at that time. Ms McClinton gave evidence of an understanding that, prior to 2008, Indigenous offenders were encouraged to only conduct smudging ceremonies outdoors, rather than inside either the cells or common areas of the EMU.

[20] There is no evidence that smudging occurred inside the EMU, including cells, prior to 2008, and no evidence that the plaintiff complained about smoke associated with smudging prior to 2008.

VI. Commissioner's Directive 259

[21] The principles that guide the CSC are set out in section 4 of the *Corrections and Conditional Release Act*, SC 1992, c 20 ("CCRA"). These principles expressly state that offenders retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted. Correctional policies, programs and practices must respect ethnic, cultural, and religious differences, and be responsive to the special needs of women, Indigenous persons, visible minorities, persons requiring mental health care and other groups (subsections (d) and (g)).

[22] Section 97 of the CCRA provides that the Commissioner of Corrections ("Commissioner") may make rules for the matters described in section 4. Section 98 of the CCRA provides that these rules may be set out in a Commissioner's Directive.

[23] On May 5, 2008, the Commissioner issued Commissioner's Directive 259 – Exposure to Second-Hand Smoke ("CD 259").

[24] The stated policy objective in CD 259 is to enhance health and wellness by eliminating exposure to second-hand smoke at all federal correctional facilities. To achieve this objective, smoking was prohibited indoors and outdoors within the perimeter of federal correctional facilities. This prohibition applies to inmates, staff, contractors, volunteers and visitors.

[25] CD 259, among other things, requires the Institutional Head or District Director to ensure that implementation plans include accommodations for religious and spiritual practices in

individual cells, rooms and in groups to the extent safely possible. Accommodations were directed to be "made in consultation with religious leaders, Elders or Aboriginal advisory bodies as appropriate."

[26] CD 259 also requires that the consultation described above ensures access to tobacco and ignition sources for smudging for the duration of a private family visit, and for ceremony and protocol purposes.

[27] A Standing Order is a document created by a particular correctional institution to operationalize a Commissioner's Directive, and specify the needs that are unique to that operational unit.

[28] On May 30, 2008, Warkworth implemented Standing Order 259. This document provided direction as to how religious and spiritual practices could be accommodated in light of the smoking ban. This Standing Order provided that smudging would be permitted by all Indigenous offenders within living units, Native Lands, Cultural Centres, or other areas of the Institution specifically designated by the Institutional Head. In addition, this Standing Order provides accommodations for other religious practices that may require the burning of incense or lighting of candles.

[29] When Standing Order 259 was first implemented, Indigenous offenders who requested traditional medicines for smudging would typically receive it on a monthly basis. This monthly distribution of medicines would include a small plastic container with some dried sage and, if

requested, a small braid of sweetgrass. Indigenous offenders would also be provided with one book of 20 matches, which they could keep in their possession. This book of matches was distributed by the ILO, and each offender was required to return the empty matchbook before receiving a new one. If an offender was to be found with more than 20 matches in their possession, this would constitute an offence that could be subject to disciplinary action pursuant to the CCRA.

[30] The guidelines included in Standing Order 259 stated that smudging would be permitted at least three times per day on the "Native Land." Group smudging was encouraged to reduce the need and frequency of individual cell smudging.

[31] Standing Order 259 was amended on June 16, 2010. The revised version provided further controls on the use and monitoring of both ignition sources and tobacco. Under the revised Standing Order, distribution of matches was discontinued. Only barbeque style lighters could be used as an ignition source, and these could not be stored by inmates in their cells. All lighters were kept in a secure area and distributed by Correctional Officers. A log book was used to track the distribution and return of these lighters.

[32] The amended Standing Order also specified that a braid of sweetgrass or a bundle of sage would be provided to Indigenous offenders, or approved individuals, for smudging each morning outdoors on Indigenous grounds with an Elder present. These medicines were to be distributed on the first working day of every month. A request for medicines needed to be submitted to the ILO (then known as an Aboriginal Liaison Officer) for consideration by the 15th of the month. If

further or other traditional medicines were needed, they could be granted on a case-by-case basis through the inmate request process.

