Federal Court  Cour fédérale

Date: 20140220

Docket: T-3-10

Citation: 2014 FC 164

SIMPLIFIED ACTION

BETWEEN:

SHEM WILLIAM TROTMAN

Applicant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

PROTHONOTARY MORNEAU

[1] At approximately 8:56 p.m. on January 8, 2007, when he was in the gymnasium of Sector 240 of the Donnacona maximum security penitentiary (the penitentiary), the applicant was shot in the hand by a correctional officer, thus causing some injury to him.

[2] As a result of this incident, the applicant has commenced a simplified action before this Court in which he is claiming $45,000.00 in damages from the respondent.

[3] In his statement of claim filed in January 2010, the applicant essentially maintains that the respondent is at fault in that [TRANSLATION] "[a]t the moment the applicant was hit by the deliberate shot fired by the correctional officer, there was no danger of serious bodily injury, death or escape and there were less harsh measures available to put an end to the confrontation" (paragraph 10 of the applicant's Statement of Claim).

[4] For the reasons that follow I have arrived at the conclusion that an analysis of the relevant facts surrounding the said gunshot leads to a finding in law that the respondent's servants are not guilty of misconduct against the applicant and that his action must therefore be dismissed.

The facts

[5] The facts essential to gaining an understanding of this decision appear to this Court to be the following, after a review of the affidavits and testimony presented by both parties at the trial of the action.

[6] The gunshot referred to in the first paragraph was fired during a final altercation that took place near a billiard table in the gymnasium and involving, on one side, the applicant and one Jason Andrew Kooger (Kooger) who formed a team, and, on the other, one Jason Steven McGowan (McGowan) (the Main Altercation).

[7] McGowan found himself in the penitentiary following a second federal prison sentence for two years and eleven months for a series of violent offences.

[8] As for the applicant and Kooger, they are both in the penitentiary serving life sentences for second degree murder.

[9] It should be recalled from the start that the Main Altercation, which broke out at approximately 8:55 p.m. (and to which we shall return later), was not the first violent incident to have occurred in the gymnasium on the evening of January 8, 2007 and in which the applicant, among others, was involved.

[10] Indeed, the various eye-witness accounts of the correctional officers who were on duty supervising the gymnasium that evening of January 8, 2007 (namely, officers Stéphane Beaulé, Patrice Munger and Karine Maloney), the applicant's testimony, as well as video evidence of some of the incidents lead the Court to understand and note that the Main Altercation was preceded by at least four assaults which may be summed up as follows:

1. At approximately 7:28 p.m., the applicant and Kooger approached inmate Ronald Sparks; they talked briefly with him and suddenly the applicant struck him violently with a shank. The assault caused several injuries to Sparks (the Sparks assault).

2. At approximately 7:35 p.m., the applicant allegedly assisted another inmate who attacked inmate Woodley Coldros, striking him in the head with a shank when he was in a telephone booth (the Coldros assault).

3. At approximately 8:08 p.m., the applicant struck inmate Hébert-Plouffe in the face with a shank (the Hébert-Plouffe assault).

4. At approximately 8:22 p.m., the applicant attacked McGowan, possibly near the training equipment in the gymnasium. McGowan was wounded in the ear but remained in the gymnasium. The applicant acknowledged that he had taken part in the assault (the McGowan assault).

[11] Thus, in a little over a half hour, three assaults with a weapon involving the applicant occurred. At the end of these three first assaults, prison authorities had to dispatch three correctional officers to accompany each victim to an outside hospital.

[12] A general return to cells was ordered at approximately 8:40 p.m. (the General Return to Cells). The purpose of a general return to cells is to direct inmates to leave the gymnasium, two by two, and return to their cells, after undergoing a thorough search.

[13] Could the General Return to Cells have been ordered earlier, and, if so, can it be inferred that this would have prevented the Main Altercation? We will return to these scenarios in our analysis.

[14] The General Return to Cells, to return to the sequence of events, did not, in fact, result in the applicant, Kooger or McGowan leaving the gymnasium.

[15] The ensuing events were those that essentially led up to the Main Altercation.

[16] A description of those pivotal events is provided by the testimony-in-chief, by affidavit, of correctional officer Stéphane Beaulé (Officer Beaulé's affidavit), namely, the officer who ultimately opened fire on the applicant. That testimony is largely corroborated by written affidavits from correctional officers Munger and Maloney, who witnessed a good part of the relevant events up close.

