Court File No. CV-09-383001

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

CORALEE SMITH, on her own behalf and as the Litigation Administrator of the Estate of Ashley Smith, Deceased, DAWNA WARD and HERB GORBER

Plaintiffs

and

ATTORNEY GENERAL OF CANADA (in Right of the Minister of Public Safety), COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA KEITH COULTER, DEPUTY COMMISSIONER ONTARIO REGION NANCY STABLEFORTH, WARDEN OF NOVA INSTITUTION FOR WOMEN ALFRED LEGERE, ACTING WARDEN OF GRAND VALLEY INSTITUTION FOR WOMEN CINDY BERRY, DEPUTY WARDEN OF GRAND VALLEY INSTITUTION FOR WOMEN JOANNA PAULINE, ASSISTANT WARDEN OF GRAND VALLEY INSTITUTION FOR WOMEN LAUNA GRATTON, TRAVIS McDONALD, KAREN EVES, BLAINE PHIBBS, SHERRY FAIRCHILD, CHARLENE VENTER, VALENTINO BURNETT, MELISSA MUELLER, LIZ GIBBONS, GAETAN DESROCHES, KENNETH ALLEN and CORRECTIONAL SERVICES EMPLOYEES JOHN DOE and JANE DOE

Defendants

FACTUM OF THE PLAINTIFFS
On a Rule 21 motion to strike the individually named Defendants

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PART ONE: OVERVIEW

1. Ashley Smith died on October 19, 2007 at the age of 19, while incarcerated at the Grand Valley Institution for Women in Kitchener, Waterloo. As plead in the Amended Statement of Claim[1], numerous correctional officers directly observed Ashley Smith positioned between the wall and her bed with a ligature tied tightly around her neck. One officer videotaped the incident. Approximately 30 minutes passed before the correctional staff present intervened, by which time

[1] The Statement of Claim was amended on November 18, 2010, after the Defendants filed their materials. The Amended Statement of Claim is attached as Appendix A.

Ashley Smith had died. These correctional officers were acting upon an agreement with senior managers that they were not to enter Ashley Smith's cell if she was breathing.

2. During the 11.5 months that Ashley Smith was incarcerated in the federal penitentiary system prior to her death, she was the victim of countless breaches of law and policy, including unlawful institutional transfers, continued housing in segregation without review and was denied reasonable medical services. These breaches of law and policy contributed to Ashley Smith's deteriorating mental health and increased her self-harming behaviour, ultimately resulting in her death.

3. The Amended Statement of Claim names those individuals who were directly involved and/or responsible at law for Ashley Smith's care. The Defendants have brought a motion pursuant to rule 21 of the *Rules of Civil Procedure* to strike the individually-named defendants from the action on the grounds that they ought not to be named where the Attorney General of Canada ("AGC") is vicariously liable for the conduct of employees. It is submitted that there is no authority in law or in statute for such a proposition, and that as a result it is not plain and obvious that an action against these defendants would not succeed. In addition, the defendants' motion to strike the claim for breach of fiduciary duty is based upon an erroneous statement of the legal principles of fiduciary relationships. Ashley Smith was clearly in a relationship of utter dependency and vulnerability upon the Correctional Service of Canada ("CSC"), and the Amended Statement of Claim clearly sets out the extreme harm she suffered as a result of the repeated violations of the fiduciary duty that she was owed.

PART TWO: FACTUAL OVERVIEW

A. The Incarceration and Death of Ashley Smith

4. On October 31, 2006, at the age of 18, Ashley Smith was transferred to the federal penitentiary system for women. From early in her incarceration, Ashley Smith engaged in repeated self-injurious behaviour, most commonly self-strangulation with make-shift ligatures.

Appendix A: Amended Statement of Claim, para. 27.

Plaintiffs' Motion Record, Tab 2: Correctional Investigator, "A Preventable Death" (June 20, 2008) at p. 73.

5. In the course of the 11.5 months that Ashley Smith spent in the federal penitentiary system for women, she was the victim of multiple and ongoing violations of law and policy. An investigation by the Correctional Investigator following Ashley Smith's death found that there were violations of law and policy in respect of: the use of institutional transfers; the use of administrative segregation; interventions involving the use of force; the provision of health and mental health services; and staff responses to medical emergencies.

Appendix A: Amended Statement of Claim, para. 4.

Plaintiffs' Motion Record, Tab 2: Correctional Investigator, "A Preventable Death" (June 20, 2008) at p. 74.

6. During the 11.5 months in which she was incarcerated in the federal penitentiary system, Ashley Smith was transferred seventeen times between nine different institutions in five different provinces. Her use of ligatures increased in frequency and intensity during her federal incarceration.

Plaintiffs' Motion Record, Tab 2: Correctional Investigator, "A Preventable Death" (June 20, 2008) at p. 75, 77.

7. The majority of the institutional transfers occurred in order to address administrative issues such as cell availability, incompatible inmates and staff fatigue, and had little or nothing to do with Ashley's needs. Each transfer eroded Ashley's trust in CSC staff and resulted in the escalation of her self-harming behaviours. As a result, the Correctional Investigator concluded in his report that many of the transfers violated the *Corrections and Conditional Release Act* (CCRA) as well as the Commissioner's Directive 843 on the prevention, management and response to suicide and self-injuries. The Commissioner's Directive prohibits the transfer of inmates considered imminently suicidal or self-injurious to an institution other than a treatment facility unless the psychologist managing the case deems the transfer a necessity to reduce or eliminate an inmate's potential for suicide or self-injury. This policy directive was not respected in several instances, resulting in a frequency of transfers that, in the Correctional Investigator's words, were "beyond comprehension."

Plaintiffs' Motion Record, Tab 2: Correctional Investigator, "A Preventable Death" (June 20, 2008) at p. 75, 83.

8. Throughout her 11.5 months in the custody of the Correctional Service of Canada, Ashley Smith was housed almost continuously in administrative segregation, where she had very little positive human contact, few opportunities for meaningful or purposeful activity and spent long hours and days in a cell with no stimulation available. At times Ashley Smith had no clothing other than a smock, no shoes, no mattress, and no blanket. During the last weeks of her life she often slept on the floor of her segregation cell, from which the tiles had been removed.

> Plaintiffs' Motion Record, Tab 2: Correctional Investigator, "A Preventable Death" (June 20, 2008) at p. 73, 75-76.

9. CSC was aware that the conditions of her confinement had a detrimental effect on Ashley's well-being, and knew that segregation had been unsuccessful in changing her behaviours in the past. Despite this knowledge, "the Correctional Service placed Ms. Smith on administrative segregation status – under a highly restrictive, and at times, inhumane regime – and maintained her on this status during her entire period of incarceration."

> Plaintiffs' Motion Record, Tab 2: Correctional Investigator, "A Preventable Death" (June 20, 2008) at p. 76, 79-80.

10. The Correctional Investigator concluded that there were violations of the *Corrections and Conditional Release Act*, the *Corrections and Conditional Release Regulations* and CSC policy in the use of administrative segregation, in that her segregation status was not reviewed at the regional level as required:

> 93. I believe strongly that a thorough external review of Ms. Smith's segregation status could very likely have generated viable alternatives to her continued and deleterious placement on such a highly restrictive form of confinement. There is reason to believe that Ms. Smith would be alive today if she had not remained on segregation status and if she had received appropriate care.
>
> Plaintiffs' Motion Record, Tab 2: Correctional Investigator, "A Preventable Death" (June 20, 2008) at p. 74, 80, 91.

