Federal Court Cour fédérale

Date: 20230801

Docket: T-2069-19

Citation: 2023 FC 1054

Ottawa, Ontario, August 1, 2023

PRESENT: Mr. Justice McHaffie

BETWEEN:

JEFFREY G. EWERT

Plaintiff

and

HIS MAJESTY THE KING IN RIGHT OF CANADA

Defendant

JUDGMENT AND REASONS

I. Overview

[1] Like many Indigenous inmates who follow traditional teachings and healing practices, Jeffrey Ewert carries a medicine bundle. His medicine bundle began with an eagle feather that an Elder presented to him over 30 years ago. It has grown over the course of his lengthy incarceration and now includes a variety of herbal medicines, stones, and artefacts. Mr. Ewert considers it sacred and believes it is desecrated if touched by someone else. In furtherance of his

spiritual beliefs, and as part of his medicine bundle, Mr. Ewert wears headbands that have significance to him based on their colour, the Elders who presented them, and the teachings he has received.

[2] In this claim against the Crown, Mr. Ewert asserts that in the summer of 2019, Correctional Services Canada (CSC) violated his rights under the *Canadian Charter of Rights and Freedoms* by searching his medicine bundle in his absence contrary to CSC policy, and by asking or requiring him to remove his headbands for photographs and searches. He seeks damages and declarations as remedies for those breaches of the *Charter*.

[3] For the reasons below, I conclude that CSC's detention and search of Mr. Ewert's medicine bundle in July 2019 violated his rights under sections 2(*a*) and 8 of the *Charter* in a manner not justified under section 1 of the *Charter*. However, I conclude that Mr. Ewert has not demonstrated that the requests and demands made regarding his headbands in July and August of 2019 breached his *Charter* rights. Having reviewed the various factors relevant to the award and quantum of damages under subsection 24(1) of the *Charter*, I conclude that an award of $7,500 is an appropriate and just award to remedy the *Charter* breaches I have identified.

II. Issues

[4] Mr. Ewert's original statement of claim raises a broad number of issues, including allegations regarding the reasons for his prolonged incarceration and retaliation against him for various legal proceedings he has brought against the Crown to defend his spiritual beliefs and

practices. However, during the course of case management of this action, the parties agreed that only the following three issues were to be determined at trial, which I have slightly rephrased:

A. Did the search of Mr. Ewert's medicine bundle conducted by CSC personnel on July 17, 2019, infringe upon any of his rights under sections 2, 7, 8, 12, and/or 15 of the *Charter*?

B. Did CSC personnel harass Mr. Ewert with respect to his wearing of headbands in accordance with his traditional teachings and spiritual beliefs between the months of June and August 2019, in violation of his rights under sections 2, 7, 8, 12, and/or 15 of the *Charter*?

C. If so, is Mr. Ewert entitled to damages pursuant to subsection 24(1) of the *Charter*?

III. Analysis

A. *The search of Mr. Ewert's medicine bundle on July 17, 2019, infringed Mr. Ewert's rights under section 2(a) of the* Charter

(1) Mr. Ewert's medicine bundle

[5] I begin with a discussion of the origins and nature of Mr. Ewert's medicine bundle and his spiritual connection to it, given their importance in this litigation.

[6] Mr. Ewert describes himself as having been part of the Sixties Scoop. He was put under protection of the Children's Aid Society at birth and was placed for adoption with a non-Indigenous family in Surrey, British Columbia. The severance of ties to his culture and

community meant he had little support when facing racism in school and the community in his youth, difficulties that were compounded by his adoptive parents' mental health and substance abuse issues. He grew up ashamed of his Indigenous heritage, lacking direction and self-respect. He turned to alcohol and drugs at a young age. In May and June 1984, at the age of 22, he committed two horrific crimes—the second-degree murder of one young woman and the attempted murder of another—of which he was later convicted: see *R v Ewert*, [1992] 3 SCR 161, rev'g 1991 CanLII 5763 (BC CA). Mr. Ewert has been incarcerated since July 1984.

[7] Mr. Ewert described his transfer to a federal penitentiary in British Columbia as "the first time [he] was really exposed to Indigenous culture, […] seeing the Indigenous Brothers in the institution doing what they do." He immersed himself in Indigenous culture within the correctional system, working with the Native Brotherhood to press for recognition of Indigenous rights and practices in the prison setting. He met with Elders and began receiving their teachings regarding Indigenous spirituality. While acting as a Chief for the Native Brotherhood in 1990, Mr. Ewert conducted a fast as part of the blessing of a new sweat lodge. The Elder who led him to that fast presented him with an eagle feather, a smudge bowl, some medicines, and other items which began his medicine bundle.

[8] Over time, Mr. Ewert's medicine bundle has grown. He has received further teachings from Elders. He has received from Elders other medicines, sacred items, stones of spiritual significance, artefacts such as arrowheads, and the headbands he wears as part of his spiritual beliefs, discussed further below. He keeps these items in a cloth, with pouches to protect

individual objects such as the stones and arrowheads. When he is not using the medicine bundle, the cloth is rolled and tied shut.

[9] Mr. Ewert's medicine bundle is sacred to him. Mr. Ewert has been sober for almost four decades. He is no longer ashamed of his Indigenous identity. He attributes this healing to his reconnection with Indigenous culture and in particular to his medicine bundle. He views it as a "pure" object that acts like a second conscience.

[10] Given its sacred nature, one of the teachings Mr. Ewert received with respect to his medicine bundle is that he is the only one who should touch it. The evidence suggests this is a widely held belief in Indigenous communities. Part of a CSC manual addressing Principles of Religious and Spiritual Accommodation filed in evidence (undated but apparently from around April 2005) recognized that "[a] medicine bundle is sacred and the preservation of its spiritual value can be assured only if it is handled by its owner or by the person entrusted with its care." Ginette Nadon, an Elder in the Algonquin community who worked under contract with CSC in July 2019 and who gave evidence at trial, similarly confirmed that in her experience of sweat lodge ceremonies, no-one but the owner of a medicine bundle would handle it, and that there are even those who believe that if another touches their medicine bundle, they will die.

[11] The Crown, appropriately, does not contest any of the foregoing, nor the sincerity and strength of Mr. Ewert's beliefs regarding his medicine bundle, including the importance of it being handled only by himself. As discussed in further detail below, Mr. Ewert has had a number of issues regarding the treatment of his medicine bundle by CSC staff over the years. He has

consistently fought to maintain his medicine bundle, to have it respected, and to be the only person who touches it.

(2) The legislative and regulatory context of the search

[12] Mr. Ewert's incarceration in the federal correctional system, and CSC's control and supervision of that incarceration, are governed by provisions of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*], and the associated *Corrections and Conditional Release Regulations*, SOR/92-620 [*CCRR*]. The *CCRA* defines the purpose of the federal correctional system as being to "contribute to the maintenance of a just, peaceful and safe society" by carrying out sentences through the safe and humane custody and supervision of offenders, and assisting their rehabilitation and reintegration into the community through the provision of programs: *CCRA*, s 3.

[13] The *CCRA* sets out principles that guide the CSC in achieving this purpose. The paramount consideration is the protection of society: *CCRA*, s 3.1. Other principles include that CSC uses the least restrictive measures consistent with the protection of society, staff, and offenders; that offenders retain the rights of all members of society except those that are lawfully and necessarily removed or restricted; and that correctional policies, programs, and practices respect, among other things, cultural and religious differences and are responsive to the needs of Indigenous persons: *CCRA*, s 4(*c*), (*d*), (*g*).

[14] As Mr. Ewert recognizes, searches of inmates are an important element of security in the penitentiary context. The *CCRA* and *CCRR* contain various provisions dealing with searches of

inmates, their possessions, and their cells: *CCRA*, ss 46–58; *CCRR*, ss 43–53. Particularly relevant to this proceeding is section 47 of the *CCRA*, which permits routine non-intrusive or frisk searches of inmates without individualized suspicion, in prescribed circumstances, limited to what is reasonably required for security purposes. Section 47 of the *CCRR* sets out the prescribed circumstances, which include an inmate entering or leaving a penitentiary, a secure area, or a work or activity area.

[15] The *CCRA* also has a number of provisions pertaining to Indigenous offenders in particular: *CCRA*, ss 79–84.1. Of note, paragraph 79.1(1)(*c*) requires that in making decisions affecting an Indigenous offender, CSC shall consider the Indigenous culture and identity of the offender; section 82 provides for the establishment of Indigenous advisory committees; and section 83 underscores that Indigenous spirituality, spiritual leaders, and Elders "have the same status as other religions and other religious leaders."

[16] Pursuant to sections 97 and 98 of the *CCRA*, the Commissioner of Corrections has issued a number of Commissioner's Directives for carrying out the purposes and provisions of the *CCRA*, which are amended from time to time. At trial, the Court heard evidence from Kathleen Angus, Regional Administrator with the Indigenous Initiatives Directorate at CSC. She indicated that following the enactment of the *CCRA* in 1992, and notably the provisions pertaining to Indigenous offenders referred to above, various Commissioner's Directives were implemented to take Indigenous practices and experiences into consideration. Based on her understanding from her role, the policies in these Directives were developed in consultation with

Elders and Indigenous organizations, through the National Indigenous Advisory Committee established pursuant to section 82 of the *CCRA*.

[17] I note that the versions of relevant Commissioner's Directives that were filed in evidence date from the mid-2010s and earlier rather than being either the most recent versions or those applicable in 2019. These older versions, filed in their English versions, use the term "Aboriginal" rather than "Indigenous." To the Court's understanding, current English versions of the Commissioner's Directives use the term "Indigenous," as does the CCRA following amendments in 2019: *An Act to amend the Corrections and Conditional Release Act and another Act*, SC 2019, c 27. In quoting the documents in the English version of this judgment, I will use the original text, but will otherwise use the term "Indigenous." In French, use of the term "*autochtone*" has remained consistent. Conversely, while the English term "medicine bundle" has generally remained constant, a number of French terms are used, including "*ballot de médecine autochtone*" and "*sac sacré*." In the French version of this judgment, the original text from the French versions of the documents will be used, but I will otherwise use the term "*sac de médecine*," as this was the term the witnesses generally used when referring to Mr. Ewert's medicine bundle in French.

[18] Commissioner's Directives have addressed the issue of searching medicine bundles since at least the mid-1990s. The 1995 version of Commissioner's Directive 702, then entitled "Aboriginal Programming" and now entitled "Indigenous Offenders" [CD 702], included a definition of "medicine bundle" and protocols for searching them, using language also seen in

the section of the 2005 CSC manual addressing Principles of Religious and Spiritual Accommodation referred to above:

> 14. “Medicine bundle” means a receptacle of any size, or a blanket of any size, either of which contain natural objects or substances of spiritual value. A medicine bundle is considered to be sacred. To preserve its spiritual value, it should be handled only by its owner or by the person entrusted with its care.
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> […]
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> 21. Aboriginal inmates shall be permitted personal possession of medicine bundles and other sacred objects which have been provided or sanctioned by an Elder whose services to inmates have been solicited by the institution. Any required security examination of such bundles or objects shall normally be accomplished by having the owner manipulate them for visual inspection by the examining officer.
>
> [Emphasis added.]

[19] CD 702 was subsequently amended to remove reference to medicine bundles. Protocols regarding searches of medicine bundles are now instead found in Commissioner’s Directive 566-7: Searching of Offenders [CD 566-7] and Commissioner’s Directive 566-9: Searching of Cells, Vehicles and Other Areas of the Institution [CD 566-9]. Section 10 of CD 566-7 reads as follows:

> 10. Any required security examination of Aboriginal medicine bundles, religious and spiritual articles or other sacred objects will be accomplished by having the owner manipulate them for visual inspection by the examining officer. In the owner’s absence, an Elder, an Elder’s representative (who is not an inmate) or a religious representative will inspect or manipulate the contents for inspection.
>
> [Emphasis added.]

[20] The 2011 version of CD 566-9 in the record has a provision identical to section 10. Although not in evidence, the Crown advised the Court that the current version of CD 566-9 has a similar provision, with slightly different wording, as section 15. The parties agree that regardless of any subsequent changes in language or numbering, the language set out above as section 10 of CD 566-7 reflected the applicable CSC policy with respect to searches of medicine bundles and other sacred objects. I will therefore refer to this policy simply as “section 10” or the “CSC sacred object search policy.”

[21] As can be seen, section 10 recognizes the principle that the owner of a medicine bundle should be the one to handle it, while providing that an Elder or Elder’s representative will do so “[i]n the owner’s absence.” The meaning of the phrase “[i]n the owner’s absence” was the subject of evidence and argument, as discussed further below.

[22] Also of relevance is Commissioner’s Directive 566-12: Personal Property of Offenders [CD 566-12]. That directive sets out national lists of personal property that will normally be allowed, together with various rules and policies regarding such personal property. Of note, section 69 of CD 566-12 states that following the arrival of an inmate, “the receiving institution will normally issue personal items to the inmate within 10 working days after the effects have been received.”