[33] Standing Order 259 was further amended on October 1, 2013 to provide additional protections and controls around the use of semma and access to ignition sources. Pursuant to the October 1, 2013 Standing Order, semma was made available within the institution for cultural and spiritual activities, however, it was not distributed to and stored by offenders. Rather, all semma was then directed to be kept in a secure location within the Cultural Centre. Semma is now only distributed by the ILO upon request. The ILO can then give a very small pinch of semma, usually in the form of a tobacco tie, for use only during spiritual ceremonies that are led by Elders and take place outdoors on the Indigenous lands within the institution walls. Offenders are not permitted to return with these tobacco ties to their cells.

[34] Standing Order 259 was further amended on June 16, 2015. In accordance with the amended Standing Order, ILOs were responsible for verifying, on a weekly basis, that there is an adequate supply of materials available for Indigenous religious and spiritual practices, and that the lighters are in good working condition.

[35] Currently, Indigenous offenders are provided with a small plastic bag containing sage and a small braid of sweetgrass approximately 2 inches long. In addition, upon request, offenders can receive a small amount of cedar in the plastic bag with the sage. The distribution of these traditional medicines is done on a weekly basis and is overseen by the ILO under the direction of

the Elder on staff at Warkworth. If an offender wishes to receive more traditional medicines, they can make a special request, which will be assessed on a case-by-case basis.

VII. Contraband Tobacco

[36] After CD 259 was enacted, steps were taken to prevent contraband tobacco from entering Warkworth, and to enforce the smoking ban. These measures include a requirement that visitors have their belongings searched at the main entrance before they can enter the building.

[37] Warkworth staff are also subject to search at the main entrance when they enter the building. If a staff member is found smoking or in possession of tobacco, they are subject to a separate disciplinary process. Mr Gunter's evidence is that, since the smoking ban in 2008, four different CSC staff members have been found bringing tobacco into Warkworth. On each occasion, disciplinary actions were taken, and all of these employees no longer work at Warkworth.

[38] Correctional Officers at Warkworth routinely conduct "sweeps" (searches) of inmate calls for contraband, including tobacco.

[39] An inmate found smoking or in the possession of contraband tobacco may be subject to disciplinary action under section 40 of the CCRA. An inmate who is found guilty of a disciplinary offence may be given a warning, lose privileges, pay a fine, or be required to perform extra duties (CCRA section 44). A disciplinary offence may also be grounds to move an inmate out of the EMU, a desired living unit.

[40] Mr Gunter's evidence is that he has not seen anyone smoking in the EMU. While his review of institutional records was admitted to be cursory, he stated that there were "numerous" disciplinary charges indicated as being smoking-ban related between January 1, 2008 and July 26, 2021, but no charges were located involving an offender smoking inside the EMU.

[41] When asked in cross-examination if staff bring in tobacco, Mr Gunter stated that "it's been known to happen." While I accept that contraband tobacco has made its way into Warkworth since the smoking ban in 2008, I do not have admissible or reliable evidence that tobacco has been smoked in the EMU since the smoking ban took effect.

VIII. The Plaintiff's Complaints and Grievances

[42] Sections 90 to 91.2 of the CCRA set out a grievance or complaint procedure. There is an established procedure for resolving inmate grievances that has four stages:

i. complaint: a grievance is filed directly to, and reviewed by, the supervisor of the staff member whose decision or behaviour is being challenged;

ii. first level: the grievance is submitted to the Institutional Head for a response;

iii. second level: the grievance is sent to Regional Headquarters to be reviewed and responded to by the Regional Deputy Commissioner; and

iv. third level: the grievance is sent to National Headquarters where the Commissioner will review the matter and provide a final response.

[43] A third level grievance decision can be the subject of judicial review in this Court.