[17] While we will want to review the assessment of certain aspects of this affidavit along with the video that captured parts of the events described below (this video having captured the events described at paragraphs 78 to 105 of the said affidavit), the following paragraphs from Officer Beaulé's affidavit nonetheless do describe what he (and, at times, his colleagues Patrice Munger and Karine Maloney if we refer to their affidavits) had been able to observe and ascertain from the moment the Main Altercation started until it ended at approximately 8:55 p.m. (reproduced verbatim):

> [TRANSLATION]
>
> 47. After Dominik Hébert-Plouffe left the gymnasium, I saw Shem Trotman and Jason Kooger at the billiard table on the corner of the canteen wall.
>
> 48. At that moment, I saw Shem Trotman hand a shank to Jason Kooger, who put it in his left pocket.
>
> 49. The two were armed with shanks and presented a high level of dangerousness.
>
> 50. I noticed that below me was inmate Jason McGowan, who was pacing back and forth in front of the training equipment towards the canteen and that he was injured behind the left ear.

51. I did not know that Jason McGowan had been assaulted by Shem Trotman and/or Jason Kooger, but it was clear to me that Shem Trotman and Jason Kooger wanted to harm him.

52. Jason Kooger was constantly staring at Jason McGowan while keeping his hand in his pocket. It looked as if he was waiting for the right time to rush at Jason McGowan and stab him.

53. Shem Trotman and Jason Kooger looked like two predators waiting for the right moment to attack their prey.

54. I truly felt that if Shem Trotman and Jason Kooger got to Jason McGowan, they would kill him.

55. The previous incidents that evening involving Shem Trotman and Jason Kooger had occurred very quickly.

56. But this time, they were not hiding; they were determined to get Jason McGowan. Their intentions were clear to me.

57. According to the Situation Management Model, we had reached the last stage where the use of firearms is warranted, as set out in the Situation Management Model, Exhibit SB-1.

58. So I opened my window while preparing my firearm.

59. The little game that unfolded between them lasted at least 25 minutes.

60. During that time, I yelled out to Jason McGowan in French and English to get out of the gymnasium but he would not comply with my order.

61. Officer Patrice Munger even opened the gate so that he could get out of the gymnasium but he didn't want to.

62. I asked Jason McGowan to leave to avoid being attacked by Shem Trotman and Jason Kooger.

63. That said, the gate door was wide open, Shem Trotman and Jason Kooger could easily have left the gymnasium without incident.

64. When the general return to cells was called by the MCCP, Shem Trotman and Jason Kooger approached Jason

McGowan to within about 25 feet of him and took out their shanks.

65. Shem Trotman and Jason Kooger finally decided to attack him.

66. Jason McGowan was right in front of the training equipment area near the canteen; Shem Trotman and Jason Kooger were advancing from the corner of the canteen near the billiard table.

67. Shem Trotman and Jason Kooger were wearing coats.

68. I fired two (2) warning shots just above their heads to stop them.

69. The warning shots worked: Shem Trotman and Jason Kooger backed up toward the canteen.

70. A few moments after that, they started moving forward again but Officer Patrice Munger (Alpha 22) fired a rifle shot right next to them and they went back toward the billiard table.

71. Officer Munger fired a shot right near them, about two feet away. He shot a Pepsi can.

72. The three warning shots stopped Shem Trotman and Jason Kooger from advancing further towards Jason McGowan. Even when backing up, they continued to stare at Jason McGowan. It wasn't over. It was obvious they were determined to attack him.

73. During this time, my window remained open and there were no inmates near Jason McGowan.

74. I never saw McGowan with a weapon and at no time did I believe he had one.

75. When the inmates started leaving I heard inmate Duguay say [TRANSLATION] "*if you don't want to leave the gym, well then stop hiding where the armed officers are and go fight them*."

76. He was inciting Jason McGowan to go and confront Shem Trotman and Jason Kooger.

77. After a challenge like that, Jason McGowan really had no choice but to go and confront them because of the "Con Code."