(3) The search

(a) *Context of the search*

[23] On June 17, 2019, Mr. Ewert was transferred from La Macaza Institution, a medium security facility in La Macaza, Quebec, to the minimum security unit of the Archambault Institution in Ste-Anne-des-Plaines, Quebec. The Archambault Institution is a clustered site, with a medium security unit and a minimum security unit. Mr. Ewert was transferred to Archambault Minimum after receiving a minimum security classification for the first time in his 35 years of incarceration.

[24] Mr. Ewert’s medicine bundle was searched before leaving La Macaza. That search was conducted by Mr. Ewert handling the medicine bundle and displaying its contents to a corrections officer and an Elder at La Macaza before travelling in a transport vehicle. The medicine bundle travelled in the transfer vehicle with Mr. Ewert.

[25] On arrival at Archambault Minimum, Mr. Ewert’s medicine bundle was taken and stored in the personal effects department. Ten days later, on June 27, Mr. Ewert was brought to the personal effects department by his new parole officer, Catherine Lesey. A search of the medicine bundle was conducted (not the one at issue in this action), during which Mr. Ewert was given the bundle in the presence of an Indigenous Liaison Officer, Chantale Chartrand, and a correctional officer, and was asked to open and show its contents. The search lasted about an hour, after which Mr. Ewert was permitted to take his medicine bundle back to his cell. Although Mr. Ewert feels there was no need for a ten-day delay before the search, he does not complain about the

manner in which this search was conducted. Rather, the search appears to have been conducted in accordance with the CSC sacred object search policy, by having Mr. Ewert manipulate it for visual inspection by the examining officer.

[26] The same day, June 27, Mr. Ewert experienced difficulties with his parole officer, Ms. Lesey. During the course of a meeting about a six-month plan, Mr. Ewert made comments to Ms. Lesey that he says were intended in a light-hearted and joking way, but that pertained to her appearance and her attractiveness. Shortly thereafter, he was called to the principal entrance, where he was handcuffed and advised that Ms. Lesey had raised concerns about his comments and her safety, particularly in light of the nature of Mr. Ewert's earlier crimes. Mr. Ewert was transferred to the Archambault Medium facility pending a review of his security classification.

[27] Mr. Ewert did not receive his medicine bundle, which had been in his cell at Archambault Minimum when he was transferred to Archambault Medium. On July 9, 2019, Mr. Ewert raised the issue of the whereabouts of his medicine bundle during a meeting with counsel for CSC about a claim arising from an earlier search of his medicine bundle at La Macaza Institution in 2017. A week later, on July 16, two correctional staff members came to Mr. Ewert's cell and asked him where his medicine bundle was. He responded that he didn't know, believing it to still be in his cell at Archambault Minimum. In fact, that cell had been cleaned within a day of his transfer to Archambault Medium.

[28] Later the same day, July 16, Mr. Ewert spoke to Elder Nadon, who was working under contract with CSC at Archambault, and Anabelle Morin, the Indigenous Liaison Officer at

Archambault Medium. Mr. Ewert asked about his medicine bundle and underscored the importance of him being the only one to touch it. Ms. Morin, who gave evidence at trial, had very little recollection of the contents of this meeting, but agreed that she was aware that Mr. Ewert's medicine bundle was an issue for him. Elder Nadon recalled Mr. Ewert saying that he did not want anyone touching his medicine bundle.

[29] Mr. Ewert met with Elder Nadon and Ms. Morin a number of times over the following week, discussing the medicine bundle among other things. On July 23, Mr. Ewert met with Elder Nadon, again asking after his medicine bundle. At this time, and to Mr. Ewert's great surprise, Elder Nadon advised him that she and Ms. Morin had already searched the medicine bundle, a search that had occurred the week before, on July 17.

(b) *Evidence regarding the search*

[30] When Mr. Ewert was transferred to Archambault Medium, his medicine bundle was taken directly to the office of a Correctional Manager, Mark Morris. Édith Desnoyers, Deputy Warden at Archambault, testified that it was sent to a Correctional Manager's office, rather than the personal effects department where many people worked, given the concerns Mr. Ewert had raised during his transfer from La Macaza. Ms. Desnoyers said CSC wanted to ensure it knew where the medicine bundle was, to allow it to be searched in Mr. Ewert's presence or in the presence of an Elder, and to return it to Mr. Ewert as quickly as possible. However, the search did not occur in Mr. Ewert's presence and, as set out below, the medicine bundle was not returned to Mr. Ewert until he was transferred to another institution, almost a

month later. Rather, Mr. Ewert's medicine bundle was searched on July 17, 2019, in Mr. Morris' office, in the presence of Mr. Morris, Elder Nadon, and Ms. Morin.

[31] Mr. Morris, the Correctional Manager who apparently made the decision to search Mr. Ewert's medicine bundle in his absence, was not called to give evidence at trial.

[32] Ms. Morin recalled having assisted in the search of Mr. Ewert's medicine bundle with Elder Nadon. However, she had limited recollection of the search itself, or of meetings with Mr. Ewert before or after the search. She did recall seeing a cardboard box containing Mr. Ewert's Indigenous effects, including a ribbon shirt, a drum, rocks, bandanas, and his medicine bundle. She did not recall whether the medicine bundle was tied or not, or whether she or Elder Nadon had to untie it. She said that the search took place by looking at what was inside the pockets of the medicine bundle and advising the Correctional Manager what she and Elder Nadon recognized, did not recognize, what they knew Mr. Ewert could keep, and what should be stored elsewhere. She also had no recollection of what she did with the objects after the search, but relied on her own general practice of always putting objects back the way she found them.

[33] Elder Nadon similarly had some recollection of the search, but was unable to recall many details. She did not remember how the objects or the medicine bundle looked in the box when it was first opened. She originally recalled seeing pots of herbs and seeing the headbands in a corner of the box, but subsequently indicated she could not say with certainty and did not recall.

She recalled that she was asked to identify the various plants and medicines, but beyond this had little recollection.

[34] Neither Ms. Morin nor Elder Nadon recalled raising an issue with Mr. Morris about touching Mr. Ewert's medicine bundle or searching it in his absence, despite the concerns Mr. Ewert had raised the day before. Based on Elder Nadon's testimony, it seemed clear that she did not consider it her role to raise such issues or to question decisions by correctional officers regarding searches. In contrast, Ms. Desnoyers testified that in her view, either a Correctional Manager or an Elder could say that an Indigenous inmate should be present for the search. In any event, I conclude that no such concern was raised. The search was conducted without Mr. Ewert and did not reveal any contraband.

[35] Mr. Ewert did not see his medicine bundle again until Friday, July 26. No evidence or explanation was given as to why the medicine bundle was not returned to Mr. Ewert immediately after the search. On July 26, Mr. Ewert met with CSC staff who told him his security classification would remain at minimum and discussed transfer options with him. Ms. Morin joined one of these meetings, and Mr. Ewert again asked after his medicine bundle. He was escorted to Mr. Morris' office and shown his medicine bundle in the presence of Mr. Morris and Ms. Morin. Mr. Ewert's evidence was that the bundle was in the cardboard box, but its contents were out of their pouches and sitting in the box. Stones and arrowheads, usually wrapped in velvet for protection, were loose in the box. In Mr. Ewert's words, his medicine bundle was in "the worst disarray [he] had ever seen."

[36] Mr. Ewert was then advised that he could not take the entirety of his bundle back to his cell. Rather, Ms. Morin told him that he could only take a few items with him for the weekend, prior to his anticipated transfer to a new minimum security facility. Mr. Ewert explained that his medicine bundle is a single unit that is not readily subdivided, but he was still told he could only take a few items. He selected some items and returned to his cell.

[37] Mr. Ewert was not cross-examined on this evidence, except being asked to confirm that none of the items in his medicine bundle had been chipped or broken. Ms. Morin has no recollection of the events of July 26. As noted above, Mr. Morris was not called to give evidence. Mr. Ewert's evidence regarding what he saw and the state of his medicine bundle on July 26 was detailed, consistent, straightforward, and stands uncontroverted. I accept his evidence.

[38] On Tuesday, July 30, Mr. Ewert was transferred to the minimum security unit at another multi-level facility in Quebec, known as Federal Training Centre (FTC)-6099. Prior to his transfer, he was brought to Mr. Morris' office to retrieve his medicine bundle. It travelled in the same transport vehicle with him to FTC-6099. Upon arrival, Mr. Ewert met with an Elder, who sat with him while he displayed the contents of the medicine bundle for the Elder's inspection. Mr. Ewert then packed up the bundle and took it to his new cell. He raises no issues with respect to this search of his medicine bundle.

[39] Based on my appreciation of the evidence given by Mr. Ewert, Ms. Desnoyers, Elder Nadon, and Ms. Morin, I conclude that the following occurred between Mr. Ewert's transfer to Archambault Medium on June 27 and his transfer to FTC-6099 on July 30:

(a) Mr. Ewert's medicine bundle was taken from his cell at Archambault Minimum and placed with other items in a box, brought to Archambault Medium, and placed in the office of Mr. Morris, a Correctional Manager.

(b) At some point prior to July 17, the medicine bundle was opened by unknown CSC staff. Only this can account for Ms. Morin seeing rocks and bandanas in the box when it was first opened, and Elder Nadon seeing bandanas, items which Mr. Ewert kept tied up in his medicine bundle.

(c) On July 17, the medicine bundle was searched by Elder Nadon and Ms. Morin in Mr. Morris' office. Mr. Ewert was present at Archambault Medium and could have been brought to the office or another location for the search, but was not. No witness suggested there was any urgency associated with the search.

(d) At the conclusion of the search or at some point afterwards, the contents of Mr. Ewert's medicine bundle were placed in the cardboard box, outside the medicine bundle itself. There is little reason to doubt Elder Nadon and Ms. Morin's evidence that they believe they treated the items in the medicine bundle with care, and Ms. Morin's evidence that her practice was to return articles to where she found them. However, whether it was the outcome of the search or something that occurred later, the contents of Mr. Ewert's medicine bundle were removed from the bundle, removed from pouches and protective fabric, and left loose in the bottom of the cardboard box. This is the only inference that

concords with the condition in which Mr. Ewert saw them on July 26, evidence on which he was not contradicted.

(e) Mr. Ewert's medicine bundle was not returned to him after the search. He was not told about the search until July 23, was not taken to see his medicine bundle until July 26, was permitted to only take certain items from it at that time, and his medicine bundle was not returned to him until July 30.

[40] The Crown argues I should not draw the inferences referred to above, notably those in paragraphs (b) and (d), based on the direction in article 2849 of the *Civil Code of Québec* that the Court "shall take only serious, precise and concordant presumptions into consideration." A "presumption" for this purpose is an inference drawn by the law or the court from a known fact to an unknown fact: *Civil Code of Québec*, art 2846. I am satisfied that the inferences above in paragraphs (b) and (d) regarding the handling of Mr. Ewert's bundle meet the requirements of "serious, precise and concordant presumptions": *Benhaim v St-Germain*, 2016 SCC 48 at paras 59–60. In particular, the connection between the known facts (the state of the medicine bundle when first seen by, respectively, Ms. Morin, Elder Nadon, and Mr. Ewert) and the unknown facts (how they came to be in that state) is such that the existence of one establishes the other in a clear and obvious manner. In my view, no different or contrary inference is consistent with the known facts, and no contradictory evidence was presented. In this regard, the Crown's reference to Mr. Ewert's admission that his arrowheads had not been scratched or damaged is beside the point. The fact that objects had been removed and stones and arrowheads were out of the medicine bundle is in no way contradicted by the fact that the objects were not permanently damaged.

[41] I note the Crown argues that article 2849 of the *Civil Code of Québec* applies by virtue of section 40 of the *Canada Evidence Act*, RSC 1985, c C-5. Section 40 provides that in proceedings over which Parliament has authority, the applicable laws of evidence are those "in force in the province in which those proceedings are taken" [emphasis added] (in the French version of the statute, "*qui sont en vigueur dans la province où ces procédures sont exercées*" [emphasis added]).

[42] Having reviewed the limited jurisprudence on the application of section 40 of the *Canada Evidence Act* to proceedings in this Court, there is in my view some uncertainty as to whether these proceedings "are taken" in Quebec. In various cases, federal courts have referred to the location of commencement, pursuance, and/or trial as being where proceedings are "taken": see, *e.g.*, *Anderson v Canada (Attorney General)*, 1997 CanLII 17645 (FC); *Desroches v The Queen*, 2013 TCC 81 at para 33; *Canada (Citizenship and Immigration) v Halindintwali*, 2015 FC 390 at para 96; *Tepper v Canada (Attorney General)*, 2020 FC 1046 at para 2; *Porto Seguro Companhia de Seguros Gerais v Belcan SA*, [1996] 2 FC 751 (CA) at para 8, rev'd on other grounds, [1997] 3 SCR 1278; *South Yukon Forest Corporation v Canada*, 2010 FC 495 at paras 1–4, 40–41, rev'd on other grounds, 2012 FCA 165, leave to appeal ref'd, 2012 CanLII 76981 (SCC).