11. It is plead in the Amended Statement of Claim that senior managers directed correctional officers and correctional managers that on those occasions when Ashley Smith was choking herself with a ligature, staff were not to enter Ashley Smith's cell if she was breathing. This directive was made and conveyed to correctional staff by numerous managerial staff, including

the Warden (Cindy Berry), Deputy Warden (Joanna Pauline) and Security Intelligence officer (Launa Gratton) and by staff from Regional Headquarters (including Kenneth Allen).

Appendix A: Amended Statement of Claim, para. 32.

12. The existence of the above directive was confirmed in testimony at the preliminary inquiry by the defendants Launa Gratton, Melissa Mueller and Sherri Fairchild:[2]

Evidence of Launa Gratton (Security Intelligence Officer):

Q: And was it a frequent direction to you [sp.] knowledge, to the Correctional officers, don't go in as long as she is breathing?

A: Yes.

Q: And that was a standard type of direction during Ashley Smith's second semester at GVI?

A: Yes.

Q: And that was a standard direction given by Correctional Managers to various shifts, dealing with Ashley Smith?

A: Yes.

Q: And where would the Correctional Managers have gotten that direction from?

A: They would have received it from their supervisor, being the Deputy Warden or Warden.

Appendix B: Testimony of Launa Gratton, *R. v. Phibbs et al.*, Preliminary Inquiry, November 13, 2008 at p.103 l.23 – p.104 l.8.

Evidence of Sherry Fairchild (Correctional Officer)

Q: Okay, you've also been given direction that you've told us about; don't go in if she's breathing?

A: Correct.

Q: What did you – let's start with this. What did you take that direction to mean; don't go in if she's breathing?

A: Exactly what it was. Don't go in as long as she was breathing.

Q: Well, if somebody's not breathing, what does that mean?

A: Pardon me?

Q: If somebody's not breathing, what does that mean?

[2] The preliminary inquiry testimony by these defendants is incorporated into the Amended Statement of Claim by reference at paragraph 80.

A: It probably means that they're not breathing.

Appendix B: *R. v. Phibbs et al.*, Preliminary Inquiry, November 26, 2008 at p.67 l.8 – p.68 l.2.

Evidence of Melissa Mueller (Correctional Officer)

Q: With all that was going on at GVI with regard to Ashley Smith, did you ever have discussions with Mr. Phibbs about the preservation of life – specifically Ashley Smith's life?

A: Did we worry about Ashley? Yes. Did we express our views to managers? Yes.

Q: And during that time period, what are you being told?

A: That we were not supposed to go in; that the use of force was too high; we had too many incidents of use of force.

Q: Was that always the way it was with Ashley? In other words…

A: I don't remember much from the first time she was with us but the second time, yes. Our numbers were too high.

Q: And who did you hear that from?

A: I heard it from Michelle Brigden; I believe I heard it from Eric Broadbent; I heard it from Ken Allan when he came down; I believe I heard it from Cindy Berry on a Sunday when she came to the unit. It was pretty well known that we were very high with our numbers of the use of force.

Q: Okay. And was that a source of frustration for you as a frontline officer?

A: Yes.

Q: A source of frustration for you and your fellow officers?

A: Yes.

Q: Would you and your fellow officers talk about that and the direction that was being given?

A: Yes.

Q: What was the direction that you were being given? What were you told with regard to going into Ashley Smith's cell?

A: I was told by one manager that I was not to enter the cell; that I was there to observe her; it was going to test me but I needed to stay strong and just watch. I was told by another manager that I would not be entering the cell; at one point he actually stopped us from entering the cell.

Q: And before you…

A: Yes.

> Q: … the first manager …
>
> A: Michelle Brigden.
>
> Q: And the second was?
>
> A: Eric Broadbent.
>
> Q: Thank you.
>
> A: And then there was a Sunday morning when Cindy Berry came into the unit and she told us that Ashley was playing a game with us; that we needed to stop going in there; enough was enough. So, I mean, she was the warden.
>
> Q: Were you given any special instruction as to when you should or shouldn't go in?
>
> A: We were told to – we were not to go in the cell as long as she was breathing.
>
> Appendix B: *R. v. Phibbs et al.*, Preliminary Inquiry, November 27, 2008 at p.38 l.5 - p.39 l.26.

13. On October 19, 2007, correctional staff at the Grand Valley Institution for Women directly observed Ashley position herself between the wall and her bed and tightly tie a ligature around her neck. Approximately thirty minutes passed before correctional staff intervened, by which time Ashley had died. As plead in the Amended Statement of Claim, the correctional staff present included the defendants Karen Eves, Sherry Fairchild, Charlene Venter, Valentino Burnett, Mellissa Mueller, Liz Gibbons, Blaine Phibbs, and Gaetan Desroches.

> Plaintiffs' Motion Record, Tab 2: Correctional Investigator, "A Preventable Death" (June 20, 2008) at p. 76.
>
> Appendix A: Amended Statement of Claim, para. 35-40.

B. Claims as against the individually-named Defendants

14. The Amended Statement of Claim sets out a statement of the material facts relating to each of the individually-named defendants, including the torts for which it is alleged they are each liable. The following is a summary of the claims against each of the individuals named in the Amended Statement of Claim:

COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA KEITH COULTER

- As Commissioner, this defendant was responsible for the control and management of the Correctional Service of Canada ("CSC") and all matters connected with CSC (para. 15).
- Coulter committed numerous violations of law and policy including unlawful institutional transfers, unlawful detention in administrative segregation, unlawful treatment of

Ashley's inmate grievances, failure to report incidents of "use of force", failing to provide competent and reasonable health care (para. 49-62).

- Liable for negligence (para. 81-86).
- Failed to ensure by way of supervision that the correctional staff in his charge complied with their training and the laws, regulations, and rules that pertain to the Institution to ensure the health and safety of the inmates and thereby acting with reckless indifference to the welfare of inmates including Ashley Smith and knowing that such failure would result in serious injury to the plaintiffs (para. 83(l)).
- Infliction of mental suffering and psychiatric damage (para. 87-88).
- Abuse of public office (para. 89-93).
- False imprisonment (para. 94-95).
- Breach of fiduciary duty (para. 96-98).

DEPUTY COMMISSIONER ONTARIO REGION NANCY STABLEFORTH

- As Deputy Commissioner, this defendant was responsible for the management of CSC operations within Ontario region and the implementation o correctional policy. As a member of the Executive Committee of CSC, she was aware of and directly reviewed issues arising from the imprisonment of Ashley Smith (para. 16).
- Stableforth committed numerous violations of law and policy including unlawful institutional transfers, unlawful detention in administrative segregation, unlawful treatment of Ashley's inmate grievances, failure to report incidents of "use of force", failing to provide competent and reasonable health care (para. 49-62).
- Liable for negligence (para. 81-86).
- Failed to ensure by way of supervision that the correctional staff in her charge complied with their training and the laws, regulations, and rules that pertain to the Institution to ensure the health and safety of the inmates and thereby acting with reckless indifference to the welfare of inmates including Ashley Smith and knowing that such failure would result in serious injury to the plaintiffs (para. 83(l)).
- Infliction of mental suffering and psychiatric damage (para. 87-88).
- Abuse of public office (para. 89-93).
- False imprisonment (para. 94-95).
- Breach of fiduciary duty (para. 96-98).