[44] The plaintiff engaged the grievance process by completing an "Offender Complaint Presentation" form on October 10, 2010. The details of the complaint, as written by the plaintiff, are (*sic* throughout):

> Again on Saturday October 9, 2010 at noon an inmate was allowed to create clouds of smoke as inmates went to from meals. This further allowed clouds of smoke to roll into the unit through the front doors.
>
> Further was allowed at 1400 hours was two inmates to create more smoke just outside the front doors. Not only does this practice contravene the no smoke policy in and around the units, but is further a racial discrimination practice against all non natives not being allowed in the unit compound given the fact that the Natives have their own area for such practices along with all other religions.
>
> This further demonstrates this administrations practice of encouraging criminal behaviour.

[45] Notably, this complaint is based on racial discrimination, and does not make reference to any actual or potential adverse health consequences arising from second-hand smoke.

[46] Mr Gunter spoke to this complaint in his evidence. The complaint was investigated, including interviews with the officers on site that day. While inmates occasionally practice religious ceremonies outside of the EMU in the courtyard area, at no time was any cloud of smoke observed by staff coming into the unit. The plaintiff was interviewed to gather further details, but he stated he had nothing to add. According to Mr Gunter, the plaintiff stated that he attempted to resolve the issue, but did not specify how. The complaint was denied.

[47] The plaintiff filed a first-level grievance of this decision on December 6, 2010. The first-level grievance asserted that smoke was getting in the front doors and cell windows facing the compound area, and that if the issue of second-hand smoke was being taken seriously, then second-hand smoke under the guise of religion would not be allowed. This first-level grievance did not allege that the plaintiff had any adverse health consequence as a result of smoke created by smudging. In a response dated February 4, 2011, the allegations of racial discrimination were determined to be without merit; the grievance was denied.

[48] The plaintiff filed a second-level grievance on May 11, 2011. In addition to allegations of racial and religious discrimination, the plaintiff stated that he has to rely on two inhalers just to breathe "in the smoke filled unit", and claims that he suffers constant pain every day. This grievance was denied in a decision dated June 2, 2011.

[49] The plaintiff filed a third-level grievance on July 10, 2011. This grievance was denied in a decision dated January 10, 2012.

[50] On August 30, 2012, CSC agreed that it would reconsider the plaintiff's grievance and issue a new third-level decision to address both the discrimination complaint that was initially raised, and the subsequent issues raised with respect to claims regarding the plaintiff's health and safety.

[51] In a decision dated October 29, 2012, the Commissioner found (among other things) "[h]owever, in light of all the circumstances, there is no evidence that the manner in which

Aboriginal offenders are practicing smudging outside the EMU is having an adverse effect on your health." The decision also states "[f]inally, there is no indication from your physician on file to indicate that your personal health is being affected negatively by smudging ceremonies" (emphasis in original).

[52] This litigation began as an application for judicial review of the Commissioner's October 29, 2012 decision.

[53] While this proceeding was ongoing, the plaintiff filed a further complaint on December 16, 2013. Among other things, this complaint alleged that management of Warkworth allows smokers to reside in Unit 5 that continue to smoke around inmates with serious sensitivity to smoke without fear of being removed despite breaches of security. This complaint was denied on the basis that the plaintiff did not provide any proof of his allegations. The plaintiff also pursued this complaint up to a third level grievance, which was denied. The third level grievance response dated August 4, 2015 noted that the plaintiff had not provided subsequent evidence to substantiate his allegations.

[54] The plaintiff submitted three further grievances in 2015, each making the same general complaints regarding alleged exposure to second-hand smoke. As they related to the allegations of exposure to second-hand smoke, these grievances were collectively denied in an Offender Final Grievance Response dated March 14, 2018.

IX. Limitation Period

[55] The plaintiff asserts that the relevant period for assessment of any damages begins on February 22, 2010. This date was taken from a document entitled “Doctor’s Orders and Progress Notes”, where there is a February 22, 2010 handwritten entry that states “second-hand smoke” and also states “I offered Ventolin”.