[43] In the present case, the action was commenced in Vancouver, the causes of action arose in Quebec, and the trial was held at a sitting of the Court in Montreal (by videoconference), with the parties in Quebec. I question whether the applicable rules of evidence should be determined solely by the location of the Registry Office where the originating document was issued. In the

present case, I am satisfied that the laws of evidence of Quebec should apply, as proposed by the Minister, while noting that none of my conclusions would differ if the British Columbia laws of evidence applied.

[44] Having reviewed the factual nature of the search, I turn to Mr. Ewert's *Charter* claims.

(4) Section 2(*a*) of the *Charter*

[45] As set out above, Mr. Ewert alleges that the search of his medicine bundle infringed his rights and freedoms under sections 2, 7, 8, 12, and 15 of the *Charter*. The parties focused most of their arguments on section 2(*a*) of the *Charter*. For the reasons expressed below, I conclude that section 2(*a*) is the most directly implicated *Charter* right. Since the factual matrix underpinning each of the *Charter* claims is the same, and since I find section 2(*a*) has been infringed, I will follow the approach of the Supreme Court of Canada in *Trinity Western* and focus my discussion on that provision: *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at paras 76–78.

[46] Section 2(*a*) of the *Charter* guarantees "freedom of conscience and religion" as a fundamental freedom. An infringement of section 2(*a*) is made out where (1) the claimant sincerely believes in a belief or practice that has a nexus with religion; and (2) the impugned measure interferes with the claimant's ability to act in accordance with their religious beliefs in a manner that is more than trivial or insubstantial: *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 32, citing *Syndicat Northcrest v Amselem*, 2004 SCC 47 and *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6; *Trinity Western* at para 63. If there

has been such an infringement, the question becomes whether the limit is a reasonable one, prescribed by law and demonstrably justified in a free and democratic society: *Charter*, s 1; *Hutterian Brethren* at para 34; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 39.

(a) *Mr. Ewert's sincere beliefs have a nexus with religion*

[47] The Crown does not challenge the sincerity of Mr. Ewert's beliefs and practices with respect to his medicine bundle, nor their nexus with religion. I am satisfied that the evidence, including Mr. Ewert's testimony, establishes that he sincerely believes that his medicine bundle is a pure and sacred object; that it has assisted him in his healing, recovery, and sobriety; that it is to be kept in his possession; that he should be the only person who touches his medicine bundle; and that it is desecrated if anyone other than him touches it, particularly, but not exclusively, if that person has consumed drugs or alcohol, or is "on their moon time" (menstruating); and that it is to be kept together and not subdivided. Given the connection between these beliefs and Mr. Ewert's spiritual faith, I am satisfied that his beliefs have a nexus with religion: *Amselem* at para 56.

(b) *The treatment of Mr. Ewert's medicine bundle was a non-trivial interference*

[48] In my view, Mr. Ewert has established that the search of his medicine bundle constituted a non-trivial interference with his ability to act in accordance with his religious beliefs. The assessment of what constitutes a non-trivial interference is context-dependent: *Amselem* at para 60. In the present case, Mr. Ewert's medicine bundle was kept out of his possession for a

period of almost one month, preventing him from practising his beliefs through the use and possession of his medicine bundle. It was also searched in a manner that involved others touching the medicine bundle and its contents, an act that Mr. Ewert sincerely believes to be an act of desecration. He was then permitted to only take certain items from his medicine bundle, rather than the entire bundle, although the search had not revealed any items he was prohibited from having in his cell. In the context of Mr. Ewert's evidence regarding the importance of his medicine bundle, his relationship to it, and its relationship to his spiritual and traditional beliefs, these are non-trivial matters.

[49] I note that the interference with Mr. Ewert's religious freedoms was not simply an accidental or unknowing one. The evidence clearly establishes that CSC was well aware of the spiritual importance and sacredness of medicine bundles generally, and of Mr. Ewert's beliefs regarding his medicine bundle in particular. Indeed, Mr. Ewert specifically raised his concern that no-one else should touch his medicine bundle with Elder Nadon and Ms. Morin the day before the search. Although both were then asked to, and did, participate in the search, neither raised any concerns with the Correctional Manager, Mr. Morris.

[50] It is worth highlighting one other aspect of Elder Nadon's evidence on this point. Elder Nadon knew of Mr. Ewert's belief that no-one else should touch his medicine bundle, and agreed this belief was consistent with her own knowledge of traditional beliefs regarding sacred objects, such as her own eagle feather. However, Elder Nadon considered it necessary to clarify that her responses related to her understanding with respect to matters outside a penitentiary, and

that within a penitentiary, it was [TRANSLATION] “completely different.” This then led to the following responses to questions from Mr. Ewert:

> Q: So, Mme Nadon, you were just telling the Court that your discussion about someone touching your feather, you were referring to what happens outside a prison, and not what happens inside a prison, correct?
>
> A: [TRANSLATION] Correct.
>
> Q: And so, are you saying that if somebody touched your feather inside a prison, without your permission, that would be okay?
>
> A: [TRANSLATION] There is a big difference, Mr. Ewert, between you and me. I am an Elder, you are an inmate. So the policies are not the same. Unfortunately, if the inmate cannot be present, the Elder and her [Indigenous Liaison Officer] have the right to conduct searches without the presence of the inmate. We spoke about that at the beginning. So, and I, what I can assure you is that all that I did was with respect for your beliefs and your items.
>
> [Emphasis added.]

[51] Elder Nadon’s statements regarding the differences between inmates and non-inmates appear to pertain to CSC search policies, and to section 10 of CD 566-7 in particular, and not to the impact of touching a person’s medicine bundle from a religious or spiritual perspective. I address the question of CSC policies below in considering justification under section 1 of the *Charter*. However, to the extent that Elder Nadon may have been suggesting that what constitutes an interference with a religious belief is different for an inmate and a non-inmate, I cannot agree. As Justice Norris of this Court recently affirmed, “correctional institutions are not *Charter*-free zones”: *Richards v Canada*, 2022 FC 1763 at para 273; see also *R v Joseph*, 2014 ONCJ 559 at para 38, citing *R v Taylor*, 2014 SCC 50 at para 34. While the institutional setting is relevant to the question of justification, it does not prevent CSC’s actions from constituting an interference with Mr. Ewert’s freedom of religion. I also note that I agree with

Mr. Ewert that given his beliefs only he should touch his medicine bundle, Elder Nadon's assertion that she handled his medicine bundle and conducted the search [TRANSLATION] "with respect" for his beliefs is difficult to reconcile. She may have handled his medicine bundle with care, but doing so without raising his concerns about who touched the bundle, or suggesting that he be present to handle it himself, showed little respect for his beliefs.

[52] Similarly, Mr. Ewert was required to separate his bundle despite his express advice that this was contrary to his practices. In this regard, I agree with the views of Ms. Angus, who gave the following response to Mr. Ewert's question as to whether it was appropriate to ask an Indigenous inmate to take his medicine bundle apart piecemeal:

> I believe it's appropriate. At the end […] of the day, if it's not something that culturally makes sense to the person being asked, then that can be shared. But from the start, knowing that we come from various traditions, and that we are open to the differences, and that we can […] ask out of good faith. And I think that it's fair that somebody did ask that in the spirit of reassuring or in the spirit of ensuring that you had access to your medicine. Now, whether or not this [taking it apart] was something that you felt was appropriate or not [in] receiving it, in the sense that if it's not something that you usually do, then it's okay to state it.
>
> [Emphasis added.]

[53] In the present case, Mr. Ewert was asked to take some objects from his bundle. He expressed that he did not consider it appropriate to subdivide the bundle. Nonetheless, this expression of his religious practices was ignored and he was required to separate his bundle. This constituted a further infringement of his religious freedoms.

[54] In closing submissions, the Crown did not argue that the detention, search, and retention of Mr. Ewert's medicine bundle was not an interference with his ability to act in accordance with his beliefs, or that any such interference was trivial or insubstantial. Nor did the Crown argue that the interference was not caused by the government of Canada or its employees or agents for whom the Crown is liable. Rather, the Crown argued only that the search, and thus any interference, was a reasonable and justified one. I turn to that issue now.

(5) Section 1 of the *Charter*

(a) *Analytical framework*

[55] As mentioned above, the rights and freedoms guaranteed in the *Charter* are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society: *Charter*, s 1. The onus of proving that a limit on a right or freedom is reasonable and demonstrably justified rests on the party seeking to uphold the limitation, in this case, the Crown: *R v Oakes*, [1986] 1 SCR 103 at pp 136–137, 1986 CanLII 46 (SCC) at para 66.

[56] The Supreme Court of Canada has enunciated two frameworks for a section 1 analysis. Under the *Oakes* framework, the Crown must show first, that the objective of the limitation is a "pressing and substantial" one, and second, that there is proportionality between the objective and the means used to achieve it: *Oakes*, at pp 136–137, paras 69–70. Under the *Doré/Loyola* framework, used for reviewing a discretionary administrative decision said to violate the rights of an individual, the Court assesses whether the decision is "reasonable" in that it reflects a "proportionate balancing" in which *Charter* protections are limited no more than is necessary

given the applicable statutory objectives: *Doré v Barreau du Québec*, 2012 SCC 12 at paras 3–7, 54–58; *Loyola* at paras 4, 35, 37–39; *Trinity Western* at paras 79–80. The *Doré/Loyola* framework involves deference to an administrative decision maker, but it remains a "robust" analysis and is not a "weak or watered-down version of proportionality": *Trinity Western* at paras 79–80; *Loyola* at para 3.

[57] The Crown argues the Court should apply the *Doré/Loyola* framework since the search of Mr. Ewert's medicine bundle was the result of an administrative decision. I question whether this framework, expressly developed in the administrative law context of judicial review of administrative action, is readily transferable to an action for *Charter* damages: *Doré* at paras 3, 32–35, 52–58; *Loyola* at paras 35–39; *Trinity Western* at paras 57–59. Damages are not a remedy available on judicial review, and judicial review is not a prerequisite to an action in damages, including an action based on the *Charter*: *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 at paras 4, 23–28; *Canada (Attorney General) v McArthur*, 2010 SCC 63 at paras 1, 7, 13–14.

[58] I also question whether, at least in these circumstances, deference can be given to the very administrative actor who is alleged to have infringed an inmate's *Charter* rights and freedoms without inherently undermining those rights and freedoms. If the Court were restricted in its assessment of whether a state actor has infringed an individual's *Charter* rights by the fact that the state actor considers they have not done so, this would seem to impoverish the very rights the *Charter* seeks to protect.

[59] That said, in my view, the applicable analytical framework does not change the assessment of whether the interference with Mr. Ewert's religious freedoms was a demonstrably justified reasonable limit. For present purposes, I will therefore adopt the Minister's proposed framework of assessing whether the search was reasonable because it proportionately balanced the *Charter* protections to ensure they were "limited no more than [was] necessary given the applicable statutory objectives": *Loyola* at para 4; see *Brazeau v Attorney General (Canada)*, 2019 ONSC 1888 at paras 322–324, rev'd in part on other grounds, 2020 ONCA 184.

[60] Before turning to the issue of proportionate balancing, I note that the parties did not address significant submissions to the question of whether any limits on Mr. Ewert's religious freedoms were "prescribed by law." As set out above, the *CCRA* and *CCRR* contain provisions pertaining to the searching of inmates and their possessions. While these provisions cannot be taken to authorize or prescribe searches that unreasonably infringe an inmate's *Charter* rights, I am satisfied that a search of an inmate that otherwise complies with the statutory and regulatory provisions, and that reasonably limits a *Charter* right, is one that is prescribed by law.

(b) *Evidence regarding proportionate balancing*

[61] Accepting the Crown's submission with respect to the applicable framework, I am not satisfied the Crown has demonstrated that the limitation on Mr. Ewert's religious freedoms was reasonably justified. I note that while the onus usually rests on an applicant to demonstrate the unreasonableness of an administrative decision, where the issue is the reasonableness of a limitation on a *Charter* right, in my view the onus to justify the limitation must remain on the party seeking to uphold the limitation, here the Crown: *Trinity Western* at para 117, *per*

McLachlin CJ, concurring, paras 195–197 *per* Rowe J, concurring, and paras 312–314, *per* Côté and Brown JJ, dissenting; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 57, 100. In any event, I would reach the same conclusion regardless of who bears the burden.