WARDEN OF NOVA INSTITUTION FOR WOMEN ALFRED LEGERE

- As the warden of the Nova Institution, this defendant was responsible for *inter alia*, the care, custody and control of all inmates in the penitentiary, the management, organization and security of the penitentiary and the direction and work environment of staff members and health professionals as well as ensuring that inmate grievances were processed in compliance with law and policy (para. 17).
- Alfred Legere instructed staff at GVI that they were not to enter Ashley Smith's cell if she was breathing (para. 17).
- Alfred Legere was responsible for ensuring that law and policy was complied with in respect of grievances submitted at Nova Institution and failed to comply with this duty (para. 57).

- Legere committed numerous violations of law and policy including unlawful institutional transfers, unlawful detention in administrative segregation, unlawful treatment of Ashley's inmate grievances, failure to report incidents of "use of force", failing to provide competent and reasonable health care (para. 49-62).
- Was part of a conspiracy to maintain Ashley Smith in segregation status without regional review (para. 63-71).
- Was part of a conspiracy to deprive Ashley Smith of the necessaries of life (para. 72-80)
- Liable for negligence (para. 81-86).
- Failed to ensure by way of supervision that the correctional staff in his charge complied with their training and the laws, regulations, and rules that pertain to the Institution to ensure the health and safety of the inmates and thereby acting with reckless indifference to the welfare of inmates including Ashley Smith and knowing that such failure would result in serious injury to the plaintiffs (para. 83(l)).
- Infliction of mental suffering and psychiatric damage (para. 87-88).
- Abuse of public office (para. 89-93).
- False imprisonment (para. 94-95).
- Breach of fiduciary duty (para. 96-98).

ACTING WARDEN OF GRAND VALLEY INSTITUTION FOR WOMEN CINDY BERRY

- As the Acting Warden of Grand Valley Institution, this defendant was responsible for *inter alia*, the care, custody and control of all inmates in the penitentiary, the management, organization and security of the penitentiary and the direction and work environment of staff members and health professionals as well as ensuring that inmate grievances were processed in compliance with law and policy (para. 18).
- Cindy Berry instructed staff at GVI that they were not to enter Ashley Smith's cell if she was breathing (para. 18).
- Cindy Berry was responsible for ensuring that law and policy was followed in respect of Ashley Smith's grievances submitted at Grand Valley Institution. She failed to meet this duty, in particular as these grievances were not opened until two months after Ashley Smith's death and were never processed (para. 58).
- Berry committed numerous violations of law and policy including unlawful institutional transfers, unlawful detention in administrative segregation, unlawful treatment of Ashley's inmate grievances, failure to report incidents of "use of force", failing to provide competent and reasonable health care (para. 49-62).
- Was part of a conspiracy to maintain Ashley Smith in segregation status without regional review (para. 63-71)
- Was part of a conspiracy to deprive Ashley Smith of the necessaries of life (para. 72-80)
- Liable for negligence (para. 81-86).
- Berry failed to ensure by way of supervision that the correctional staff in her charge complied with their training and the laws, regulations, and rules that pertain to the Institution to ensure the health and safety of the inmates and thereby acting with reckless indifference to the welfare of inmates including Ashley Smith and knowing that such failure would result in serious injury to the plaintiffs (para. 83(l)).
- Infliction of mental suffering and psychiatric damage (para. 87-88).
- Abuse of public office (para. 89-93).

- False imprisonment (para. 94-95).
- Breach of fiduciary duty (para. 96-98).

DEPUTY WARDEN OF GRAND VALLEY INSTITUTION FOR WOMEN JOANNA PAULINE

- As the Deputy Warden of Grand Valley Institution, this defendant was responsible for *inter alia*, the care, custody and control of all inmates in the penitentiary, the management, organization and security of the penitentiary and the direction and work environment of staff members and health professionals (para. 19).
- Joanne Pauline instructed staff at GVI that they were not to enter Ashley Smith's cell if she was breathing (para. 19).
- Committed numerous violations of law and policy including unlawful institutional transfers, unlawful detention in administrative segregation, unlawful treatment of Ashley's inmate grievances, failure to report incidents of "use of force", failing to provide competent and reasonable health care (para. 49-62).
- Was part of a conspiracy to maintain Ashley Smith in segregation status without regional review (para. 63-71)
- Was part of a conspiracy to deprive Ashley Smith of the necessaries of life (para. 72-80)
- Liable for negligence (para. 81-86).
- Failed to ensure by way of supervision that the correctional staff in her charge complied with their training and the laws, regulations, and rules that pertain to the Institution to ensure the health and safety of the inmates and thereby acting with reckless indifference to the welfare of inmates including Ashley Smith and knowing that such failure would result in serious injury to the plaintiffs (para. 83(l)).
- Infliction of mental suffering and psychiatric damage (para. 87-88).
- Abuse of public office (para. 89-93).
- False imprisonment (para. 94-95).
- Breach of fiduciary duty (para. 96-98).

ASSISTANT WARDEN OF GRAND VALLEY INSTITUTION FOR WOMEN LAUNA GRATTON

- As the Assistant Warden of Operations at GVI as well as the Security Intelligence Officer, this Defendant was responsible for *inter alia*, investigating incidents within GVI, and reviewing the use of force within the institution. (para. 20)
- Launa Gratton instructed staff at GVI that they were not to enter Ashley Smith's cell if she was breathing (para. 20).
- Committed numerous violations of law and policy including unlawful institutional transfers, unlawful detention in administrative segregation, unlawful treatment of Ashley's inmate grievances, failure to report incidents of "use of force", failing to provide competent and reasonable health care (para. 49-62).
- Was part of a conspiracy to deprive Ashley Smith of the necessaries of life (para. 72-80)
- Liable for negligence (para. 81-86).
- Infliction of mental suffering and psychiatric damage (para. 87-88).
- Abuse of public office (para. 89-93).
- False imprisonment (para. 94-95).

- Breach of fiduciary duty (para. 96-98).

TRAVIS McDONALD, KAREN EVES, BLAINE PHIBBS, SHERRY FAIRCHILD, CHARLENE VENTER, VALENTINO BURNETT, MELISSA MUELLER, LIZ GIBBONS, GAETAN DESROCHES

- As correctional officers and managers at Grand Valley Institution, these Defendants had supervision, care, custody and control of Ashley Smith (para. 21).
- These Defendants failed to provide Ashley Smith with the necessaries of life, including by failing to intervene on the date of her death (para. 35-48)
- Committed numerous violations of law and policy including unlawful institutional transfers, unlawful detention in administrative segregation, unlawful treatment of Ashley's inmate grievances, failure to report incidents of "use of force", failing to provide competent and reasonable health care (para. 49-62).
- Was part of a conspiracy to deprive Ashley Smith of the necessaries of life (para. 72-80)
- Liable for negligence (para. 81-86).
- Infliction of mental suffering and psychiatric damage (para. 87-88).
- Abuse of public office (para. 89-93).
- False imprisonment (para. 94-95).
- Breach of fiduciary duty (para. 96-98).

KENNETH ALLEN

- As a Correctional Supervisor from CSC Ontario Regional Headquarters, this Defendant was responsible for reviewing use of force reports generated in Ontario region penitentiaries (para. 22).
- Kenneth Allen attended at GVI between October 9-11, 2007 to provide training to all correctional officers and correctional managers concerning Ashley Smith. Kenneth Allen instructed those who attended the training that they were not to enter Ashley Smith's cell if she was breathing (para. 22).
- Committed numerous violations of law and policy including unlawful institutional transfers, unlawful detention in administrative segregation, unlawful treatment of Ashley's inmate grievances, failure to report incidents of "use of force", failing to provide competent and reasonable health care (para. 49-62).
- Was part of a conspiracy to deprive Ashley Smith of the necessaries of life (para. 72-80)
- Liable for negligence (para. 81-86).
- Infliction of mental suffering and psychiatric damage (para. 87-88).
- Abuse of public office (para. 89-93).
- False imprisonment (para. 94-95).
- Breach of fiduciary duty (para. 96-98).