78. So he walked toward Shem Trotman and Jason Kooger who were in the billiard table corner.

79. Shem Trotman and Jason Kooger got their shanks out right away.

80. I yelled at Jason McGowan to back away several times, but he wouldn't.

81. Jason McGowan went up to the billiard table to confront them.

82. Shem Trotman and Jason Kooger were behind the billiard table and Jason McGowan was in front.

83. The billiard table separated them but Shem Trotman and Jason Kooger advanced toward Jason McGowan on each side.

84. I saw Jason McGowan kick the recycling box towards Jason Kooger.

85. After that I saw Officer Karine Maloney (Alpha 21) "gassing" the Federal gas gun in the direction of Shem Trotman and Jason Kooger to get them to stop.

86. Patrice Munger also fired several warning shots to stop the confrontation but they did not stop.

87. All of these measures taken by the team to stop the confrontation were unsuccessful.

88. The confrontation continued.

89. So I fired two (2) more warning shots over Shem Trotman and Jason Kooger but it was useless, they would not stop.

90. Shem Trotman and Jason Kooger were determined to go after Jason McGowan.

91. I clearly saw that Shem Trotman and Jason Kooger were both armed with shanks and that Jason McGowan had no weapon.

92. We had tried using several methods to stop them, but they continued.

93. I sincerely believed they were going to kill Jason McGowan or seriously injure him.

94. If Shem Trotman and Jason Kooger had managed to jump Jason McGowan and a physical fight with weapons ensued, it would have been very difficult if not impossible for me to have stopped them.

95. The outcome would probably have been the death of Jason McGowan.

96. I made several attempts to stop them; if I hadn't taken action right then we would have lost complete control. Shem Trotman and Jason Kooger were close to Jason McGowan and were ready to jump him and attack him with their shanks.

97. At that moment, Shem Trotman was close to Jason McGowan, I didn't see any other alternative to stop him; I had already fired four (4) warning shots.

98. Shem Trotman left me no other choice but to use my weapon against him in order to stop him.

99. So I shot him in the hand that was holding the shank.

100. I made the decision because I had to stop Shem Trotman before someone got killed.

101. I never felt that Shem Trotman and Jason Kooger were at risk or in danger from Jason McGowan.

102. I felt there was a duty to protect Jason McGowan—who was definitely the victim.

103. According to the Situation Management Model, I was still at the ultimate step, that is, the use of weapons.

104. At no time did Shem Trotman and Jason Kooger give me a chance to reassess the situation management options to de-escalate.

105. Patrice Munger and I fired several warning shots that had no effect on Shem Trotman and Jason Kooger. With the warning shots they should simply have stopped.

Analysis

Applicable law:

[18] Although the applicant would have preferred the Court to adhere mostly to a line of case law, that, in analyzing section 25 of the *Criminal Code*, RSC, 1985, c C-46 (the Criminal Code), places a shared burden of proof on both parties, it appears to this Court that the present matter calls for the approach taken by this Court in June 2005, when it had to assess, in a correctional setting, the civil liability of the respondent in an action for damages initiated by an inmate of a federal penitentiary in Quebec on the basis that prison authorities could, and should, have prevented the applicant's assault by another inmate.

[19] Further, I am of the view that the final conclusion of the Court in the present matter would have been the same even if it had pursued the analysis found at paragraphs 41 to 43 of *Bevan v Ontario*, 2010 ONSC 3812 with regard to section 25 of the Criminal Code.

[20] Thus in *Aubin v Canada*, 2005 CF 812, Justice Lemieux of this Court set out, at paragraphs 117 to 121 and 126, the following principles:

> [TRANSLATION]
>
> [117] The law and jurisprudence have long recognized the State's responsibility to inmates in correctional institutions. This responsibility is in fact a vicarious liability since the State is answerable to for the actions of its servants: correctional officers.
>
> [118] Justice Hall, on behalf of the Supreme Court of Canada in *R. v. MacLean*, [1973] S.C.R. 2, adopted the reasoning of Justice Cattanach of this Court in *Timm v. The Queen*, [1965] 1 Ex.C.R. 174, as follows:

> The responsibility of the Crown towards inmates of penal institutions was correctly stated by Cattanach J. in *Timm v. The Queen*, at p. 178, as follows:
>
> Section 3(1)(*a*) of the *Crown Liability Act* S.C. 1952-53, c. 30 provides as follows:
>
> "3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable
>
> > (*a*) in respect of a tort committed by a servant of the Crown, …"
>
> and section 4(2) provides,
>
> "4. (2) No proceedings lie against the Crown by virtue of paragraph (*a*) of subsection (1) of section 3 in respect of any act or omission of a servant of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or his personal representative."
>
> The liability imposed upon the Crown under this Act is vicarious. *Vide The King v. Anthony and Thompson*, [1946] S.C.R. 569. For the Crown to be liable the suppliant must establish that an officer of the penitentiary, acting in the course of his employment, as I find the guard in this instance was acting, did something which a reasonable man in his position would not have done thereby creating a foreseeable risk of harm to an inmate and drew upon himself a personal liability to the suppliant.
>
> The duty that the prison authorities owe to the suppliant is to take reasonable care for his safety as a person in their custody and it is only if the prison employees failed to do so that the Crown may be held liable, *vide Ellis v. Home Office*, [1953] 2 All E.R. 149.

[119] Under Quebec law, (see Baudouin, *La responsabilité civile*, 6th edition, Éditions Yvon Blais) three essential conditions must be met before extracontractual civil liability becomes engaged: (1) fault; (2) injury; (3) a causal link between the fault and the injury.

> [120] In Baudouin, *supra*, the authors explain, at paragraph 88, that under Quebec law, liability is based on fault, i.e. [TRANSLATION] "behaviour that is inconsistent with standards generally accepted by the jurisprudence or, as is now stated in section 1457 C.c., where the person does not abide by the rules of conduct which lie upon him, according to the circumstances, usage or law".
>
> [121] In particular, they describe extracontractual civil fault as [TRANSLATION] "consisting of the gulf separating the behaviour of the officer from the abstract and objective behaviour of a reasonable, prudent and diligent person" in the same circumstances.
>
> …
>
> [126] The burden is on the applicant to establish, on a balance of probabilities, the existence of a fault giving rise to damages and liability.
>
> [Emphasis added.]

[21] In short, it must therefore be determined whether, on the evening of January 8, 2007, the correctional officers, including their supervisor, Mr. Laberge, acted as reasonable, prudent and diligent officers would have acted under the same circumstances (the applicable standard of conduct).

[22] If the applicable standard of conduct has been met, there is no fault on the respondent's part and the applicant's action will have to be dismissed.

Application of the standard of conduct applicable to the facts

[23] The applicant submits that, before even considering whether officers Munger and Beaulé respected the applicable standard of conduct during the Main Altercation, it is clear that the

penitentiary authorities, allegedly did commit one or several errors in what the Court will refer to as the management of the gymnasium throughout the evening of January 8, 2007.

[24] Without being too dismissive here, it is interesting to note that the failings described below were raised by the applicant not in his statement of claim but in his pre-trial conference memorandum.

[25] In addition, these failings were drawn either from observations noted by the warden in his report written in the days following January 8, 2007 (the Warden's Report) or from the findings of the board of investigation formed in the months after January 8 and tasked with reviewing, *at large*, and in a thorough manner, the tumultuous events that evening in January 2007 (the Board of Investigation Report).

[26] The central complaint, on the one hand, regards the hour and a quarter delay between the first incident and the start of the General Return to Cells, and on the other, on the fact that the protagonists were not ordered to return to their cells even before the General Return to Cells was announced to the other inmates.

[27] On these and other aspects, the following is written at page 5 of the Warden's report (see Exhibit T-23 in the List of Exhibits):

> [TRANSLATION]
>
> The forthcoming investigation will need to consider the reasons why nearly an hour and a quarter had elapsed before the inmates began returning to their cells (hence, before the aggressors were intercepted and placed in administrative segregation) and the first of the assaults. Our analysis leads us to find that a succession of

> events resulted in a reactive approach being taken by the acting COS in charge at the time of the incidents. While we understand that the first two injured inmates (Sparks and Coldros) needed immediate medical attention and that the focus was on providing such assistance, it is difficult to fathom why no one attempted to get the aggressors to return to their cells. In defence of the COS, the fact that 3 escort teams (9 officers) were monopolized and difficulties calling in additional staff to proceed with the interventions with an optimal deployment of personnel created difficulties and delays. We believe, however, that efforts could have been made based on normally known practices (use of members of the inmates' committee or a negotiator, or simply issuing orders over the loudspeakers). While the COS could (or should) have taken a step back to coordinate everything, we believe what occurred reflects a certain lack of experience (he was a COS in training) and that the staff did not necessarily need to wait for orders. AC-01s and AC-02s are trained to take required measures independently, but it seems that a culture of waiting for direction has become entrenched. Under the circumstances, we can understand the first half-hour delay, but the following fifty minutes or so are difficult to comprehend. However, we cannot conclude with any certitude that this would have prevented the last assault or the firing of several shots, but question needs to be asked in order to draw lessons from the situation, inasmuch as it concerns the roles of both the COS and the officers.
>
> [Emphasis added.]