[62] In the present case, there is no evidence of what, if any, balancing of *Charter* rights and statutory objectives was undertaken by the person who decided when, where, and how to conduct the search, who appears to have been Mr. Morris. There is understandably no written decision. However, there is also no other evidence as to the reasons why the search was not conducted until 20 days after Mr. Ewert's arrival at Archambault Medium; why the search was conducted in Mr. Ewert's absence rather than by him showing its contents; why it was conducted in a manner that left the contents of Mr. Ewert's medicine bundle in the bottom of a cardboard box rather than wrapped in the bundle as he had left them; or why Mr. Ewert's medicine bundle was not returned to him for many days after the search. The situation is thus different from that in *Trinity Western*, in which the Supreme Court addressed the difficulty of *Charter* reasonableness review in the absence of formal reasons through reference to the democratic context and the speeches of Law Society Benchers: *Trinity Western* at paras 51–56; see also *Vavilov* at paras 136–137.

[63] The Crown submits that the evidence regarding balancing, and the reasonableness of the decision, can be drawn from the CSC sacred object search policy in section 10 of CD 566-7, and from how the search was conducted. In my view, referring to these elements of the evidence points to the conclusion that the limitation on Mr. Ewert's religious freedoms was not reasonably justified. For clarity, this case is not about whether the CSC sacred object search policy infringes

section 2(*a*) of the *Charter*. The following discussion of the policy is relevant because, in the absence of any evidence from the person who decided to conduct the search in Mr. Ewert's absence, the Crown argues that the search was reasonable because it complied with the policy as they propose it be interpreted.

(c) *The CSC sacred object search policy*

[64] In considering the CSC sacred object search policy, I start from the proposition that searches in the correctional context are necessary. Mr. Ewert starts from the same proposition. As set out above, the *CCRA* sets out important statutory objectives that focus on the protection of society, staff, and offenders: *CCRA*, ss 3(*a*), 3.1, 4(*c*). However, consistent with *Charter* protections and values, the *CCRA* also underscores that offenders retain all rights except those that are lawfully and necessarily removed or restricted, and that correctional policies are to respect cultural and religious differences, and are responsive to the special needs of Indigenous persons: *CCRA*, s 4(*d*), (*g*).

[65] The CSC sacred object search policy set out in section 10 of CD 566-7 was issued in this context. For ease of reference, I reproduce it again here:

> 10. Any required security examination of Aboriginal medicine bundles, religious and spiritual articles or other sacred objects will be accomplished by having the owner manipulate them for visual inspection by the examining officer. In the owner's absence, an Elder, an Elder's representative (who is not an inmate) or a religious representative will inspect or manipulate the contents for inspection.

[66] The Court heard evidence on this policy from four CSC witnesses. They had different understandings of the policy, and in particular the meaning of the term “[i]n the owner’s absence.”

[67] Éric Cyr is a Correctional Manager at Archambault Medium who was familiar with and had applied the policy in his position. In his view, “[i]n the owner’s absence” meant situations where it was impossible for the owner to be present, such as an inmate who was outside the institution or had left in an emergency situation. It did not include situations where the owner of the medicine bundle was simply in his cell or elsewhere in the facility, since in that case the owner could simply be brought to where his medicine bundle was and could manipulate the bundle for inspection.

[68] Ms. Morin’s view was that “[i]n the owner’s absence” meant that the owner was not at the site of the search, such as a specific room within an institution. She noted that since the search of Mr. Ewert’s medicine bundle occurred in a Correctional Manager’s office, where inmates do not generally have access, this could justify conducting the search in his absence. Elder Nadon’s view was similar. She considered that “absence” meant simply that the owner was not present when the search was requested, such as if the inmate was in the hospital or if the medicine bundle was somewhere where the inmate did not have access.

[69] Ms. Desnoyers indicated that in her understanding, a search could be conducted in the “absence” of its owner where they were not present when the search had to be conducted. She gave as examples situations where an inmate was in a school or programme, in the hospital, or

on an escorted absence. She noted that the policy simply refers to the owner's "absence" and not their absence from the institution. In her view, the possibility of bringing an inmate to the location where a search was conducted was not prohibited by the policy, but was also not required. Rather, it was left to the discretion of the correctional staff, if they considered there was [TRANSLATION] "added value" in doing so. In Ms. Desnoyers' view, having an Indigenous inmate present for the search of his medicine bundle was a question of what was [TRANSLATION] "preferable" and not what was required by the policy. Ms. Desnoyers' evidence was that, at least at the Archambault Institution, searches of a medicine bundle after a transfer are usually conducted in the owner's absence, since such searches are usually done in the personal effects department, where inmates do not regularly go. Ms. Desnoyers was unable to say whether she had received any training or directives on the meaning of the policy, or that she had conveyed her understanding of it to Correctional Managers at the institution.

[70] It is clear from the foregoing that there are differing views, even within CSC, as to the meaning of the CSC sacred object search policy, and in particular the meaning of the phrase "[i]n the owner's absence." None of these views was that of Mr. Morris, who was apparently the person who decided to search Mr. Ewert's medicine bundle in his absence.

[71] On its face, the CSC sacred object search policy is designed to respect the sacred nature of such objects, including medicine bundles. Were it otherwise, the policy would not be specific to such objects. It does so by mandating that searches of such objects "*will be* accomplished" [emphasis added] by having the owner manipulate the object for visual inspection. The Crown proposes a reading of the policy like that of Ms. Desnoyers, Ms. Morin, and Elder Nadon, in

which this mandated language is avoided in any situation that an inmate is not already present at the time of the search.

[72] As Mr. Ewert points out, correctional staff control the location of inmates and their possessions, particularly in the context of an inmate transfer. The Crown's proposed reading of the policy would permit CSC staff to avoid the mandate that a search "will be accomplished" by the owner handling the object, simply by ensuring the inmate is not present when the search is conducted, or undertaking the search at a location where the inmate is not, and cannot be, present. In essence, it focuses on the words "[i]n the owner's absence" by removing them from the context of the policy as a whole, which indicates that the "owner's absence" is expected to be an exception to the general requirement of how to search a sacred object, and not an invitation to arrange effectively all searches in this fashion.

[73] This is an unreasonable reading and application of the policy, which does not conform either with the spirit and text of the policy, or with a balanced approach to the protection of the *Charter* right to freedom of religion.

[74] The unreasonableness of this reading is highlighted by the facts of the current case. Mr. Ewert and his medicine bundle were transferred to Archambault Medium on June 27, 2019. His medicine bundle was taken from his cell at Archambault Minimum. Entirely at the choice of CSC staff, it was brought to a Correctional Manager's office, a place where Mr. Ewert could not go without a summons or pass from correctional staff. This was ostensibly done, according to Ms. Desnoyers, to ensure CSC had control over the bundle so it could search it in accordance

with the CSC sacred object search policy and return it to Mr. Ewert quickly within the ten-day period referred to in CD 566-12. However, 20 days then passed before the search. During this period, it was conceded that there was no reason Mr. Ewert could not have been brought to the Correctional Manager’s office for the purpose of the search, in the same way he was brought after the search to retrieve some items from his bundle. There was no urgency to the search other than the need to return Mr. Ewert’s effects to him on a timely basis, which was not respected, and there was no need that it be conducted in his absence.

[75] Contrary to Ms. Desnoyers’ contention, there is no indication in section 10 that whether to have the owner of a sacred item present or not is a matter entirely in the discretion of CSC staff, to be exercised when they see some “added value” in having the owner there. The policy in the Commissioner’s Directive is to the opposite effect. At the risk of repetition, it states that a search “will be accomplished” by having the owner there. The fact that it then describes how a search is to be conducted when the owner is not there does not make the policy entirely discretionary.

[76] The interpretation of the CSC sacred object search policy that the Crown now advances would permit a correctional officer to interfere with an inmate’s sincere religious beliefs simply to avoid inconvenience or because they chose to conduct a search without the inmate present, regardless of any urgency or other security need to do so. It is difficult to see how this would be a demonstrably justified reasonable limit on the inmate’s religious freedom. I am unwilling to ascribe to CSC as an institution, or to the Commissioner in issuing the Directives containing the policy, an intention to give so little respect to the religious freedoms of inmates.

[77] On the other hand, the CSC sacred object search policy as interpreted by Mr. Cyr reflects a realistic balance between the religious freedoms of inmates and the correctional setting. On that interpretation, a search of a sacred object such as a medicine bundle is to be accomplished by the inmate handling the object for inspection, unless the particular factual circumstances render this actually or practically impossible, in which case the search may be performed by an Elder, an Elder's representative, or a religious representative.

[78] The Minister notes that the wording of the policy changed between the earlier 1995 version and the current language in section 10. The 1995 version of CD 702 pertained only to Indigenous sacred objects and not to sacred objects more generally. As reproduced at paragraph **Erreur ! Source du renvoi introuvable.** above, it stated that "[a]ny required security examination of such [medicine] bundles or objects shall normally be accomplished by having the owner manipulate them for visual inspection by the examining officer" [emphasis added]. It did not address how the search would be conducted in the "non-normal" situation.

[79] This earlier language was addressed in a September 2007 decision on a grievance Mr. Ewert brought regarding a search of his medicine bundle in November 2006. After citing paragraphs 14 and 21 of then CD 702, the then Senior Deputy Commissioner of CSC concluded the following:

> My review of the policy clearly indicates that the norm should be for the offender to be present during a search of his/her bundle. This is so that he/she can manipulate the items for visual inspection and maintain the spiritual value of the effect. A search without the offender being present should be the exception to the rule and should occur only in rare circumstances.

> Therefore, I agree you should be allowed to be present during the search of your bundle, <u>provided there are no pressing security concerns</u>. Your grievance is upheld.
>
> [Emphasis added.]

[80] In amending the policy, the Commissioner of Corrections strengthened the language from "shall normally be accomplished" to the more mandatory "will be accomplished," and added language regarding how the search was to be conducted in the inmate's absence. While there was no evidence regarding the purpose of the amendment, I again cannot attribute to the Commissioner an intent that the "[i]n the owner's absence" language was meant to wholly undermine the strengthening of the language to "will be accomplished," so as to make searches in the offender's absence *less* rare, render the policy effectively discretionary, or permit correctional staff to interfere more freely with the spiritual value of Indigenous medicine bundles.

[81] Ultimately, the question is not the interpretation of the policy, but whether *the search that was conducted* infringed section 2(*a*) in a manner that was not demonstrably justified. I conclude that the Crown cannot rely on compliance with the policy as an indicator of reasonableness based on a strained reading of the policy that would itself result in greater limitations on religious freedom than are necessary. Put another way, to the extent that the "balancing" at issue is the balancing set out in the Commissioner's Directive, that balancing is only proportionate if it is interpreted and applied as Mr. Cyr understands it, and not by permitting correctional staff to ensure that searches are effectively always done "[i]n the owner's absence" by conducting them when and where the owner is not, and cannot be, present.

(d) *Conclusions on proportionate balancing*

[82] The primary statutory objectives cited by the Crown as relevant to the issue of balancing are the security mandate of CSC staff, particularly in the context of searches, and the importance of the protection of society, staff and offenders: *CCRA*, ss 3.1, 4(*c*), 47, 58. I agree with the Crown that these important principles justify the need to search an inmate's possessions upon arrival at a new institution. Mr. Cyr noted in his evidence that searches sometimes reveal contraband, even in possessions that have already been searched.

[83] However, as the Crown itself submitted in final argument, the real issue is not about whether the search should have been conducted, but about how it was conducted. On this issue, the Crown presented no explanation or submission as to why the statutory objectives of security and protection were in any way better met through a search by Elder Nadon and Ms. Morin than by one in which Mr. Ewert was present and displayed his bundle for inspection. Nor did the Crown present any justification for why these objectives were better served by a policy which gave correctional officers an absolute discretion as to whether an Indigenous inmate was present for the search of his medicine bundle or not.

[84] The closest the Crown came to offering such a justification was in the evidence of Ms. Desnoyers, who referred generally to operational realities and the number of searches conducted in the institutional setting. These include regular monthly searches of cells in accordance with search plans, and additional searches where there is belief in the existence of contraband. She suggested that it was operationally impossible to ensure that the inmate was

present for all such searches. She noted that Archambault had as many as 100 inmates who identify as Indigenous, and thus [TRANSLATION] “potentially” 100 inmates with medicine bundles that might need to be searched on a regular basis. At the same time, I note that Mr. Cyr, who has 16 years of experience with CSC as a Correctional Officer and Correctional Manager, including time spent at Archambault, said that he had only conducted one or two searches of medicine bundles.