CORRECTIONAL SERVICES EMPLOYEES JOHN DOE and JANE DOE

- These Defendants were at all material times employees of the CSC and as such had supervision, care, custody and control of Ashley Smith in their capacity as Correctional Officers, Supervisors, and medical staff. The wrongful actions of the correctional staff individually and/or collectively, in failing to ensure that Ashley Smith's conditions of confinement were lawful and to respond to her manifest and worsening medical condition

resulted in her suffering and death. The identities of these correctional staff are unknown to the plaintiffs and are within the unique knowledge of the defendants (para. 23).

- Committed numerous violations of law and policy including unlawful institutional transfers, unlawful detention in administrative segregation, unlawful treatment of Ashley's inmate grievances, failure to report incidents of "use of force", failing to provide competent and reasonable health care (para. 49-62).
- Was part of a conspiracy to maintain Ashley Smith in segregation status without regional review (para. 63-71)
- Was part of a conspiracy to deprive Ashley Smith of the necessaries of life (para. 72-80)
- Liable for negligence (para. 81-86).
- Infliction of mental suffering and psychiatric damage (para. 87-88).
- Abuse of public office (para. 89-93).
- False imprisonment (para. 94-95).
- Breach of fiduciary duty (para. 96-98).

PART THREE: ISSUES

15. The issues to be determined are:

a. Whether the action as against the individually-named Defendants should be struck on the grounds that it is plain and obvious that the defendant does not have the legal capacity to be sued.

b. Whether the action as against the individually-named Defendants should be struck on the grounds that the litigation would thereby be less costly and complex.

c. Whether the action as against the Defendants Coulter and Stableforth should be struck on the grounds that it is plain and obvious that the Amended Statement of Claim does not disclose a reasonable cause of action as against them.

d. Whether the claim for breach of fiduciary duty should be struck on the grounds that it is plain and obvious that the pleadings do not disclose a reasonable cause of action.

PART FOUR: LAW AND ARGUMENT

A. General principles governing a Rule 21 motion

16. Rule 21 of the *Rules of Civil Procedure* provides as follows:

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
>
> and the judge may make an order or grant judgment accordingly.
>
> …
>
> (3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,
>
> (a) the court has no jurisdiction over the subject matter of the action;
>
> (b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;
>
> (c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or
>
> (d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,
>
> and the judge may make an order or grant judgment accordingly.

17. The following principles governing a Rule 21 motion were established by the Supreme Court of Canada in *Hunt v. Carey Canada Inc*.:

> a) The facts of the pleading are to be taken as proven and true and unless they are patently ridiculous or incapable of proof;
>
> b) It must be "plain and obvious" that the pleading is unfounded or contains no reasonable cause of action in order for the motion to succeed;
>
> c) The threshold for sustaining a pleading is not high- a "germ" or "scintilla" of a cause of action will be sufficient;
>
> d) The pleading will only be struck if the allegation does not give rise to recognized cause of action or the claim fails to plead the necessary elements to recognize the cause of action;
>
> e) The pleading is to be read generously;
>
> g) The novelty of the claim does not prevent the plaintiff proceeding with its case; and
>
> h) The courts rule that the motion stage is not to determine the strength of the case or the likelihood of success.
>
> *Hunt v. Carey Canada Inc*. [1990] 2 S.C.R. 959 at p. 24.

18. These same principles are applied whether the motion is brought under R. 21.01(1)(a) or (b). In applying the test, the first step is to look at the facts set out in the Amended Statement of Claim, whether or not they are disputed. The next step is to determine if they are capable of

proof or patently ridiculous. Thereafter, the court will consider the balance of the test in conjunction with the facts and then assess the various components, or remaining principles, as a whole.

Tizard Estate v. Ontario, [2001] O.J. No. 4087 at para. 18-21.

B. It is not plain and obvious that the Defendants lack the legal capacity to be sued (Rule 21.01(3)(b))

19. The Moving Parties do not take the position that there is an absence of material facts plead against the individually-named Defendants. The only exception is in respect of the Defendants Coulter and Stableforth and the claim for breach of fiduciary duty (addressed further below).

20. Rather, the Defendants argue that the claim against the individually-named Defendants should be struck on the grounds that they do not have the legal capacity to be sued as a result of the statutory liability of the AGC for torts committed by servants of the Crown.[3] The AGC argues that in light of the vicarious liability of the Crown for its servants, the individually-named Defendants are neither necessary nor proper parties (para. 15). The AGC relies upon R. 5.04(2) of the *Rules of Civil Procedure*, which permits the deletion of parties (para. 16).

21. The Defendants cite no caselaw to support their position, nor is there any. It is common place for actions to name both employees and employers, even where there is statutory liability on behalf of the government.[4] There is no rule or legal principle prohibiting such. Indeed in the recent rule 21 case of *Yeates v. Attorney General of Canada*, a case in which the AGC attempted to make this argument, the Court noted as follows: "As for the claims against the individual defendants, the applicants have not provided me with any authority for their position that the

[3] *Crown Liability and Proceedings Act*, R.S.O. 1985, c.C.50, s. 3(b).

[4] See, for example, the following cases in which both the Attorney General of Canada and Crown servants were named without objection: *Merrifield v. Attorney General of Canada, Inspector James Jagoe, Superintendent Mark Proulx*, 2009 ONCA 127 (CanLII) (A rule 21 motion at which the argument concerning vicarious liability was not raised); *Bron v. Attorney General of Canada, Gerald Frappier, Joanne St-Onge, Laureen Kinney and Marc Gregoire*, 2010 ONCA 71 (CanLII) (A rule 21 motion at which the argument concerning vicarious liability was not raised); *Tucker v. Attorney General of Canada, Canada Customs and Revenue Agency and Rick Desrosier*, 2006 CanLII 32330 (Ont. S.C.) (an action that went to trial, with Desrosier sued in his capacity as a servant of the Crown).

claims are an abuse of process because the CRA has acknowledged its vicarious liability for their acts. In the absence of any support for that assertion, it would fail."

Yeates v. Canada, 2010 ONSC 3407 (CanLII) at para. 22.

22. Moreover, the position of the Defendants is inconsistent with and contrary to statute, which specifically contemplates legal action being taken as against Crown servants.

23. The *Crown Liability and Proceedings Act* provides that the AGC is liable in respect of torts committed by servants of the Crown:

> **3.** The Crown is liable for the damages for which, if it were a person, it would be liable
>
> (*b*) in any other province [apart from Quebec], in respect of
>
> (i) a tort committed by a servant of the Crown, or
>
> (ii) a breach of duty attaching to the ownership, occupation, possession or control of property.

Crown Liability and Proceedings Act, R.S.O. 1985, c.C.50, s. 3(b).

24. While the *Crown Liability and Proceedings Act* explicitly provides for vicarious liability of the Crown, it also explicitly contemplates the granting of relief or the making of an order against a servant of the Crown:

> 22(2) A court shall not in any proceedings grant relief or make an order against a servant of the Crown that it is not competent to grant or make against the Crown.