[56] The defendant asserts that any assessment of damages must begin on July 28, 2013, two years before the statement of claim was issued. I agree with the defendant.

[57] Section 32 of the *Crown Liability and Proceedings Act*, RSC, 1985 c C-50 provides:

Prescription and Limitation	Prescription
Provincial laws applicable	Règles applicables
32 Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.	32 Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s’appliquent lors des poursuites auxquelles l’État est partie pour tout fait générateur survenu dans la province. Lorsque ce dernier survient ailleurs que dans une province, la procédure se prescrit par six ans.

[58] This proceeding was commenced as an application for judicial review. Damages are not available in an application for judicial review (*Philipps v Librarian and Archivist of Canada*, 2006 FC 1378 at para 71).

[59] By order dated July 9, 2015, case management judge Aalto ordered that the application be converted to an action. A statement of claim was issued on July 28, 2015. This was the first time a claim for damages was advanced.

[60] All of the events that are the subject of this action occurred in Ontario. As such, Ontario law relating to limitations of actions applies by virtue of section 39 of the *Federal Courts Act*, RSC 1985, c F-7 and section 32 of the *Crown Liability and Proceedings Act*.

[61] As of July 28, 2015 (and also July 28, 2013), the Ontario *Limitations Act, 2002*, SO 2002, c 24, sched B provides:

Basic limitation period	Délai de prescription de base
4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered. 2002, c. 24, Sched. B, s. 4.	4 Sauf disposition contraire de la présente loi, aucune instance relative à une réclamation ne peut être introduite après le deuxième anniversaire du jour où sont découverts les faits qui ont donné naissance à la réclamation. 2002, chap. 24, annexe B, art. 4.

[62] Since the plaintiff first made a claim for damages on July 28, 2015, I conclude that there can be no claim for or assessment of damages before July 28, 2013.

[63] In any event, nothing turns on this determination. As discussed below, I have no admissible or reliable evidence that the plaintiff was exposed to second-hand smoke from contraband tobacco or smudging ceremonies as of either February 22, 2010 or July 28, 2013.

X. Factual Findings

[64] The plaintiff's claim will be dismissed because there is insufficient evidence to conclude that he sustained any adverse health consequence arising from either smudging or contraband tobacco.

[65] The plaintiff's affidavit is 49 pages long. Under the heading "second-hand smoke issues identified", he states: "In 2009 growing second-hand smoke in the EMU was affecting my health requiring me to seek help through various government departments." The affidavit does not give any details of this second-hand smoke, including whether smoke was caused by smudging or contraband tobacco, when this second-hand smoke was observed, or where it was observed.

[66] The plaintiff's evidence also includes an affidavit of Gary Walker, another inmate housed within the EMU. Mr Walker's affidavit comprises four paragraphs. While the affidavit states that it is in support of the plaintiff's action, and that he has "further and better evidence in support of his own against smudging within Unit 5", he does not say what this further and better evidence is. Mr Walker was not cross-examined. I find his evidence to be of no assistance at all.

[67] The plaintiff's affidavit attaches a number of documents relating to the grievances and complaints discussed above. I find these documents to be of limited assistance. At best, they show that complaints were filed, however I cannot accept that what the plaintiff said in those grievances and complaints can be received for the truth of their contents. The plaintiff had full opportunity to present direct evidence on any exposure to second-hand smoke from smudging and contraband tobacco in his affidavit, and did not. The plaintiff also had the opportunity to cross-examine the defendant's witness to obtain admissions that smudging or use of contraband tobacco took place within the EMU. No such admissions were made.

[68] The onus is on the plaintiff to establish, on a balance of probabilities, that he was exposed to second-hand smoke; the onus is not on the defendant to prove a negative. In any event, the defendant's evidence, including cross-examination of the defendant's witnesses, did not reveal a single instance of smoke being observed within the EMU, whether caused by smudging or contraband tobacco.