[85] I am not satisfied that this scant evidence presents a justification for conducting the search of Mr. Ewert’s medicine bundle in his absence. The issue before the Court is not the conduct of every search of a medicine bundle in Archambault Institution. Nor is it the conduct of routine cell searches. It is the search of Mr. Ewert’s medicine bundle upon his transfer to Archambault Medium in July 2019. It may be there are circumstances in which it is not possible for a search to be conducted with the inmate present, either for operational or security reasons, or both. In such circumstances, an infringement of religious freedoms may be demonstrably justified. However, the limited evidence of operational difficulties presented by the Crown cannot create a universal justification for conducting all searches in a manner that infringes religious freedoms. In particular, there was no evidence whatsoever presented that it would have been operationally difficult or impossible to ask Mr. Ewert to come to the Correctional Manager’s office to manipulate his bundle for inspection, or more operationally difficult than it was to ask Elder Nadon and Ms. Morin to be there to do so.

[86] As mentioned above, a proportionate balancing is one that ensures *Charter* protections are limited no more than is necessary given the applicable statutory objectives: *Loyola* at paras 4,

31. Searching Mr. Ewert's medicine bundle in his absence, with others touching the medicine bundle and the items within it, limited his religious freedoms far more than having him present to manipulate his bundle for inspection. There was simply no evidence to demonstrate that the applicable statutory objectives in any way necessitated this greater restriction. In this regard, I agree with Mr. Ewert that even if Elder Nadon and Ms. Morin conducted the search with respect as they contend—leaving aside for now the evidence regarding the state of the medicine bundle after the search—this does not make the search an inherently respectful one. The lack of respect for Mr. Ewert's religious freedoms arose from the mere handling of his medicine bundle and the objects in it when it was not necessary for the search, regardless of *how* they were handled.

[87] To the extent that the individual decision maker who decided to search Mr. Ewert's bundle in his absence conducted any "balancing" at all between Mr. Ewert's *Charter* rights and the relevant statutory objectives, which is far from clear on the record before me, I am not satisfied it was a proportionate balancing.

[88] Nor am I satisfied that either the statutory objectives or the practical realities necessitated a delay of 20 days before Mr. Ewert's medicine bundle was searched, during which he was deprived of an important sacred object central to his beliefs, or a further ten days after the search before it was returned to him. The Crown did not even attempt to offer an explanation for either of these delays. Under CSC's own policies, an inmate's possessions, even non-religious ones, are normally to be returned to them within ten working days of their arrival.

[89] Parenthetically, I note Mr. Ewert contends that his medicine bundle is not a “personal item” or “personal property” falling within CD 566-12, but rather a “personal spiritual effect,” a term used as a synonym for “ceremonial object” in the current version of CD 702. He points to the fact that medicine bundles do not appear on the national lists of personal property, and that a zero dollar value is assigned to his medicine bundle on his Offender Personal Property Record. To the Court’s understanding, this argument is directed at suggesting that the ten-day period in CD 566-12 does not apply to medicine bundles. I have difficulty accepting the contention that personal spiritual effects are not a form of personal property falling within CD 566-12 based on the limited argument before the Court, particularly given that numerous sections in CD 566-12 refer to “religious, spiritual and cultural items” as part of the subject matter of the Directive. At the same time, CD 566-12 does not itself provide automatic justification of any ten-day delay in returning a religious item where doing so contravenes religious freedoms. I need not decide this matter, however, as the unexplained delay in returning Mr. Ewert’s bundle to him fell well outside this period.

[90] I am further not satisfied that conducting the search in a manner that resulted in the contents of Mr. Ewert’s medicine bundle being placed in a cardboard box, outside the medicine bundle—regardless of who at CSC was responsible for this—showed that the search was conducted reasonably or with “proportionate balancing,” or was necessitated by the statutory objectives of security and protection.

[91] Finally, I conclude that the evidence does not establish any justification for Mr. Ewert being required to take only portions of his medicine bundle with him to his cell on July 26. The

medicine bundle had been searched. The Crown tendered no evidence indicating that any items in it were not permitted in his cell. Mr. Ewert had explained that his medicine bundle is a single unit. Yet he was required to separate his medicine bundle and take only portions of it, for no reason given either to Mr. Ewert at the time or to the Court at trial.

[92] I therefore conclude that, regardless of who bears the burden of justification or demonstrating that the search was reasonable, the evidence shows that there was no "proportionate balancing" that ensured that Mr. Ewert's *Charter* rights were limited no more than was necessary given the statutory objectives. The interference with Mr. Ewert's rights under section 2(*a*) of the *Charter* was thus not justified under section 1.

B. *CSC's treatment of Mr. Ewert's headbands did not breach Mr. Ewert's* Charter *rights*

(1) Mr. Ewert's headbands

[93] As part of his spiritual beliefs and practices, Mr. Ewert wears headbands of different colours and origins that have special meaning to him. As he notes, the headbands themselves are not traditional in the sense of being from a traditional source or being made by traditional methods. They are bandanas of a sort that may be acquired in a clothing store. However, Mr. Ewert's headbands have been presented to him by Elders in association with teachings that are important to him, and some are worn in honour of those Elders. Ms. Angus' evidence confirmed that she, too, considers that the presentation of an object by an Elder in association with a teaching can make an otherwise ordinary item take on cultural and spiritual significance.

[94] The individual headbands that Mr. Ewert wears have different colours, different significance, and are worn on different days. Mr. Ewert spoke of the connection between the colours of the headbands and the medicine wheel, and the different meanings associated with different colours, as well as some of the teachings of other First Nations with respect to the wearing of headbands.

[95] As noted above, Mr. Ewert's headbands are part of his medicine bundle. They form part of his spiritual and traditional beliefs and, like other objects in his medicine bundle, he considers them sacred objects that should only be touched by him. He keeps the headbands in his medicine bundle. They form part of the teachings and beliefs to which he attributes his recovery and personal development. He states that when he wears his headbands, he feels that his "thoughts are more collected."

[96] Mr. Ewert made repeated comparison between his headbands and other religious headwear, such as kippahs, kufis, and turbans. These comparisons appear to flow in part from Mr. Ewert's historical difficulties in convincing CSC staff to recognize his headbands as religious or cultural headwear entitled to the same protection as other headwear with which staff may have been more familiar. In the current context, while such comparisons may be helpful to consider, what is ultimately important is Mr. Ewert's beliefs and practices in respect of his own headbands, which may have similarities and differences with the other headwear described.

(2) The incidents

[97] Mr. Ewert recounts that he has had numerous encounters with CSC staff and CSC policies regarding his headbands over the years, dating back to at least 2011. These encounters have generally involved Mr. Ewert being told he could not wear his headband, or being asked to remove his headband for certain reasons, including searches, or in certain areas of an institution. CSC's policies with respect to bandanas have changed over time. The record includes reference to a change to CD 566-12 that permitted "bandannas (non-gang related)" as an allowable item of personal property for offenders. Particular consideration was also given to bandanas as religious or spiritual items, at least in response to complaints from Mr. Ewert. A grievance decision upholding a complaint by Mr. Ewert recognized that "religious and cultural headwear is not banned in the same way that other headwear is banned" and that "headbands could be legitimately viewed as a cultural item," while at the same time recognizing that an institutional head has the authority to restrict items, "even those that are permitted according to policy."

[98] For the purposes of this action, however, the relevant incidents involving Mr. Ewert's headbands occurred between his arrival at Archambault Minimum on June 17, 2019, and August 20, 2019. He claims that these incidents amount to harassment that constitutes a breach of his rights under sections 2, 7, 8, 12, and/or 15 of the *Charter*.

(a) *Photograph upon arrival at Archambault Minimum*

[99] Upon arrival at a new facility, inmates are required to have a new identification photograph taken, which is used on identification cards and put in the Offender Management

System. On June 17, 2019, Mr. Ewert was asked by a correctional officer to remove his headband to have his photograph taken. Mr. Ewert stated that he was not required to do so, based on his experience with prior incidents in other institutions. The officer took Mr. Ewert's photograph with his headband on, although he says she did so "begrudgingly."

[100] The following morning, Mr. Ewert was called to speak with Mr. Cyr, who asked him if he would take his headband off for a photograph. Mr. Ewert again explained that the issue had been previously resolved, and that he had been told he was not required to do so. Mr. Cyr told Mr. Ewert he would look into it. Mr. Ewert spoke with Ms. Angus, who suggested that she attempt to resolve the issue. She spoke to the Regional Administrator of Security, asking him to look into the matter and review Mr. Ewert's history to see what had been done in the past.

[101] While the evidence was not precise on this point, it appears that the Regional Administrator or another individual reviewed the matter, and Mr. Cyr received word that Mr. Ewert should not be required to remove his headband for a photograph. The photograph taken with his headband was used.

[102] I note that the evidence of Mr. Ewert, Mr. Cyr, and Ms. Angus with respect to this event was generally consistent.

(b) *Further requests to remove headband*

[103] The remaining six incidents raised by Mr. Ewert (four at Archambault Medium; two at FTC-6099) involve requests that he remove his headband either to access an area of an

institution or for the purposes of a search. Mr. Ewert's evidence was the only evidence regarding these incidents. While Mr. Cyr spoke to some aspects of the practice of searches, he was not present for any of the following searches, and no other witness to any of the incidents was called at trial.

[104] Incident 1. On June 28, 2019, after Mr. Ewert was transferred to Archambault Medium, he was required to visit the health care unit to review his file. When he arrived at the search point leading to the health care unit, a correctional officer told him he could not wear headbands in the unit. Mr. Ewert explained that he wore the headband for religious reasons. The officer responded that he would be allowed to wear it on this occasion, but that Mr. Ewert would need something written by an Elder for the future.

[105] Incident 2. On July 10, 2019, while still at Archambault Medium, Mr. Ewert had a meeting with an articling student in connection with a separate matter related to an earlier search of his medicine bundle at La Macaza. Again, a correctional officer told him he could not enter the meeting with his headband on, and told him to remove it. Again, Mr. Ewert explained that he wore the headbands for religious reasons. The officer permitted him to wear it, but asked him to remove it for inspection. Needing to meet with the student, he did so. The officer did not, however, search other clothing items such as Mr. Ewert's shoes.

[106] Mr. Ewert discussed the July 10 incident with Ms. Angus on July 11. Ms. Angus suggested he get a written permission regarding his headbands from an Elder, which he

requested on the same day. On July 16 (the day before the medicine bundle search), Elder Nadon and Ms. Morin responded in writing with the brief note "No written permission needed."

[107] Incidents 3 and 4. Nonetheless, Mr. Ewert suggests that on two further occasions on unspecified dates in July, he was asked upon arrival at the health care unit to remove his headband for searches by correctional officers, while not asking for shoes or other clothing to be removed.

[108] At some point while Mr. Ewert was at the Archambault Institution, a memorandum was circulated by Simon Brunet, Assistant Warden, Operations, concerning Mr. Ewert. It included Mr. Ewert's photograph and the following text [TRANSLATION]:

> Please note that the above-mentioned inmate is authorized to wear his headband inside the institution (all sectors combined) at all times. This headband is considered a religious article. If you need to conduct an exhaustive search, he must remove the headband himself to let you do a visual inspection of the said headband.

[109] The memorandum is undated. Ms. Desnoyers was able to confirm that it was circulated while Mr. Ewert was present at Archambault, but no more precise date on the document could be provided.

[110] Incident 5. On August 1, 2019, after Mr. Ewert's transfer to FTC-6099, he had another meeting with lawyers. Before being permitted to enter the meeting, he was asked by a correctional officer to remove his headband for inspection, but not his shoes or other articles of clothing.

[111] Incident 6. On August 20, 2019, before another meeting with counsel, Mr. Ewert was patted down and asked to remove his headband for inspection. Mr. Ewert noted that he was in minimum security and normally would not be patted down, but the officer responded that since there were medium security inmates in the facility, he would receive the same treatment. Mr. Ewert explained that he would not have to remove his headwear if it were a turban, a kufi, or a kippah, but the officer insisted it be removed. He removed the headband to show the officer there was nothing beneath it. Again, the officer did not ask him to remove his shoes or any other item of clothing.

[112] Mr. Ewert's evidence at trial was that on each occasion, the searching officer handled the headband to search it before returning it to him, resulting in him feeling a need to wash his hair and smudge his headband to cleanse it. He underscores that while these incidents may not seem significant individually, they reflect a disrespect for his religious freedoms that becomes greater in the aggregate. He also notes that on each occasion, he felt that insisting on his rights might result in an adverse encounter with a correctional officer and/or a potential notation in his file that could affect his security classification. In his words, during the encounters he was "sweating bullets" with a fear that defending his religious freedoms could leave him on the wrong side of correctional officials.

[113] Mr. Ewert also highlights the fact that during these searches, he was not asked to remove his shoes or other articles of clothing where contraband or other prohibited items could be more easily hidden. He contends that this shows that his headband is being singled out for unnecessary

searching. He points to Mr. Cyr's statement that he would not conduct a search in which he asked an inmate to remove a headband, but not their shoes.