Crown Liability and Proceedings Act, R.S.O. 1985, c.C.50, s. 22(2).

25. Indeed, a case cited at paragraph 20 of the factum of the Defendant Karen Eves confirms that s. 22(2) of the *Crown Liability and Proceedings Act* "does not bar an action" against a servant of the Crown. The authorities cited in the factum of the Defendant Joanna Pauline stand for the well-known proposition that a plaintiff "need not" sue individual Crown servants where the Crown is vicariously liable (see paragraphs 28-30 of the factum). The jurisprudence does not assert that a plaintiff "cannot" name individual Crown servants, a legal principle that would be inconsistent with the statute.

Canada Deposit Insurance Corp. v. Prisco, [1994] A.W.L.D. 642 at para. 49.

26. It is therefore submitted that it can hardly be said, in the absence of any statutory authority or jurisprudence and in light of *Yeates*, that it is plain and obvious that an individual defendant cannot be named where the employer is vicariously liable.

C. The action against the individually-named Defendants should not be struck on the grounds that the litigation would thereby be less costly and complex (Rule 21.01(1)(a)).

27. In addition to the above argument in respect of the legal capacity to sue the individually-named Defendants, the Defendants assert that these claims should be struck on the grounds of r. 21.01(1)(a) of the *Rules of Civil Procedure*. As noted above, r. 21.01(1)(a) provides that a party may move before a judge for a determination of a question of law raised by a pleading, where the determination may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs.

28. It is not apparent from the factums of the Moving Parties precisely what "question of law" they seek to have determined. To the contrary, the Moving Parties simply assert that r. 21.01(1)(a) should permit the striking of the claim – as against otherwise lawfully named parties – on the grounds of cost savings and rendering the action less "complicated." For example:

> Factum of Joanna Pauline, paragraph 34: Further, and in recognition of the purpose of Rule 21.01(1)(a), it is submitted that by striking the within claims as against Pauline will be a great savings of cost to her, given that there is no doubt that she would never be directly liable to the Plaintiffs for any of the torts for which she is alleged to have committed even if it found that she has done so, but that the Crown would be liable for any damages arising therefrom based upon its vicarious liability as set out in the Act.

> Factum of Karen Eves, paragraph 23: refers to 21.01(1)(a) and then states: "It is submitted that the presence of the individual defendants in this lawsuit serves no purpose and instead complicates and increases the cost of this proceeding."

29. It is submitted that speculation that the action would be less expensive or complicated is not a "question of law" upon which to strike a claim as contemplated by r. 21.01(a), nor have the Defendants identified any support in the caselaw for this position. To the contrary, the Supreme Court in *Hunt v. Carey* specifically held that "the fact that the plaintiff's case was a complicated one could not justify striking out the statement of claim."

Hunt v. Carey Canada Inc. [1990] 2 S.C.R. 959 at p. 16

30. So long as there are material facts upon which to support a claim as against an individually-named Defendant (as there are in this case), the Plaintiffs are entitled to name those parties that they choose to name. It is not plain and obvious that there is any basis in law to strike the claims against the individually-named Defendants simply because it would be less costly for the Defendants or that it would render the litigation less complex.

D. The pleading sets out material facts as against the Defendants Coulter and Stableforth (AGC para. 22-24)

31. The AGC asserts that the pleadings do not plead sufficient material facts to support the continuation of the action as against the former Commissioner Coulter and the former Deputy Commissioner Stableforth.

32. As set out above, the Amended Statement of Claim clearly identifies facts and law upon which its claims against Coulter and Stableforth are based. For ease of reference, these are reproduced below:

COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA KEITH COULTER

- As Commissioner, this defendant was responsible for the control and management of the Correctional Service of Canada ("CSC") and all matters connected with CSC (para. 15).
- Committed numerous violations of law and policy including unlawful institutional transfers, unlawful detention in administrative segregation, unlawful treatment of Ashley's inmate grievances, failure to report incidents of "use of force", failing to provide competent and reasonable health care (para. 49-62).
- Liable for negligence (para. 81-86).
- Failed to ensure by way of supervision that the correctional staff in their charge complied with their training and the laws, regulations, and rules that pertain to the Institution to ensure the health and safety of the inmates and thereby acting with reckless indifference to the welfare of inmates including Ashley Smith and knowing that such failure would result in serious injury to the plaintiffs (para. 83(l)).
- Infliction of mental suffering and psychiatric damage (para. 87-88).
- Abuse of public office (para. 89-93).
- False imprisonment (para. 94-95).
- Breach of fiduciary duty (para. 96-98).

DEPUTY COMMISSIONER ONTARIO REGION NANCY STABLEFORTH

- As Deputy Commissioner, this defendant was responsible for the management of CSC operations within Ontario region and the implementation o correctional policy. As a member of the Executive Committee of CSC, she was aware of and directly reviewed issues arising from the imprisonment of Ashley Smith (para. 16).
- Committed numerous violations of law and policy including unlawful institutional transfers, unlawful detention in administrative segregation, unlawful treatment of Ashley's inmate grievances, failure to report incidents of "use of force", failing to provide competent and reasonable health care (para. 49-62).
- Liable for negligence (para. 81-86).
- Failed to ensure by way of supervision that the correctional staff in their charge complied with their training and the laws, regulations, and rules that pertain to the Institution to ensure the health and safety of the inmates and thereby acting with reckless indifference to the welfare of inmates including Ashley Smith and knowing that such failure would result in serious injury to the plaintiffs (para. 83(l)).
- Infliction of mental suffering and psychiatric damage (para. 87-88).
- Abuse of public office (para. 89-93).
- False imprisonment (para. 94-95).
- Breach of fiduciary duty (para. 96-98).

33. In addition, paragraph 24 of the Amended Statement of Claim pleads and relies upon the facts set out in the Correctional Investigator's report. Amongst other things, that report states as follows in respect of the Defendants Coulter and Stableforth:

> Transfers required consultation between the sending and receiving Regions prior to their approval. As such, with the exception of the Pacific Region, all of CSC's
>
> Regional Deputy Commissioners (RDCs), or their delegates, should have been involved in and aware of Ms. Smith's case during her period of federal incarceration.
>
> It appears, however, that the Women Offender Sector at CSC National Headquarters became the *de facto* approving authority behind the transfers. This was inappropriate as it was each Region's responsibility to ensure that all of Ms. Smith's transfers were done in accordance with law and policy and were in her best interests.
>
> The Ontario RDC and the Deputy Commissioner for Women (DCW) were both told by the Acting Warden of GVI of the challenges of managing Ms. Smith. The RDC and DCW were also personally advised of concerns with respect to Ms. Smith's conditions of confinement as recently as the month before her death during their September 24, 2007 visit to GVI. It is not clear to me what steps were taken at the time to either review or improve the situation for Ms. Smith. This question begs further review.
>
> The Correctional Service produces and distributes daily Situation Reports (SITREPS) which outline significant incidents involving offenders within CSC

> facilities or those who are on conditional release. These reports are circulated widely throughout the CSC and are reviewed closely by Senior Executives at CSC National Headquarters and Regional Headquarters. Ms. Smith's name appeared in these reports on a weekly and often daily basis. It is reasonable to conclude therefore that the most senior staff within the Correctional Service – including the Commissioner of Corrections, the Senior Deputy Commissioner, the Deputy Commissioner for Women, and the Regional Deputy Commissioners – was aware of the challenges presented to the Correctional Service by Ms. Smith's on-going self-injurious behaviour. Yet, there is little evidence that anyone beyond the institutional level effectively intervened before Ms. Smith died [emphasis added].
>
> Plaintiffs' Motion Record, Tab 2: Correctional Investigator, "A Preventable Death" (June 20, 2008) at p. 88.