[69] Mr Gunter was transferred to Warkworth as a Correctional Officer 1 in January 1995. From November 2013 to September 2014 he was the Correctional Manager of the EMU. He has been the Deputy Warden of Warkworth since April 2021. As the Correctional Manager of the EMU, he was inside the unit every day. As the Deputy Warden, and formerly as the Assistant Warden of Operations, he testified that he would be briefed about incidents of smoking or complaints related to smudging during "morning ops" meetings. As Assistant Warden, staff were obliged to report all incidents of smoking or other offences to him.

[70] Mr Gunter's evidence, which was not shaken in cross-examination, is that:

- before the smoking ban in 2008, Indigenous offenders respected the non-smoking rule in the EMU and agreed to conduct smudging ceremonies in the courtyard outside of the EMU, rather then inside the unit;
- he never once observed or smelled smoke inside the EMU during his time as Correctional Manager;
- he has no recollection of a Correctional Officer reporting smoke inside the EMU;
- he has not received a single complaint from staff indicating that they are being exposed to smoke while working at the EMU, and has never received a single report of smudging or smoke within the EMU;
- efforts were made to corroborate the plaintiff's complaints relating to smoking and smudging, and nothing was ever found in these investigations to corroborate the complaints;
- smudging occasionally takes place, but in the courtyard outside of the EMU; and
- while admitted to be a cursory review, there is no record of disciplinary charges related to smoking in the EMU. One inmate was found with smoking contraband, and was removed from the unit.

[71] Mr Gunter also stated that each cell in the EMU has a smoke detector. There is no evidence that one of these smoke detectors ever went off for any reason.

[72] Ms McClinton testified that she has never personally seen an inmate smudging in the courtyard of the EMU.

[73] I cannot accept the plaintiff's assertion in the amended statement of claim and in his affidavit that he has experienced "daily pain" from second-hand smoke. This assertion is simply not credible.

[74] Even if the plaintiff was exposed to second-hand smoke after July 28, 2013 (or February 22, 2010) he must also establish that there is a causal connection between exposure to second-hand smoke and adverse health consequences. The evidence does not show such a connection.

[75] The joint book of documents includes a number of the plaintiff's medical records, including those entitled "Referral for Consultation and Report" and "Doctor's Orders and Progress Notes." I also find these documents to be of limited assistance. As set out above, there is no agreement or order that the documents in the joint book could be received for the truth of their contents. Other than Ms Filion, none of the medical professionals at Warkworth gave evidence.

[76] The kinds of medical records created and maintained by CSC were explained in Ms Filion's affidavit. When inmates come to Health Services, notes are taken to record every interaction. Prior to 2016, these notes were taken in paper form in a document called "Progress Notes", which would be placed on the inmate's health care file. In 2016, CSC transitioned to an

electronic medical record system called OSCAR. In this system, a similar note taking process is used to record all appointments and interactions with inmates who come to Health Services, however these notes are called “Encounter Notes” in that system.

[77] Ms Filion also testified that some of these notes use the “SOAP” method of documentation. This is a template for recording patient notes that has four components: subjective notes; objective notes, assessment; and plan.

[78] Medical records created and maintained by CSC can be received for the truth of their contents if the requirements of section 26 of the *Canada Evidence Act*, RSC 1985, c C-5 have been met (*Sutherland v Canada*, 2003 FC 1516 at para 12). Section 26 of the *Canada Evidence Act* requires an affidavit of an officer of the department or branch of the federal public administration that the record was made in the usual and ordinary course of business, and that the record is a true copy.

[79] Ms Filion’s affidavit speaks to certain of the plaintiff’s medical records, however it was not prepared or filed for the purpose of authenticating the plaintiff’s medical records for the purposes of the *Canada Evidence Act*. Neither party asserted that the requirements of the *Canada Evidence Act* have been met, or requested that the medical records be received for the truth of their contents.