[28] As for the delay in calling the General Return to Cells, the respondent submitted as evidence the affidavit of Sylvain Laberge, the SOC referred to in the passage cited above.

[29] In his affidavit, Mr. Laberge describes his functions as Correctional Operational Supervisor (COS) during his shift on January 8, 2007. The various functions are described at paragraphs 10 to 13 of the affidavit:

> [TRANSLATION]
>
> 10. My role consisted of taking responsibility of managing the institution in the absence of management (delegation of power).

> 11. I was to ensure that operations ran smoothly and prepare the Roll Call for the next shift (make sure all employees were present and make sure all positions were covered).
>
> 12. In addition, I had to supervise all areas of the institution.
>
> 13. Throughout the course of that evening I had to supervise, manage and take several measures following successive armed assaults committed by Shem Trotman and/or Jason Kooger in gymnasium 240, all of which is described in greater detail in my report, Exhibit SL-1.

[30] He goes on to describe, forcefully and in detail, how the speed of the assaults on Sparks, then Coldros, reduced the staff he needed and his efforts following the first assaults to reconstitute an effective team.

[31] At the moment when he was almost ready to call a General Return to Cells, the assault on Hébert-Plouffe occurred, which further delayed things, namely, the General Return to cells, which happened at 8:40 p.m.

[32] Although the comments reproduced from the Warden's Report are interesting, as it was emphasized in the excerpt cited, the Court considers these comments as noting the lessons to be drawn from the situation; therefore as lessons learned for future reference.

[33] However, upon weighing the evidence, I do not find that it would have been possible to have called the General Return to Cells earlier, nor do I find in the least that Mr. Laberge committed an error in failing to meet the applicable standard of conduct.

[34] The Court is of the view that above all it was the applicant, through his repeated assaults on the evening of January 8, 2007, who in fact reduced the available staff and forced the prison authorities, in the person of Mr. Laberge, to have to delay calling a general return to cells until approximately 8:40 p.m.

[35] Moreover, I believe there are grounds to go further in our conclusions.

[36] As the last part of the Warden's report cited above suggests, I too, after my assessment, find that even if any other measures had been considered in an attempt to, among other things, order the Return to Cells earlier, none would have prevented the Main Altercation.

[37] Indeed, it is clear from the testimony of all of the officers on the walkway and assigned to supervise the gymnasium, and from my review of the evidence as a whole, that all of the belligerents who ended up participating in the Main Altercation were actively looking to and absolutely wanted to square off with each other.

[38] As evidence of this, they all remained in the gymnasium after the General Return to Cells at 8:40 p.m., waiting to do battle, which they did at approximately 8:55 p.m.

[39] Had the General Return to Cells been called earlier or had the belligerents in the Main Altercation been ordered to return before the other inmates, according to my assessment, none of theses measures would have led these same persons to obey and not face off against one another.

[40] In this regard, and as the respondent noted in oral argument, if, following the McGowan assault (at approximately 8:22 p.m., see paragraph [10], *supra*), warning shots with live ammunition fired close to the belligerents had no practical effect, any lesser form of intervention, such as the intervention of the inmates' committee, etc., would have been, on a balance of probabilities, doomed to failure.

[41] Even if after the fact and in retrospect one could undertake a painstakingly thorough analysis that would identify the failings in the management of the gymnasium on the evening of January 8, 2007, at the end of the day I do not find, contrary to the applicant's assessment, that the prison authorities allowed the situation in the said gymnasium to fester.

[42] As the Superior Court of Quebec noted in *Gignac c Trois-Rivières (Ville de)*, 2010 QCCS 2999 (CanLII), with regard to the work of police, a context very similar to the one here, we must avoid assessing the work of such people after the fact, or in hindsight as they say in English:

> [TRANSLATION]
>
> [73] The conduct of the police when faced with the suspect's refusal to surrender himself to them must be evaluated having regard to the state of mind of a reasonable person reacting not to what was discovered after the incident, but to what the suspect's conduct would lead them to believe at the very moment of the incident. [Footnote omitted.]