34. Thus, the Correctional Investigator's report states that the Defendants Coulter and Stableforth had knowledge of Ashley Smith's circumstances, had a duty to ensure the transfers and conditions of her confinement complied with law and policy, and failed to comply with that duty.

35. Finally, the Amended Statement of Claim pleads and relies upon the *Corrections and Conditional Release Act ("CCRA"), Corrections and Conditional Release Regulations ("CCRR")* and the *Commissioner's Directives* (see paragraph 112). These sources of law and policy explicitly ascribe legal responsibilities to the Defendants Coulter and Stableforth that are consistent with the claims in the pleadings, including as follows:

COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA KEITH COULTER

- The Commissioner of Corrections, under the direction of the Minister, has the control and management of the Service and all matters connected with the Service (s. 6(1) CCRA).

- The Commissioner is responsible in law for authorizing the transfer of persons committed to a penitentiary (s. 29 CCRA).

- The Commissioner is responsible in law for directing institutional heads in the: a) care custody and control of all inmates in the penitentiary; b) the management organization and security of the penitentiary; and c) the direction and work environment of staff members (s. 4 CCRR).

- The Commissioner or their designate is responsible in law for reviewing an inmate's representations in respect of proposed transfers (s. 12(c) CCRR).

- The Commissioner or their designate is responsible in law for determining whether it is necessary to immediately transfer an inmate for the security of the penitentiary or the safety of the inmate or any other person, and for reviewing the inmate's representations concerning the transfer (s. 13 CCRR).

- The Commissioner or their designate is responsible in law for consider requests by inmates for transfers and for providing a written notice of decision (s. 15 CCRR).

- Every transfer of an inmate is effected by a warrant to transfer signed by the Commissioner or their designate (s. 16 CCRR).

DEPUTY COMMISSIONER ONTARIO REGION NANCY STABLEFORTH

- Where an inmate is confined in administrative segregation, the Deputy Commissioner of Ontario Region or their designate is responsible in law for reviewing the inmate's case at least once every 60 days to determine whether the continued segregation is justified (s. 22 CCRR).

- Where a person suffers an injury in a penitentiary as a result of the use of force, the Deputy Commissioner of Ontario Region is responsible in law for reviewing the details of all the circumstances that led to the injury (s. 73(2)(b) CCRR).

36. The Amended Statement Claim sets out the material facts demonstrating a breach of the above statutory and legal duties, the breach of which gives rise to the torts of negligence, negligent supervision, abuse of public office, false imprisonment, infliction of mental distress and breach of fiduciary duty.

37. In light of the above, it is apparent that there are specific allegations as against the Defendants Coulter and Stableforth, and that the claims as against them are not based on vicarious liability for actions of subordinate Crown servants. Rather they are based on their knowledge of Ashley Smith's circumstances, breaches of their legal duties as described above, as well as their failure to supervise subordinate Crown servants. As such, it is not plain and obvious that the claims as against Coulter and Stableforth should be struck.

E. It is not plain and obvious that the claim for breach of fiduciary duty cannot succeed (R. 21.01(b)).

38. The Defendants Pauline and AGC state that the claim for breach of fiduciary duty should be struck on the basis that a) there was no relationship of "trust and confidence" and b) in order to establish a breach, it must be plead that the fiduciary in question took advantage of the relationship to gain a benefit (in particular, see AGC factum at paragraph 25; Pauline's factum at paragraphs 36-38).

39. It is submitted that the Moving Parties submissions are based on an erroneous summary of the law of fiduciaries.

i. It is not plain and obvious that the Amended Statement of Claim fails to establish a Fiduciary Duty

40. The law on fiduciary relationships was laid down in the Supreme Court of Canada decision of *Frame v. Smith*:

> However, there has been reluctance throughout the common law world to affirm the existence of and give content to a general fiduciary principle, which can be applied in appropriate circumstances. Sir Anthony Mason ("Themes and Prospects" in P. Finn, ed., Essays in Equity (1985), at p. 246) is probably correct when he says that "the fiduciary relationship is a concept in search of a principle". As a result there is no definition of the concept "fiduciary" apart from the contexts in which it has been held to arise and, indeed, it may be more accurate to speak of relationships as having a fiduciary component to them rather than to speak of fiduciary relationships as such: see J.C. Shepherd, The Law of Fiduciaries (1981), pp. 4-8. Perhaps the biggest obstacle to the development of a general fiduciary principle has been the fact that the content of the fiduciary duty varies with the type of relationship to which it is applied. It seems on its face therefore to comprise a collection of unrelated rules such as the rule against self-dealing, the misappropriation of assets rule, the conflict and profit rules and (in Canada) a special business opportunity rule: see R.P. Austin, "The Corporate Fiduciary: Standard Investments Ltd. v. Canadian Imperial Bank of Commerce" (1986-87), 12 Can. Bus. L.J. 96, at pp. 96-97; P.D. Finn, Fiduciary Obligations (1977). The failure to identify and apply a general fiduciary principle has resulted in the courts relying almost exclusively on the established list of categories of fiduciary relationships and being reluctant to grant admittance to new relationships despite their oft-repeated declaration that the category of fiduciary relationships is never closed.
>
> *Frame v. Smith*, 1987 CanLII 74 (S.C.C.) at para. 58.

41. The classes of relationships recognized by the courts to be fiduciary in nature include: trustees, executors, administrators, assignees in bankruptcy, solicitors, accountants, banks, directors, agents, partners, senior management and persons holding public office. However, there is no exhaustive list of fiduciary relationships, and a fiduciary relationship can also arise from the fact of a special circumstances of a relationship.

Lac Minerals Ltd. v. Int. Coronal Resources Ltd., 1989 CanLII 34 (S.C.C.) at p. 26-27.

42. Of assistance in identifying fiduciary relationships that have not yet been recognized as a category, Madam Justice Wilson identified three general characteristics of fiduciary relationships as follows:

> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.
>
> *Frame v. Smith*, 1987 CanLII 74 (S.C.C.) at para. 60.

43. It is possible for a fiduciary relationship to be found although not all of these characteristics are present. The one feature, however, which is considered to be indispensable to the existence of the relationship is that of dependency or vulnerability, which causes one of the parties to place reliance upon the other and requires the protection of equity acting upon the conscience of that other. Justice Sopinka, in *Lac Minerals*, adopted the following language: "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." This condition of dependency moves equity to subject the fiduciary to its strict standards of conduct.

Lac Minerals Ltd. v. Int. Coronal Resources Ltd., 1989 CanLII 34 (S.C.C.) at p. 29.

44. It is apparent that the relationship between an inmate and the Correctional Service of Canada possesses the three general characteristics identified by Madam Justice Wilson, and in

particular, a condition of dependency and vulnerability. As an inmate in a penitentiary, an inmate is utterly dependent upon the Correctional Service of Canada for all the necessaries of life and an inmate's life is controlled in almost every respect. The Correctional Service of Canada controls what visitors inmates may have, what they can read, how and whether they will be disciplined, what they eat, where they sleep, what they wear, the medical and dental care they can receive, access to showers, access to the outdoors and other recreational activities, contact with other inmates, the activities they can pursue, and – notably – whether an inmate will be transferred and whether an inmate will be maintained in administrative segregation.