[114] The Crown takes issue with Mr. Ewert's testimony that the searches of his headbands always involved a correctional officer handling them. They note that paragraph 74 of Mr. Ewert's Statement of Claim simply states that on July 10, he was asked "to remove [his headband] for inspection," without indicating that the officer conducted the inspection. On discovery, Mr. Ewert similarly described this event by saying "I had to remove it to show him there was nothing hidden in it and then I was allowed to wear it." Similarly, paragraph 124 of the Statement of Claim, states that during the August 1 incident, a correctional officer asked Mr. Ewert "to remove his headband in order that he could see there was nothing secreted beneath it." Paragraph 134 of the Statement of Claim states that during the August 20 incident, Mr. Ewert "showed [the correctional officer] the headband had nothing beneath it."

[115] Paragraph 69, addressing the June 28 incident, is to the same effect as paragraph 74, noting that the officer permitted him to wear the headband after "having him remove it for inspection." Mr. Ewert's evidence regarding the June 28 incident in particular did not address this search or its nature.

[116] Mr. Ewert responded to these references by repeating that to his recollection, every time he was asked to remove his headband, the officer handled it. He suggested that the fact that he did not mention specifically that the officer touched his headband was simply because it was inherent in the nature of the search.

[117] I am not satisfied with Mr. Ewert's explanation, particularly as it relates to the July 10, August 1, and August 20 incidents. Mr. Ewert's evidence on discovery regarding the July 10 incident, and the descriptions of the August 1 and August 20 events in the Statement of Claim, refer to Mr. Ewert "showing" his headband, so the officer could "see" (not "feel") that there was nothing secreted in it. In my view, these earlier statements, made considerably closer to the dates of the incidents in question, likely reflect a better recollection of the events. I note also that Mr. Ewert's testimony regarding the searches did not include any indication that he advised a correctional officer that insisted on a search that it was important for Mr. Ewert to be the only person to touch the headband. I found Mr. Ewert to be forthright in describing his conversations with correctional officials, and willing to express his concerns regarding the treatment of his religious items. If the searches had included the officer inappropriately touching the headband in place of Mr. Ewert, I expect Mr. Ewert would have raised a concern with that approach at the time and that his evidence regarding the events would have included reference to that discussion.

[118] Further, while the Statement of Claim is not itself evidence, one of its primary functions is to give a defendant notice of the factual allegations made and an opportunity to respond, including by calling relevant evidence at trial. While a Statement of Claim will not include all details, in this case, I view the allegations in the Statement of Claim, particularly those at paragraphs 124 ("asked him to remove his headband in order that he could see there was nothing secreted beneath it") and 134 ("[Mr. Ewert] showed him the headband had nothing beneath it"), to be inconsistent with the allegation that the correctional officer handled the headband. While paragraph 146 of the Statement of Claim, which pertains to infringement of section 15 of the *Charter*, makes a general reference to breaches arising due to "handling with dirty search

gloves," no particular factual allegations regarding the incidents in question are made to support this pleading.

[119] I therefore conclude that Mr. Ewert has not met his onus to prove that the searches of his headband conducted between June 28 and August 20, 2019, involved a correctional officer manipulating his headband, either over Mr. Ewert's objections or at all.

[120] I note also that the approach of having Mr. Ewert remove his own headband and display it for inspection is consistent with the memorandum sent by Mr. Brunet at Archambault, although there is no evidence that this memorandum, or an equivalent, was distributed at FTC-6099. Mr. Cyr's evidence was that for a cap or toque, he would conduct the search himself, but for a religious item such as Mr. Ewert's headbands, he would ask to be shown it and conduct only a visual search. Mr. Cyr's evidence is in turn consistent with the CSC sacred object search policy, which covers "religious and spiritual articles."

[121] Based on my overall assessment of the evidence, I conclude that:

(a) On arrival at Archambault Minimum, Mr. Ewert was asked to remove his headband for an identification photograph. He stated that he should not have to do so and had been photographed with it on in the past. Mr. Cyr and others looked into the matter and concluded that the photograph with a headband was satisfactory.

(b) On two occasions at Archambault Medium (Incidents 1 and 2), Mr. Ewert was told that he could not wear his headband in an area of the institution. On each occasion, Mr. Ewert was permitted to keep his headband on in the area after he explained its religious nature

and after it had been searched. Mr. Ewert has not met his onus to establish, on the evidence before the Court, that these searches were conducted through the manipulation of his headbands by correctional officers rather than through his own manipulation of his headbands for visual inspection by the officers. Mr. Ewert was not asked to remove other articles of clothing, such as his shirt or shoes, at the time of these searches.

(c) On two further occasions at Archambault Medium (Incidents 3 and 4) and two occasions at FTC-6099 (Incidents 5 and 6), Mr. Ewert was asked to remove his headband for a search prior to entering the health unit or meeting with counsel. Again, Mr. Ewert has not met his onus to establish, on the evidence before the Court, that these searches were conducted through the manipulation of his headbands by correctional officers rather than through his own manipulation of his headbands for visual inspection by the officers. Mr. Ewert was not asked to remove other articles of clothing, such as his shirt or shoes, at the time of these searches.

(3) Section 2(*a*) of the *Charter*

(a) *Mr. Ewert's sincere beliefs have a nexus with religion*

[122] As with Mr. Ewert's beliefs relating to his medicine bundle, the Crown does not challenge the sincerity of his beliefs and practices with respect to his headbands, nor their nexus with religion. I am satisfied that Mr. Ewert's testimony establishes that he wears his headbands as part of a sincere practice of his spiritual beliefs and as an expression of those beliefs. They provide him with a connection to the teachings of Elders and have significance based on their

colour and/or source. Given the connection between these beliefs and Mr. Ewert's spiritual faith, I am satisfied that his beliefs have a nexus with religion: *Amselem* at para 56.

[123] Less clear is the extent to which Mr. Ewert's beliefs require him to always wear the headbands, and never to take them off, even for short periods. Mr. Ewert spoke of the importance of wearing his headbands generally, and throughout the institution. He also felt he should not have to remove his headband when it was unnecessary to do so, such as for photographs and searches he considered needless. However, Mr. Ewert's evidence was limited on the extent to which either his teachings or faith required him to wear the headbands constantly, or what the spiritual or religious impacts of removing them are.

(b) *The request that Mr. Ewert remove his headband for a photograph was not a non-trivial interference*

[124] As noted above, it is not every action that engages a religious belief or practice that constitutes an interference with freedom of conscience or religion. Rather, an infringement of section 2(*a*) of the *Charter* is only made out where an impugned act or measure interferes with the religious beliefs in a manner that is "more than trivial or insubstantial": *Hutterian Brethren* at para 32; *Amselem* at paras 58–60. The question of what is a "more than trivial or insubstantial" interference is context driven, but must be one that "threaten[s] actual religious beliefs or conduct": *Hutterian Brethren* at para 32; *Amselem* at para 60.

[125] In my view, the June 17 incident in which Mr. Ewert was initially asked to remove his headband for his identification photograph, but was ultimately not required to remove it, does not

constitute an interference with his religious beliefs. As Justice Dickson (as he then was) noted in *Big M Drug Mart*, "[f]reedom can primarily be characterized by the absence of coercion or constraint": *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at p 336, 1985 CanLII 69 at para 95. The events of June 17 do not indicate Mr. Ewert was coerced or constrained, notwithstanding his understandable nervousness in interacting with correctional officials. To the contrary, when he advised the correctional officer of the religious nature of his headband, the officer appropriately contacted her supervisor, Mr. Cyr, who in turn appropriately reviewed the matter with others within CSC, ultimately concluding that Mr. Ewert need not remove his headband for a photograph.

[126] In my view, freedom of religion is not infringed by the mere request to do something, which is then withdrawn when a religious practice is raised, identified, and explained. In this regard, I return to the approach expressed by Ms. Angus, quoted above at paragraph [52]. Ms. Angus was speaking from her perspective working with Indigenous cultural traditions and Indigenous inmates, rather than addressing what constitutes an interference with freedoms protected by section 2(*a*) of the *Charter*. However, in my view, the approach accords with the Supreme Court's approach to section 2(*a*). As she noted, and I agree, it is fair to ask a question in good faith, with the knowledge that different people have different traditions. When the answer is given and good faith efforts are made to respect the answer, the question itself cannot be seen as an infringement, even if it requires an individual to respond by asserting their religious freedoms. In the present case, there is no indication that either the original request put to Mr. Ewert, his response, or the subsequent withdrawal of the request were undertaken in anything but good faith.

(c) *The requirement that Mr. Ewert remove his headband for searches was a non-trivial interference*

[127] However, I accept that the requirement that Mr. Ewert remove his headband for the purposes of a search constituted a non-trivial interference with his religious freedoms. With respect to these searches, Mr. Ewert was not simply requested to remove his headband, but required to do so despite his profession of his traditional practices. While Mr. Ewert did not address in detail whether his faith required him to never remove his headbands, however briefly, I am satisfied that requiring him to remove his headband, which is worn as part of his religious observance, constitutes a coercion that interferes with his religious practice in a non-trivial manner. Again, the Crown did not argue otherwise, focusing their submissions on the justification for the requirement under section 1 of the *Charter*.

(4) Section 1 of the *Charter*

[128] Although requiring Mr. Ewert to remove his headband for search purposes amounted to an interference with his freedom of religion, I conclude the Crown has demonstrated that these requirements were a justified and reasonable limit on that freedom. The interference, while non-trivial, was relatively modest, it was prescribed by law, and it was justified as the least intrusive manner of ensuring the important security and safety objectives set out in the *CCRA* and *CCRR*.

[129] Section 47 of the *CCRR* provides that a CSC staff member may conduct a routine non-intrusive or routine frisk search of an inmate where the inmate is entering or leaving a secure area; the open or family-visiting area; or a work or activity area. While Mr. Ewert complains of

the nature of the search, he does not contend as a general matter that routine frisk searches when entering a health care unit or interview area are inappropriate, unlawful, or contrary to the search plans in place at Archambault and FTC-6099. Moreover, he does not challenge the statutory provisions permitting such searches. Mr. Cyr's evidence was that all inmates that go to a visiting area have to be searched before and after, since they have had contact with others, in order to prevent the arrival of contraband. The security and safety mandates set out in the *CCAA* and *CCRR*, including the search requirements, present an important justification for certain restrictions on the rights and freedoms of inmates, whether phrased as a "pressing and substantial" objective for purposes of the *Oakes* analysis or as a relevant "statutory objective" for purposes of the proportionate balancing described in *Doré*.

[130] I am satisfied that a correctional officer requiring Mr. Ewert to remove his headbands for visual inspection represents a proportionate balancing as the least intrusive manner of ensuring the objectives of a search. While theoretically, the headband could be visually inspected while still on Mr. Ewert's head, this would not permit the searching officer to determine whether anything was hidden inside the headband. I accept that, as Mr. Ewert asserts, he has never in 30 years of incarceration been found to have hidden any prohibited items in either his headband or his medicine bundle. However, this does not in my view preclude continued searches to ensure the safety and security of the institution.

[131] Mr. Ewert recognizes the need for searches in some circumstances. However, he contends that he should be permitted to go to the health care unit or the visiting room without needing to submit to a search of his headband. I disagree. While section 2(*a*) of the *Charter*

guarantees freedom of religion, it does so subject to justified and reasonable limits. In my view, based on the evidence heard, requiring Mr. Ewert to remove his headband for searches at certain points in the institution constitutes such a reasonable limit.

[132] In addition to considering the searches individually, I also conclude that the searches considered collectively do not amount to an unjustified limitation on Mr. Ewert's religious freedom. I do not rule out the possibility that repeated instances of conduct that might, alone, be justifiable could rise to the level of an unjustified limitation, particularly if there were evidence that it was undertaken in bad faith or for purposes of harassment or discrimination. There is no such evidence in this case. Mr. Ewert has identified six occasions on which he was required to remove his headband for inspection over the course of a two-month period at two institutions. No connection between these occasions was identified, nor any evidence that the searches were conducted for any reason other than a need to conduct a search at a time when Mr. Ewert was passing between areas of the institution. While I take Mr. Ewert's point, backed by Mr. Cyr's evidence, that searching his headband while not searching his shoes or other items of clothing may not be consistent with best search practices, I do not consider this evidence sufficient to demonstrate that there was "individualized suspicion," an intention to harass, or that Mr. Ewert's headband was inappropriately singled out for treatment because of, or despite, its religious significance.

[133] Given my findings above regarding the manner in which the searches were conducted, I need not consider whether a search in which a correctional officer required Mr. Ewert to hand over his headband for them to handle would also amount to a proportionate balancing or a

justified limitation. It may depend on the facts of the particular search, such as the knowledge of the officer regarding Mr. Ewert's belief that his headband should not be touched by anyone but himself, and the officer's reasons for the search. I make no findings on these issues.