[43] Finally, the preceding reasons give no credence to the idea that Mr. Laberge breached their situation management model (the Management Model) which, as the Court understands, calls for all correctional officers in any intervention situation to constantly evaluate and reassess their measures based on the escalation, or de-escalation, of an incident.

[44] However, with respect to the facts surrounding the Main Altercation itself, the applicant argues in his affidavit-in-chief, and argued in his testimony before the Court, that McGowan must be viewed as the aggressor, and not as a victim. The applicant further argued that it should be noted that McGowan was also armed with a shank.

[45] A careful review of the video of the Main Altercation does not allow one to completely discount the applicant's version of events.

[46] Indeed, as for McGowan's role in the Main Altercation, the video shows McGowan approaching the billiard table where the applicant and Kooger were located a number of times and seeking, rather than avoiding the confrontation.

[47] Furthermore, McGowan had previously refused to comply with the order to leave the gymnasium and seemed in the lead-up to the Main Altercation to move towards the applicant and Kooger in response to a third inmate telling him to either leave the gymnasium or go and settle matters with the applicant.

[48] Nonetheless, one cannot help but conclude from the same video that the applicant and Kooger can also be seen to be the aggressors because each one walks around their side of the billiard table right before the shot is fired at the applicant. In addition, just before the shot, the applicant makes a gesture towards McGowan with his hand that the Court interprets as being an invitation to fight.

[49] As for whether McGowan was armed or not, images from the video do not allow the Court to decisively conclude one way or another. Indeed, on one hand, one cannot tell from these images whether McGowan is holding a shank in his right hand. On the other hand, during the relevant periods of the Main Altercation, McGowan moves around while seemingly keeping his right hand in the pocket of his pants. Was he holding a shank in his right hand at the time, hidden in his clothing in such a way as to hide the blade or point of the weapon under his sleeve? Possibly.

[50] To support his position that McGowan was armed, the applicant asserted at trial that this must have been the case because McGowan must have known that the applicant was armed since he had been assaulted by him earlier in the evening (see the McGowan assault, paragraph [10], *supra*).

[51] According to the applicant, it would have then been suicidal for McGowan to advance toward the billiard table in the lead-up to the Main Altercation if he was unarmed.

[52] If one were unfamiliar with prison culture, this point of view has a certain persuasiveness to it. However, both Officers Beaulé and Munger, when presented with essentially the same theory in cross-examination, were quite categorical in their view that once McGowan had been clearly challenged by inmate Duguay to go and settle his score with the applicant and Kooger, that McGowan, being subject to the "Con Code", had no other choice – or be disgraced in the eyes of the other inmates – than to go up to the applicant and Kooger and confront them, whether he, McGowan, was armed or not.

[53] Moreover, certain other factors that were noted after the gunshot that struck the applicant tend to show that McGowan was not armed. First, right after the shot was fired, the video shows McGowan leaning down near the billiard table to pick up what witnesses would later describe as the shank that had just fallen from the applicant's right hand. Why then would McGowan have gone to all the trouble of picking up this shank if he already had one in his possession?

[54] In addition, the testimony of COS Laberge identified the source of the three shanks found following a search of the inmates and gymnasium. None of them can be traced back to McGowan. The presence of any additional shank, and the underlying assumption that it would have belonged to McGowan, have not, in the Court's view, been established.

[55] The Court finds, however, that a definitive answer to these questions involving McGowan is not necessary given that it must, above all else, examine the events surrounding the Main Altercation not on the basis of a careful, frame-by-frame analysis of the video of the Main Altercation but on the basis of the speed at which it actually unfolded and the manner in which this incident was perceived by correctional officers Beaulé and Munger, whose actions the applicant complains of.

[56] In that regard, all of the assaults discussed earlier and that preceded the Main Altercation led Officers Maloney, Munger and Beaulé, to varying degrees, to keep an eye on the applicant and Kooger and to conclude, either by direct view or by reasonable estimation, that the applicant and Kooger were armed and determined to have it out with McGowan at all costs.

[57] As for McGowan, Officers Munger and Beaulé, the officers who were to a great extent most involved in the Main Altercation, thought in the heat of action that he was unarmed since they had not seen a shank in his hands at any time during the evening of January 8, 2007. Moreover, the Court notes here that when the applicant admitted in court to the assault on McGowan, which occurred at approximately 8:22 p.m., he did not state that McGowan was armed as well.