45. In addition, the *Corrections and Conditional Release Act* imposes a particular duty upon the Correctional Service of Canada to act in the best interests of inmates in order to further their rehabilitation:

> **3.** The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by
>
> (*a*) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and
>
> (*b*) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.
>
> *Corrections and Conditional Release Act*, S.C. 1992, c. 20, at s. 3.

46. That same Act also imposes a duty upon the Correctional Service of Canada to ensure that its policies, programs and practices respect gender differences, are responsive to the special needs of women and as well as the needs of other groups of offenders with special requirements. It is submitted that as a young, female inmate with mental health issues, the *Corrections and Conditional Release Act* imposed a duty of loyalty upon the Correctional Service of Canada to ensure it met Ashley Smith's needs:

> **4.** The principles that shall guide the Service in achieving the purpose referred to in section 3 are
>
> …
>
> (*h*) that correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and be responsive to the special needs of women and aboriginal peoples, as well as to the needs of other groups of offenders with special requirements;

Corrections and Conditional Release Act, S.C. 1992, c. 20, at s. 3.

47. Thus, the Correctional Service of Canada owed Ashley Smith a legal duty to protect her and the capacity to unilaterally exercise its power, or interests, to affect her legal interests and practical interests. Ashley Smith's understanding of this relationship of dependency is reflected in her statements to correctional officers: "it's your job to save me" (see para. 105(b) of the Amended Statement of Claim). The Amended Statement of Claim sets out numerous examples of the manner in which these powers were arbitrarily and unlawfully violated, in circumstances in which Ashley Smith was powerless to resist. Thus, the pleading in the Amended Statement of Claim includes all of the material facts and legal principles necessary to establish a breach of fiduciary duty, including as follows:

> 96. The plaintiffs state that the defendants owed a fiduciary duty to Ashley to ensure her health and safety while she was in the custody of CSC.
>
> 97. The plaintiffs state that by virtue of being in the custody of CSC, Ashley Smith was at the mercy of the discretion of the defendants. All the defendants were, by virtue of this custodial relationship, in a position to unilaterally exercise power over Ashley so as to affect her legal and/or practical interests. Thus all of the defendants owed a fiduciary duty to attend to Ashley Smith's physical and psychological needs and to ensure her confinement was in compliance with the law.
>
> 98. For all of the reasons set out above, the plaintiffs state that the defendants breached the fiduciary duties they owed to Ashley throughout her 11.5 months in the federal penitentiary system, and thereby cause damage to the plaintiffs.
>
> Appendix A: Amended Statement of Claim, para. 96-98.

48. It is acknowledged that in at least one case, a New Brunswick court concluded that the Correctional Service of Canada does not owe a fiduciary duty to the inmates under its care. It is noteworthy that this conclusion was reached with no analysis of the particular circumstances of inmates and correctional officers, and failed to apply the test set out by the Supreme Court in *Frame v. Smith*.

Squires v. Canada (Attorney General), [2002] N.B.J. No. 330 at para. 67-68.

49. However, there are other cases, including in Ontario, that have concluded otherwise. For example, in *Proctor v. Canada*, the Superior Court refused to grant summary judgment in the context of an action against the Correctional Service of Canada for breach of fiduciary duty. The

action arose out of the forced administration of LSD upon a 17 year-old inmate at the Prison for Women as part of drug experiments being conducted in federal penitentiaries. In refusing to grant summary judgment, the Court noted that it would be necessary to hear evidence in order to determine whether there was a fiduciary obligation:

> I cannot, as stated earlier in my analysis, usurp the trial judge's function by drawing inferences, finding facts, assessing credibility and weighing evidence. The fiduciary obligation Ms. Proctor wants me to declare and impose judgment therefore, has never been imposed on the Attorney General of Canada, in the context of a relationship between Correctional Services Canada and an inmate under its charge. If such an obligation is imposed, it ought to be done in the presence of the parties, in open Court with a trial judge who will weigh the conflicting evidence of the parties and witnesses on the specified events.
>
> *Proctor v. Canada*, [2002] O.J. No. 350 (Ont. Sup. Crt.) at para. 65.

50. In *Ault v. Canada*, a former inmate who was assaulted by another inmate, sought to commence an action against Canada grounded in negligence and breach of fiduciary duty. Because he was seeking to start the action more than 12 months following the assault, he was required to obtain leave of the court. Amongst other things, in order to succeed in commencing the lawsuit, the plaintiff had to establish a *prima facie* case. The Saskatchewan court of Queen's Bench reviewed the evidence and potential defences and concluded that a *prima facie* case was established. The claim in negligence and fiduciary duty was permitted to proceed.

> *Ault v. Canada*, 2007 SKQB 389 (CanLII).

51. In *Giacomelli v. Canada*, an individual of Italian origin who was arrested and detained by the Canadian government in the 1940s brought an action against Canada alleging, amongst other things, a breach of fiduciary duty. While the case did not arise in the context of an individual held in the custody of the Correctional Service of Canada, Giacomelli was challenging the conduct of Canada in arresting and detaining him over a number of years. On a motion for summary judgment, the Court refused to dismiss the action:

> If, indeed, the defendant acted outside the scope of its authority, then that raises the issue pleaded of fiduciary duty and that would probably be open to the plaintiff to argue that the Government of Canada under the circumstances, had breached that duty. It is to be remembered that the situations where fiduciary obligations may arise have not been limited by the courts. If there was a fiduciary duty then no limitation period is applicable. On the facts, as pleaded, the defendant could well be stripped of the cloak of immunity.

Giacomelli v. Canada, 2005 CanLII 36262 (Ont. S.C.) at para. 10.

52. It is therefore respectfully submitted that it is not plain and obvious that the Defendants did not owe a fiduciary duty to Ashley Smith. To the contrary, the principles underlying the recognition of fiduciary relationships strongly suggest that there is such a relationship. The novelty of such a claim should not preclude the claim from proceeding.

ii. It is not plain and obvious that the Amended Statement of Claim fails to establish a breach of fiduciary duty

53. The Defendants AGC and Pauline argue that in order to establish a breach of fiduciary duty, the plaintiff must establish that the fiduciary gained a benefit by virtue of the breach. It is submitted that benefit to the wrongdoer is not a requirement to establish a breach of fiduciary duty, although the existence of a benefit may well be a relevant consideration.

54. As noted by the Supreme Court in *Canson*, equity cannot be rigidly applied, designed as it is to remedy injustice. Its doctrines must be attuned to different circumstances, and not all fiduciary obligations are the same. Indeed, in *Canson*, the Supreme Court specifically contemplated situations in which a beneficiary of a fiduciary relationship would be entitled to a remedy, even in circumstances in which the wrongdoer had not received a benefit:

> In the case of a mere breach of duty, the concern of equity is to ascertain the loss resulting from the breach of the particular duty. Where the wrongdoer has received some benefit, that benefit can be disgorged, but the measure of compensation where no such benefit has been obtained by the wrongdoer raises different issues.
>
> *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 at p. 50, 61.

55. The Supreme Court went on to establish the availability of "equitable compensation" for breaches of fiduciary duties in circumstances in which there is no "benefit" to the wrongdoer that must be disgorged.