[80] I have a particular concern with the assessment aspect of the “SOAP” notes. Treating medical professionals were not called as witnesses, and were not available for cross-examination.

Any assessment, diagnosis or opinion recorded in the medical records by persons who were not witnesses is hearsay. In any event, none of the medical records reflect a diagnosis or opinion that that the plaintiff suffered an adverse health consequence as a result of exposure to second-hand smoke. At best, the plaintiff's medical records reflect what the plaintiff is noted to have said to medical professionals.

[81] There is an obvious disconnect between the plaintiff's grievances and complaints regarding smoke in the EMU (including medical records where he complains of being exposed to second-hand smoke) and the complete absence of evidence relating to smudging and/or smoking within the EMU. Neither the plaintiff nor Mr Walker provided details or particulars of a single instance where smoke from any source was observed within the EMU. None of the defendant's witnesses, in their affidavits or on cross-examination, testified to the presence of smoke in the EMU at any time. These direct observations (or more precisely, the lack of observations) cannot be overcome by an inference drawn from documents in the joint book or otherwise. I need not make a finding as to why the plaintiff advanced his complaints and grievances in the manner that he did, but cannot conclude that his past grievances and complaints establish that there was ever second-hand smoke in the EMU.

[82] The defendant's expert witness was Brian Beech, a Certified Industrial Hygienist with over 30 years of experience. He was qualified as an expert in occupational hygiene. His expert report addressed the effects of smudging on human health and sensitive populations, particularly if smudging was conducted in or around the EMU. His report included an analysis of airflow measurements within the plaintiff's cell. He concluded that, under the ventilation conditions

measured within the plaintiff's cell, more than 10 times the volume of smudging materials typically provided would need to be burned inside of the plaintiff's cell in order to generate the amount of smoke necessary during an in-cell smudging ceremony to pose any potential risk to a sensitive person residing in that space. In the absence of evidence that there was smoke within the EMU from smudging or contraband tobacco, I need not rely on Mr Beech's evidence, or make findings as to the quality of the ventilation in the plaintiff's cell.

XI. Analysis

[83] A central issue in the plaintiff's claim is an assertion that the defendant was negligent in the implementation of CD 259. There is no dispute that the creation and implementation of Standing Orders can give rise to claims in negligence.

[84] To recover for negligently caused loss, irrespective of the type of loss alleged, a plaintiff must prove all the elements of the tort of negligence: (1) that the defendant owed the plaintiff a duty of care; (2) that the defendant's conduct breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach. To satisfy the element of damage, the loss sought to be recovered must be the result of an interference with a legally cognizable right (*1688782 Ontario Inc v Maple Leaf Foods Inc*, 2020 SCC 35 at para 18).

[85] I have no difficulty concluding that the CSC has a duty of care to the plaintiff. Among other obligations, section 70 of the CCRA obliges CSC to take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and

the working conditions of staff members are safe, healthful and free of practices that undermine a person's sense of personal dignity.

[86] The plaintiff has not satisfied any of the remaining parts of the test.

[87] There is no admissible or reliable evidence that smudging took place inside the EMU at any time, including after 2008 when the general smoking ban was imposed, or after February 22, 2010 when the plaintiff reported second-hand smoke concerns to health care professionals. There is no evidence to support a conclusion that smoke from smudging, contraband tobacco, or another source was in the plaintiff's cell at any time. Even if smudging was done in the courtyard of the EMU, any outside exposure to the plaintiff was *de minimis*. To the extent the CSC's duty of care required it to prevent the plaintiff from being exposed to second-hand smoke, either from smudging or contraband tobacco, it did so. I conclude that CSC met its duty of care to the plaintiff, particularly in respect of preventing exposure to second-hand smoke.