[58] As for McGowan's aggressive posture seen in the video of the Main Altercation, this aspect in the heat of action – and to the extent it was even noted by the officers, which the evidence did not actually show – did not change their perception that McGowan was faced with the dynamic where, pressured by the "Con Code," he had to offer the applicant and Kooger an opportunity to have a confrontation with him. The officers felt that McGowan was the victim in the circumstances and that the aggressors were the applicant and Kooger.

[59] It is this perception that matters and that the Court considers reasonable to accept. Against this backdrop, the Court does not find that Officers Munger and Beaulé adopted and refused to shed a tunnel vision or that they acted outside the bounds of their Management Model. For the same reasons, I do not feel that these same officers can be accused of using a double standard with regard to McGowan. The officers reasonably perceived McGowan to be the victim and the applicant and Kooger as the aggressors; of course they were not seen to be on the same footing.

[60] At no time was it demonstrated that these two officers had any reason to side with McGowan other than the moment they thought his life was in danger.

[61] Thus, Officers Munger and Beaulé felt that they had to try and prevent the Main Altercation from playing itself out, in order to ensure McGowan's protection.

[62] The testimony of correctional officer Beaulé reproduced earlier illustrates the step-by-step approach he and his colleagues used in the measures they took to try and get the belligerents to calm down and move away from each other.

[63] I am referring here to verbal warnings, followed by the noise of a siren, and then by the use of cayenne pepper spray. Numerous warning shots were fired close to the belligerents. All of this was for naught and the officers felt that the Main Altercation was just about to erupt.

[64] They came to the conclusion that they had no alternative but to use their weapons to fire live ammunition at those they perceived to be armed aggressors.

[65] This is when the applicant was struck in the right hand by Officer Beaulé's shot.

[66] The Court feels that this measure was taken by Officer Beaulé as a last resort after several prior dissuasive measures had yielded no tangible results. The correctional officers, and Officer Beaulé in particular, acted incrementally and took a measured approach. Their actions, in the Court's opinion, meet the applicable standard of conduct, and for that matter, subsection 25(3) of the Criminal Code, the Management Model and Commissioner's Directive 567-5 on the use of firearms.

[67] The Court makes the aforementioned conclusions about the perception of Officers Munger and Beaulé despite criticism from the applicant's counsel regarding their attitude during cross-examination and in spite of the fact that the wording of their affidavits is, at times and for all intents and purposes, similar.

[68] As for their demeanour or attitude in cross-examination, I find that despite a certain nervousness that was sometimes expressed as displeasure at being cross-examined, their attitude cannot be further characterized as a means to attack their credibility.

[69] Regarding the similitude between their affidavits, each affidavit is consistent with the observation report completed by each officer in the hours immediately following the evening of January 8, 2007. Moreover, counsel for the applicant had ample time to cross-examine each officer in Court (including Ms. Maloney and Mr. Laberge), after the exclusion of witnesses at the start of the trial.

[70] Thus, in each cross-examination, witnesses were peppered with all manner of questions to have them recall different sequences of events and their perception at the time. Given that the relevant incidents occurred back in January 2007, their promptness in responding and conduct in general do not leave the Court with the impression that they made a concerted effort to rehearse their testimony with each other.

[71] Therefore, with regard to the issues to be determined and identified in the order dated November 9, 2012 that followed the pre-trial conference in this matter:

2. (a) Did the respondent's officers commit one or several faults during their intervention?

(b) Was the injury suffered by the applicant the result of a fault or faults made by the respondent's officers during their intervention?

(c) Did the applicant commit a fault and did he contribute to his own injury and, if so, how should the responsibility be divided amongst the parties?

(d) Is the quantum of damage suffered by the applicant fitting and proper?

The Court responds to questions 2(a) and (b) in the negative. Accordingly, there is no need to respond to questions 2(c) and (d) to dispose of the present action.

[72] Therefore, for the aforementioned reasons, the Court must dismiss the applicant's action, with costs.

"Richard Morneau"

Prothonotary

Montréal, (Quebec)
February 20, 2014

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-3-10
STYLE OF CAUSE:	SHEM WILLIAM TROTMAN v HER MAJESTY THE QUEEN
PLACE OF HEARING:	QUEBEC, QUÉBEC
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