56. In *Martin v. Goldfarb*, an action for breach of fiduciary duty was brought against a lawyer who failed to advise his client that a third party who was engaged in business with the client was a disbarred lawyer with a criminal record for fraud. The third party breached his own fiduciary duty to the client who suffered substantial losses. The lawyer believed that the third party was reformed and he was unaware of the third party's fraudulent activity in relation to his client. The Ontario Court of Appeal affirmed the trial court's finding that the lawyer had breached his fiduciary duty to the client by failing to disclose the facts surrounding the third party's criminal history, even in the absence of active assistance by the lawyer, actual knowledge of the third party's fraud, or personal benefit.

Martin v. Goldfarb (1998), 41 O.R. (3d) 161 (C.A.)

57. Therefore, it is submitted that there is no general requirement that a fiduciary must benefit from the breach of the duty. Rather, the content of the fiduciary relationship would govern would constitutes a breach. The Amended Statement of Claim sets out with particularity the many ways in which the Defendants breached their duties to Ashley Smith, including significant and repeated breaches of law and policy.

58. Even if this Honourable Court concludes that it is necessary to plead material facts establishing that the fiduciary obtained a benefit by way of breaching the duty, it is submitted that this test has been met. As plead in the Amended Statement of Claim, the Defendants obtained the following benefits:

a) The parties to the conspiracy to maintain Ashley Smith in segregation status obtained a benefit by way of circumventing standard oversight mechanisms;
b) The parties to the conspiracy to deprive Ashley Smith of the necessaries of life obtained a benefit by way of circumventing standard oversight mechanisms in place with respect to the use of force.
c) All of the Defendants were employees of the Crown and therefore received remuneration.
d) The Defendant correctional officers and correctional managers avoided disciplinary action.

e) The multiple, unlawful institutional transfers were carried out in order to address administrative issues such as cell availability, incompatible inmates and staff fatigue, and had little or nothing to do with Ashley Smith's needs and benefited all of the Defendants.

59. In the alternative, should this Honourable Court conclude that the material facts to establish a breach of fiduciary duty have not been plead, it is respectfully requested that leave be granted to amend the Amended Statement of Claim.

PART FIVE: ORDER REQUESTED

60. It is therefore respectfully requested that this Honourable Court make the following orders:

a) Dismissing this motion;
b) In the alternative, leave to amend the Amended Statement of Claim;
c) Costs to the Plaintiffs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 26, 2010

_____

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Schedule A: List of Authorities

1. *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959.
2. *Tizard Estate v. Ontario*, [2001] O.J. No. 4087.
3. *Yeates v. Canada*, 2010 ONSC 3407 (CanLII).
4. *Merrifield v. Attorney General of Canada*, 2009 ONCA 127 (CanLII).
5. *Bron v. Attorney General of Canada*, 2010 ONCA 71 (CanLII).
6. *Tucker v. Attorney General of Canada*, 2006 CanLII 32330 (Ont. S.C.).
7. *Canada Deposit Insurance Corp. v. Prisco*, [1994] A.W.L.D. 642.
8. *Frame v. Smith*, 1987 CanLII 74 (S.C.C.).
9. *Lac Minerals Ltd. v. Int. Coronal Resources Ltd.*, 1989 CanLII 34 (S.C.C.).
10. *Squires v. Canada (Attorney General)*, [2002] N.B.J. No. 330.
11. *Proctor v. Canada*, [2002] O.J. No. 350 (Ont. Sup. Crt.).
12. *Ault v. Canada*, 2007 SKQB 389 (CanLII).
13. *Giacomelli v. Canada*, 2005 CanLII 36262 (Ont. S.C.).
14. *Canson Enterprises Ltd. v. Boughton & Co*., [1991] 3 S.C.R. 534.
15. *Martin v. Goldfarb* (1998), 41 O.R. (3d) 161 (C.A.).

Schedule B: Relevant Statutes

***Corrections and Conditional Release Act*, S.C. 1992, c. 20:**

6. (1) The Governor in Council may appoint a person to be known as the Commissioner of Corrections who, under the direction of the Minister, has the control and management of the Service and all matters connected with the Service.

29. The Commissioner may authorize the transfer of a person who is sentenced, transferred or committed to a penitentiary to

(*a*) another penitentiary in accordance with the regulations made under paragraph 96(*d*), subject to section 28; or

(*b*) a provincial correctional facility or hospital in accordance with an agreement entered into under paragraph 16(1)(*a*) and any applicable regulations.

***Corrections and Conditional Release Regulations*, SOR/92-620:**

4. An institutional head is responsible, under the direction of the Commissioner, for

(*a*) the care, custody and control of all inmates in the penitentiary;

(*b*) the management, organization and security of the penitentiary; and

(*c*) the direction and work environment of staff members.

12. Before the transfer of an inmate pursuant to section 29 of the Act, other than a transfer at the request of the inmate, an institutional head or a staff member designated by the institutional head shall

(*a*) give the inmate written notice of the proposed transfer, including the reasons for the proposed transfer and the proposed destination;

(*b*) after giving the inmate a reasonable opportunity to prepare representations with respect to the proposed transfer, meet with the inmate to explain the reasons for the proposed transfer and give the inmate an opportunity to make representations with respect to the proposed transfer in person or, if the inmate prefers, in writing;

(*c*) forward the inmate's representations to the Commissioner or to a staff member designated in accordance with paragraph 5(1)(*b*); and

13. (1) Section 12 does not apply where the Commissioner or a staff member designated in accordance with paragraph 5(1)(*b*) determines that it is necessary to

immediately transfer an inmate for the security of the penitentiary or the safety of the inmate or any other person.

(2) Where the Commissioner or a staff member designated in accordance with paragraph 5(1)(*b*) determines that it is necessary to immediately transfer an inmate for the reasons set out in subsection (1), the institutional head of the penitentiary to which the inmate is transferred or a staff member designated by that institutional head shall

(*a*) meet with the inmate not more than two working days after the transfer to explain the reasons for the transfer and give the inmate an opportunity to make representations with respect to the transfer in person or, if the inmate prefers, in writing;

(*b*) forward the inmate's representations to the Commissioner or to a staff member designated in accordance with paragraph 5(1)(*b*); and

(*c*) give the inmate, within five working days after the final decision, written notice of the final decision respecting the transfer and the reasons for the decision.

15. Where an inmate submits a request for a transfer referred to in section 29 of the Act, the Commissioner or a staff member designated in accordance with paragraph 5(1)(*b*) shall consider the request and give the inmate written notice of the decision, within 60 days after the submission of the request, including the reasons for the decision if the decision is to deny the request.

16. Every transfer of an inmate made pursuant to section 29 of the Act shall be effected by a warrant to transfer signed by the Commissioner or by a staff member designated in accordance with paragraph 5(1)(*b*).

22. Where an inmate is confined in administrative segregation, the head of the region or a staff member in the regional headquarters who is designated by the head of the region shall review the inmate's case at least once every 60 days that the inmate remains in administrative segregation to determine whether, based on the considerations set out in section 31 of the Act, the administrative segregation of the inmate continues to be justified.

73. (1) Where a person suffers an injury or death in a penitentiary as a result of the use of force, any staff member who has knowledge of the incident shall immediately call health care staff to the scene and notify the institutional head or a staff member designated by the institutional head.

(2) Where the institutional head or staff member designated by the institutional head is notified pursuant to subsection (1) of a serious injury or a death, the institutional head or staff member shall, as soon as practicable,

(*a*) notify the head of the region and the appropriate police department; and

(*b*) submit a report to the regional head that details all of the circumstances that led to the injury or death.

APPENDIX A: AMENDED STATEMENT OF CLAIM

APPENDIX B: EXCERPTS FROM PRELIMINARY INQUIRY TRANSCRIPTS