[88] Having concluded that the plaintiff was not exposed to second-hand smoke at Warkworth, there can be no valid claim for damages. The plaintiff's medical records indicate that he was prescribed medication for asthma, but this medication was prescribed before his first grievance in 2010, and continued after his final grievances related to smoke in 2015. Ms Filion's affidavit states that from her personal knowledge working in Health Services at Warkworth, and from her review of the plaintiff's medical file, she is unaware of any incident wherein the plaintiff was in medical distress due to an asthma attack or smoke exposure. Even if there was evidence of

second-hand smoke to which the plaintiff was exposed, I do not have sufficient evidence to establish a causal connection between second-hand smoke and any adverse health consequence to the plaintiff.

[89] To the extent the plaintiff's claim alleges that CSC was negligent in the creation of CD 259, the legality of this Commissioner's Directive was affirmed by the Federal Court of Appeal in *Canada (Attorney General) v Mercier*, 2010 FCA 167 ("*Mercier*"). Unlike the plaintiff who is opposed to any kind of smoking around him, the applicants in *Mercier* wanted to smoke. They did not meet any of the religious exemptions in CD 259, and asked the Court to declare it void and unconstitutional. The application was initially allowed (*Mercier v Canada (Attorney General)*, 2009 FC 1071); that decision was overturned on appeal.

[90] The defendant asserts that the creation of CD 259 is a pure policy decision that is shielded from review on the basis of core policy immunity, citing *Nelson (City) v Marchi*, 2021 SCC 41 at paragraphs 49-52 ("*Nelson*"). This argument was not advanced in *Mercier*, which was decided a decade before *Nelson*.

[91] Policy issues were addressed in *Mercier*. The Court of Appeal overturned a decision of the applications judge who was found to have substituted his view for that of the Commissioner as to whether a total ban on smoking should be implemented in federal correctional facilities. It was determined that it was not open to a court to determine the wisdom of delegated legislation or to assess its validity on the basis of the court's policy preferences (para 80). The Court of Appeal concluded:

> [81] In the end, it was the Commissioner's duty to determine what steps were necessary to ensure the health and safety of those living and working in federal correctional facilities. After a careful review of the situation, the Commissioner determined that a total ban on smoking was the appropriate measure to "enhance health and wellness by eliminating second-hand smoke at all federal correctional facilities". Consequently, the Judge ought not to have intervened.

[92] It is a basic principle that the party asserting something has the burden to prove it. The focus of this proceeding was the implementation of the smoking ban (specifically through Standing Orders) and whether second-hand smoke was present in or around the EMU, not the events surrounding the creation of CD 259.

[93] The entirety of the plaintiff's examination for discovery of the defendant was read in under Rule 288. There were two rounds of examination. None of the questions were directed to the creation of CD 259. I have no principled basis that would permit me to conclude that the Commissioner was negligent in the creation of CD 259, particularly in respect of balancing the interests and needs of non-smokers and Indigenous offenders who engage in smudging.

[94] In *Beauchamp v Canada*, 2022 FC 47 ("*Beauchamp*"), the Court applied the four factors from *Nelson* to another Commissioner's Directive, CD 566-15, and found the Commissioner's decision to enact the Directive was a core policy decision that did not attract tort liability (paras 98-99, and 102).

[95] I cannot, however, conclude that all Commissioner's Directives are core policy decisions; each case will turn on its own facts. *Nelson* identified four factors to aid in determining whether

a government decision is a core policy decision: (1) the level and responsibilities of the decision-maker; (2) the process by which the decision was made; (3) the nature and extent of budgetary considerations; and (4) the extent to which the decision was based on objective criteria (paras 3, 56, 62-65, and 68). The Court noted "[n]one of the factors is necessarily determinative alone and more factors and hallmarks of core policy decisions may be developed; courts must assess all the circumstances" (para 66). While some of the criteria in item 4 may be apparent from *Mercier*, I do not have evidence for items 2 and 3. I am therefore unable to conclude, on this record, that CD 259 is a core policy decision that is immune from review. Nothing, however, turns on this because the plaintiff has not established that CSC was negligent in the creation of CD 259.