[134] For completeness, I note that the evidence in this case includes a Bulletin issued by the Security Branch of CSC on June 7, 2022, on the subject of "Searching of Indigenous Bandanas." The Bulletin refers to the CSC sacred object search policy, and provides that:

> The wearing of bandanas by Indigenous inmates, **when worn in accordance and observance of Indigenous spiritual beliefs and cultural practices**, is to be treated with the same deference and subjected to the same search practices and regulations as other religious head garments (such as turbans, kufis and kippahs).
>
> [Emphasis in original.]

[135] This Bulletin was issued well after the events at issue in this trial. However, it reflects a specific application of the CSC sacred object search policy to headbands worn in accordance with Indigenous spiritual beliefs, such as Mr. Ewert's. It also accords with Mr. Ewert's own views that his headbands should be respected with the same deference as other religious headwear. This is very much consistent with the principle expressed in subsection 83(1) of the *CCRA*, which confirms that "Indigenous spirituality and Indigenous spiritual leaders and elders have the same status as other religions and other religious leaders." It is to be hoped that the affirmation of these principles in CSC policy will reduce future disagreement on such issues.

[136] On the basis of the foregoing, I conclude that Mr. Ewert has not established that the requests and requirements to remove his headband in July and August 2019 constitute an unjustified infringement of his rights under section 2(*a*) of the *Charter*.

C. *Other* Charter *provisions*

[137] As noted at the outset, Mr. Ewert also contends that the same incidents infringed his rights under sections 7, 8, 12, and 15 of the *Charter*. The parties made limited submissions on these sections, focusing on section 2(*a*). I will therefore address them only briefly.

(1) Section 7: Life, liberty, and security of the person

[138] To establish a violation of section 7 of the *Charter*, a plaintiff must show (i) there has been an interference with their right to life, liberty, or security of the person; and (ii) such deprivation is not in accordance with the principles of fundamental justice: *Ewert v Canada*, 2018 SCC 30 at para 68; *Guérin v Canada (Attorney General)*, 2019 FCA 272 at para 26.

[139] Mr. Ewert referred to two matters as being an interference with right to life, liberty, and security of the person: over-incarceration and psychological autonomy. With respect to over-incarceration, Mr. Ewert referred to his own lengthy incarceration and to his security classifications during that incarceration. He also referred to the over-incarceration of Indigenous inmates generally. I am not satisfied that Mr. Ewert tendered sufficient evidence that would link the only events at issue in this proceeding—those involving the July 17, 2019, search of his medicine bundle and the treatment of his headbands in the summer of 2019—to any interference with his liberty or residual liberty interests.

[140] In particular, while Mr. Ewert led evidence regarding the potential for “incident reports” to be considered as part of an inmate’s security classification, there is no evidence that any of the

incidents at issue led to an incident report being placed on Mr. Ewert's file in a manner that might even possibly affect his security classification. Nor am I satisfied that Mr. Ewert established on the evidence that his transfer from Archambault Minimum to Archambault Medium was the result of either the incidents at issue, concerns about his "litigious" reputation, the involvement of the Warden of Archambault, or any other matter other than the stated concern about his comments to his parole officer.

[141] With respect to an asserted interference with Mr. Ewert's psychological autonomy, the Supreme Court has recognized that section 7 does protect psychological integrity as well as physical integrity: *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras 55–56. However, to engage section 7, there must be "serious state-imposed psychological stress" that goes beyond "the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action": *Blencoe* at paras 57, 81, citing *R v Morgentaler*, [1988] 1 SCR 30 at p 56 and *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at paras 59–64; *Guérin* at para 36. In my view, Mr. Ewert has not presented sufficient evidence to establish an infringement of his psychological integrity that would meet the description in *Blencoe*.

[142] I therefore conclude that Mr. Ewert has not established an interference with his right to life, liberty, or security of the person and need not address whether any such interference was in accordance with the principles of fundamental justice.

(2) Section 8: Unreasonable search and seizure

[143] A search will only be "reasonable" under section 8 of the *Charter* where it is authorized by law, the law itself is reasonable, and the search was conducted in a reasonable manner: *Ewert v Canada (Attorney General)*, 2018 FCA 175 at para 15, citing *R v Golden*, 2001 SCC 83 at para 44; *R v Tessling*, 2004 SCC 67 at para 18.

[144] For effectively the reasons discussed at length above, I conclude that the search of Mr. Ewert's medicine bundle at Archambault Medium was authorized by laws whose reasonableness was not challenged (the *CCRA* and *CCRR*), but it was not conducted in a reasonable manner. Contrary to Mr. Ewert's submissions, I do not find it was unreasonable to search Mr. Ewert's medicine bundle upon his arrival at Archambault Minimum despite it having been searched before his departure from La Macaza. Nor was it unreasonable to search it again at Archambault Medium. However, the search at Archambault Medium was not conducted reasonably. Rather, it was conducted in a manner that did not respect CSC's own policies or Mr. Ewert's religious freedoms, and was therefore "more intrusive than [was] reasonably necessary to achieve its objectives": *R v Vu*, 2013 SCC 60 at para 22. To the extent that a search that is unreasonable under section 8 can be justified as a reasonable limit under section 1, no such justification was present in this case.

[145] Conversely, and again for essentially the reasons above, I conclude that the searches of Mr. Ewert's headbands were not contrary to section 8, as they were authorized by laws whose reasonableness was not challenged, and were conducted in a reasonable manner.

(3) Section 12: Cruel and unusual treatment or punishment

[146] Mr. Ewert's section 12 claim was originally focused on issues pertaining to his over-incarceration that were withdrawn as issues for trial. In closing submissions, Mr. Ewert appropriately recognized that section 12 was no longer in issue and abandoned his claim on this ground.

(4) Section 15: Equality

[147] Mr. Ewert's limited arguments under section 15 of the *Charter* asserted that CSC and its correctional officers treated his Indigenous spiritual articles with less respect than those of members of other religions. He alleged in particular that inmates who wear turbans, kippahs, or kufis are not asked to remove them for searches. In my view, there was insufficient evidence to establish a practice of differential treatment of religious headwear. Mr. Ewert's own assertions on the subject were of a general nature. Mr. Cyr gave his view that they should be searched in the same way, but said that he did not have personal experience so could not say whether this was the case. Such evidence is insufficient to establish the existence of discrimination. Nor am I willing to draw the inference that Mr. Ewert asks me to draw, namely that the issuance of the June 7, 2022, "Searching of Indigenous Bandanas" Bulletin suggests that this was not the practice prior to June 2022.

[148] Paragraph 146(*b*) of Mr. Ewert's Statement of Claim also refers to differential treatment of his spiritual article compared to articles of faith of other religions, such as prayer rugs, holy books, and rosaries. However, no evidence was presented in respect of such other articles.

[149] A claim under section 15 of the *Charter* need not be premised on a comparison with the treatment of another “comparator group”: *Withler v Canada (Attorney General)*, 2011 SCC 12 at paras 55–60. However, Mr. Ewert’s claims and allegations with respect to section 15 were limited to the foregoing arguments made with comparison to the treatment of other religious headwear and spiritual articles. These allegations were not substantiated on the evidence. I conclude Mr. Ewert has not established a breach of his right to equality without discrimination under section 15 of the *Charter*.

D. *Damages*

(1) Damages are an appropriate and just remedy

[150] Subsection 24(1) provides that anyone whose *Charter* rights have been infringed or denied may apply to a competent court to obtain “such remedy as the court considers appropriate and just in the circumstances.” Mr. Ewert’s Statement of Claim claims a variety of remedies, including injunctive relief. However, as set out above and as agreed by the parties prior to trial, the only remedy sought by Mr. Ewert at trial is monetary damages.

[151] The Supreme Court of Canada in *Ward* confirmed that damages may be an “appropriate and just” remedy in some circumstances: *Vancouver (City) v Ward*, 2010 SCC 27 at paras 4, 21. Speaking for the Court, Chief Justice McLachlin set out a four-step inquiry to assess a claim for *Charter* damages. The first step determines whether there has been a *Charter* breach. The second considers the functional justification for damages, that is, why damages are an appropriate and just remedy. The third considers whether there are countervailing factors that might defeat the

functional considerations supporting a damage award. The fourth assesses the quantum of damages, if they are found to be appropriate and just: *Ward* at paras 4, 16–57; *Henry v British Columbia (Attorney General)*, 2015 SCC 24 at paras 34–36; *Richards* at paras 258–266.

[152] As set out above, Mr. Ewert has established that his rights to freedom of religion under section 2(*a*) of the *Charter* and his right to be free from unreasonable search and seizure under section 8 of the *Charter* were breached through the search and treatment of his medicine bundle in July 2019. This is the "wrong on which the claim for damages is based": *Ward* at para 23.

[153] In closing submissions, the Crown did not contest that damages would be an appropriate remedy in the present case if a *Charter* breach were found, and raised no countervailing factors that would negate the appropriateness of damages: *Ward* at paras 33–39. I agree that considering the compensation, vindication, and deterrence functions of damages, damages would serve a useful purpose, furthering the objects of the *Charter*: *Ward* at paras 25–29. These functions are also relevant to the assessment of the quantum of damages, so I will discuss them in that context given the Crown's concession: *Ward* at paras 47–55.

(2) Quantum

[154] Any remedy granted under subsection 24(1) of the *Charter* must be "appropriate and just." This applies equally to the assessment of the amount of damages: *Ward* at para 46. The requirement that an award be appropriate and just requires the Court to avoid, to the extent possible, not only under-compensating a plaintiff but also over-compensating them in a manner

unjust to the defendant. The functions of damages referred to above—compensation, vindication, and deterrence—determine the amount of *Charter* damages to be awarded.

[155] Compensation. *Ward* notes that the function of compensation focuses on the claimant's personal loss, whether physical, psychological, pecuniary, or harm to "intangible interests" including distress, humiliation, embarrassment, and anxiety: *Ward* at paras 27, 48–50. Notably, Chief Justice McLachlin recognized that compensatory damages for a *Charter* breach are not precluded simply because a claimant cannot prove a substantial psychological injury: *Ward* at para 27. While non-pecuniary damages can be harder to measure, they are not rejected on that basis: *Ward* at para 50.

[156] In the present case, the sanctity of Mr. Ewert's medicine bundle was infringed in a manner he viewed as a desecration. While none of the objects in the medicine bundle were physically harmed, it would be wrong to unduly focus on the physical over the spiritual or intangible, particularly in matters involving freedom of religion. The fact that a violation of the right to freedom of religion has not caused physical harm or substantial psychological injury does not mean it has no compensable impact: *Ward* at paras 27, 50, 55.

[157] Mr. Ewert's medicine bundle was also kept from him for about a month, for no apparent or explained reason. Its absence, and the possibility that it would be handled by someone else, left him sufficiently anxious and nervous that Elder Nadon commented on his behaviour in an observation report about the meeting on the day before the search. In my view, the impact of the search and its circumstances on Mr. Ewert's spiritual well-being require compensation.

[158] Mr. Ewert referred to a pattern of conduct on the part of CSC, noting past incidents in which his medicine bundle was improperly searched. As Mr. Ewert accepts, these events were the subject of other proceedings that were determined or resolved. They are thus not the "wrong on which the claim for damages is based": *Ward* at para 23. The Crown argues that as a result, they cannot and should not be considered in the context of assessing damages in this case. I agree with the Crown that the prior events should not be considered in assessing the *compensatory* function of damages. However, as discussed further below, I view them as relevant in considering the *deterrence* function of damages.

[159] I reiterate that the evidence does not support a conclusion that the search of his medicine bundle, or any of the search incidents raised by Mr. Ewert, had any impact on his security classification or transfer between institutions. I also note that I agree that the decisions of the Quebec Superior Court and the Quebec Court of Appeal in Mr. Ewert's *habeas corpus* application pertaining to his transfer from Archambault Minimum to FTC-6099 are not relevant to the matter or my assessment of damages: *Ewert c Thibeault*, 2019 QCCS 5911, aff'd 2020 QCCA 1141.

[160] Vindication. The vindication function of damages focuses on the harm the infringement causes society, recognizing that violations of constitutionally protected rights impair public confidence and diminish faith in the efficacy of the constitutional protection: *Ward* at para 28. The seriousness of the breach is the principal factor, considered with regard to the repercussions on the claimant and the egregiousness of the conduct: *Ward* at para 52.

[161] In the present case, the search of Mr. Ewert's medicine bundle was undertaken by others in his absence, despite CSC's sacred object search policy and despite his stated concern that he should be the only person to touch it. Although he expressed that concern, those with whom he did so did not relay or raise it with the Correctional Manager responsible for the search. The search was not conducted until 20 days after his arrival, and he was not told about it until almost a week later. His medicine bundle was left in a state in which objects were outside the bundle, gathered loosely in the bottom of a box. At the same time, CSC made efforts to have the search conducted by an Elder and an Indigenous Liaison Officer rather than by a correctional officer. I conclude that while the search constituted a fairly serious violation of Mr. Ewert's religious freedoms and was unreasonable, it was not highly egregious.