[96] The plaintiff alleges that his rights under sections 7 and 12 of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (UK), 1982, c 11 ("*Charter*") have been infringed.

[97] Section 7 of the *Charter* "is breached by state action that deprives someone of the right to life, liberty, or security of the person, contrary to a principle of fundamental justice. Section 7 protects individual autonomy and dignity, and encompasses control over one's personal integrity, free from state interference. It is engaged by "state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering"" (*Hudson v Canada*, 2022 FC 694 at para 120, citations omitted).

[98] In the absence of evidence that the plaintiff was exposed to second-hand smoke from smudging or contraband tobacco, I cannot conclude that there has been a negative impact on his

individual autonomy and dignity, or his integrity. The fact that CSC has created policies and procedures by which Indigenous offenders can engage in spiritual ceremonies does not diminish the plaintiff's autonomy and dignity. Any claims based on section 7 of the *Charter* must therefore fail.

[99] Section 12 of the *Charter* protects an individual's freedom from cruel and unusual treatment or punishment. The test for establishing a breach of section 12 "is a high bar and very properly stringent and demanding. 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" (*Lee v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 383 at para 82, citations omitted).

[100] Again, in the absence of evidence that the plaintiff was exposed to second-hand smoke from smudging or contraband tobacco, I cannot conclude that he was punished at all (that is, separate and apart from his incarceration). Any claims based on section 12 of the *Charter* must also fail.

[101] While the plaintiff's grievances and complaints are in part based on an interference with his religion, no claim was advanced in this action under section 2(a) of the *Charter*, which guarantees freedom of conscience and religion. There is a general statement in the plaintiff's affidavit that he follows the teachings of the Bible, and considers second-hand smoke to pollute the Holy Temple of God in every person. In the absence of evidence of the plaintiff's exposure to

second-hand smoke, and any claim based on section 2(a) of the *Charter*, I need not consider this further.

[102] The statement of claim makes an unparticularized allegation of misfeasance in public office.

[103] Misfeasance in public office is an intentional tort. The elements of the tort are, first, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff. Misfeasance in public office also requires an element of "bad faith" or "dishonesty" (*Odhavji Estate v Woodhouse*, 2003 SCC 69 at paras 23, 25, and 28 ("*Odhavji*")).

[104] Proof that the tortious conduct was the cause of the injuries and are compensable in tort law is also required (*Odhavji* at para 32).

[105] The evidence is entirely insufficient to conclude that there has been misfeasance in public office. To the contrary, CSC has: balanced the health and spiritual needs of Indigenous and non-Indigenous offenders; investigated and responded to the plaintiff's complaints and grievances; and placed the plaintiff in the cell furthest from the EMU courtyard. There is no indication that the plaintiff's health needs were not met by appropriate appointments with health care professionals and appropriate treatment.

XII. Conclusion

[106] For all of the above reasons, the plaintiff's action is dismissed.

[107] The defendant may make written submissions as to costs, which are to be served and filed within 15 days of the date of this order, not to exceed 10 pages. The plaintiff may serve and file reply submissions on costs within 20 days of service of the defendant's submissions, also not to exceed 10 pages.

JUDGMENT in T-149-13

THIS COURT'S JUDGMENT is that:

1. The plaintiff's action is dismissed.

2. The defendant may make written submissions as to costs, which are to be served and filed within 15 days of the date of this order, not to exceed 10 pages. The plaintiff may serve and file reply submissions on costs within 20 days of service of the defendant's submissions, also not to exceed 10 pages.

"Trent Horne"

Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-149-13
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PLACE OF HEARING:	HELD VIA VIDEOCONFERNCE
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JUDGMENT AND REASONS:	HORNE A.J.
DATED:	DECEMBER 19, 2022

APPEARANCES:

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Elizabeth Koudys Alyson Sutton	FOR THE DEFENDANT

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