[162] Deterrence. The function of deterrence seeks to avoid future violations by influencing government behaviour to secure compliance with the *Charter*: *Ward* at para 29. As noted above, I consider it relevant that the infringement of July 2019 was not the first occasion in which Mr. Ewert's medicine bundle had been searched in his absence, leading to complaints by him.

[163] As set out in paragraph [79] above, Mr. Ewert filed a grievance in respect of a search of his medicine bundle conducted in his absence in November 2006. This was upheld in September 2007, with clear comments from the then Senior Deputy Commissioner of CSC regarding what "the norm" for medicine bundle searches should be.

[164] The evidence also discloses (i) the settlement in 2011 of a complaint to the Canadian Human Rights Commission pertaining to the November 2006 search and another search in

January 2007; (ii) the settlement in 2016 of an action in this Court pertaining to another search in September 2012; and (iii) the settlement of a further action in this Court arising from another search in December 2017. With one exception, the terms of these settlements are not on record.

[165] The exception is a letter of apology on behalf of CSC, written by the Warden of Kent Institution in June 2011, the body of which reads as follows:

> Please accept CSC's apology for searching your medicine bundle on November 8, 2006 in a manner that which [*sic*] was non-compliant with CD 702, paragraph 21.
>
> CSC acknowledges that, since the circumstances within the Institution at the time allowed, you should have been present for the search and should have been the only person to manipulate your medicine bundle.
>
> CSC further apologizes for videotaping the search of your medicine bundle on January 25, 2007.

[166] Mr. Ewert seeks to rely on this letter of apology, arguing that in addition to admitting wrongdoing, the apology inherently indicates that CSC did not intend to undertake the same conduct again. The Crown did not object to the filing of this letter of apology into evidence, but argues it cannot be used as an admission and cannot be taken into account in considering damages. The Crown relies on article 2853.1 of the *Civil Code of Québec*, which reads as follows:

2853.1. An apology may not constitute an admission. Furthermore, it may not be admitted into evidence, affect the determination of fault or liability, interrupt prescription or cancel or reduce the insurance coverage to which the insured or a third person is entitled. Any express or implied expression of sympathy or regret constitutes an apology.	**2853.1** Une excuse ne peut constituer un aveu. De plus, elle ne peut être admise en preuve, avoir d'incidence sur la détermination de la faute ou de la responsabilité, interrompre la prescription ou annuler ou diminuer la garantie d'assurance à laquelle un assuré ou un tiers a droit. Constitue une excuse toute manifestation expresse ou implicite de sympathie ou de regret.

[167] This provision is a new one, introduced in 2020. The Crown was therefore unable to point to any relevant jurisprudence considering the provision. The Court's review indicates that it has been rarely considered, and then only briefly: see, *e.g.*, *Air Canada c PA*, 2021 QCCA 873 at para 122, fn 97; *Douville c St-Germain*, 2021 QCCS 3374 at para 13; *Municipalité du Canton de Potton c Roger*, 2023 QCCS 341 at para 169. In *Potton*, Justice Villeneuve questioned whether the article was intended to preclude those who had apologized, as opposed to those who had received an apology, from relying on such apology in mitigation of damages, but did not need to decide the matter: *Potton* at para 169.

[168] While article 2853.1 is new, it bears similarity to apology legislation in common law provinces: see, *e.g.*, *Apology Act*, SBC 2006, c 19; *Apology Act*, SNS 2008, c 34; *Apology Act, 2009*, SO 2009, c 3. Cases decided under this similar legislation confirm that apologies or expressions of regret with respect to a matter cannot be taken as admissions of liability, at least in proceedings brought against the person making the apology in respect of the matter: *Rebello v*

Ontario, 2023 ONSC 601 at paras 18–23; *Symonds v Halifax Regional Municipality (Halifax Regional Police Department) (Re)*, 2021 CanLII 37128 (NS HRC) at paras 68–74. Some cases have found that the "apology" portion of a written apology may be differentiated from factual elements of the same writing: see, *e.g.*, *Coles v Takata Corporation*, 2016 ONSC 4885 at paras 17–21 and cases cited therein.

[169] The 2011 apology letter relates to an incident for which liability is not at issue in this case. It also contains an acknowledgement of the meaning of CD 702 which might, following the approach described in *Coles*, be distinguished from the apologetic aspects of the letter. However, I conclude that in the context of this case, I need not decide the matter, as there is no need to consider or rely on the apology letter in assessing damages. This is because, in essence, Mr. Ewert seeks to rely on the apology letter for three reasons, namely to show: (i) there was an earlier incident in 2008 in which his medicine bundle was searched in his absence; (ii) he filed a complaint with respect to the incident which was subsequently settled; and (iii) CSC knew and recognized that their own policy was that an inmate should be present for the search of a medicine bundle where circumstances allow. Each of these facts are independently established on the record. In particular, as noted, the grievance decision by the Senior Deputy Commissioner of CSC with respect to the same incident shows the same understanding of the search policy. In my view, whether or not CSC formally apologized for the incident in the context of a settlement of the human rights complaint does not affect the need for deterrence.

[170] Rather, the need for deterrence is shown by the fact that despite having had a written policy with respect to the matter since at least 1995, and despite several contraventions of that

policy having led to prior disputes, CSC correctional officers have continued to conduct searches in Mr. Ewert's absence without any indication of an operational or security need to do so. Indeed, CSC took the formal position at the trial of this matter that it was a reasonable limitation on Mr. Ewert's religious freedoms to have someone else search his medicine bundle any time he was not already physically present wherever CSC had itself taken his bundle, and that this approach could be taken with all Indigenous inmates in all correctional institutions.

[171] I take into account the fact that the incidents described amount to only three or four incidents over the course of about a decade prior to the 2019 incident at issue in this proceeding. I also take into account the evidence that there were other searches that were conducted as contemplated in the CSC sacred object search policy, that is, by having Mr. Ewert display its contents. However, the various events indicate that knowledge (or interpretation) of the policy is far from universal, and that CSC was willing to conduct searches of Mr. Ewert's medicine bundle in his absence even when his religious beliefs on the subject had been made known repeatedly.

[172] Neither party made specific submissions regarding the quantum of damages that would be appropriate in respect of the search of Mr. Ewert's medicine bundle. Mr. Ewert sought damages in excess of $50,000 in respect of all of the incidents discussed above, including those involving his headbands. He argued that no amount below that would suffice given CSC's past conduct, emphasizing the importance of deterrence. The Crown did not propose any particular quantum of damages, but cited the statement in *Ward* that compensation for non-pecuniary

damages is typically "fairly modest" absent exceptional circumstances, and referred to several cases in which modest *Charter* damages were awarded.

[173] I have considered the following cases as illustrative of the range of damage awards found to be just and appropriate for infringements of the *Charter*:

(a) *Ward* at paras 6–9, 61–73. The Supreme Court of Canada upheld an award of $5,000 for an unreasonable strip search of an individual wrongly suspected of intending to throw a pie at the Prime Minister. The impact on Mr. Ward's dignity and person was recognized as serious.

(b) *Stewart v Toronto (Police Services Board)*, 2020 ONCA 255 at paras 8, 19, 128–149. The Court of Appeal awarded $500 for an arbitrary detention and unreasonable search of the plaintiff's backpack by police during the G20 summit in Toronto in 2010. The search lasted less than three minutes, involved the seizure of swim goggles, and there was little evidence of physical, psychological, pecuniary, or intangible loss. The good faith and professionalism of the police officers were relevant factors.

(c) *Russell v British Columbia (Public Safety & Solicitor General)*, 2018 BCSC 1757 at paras 47–49, 59, 66–78. The Court awarded $1,000 for a breach of an accused's right to retain and instruct counsel without delay under section 10(*b*) of the *Charter* where the police had not facilitated contact with counsel for 13 hours after a lawful arrest. Although the *Charter* breach was serious, no personal loss was attributable to the breach, and the police conduct was not intentional or malicious.

(d) *McGowan c City of Montréal*, 2018 QCCS 1740 at paras 1, 153–168. The Court awarded $3,000 for an arbitrary detention of one hour after a lawful arrest of a student protestor at a downtown protest against police brutality. Ms. McGowan's detention involved a humiliating use of a washroom. The Court referred to Quebec jurisprudence awarding non-pecuniary damages for illegal detention varying from $1,500 to $25,000.

(e) *Richards* at paras 10, 268–283. This Court awarded a total of $32,500 in damages for various *Charter* breaches associated with the battery and unlawful arrest of an inmate, and his placements in administrative segregation. These damages were directed toward vindication and deterrence alone, as compensatory damages had already been awarded under private law causes of action.

[174] In *Richards*, Justice Norris underscored two aspects of the correctional context that are worthy of repetition and relevant in this case. First, he noted the significant power imbalance between inmates and correctional officers, with inmates being particularly vulnerable to abuses of authority. As a result, "[r]emedies that meaningfully vindicate *Charter* rights and deter future violations are thus of particular importance in the correctional context": *Richards* at para 273. Second, Justice Norris recognized the inherent challenges faced by inmates in bringing *Charter* claims against correctional officers before a court, such that when those claims are established, "the Court must provide a meaningful remedial response": *Richards* at para 274.

[175] I also consider the decision of the British Columbia Human Rights Tribunal in *Kelly v BC (Ministry of Public Safety and Solicitor General) (No 3)*, 2011 BCHRT 183, on which Mr. Ewert relied through indirect reference to a newspaper article about the case. The Tribunal found that

the denial of access to Indigenous spiritual services while Mr. Kelly was in administrative segregation constituted discrimination on grounds of ancestry and religion, and awarded him $5,000 in damages: *Kelly* at paras 1–4, 14, 433–443. The Tribunal noted Mr. Kelly's particular vulnerability as a young Indigenous inmate, the positive benefit that Indigenous spiritual services may have had, and that "an inmate's human rights are not suspended upon incarceration": *Kelly* at paras 440–441. While the statutory human rights context is not the same as that of the *Charter*, the Supreme Court has noted analogies between the functions of *Charter* damages and those under statutory human rights instruments: *Ward* at para 26.

[176] I have considered the circumstances of the infringement of Mr. Ewert's *Charter* rights in connection with the search of his medicine bundle in July 2019, and in particular the factors described above. I conclude that an award of *Charter* damages in the amount of $7,500 would best serve the functions of compensation, vindication, and deterrence, and would be appropriate and just in the circumstances.

IV. Conclusion

[177] For the foregoing reasons, Mr. Ewert's action is allowed in part. I award $7,500 as a remedy under subsection 24(1) for breach of his rights under sections 2(*a*) and 8 of the *Charter* arising from the search of his medicine bundle in July 2019. Mr. Ewert's claim for remedies under the *Charter* in respect of the treatment of his headbands in July and August 2019 is dismissed.

[178] At the hearing, the Crown advised there were offers to settle that may be relevant to the issue of costs and asked that the parties be permitted to make submissions on costs after the Court's decision. If the parties are unable to reach agreement on costs, they may make submissions in accordance with the following schedule:

(a) within 15 days of the date of judgment, Mr. Ewert may serve and file submissions in letter format, not to exceed 4 pages, to which he may attach a bill of costs as an appendix;

(b) within 15 days of receipt of Mr. Ewert's submissions, the Crown may serve and file submissions in letter format, not to exceed 4 pages, to which it may attach as an appendix a bill of costs and/or a submission, not to exceed one page, addressing specific line items in Mr. Ewert's bill of costs (if filed); and

(c) within 7 days of receipt of the Crown's submissions, Mr. Ewert may serve and file reply submissions in letter format not to exceed 2 pages, to which he may attach as an appendix a submission, not to exceed one page, addressing specific line items in the Crown's bill of costs (if filed).

[179] The parties may extend the above dates on consent, provided the final submission of costs is filed within 60 days of the date of judgment.

JUDGMENT IN T-2069-19

THIS COURT'S JUDGMENT is that

1. The action is allowed in part. The defendant shall pay to the plaintiff the sum of $7,500 as a remedy for the breach of the plaintiff's rights under sections 2(*a*) and 8 of the *Canadian Charter of Rights and Freedoms* in connection with the search of his medicine bundle in July 2019.
2. The remainder of the action is dismissed.
3. If unable to reach an agreement on costs, the parties may make submissions in accordance with the schedule given in the reasons.

"Nicholas McHaffie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2069-19
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PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	FEBRUARY 15-17, 21, 2023
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DATED:	AUGUST 1, 2023

APPEARANCES:

Jeffrey G. Ewert	ON HIS OWN BEHALF
Julien Dubé-Senécal Dominique Guimond	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Attorney General of Canada Montreal, Quebec	FOR THE DEFENDANT