

Federal Court



Cour fédérale

**Date: 20211022**

**Docket: T-2069-19**

**Citation: 2021 FC 1132**

**Ottawa, Ontario, October 22, 2021**

**PRESENT: The Honourable Madam Justice Kane**

**BETWEEN:**

**JEFFREY G. EWERT**

**Plaintiff**

**and**

**HER MAJESTY THE QUEEN**

**Defendant**

**ORDER AND REASONS**

[1] For the reasons that follow, the relief sought by the Plaintiff cannot be granted. The Plaintiff seeks to have many issues resolved and wide-reaching orders made which far exceed the scope of the action within which the motion is brought and/or which simply cannot be granted by way of motion.

I. Background

[2] The Plaintiff, Mr. Jeffrey Ewert [Mr. Ewert], is currently incarcerated at the Federal Training Centre in Laval, Québec. Mr. Ewert is serving two life-sentences and has been incarcerated for over 37 years. Mr. Ewert recounts that he has been incarcerated at several federal penitentiaries over these years. One of his many concerns is that he has been “over-incarcerated” because, in his view, he should be housed in a minimum-security institution.

[3] Mr. Ewert filed a Statement of Claim in December 2019 claiming damages against the Defendant, based on the Defendant’s vicarious liability for the acts or omissions of Crown employees, including those of the Correctional Service of Canada [CSC]. Mr. Ewert alleges breaches of his rights under the *Canadian Charter of Rights and Freedoms* [Charter], in particular, sections 2, 7, 8, 12 and 15. He seeks monetary damages and a declaration that his *Charter* rights have been infringed.

[4] Mr. Ewert's Statement of Claim provides a chronology of events and details of the incidents he complains of, which arise from the allegedly illegal search or searches of his medicine bundle and the requirement that he remove his headband for security checks. Mr. Ewert identifies as Cree Métis and states that his medicine bundle is personal and sacred and should not be interfered with by others.

[5] In February 2020, the Defendant filed a Statement of Defence. Mr. Ewert subsequently filed a Reply to the Defendant's Statement of Defence. The Court appointed a Case Management Judge to address the procedural steps leading to the trial of the action.

## II. The Current Motion

[6] On August 11, 2021, Mr. Ewert filed a (revised) Notice of Motion in writing and Motion Record, seeking the following (in his own words):

1. An Order for an interim and permanent injunction against:
  - denying his lawful voluntary transfer to a culturally and linguistically compatible true minimum-security facility in his home province, pursuant to sections 4(c), (c.2), (g) and 28 of the *Corrections and Conditional Release Act, SC 1992, c 20 [CCRA]*;
  - unlawfully involuntarily transferring or moving him out of whatever institution he resides in to higher security or placing him in segregation (Structured Intervention Units) without just cause;
  - raising his security classification without just cause; or
  - otherwise behaving retributively towards him in response to his taking legal action in this instance and/or others.
2. A declaratory order or orders that the Defendant, by way of the actions of its servants, has:
  - diminished the integrity of his sentence, and/or that he has been over-incarcerated, and/or that the administration of his sentence amounts to arbitrary detainment contrary to section 9 of the *Charter*, and/or has become cruel and unusual treatment or punishment contrary to section 12 of the *Charter*; and/or
  - any other remedy within the Court's jurisdiction pursuant to subsection 24(1) of the *Charter*.

[7] Mr. Ewert's Memorandum of Fact and Law for the within motion seeks further remedies and/or re-characterizes the relief he set out in his Notice of Motion, requesting in particular:

- An injunction against and overturning of the Transfer Decision of January 5, 2021 (this refers to the denial of his request to be transferred to the Kwìkwèxwelhp Healing Village [Kwi], which occurred after he served and filed his Statement of Claim);
- An injunction against the Defendant's further placements of him in segregation, raising of his security classification, and/or his involuntary transfer to higher security, without just cause;
- A declaration that his *Charter* rights under sections 2, 7, 8, 9, 12 and 15 have been infringed by the Defendant;
- A declaration that the regime of the multi-level Federal Training Centre is illegal and that holding minimum-security prisoners inside a medium-security prison is a violation of section 7 of the *Charter*;
- A declaration that the integrity of his sentence has been diminished due to the Defendant's mismanagement of it; and
- An order quashing his sentence pursuant to a finding that it contravenes section 12 of the *Charter* and has become illegal.

[8] Mr. Ewert's Memorandum of Fact and Law, at paragraphs 83-85, also requests an order pursuant to subsection 24(2) of the *Charter* that information used to justify his

over-classification and over-incarceration was obtained in a manner that infringed his *Charter* rights and should be excluded from his Offender Management System file maintained by CSC. He reiterates his request that his sentence be quashed.

III. The Plaintiff's Submissions

[9] In support of this Motion, Mr. Ewert filed a 240-page affidavit with over 100 exhibits. His affidavit sets out his account of his lengthy incarceration, various incidents and allegations, his perception of the progress of his rehabilitation, various programs he has participated in, and the litigation he has pursued and its outcome, among other information.

[10] In the Memorandum of Fact and Law for this motion, Mr. Ewert again provides an account of his incarceration since 1984, transfers from various penitentiaries, previous litigation, excerpts of notes of psychiatric and other assessments, and allegations of bias, which he submits are relevant to the Court's understanding of the “totality of [his] circumstances.”

[11] Mr. Ewert submits that his ongoing incarceration, including the more recent refusal of his request to be transferred to the Kwi Healing Village, is the result of retaliation and bias by CSC against him because CSC regards him as overly litigious.

[12] Mr. Ewert notes that his request to be transferred to the minimum-security Kwi Healing Village was refused by CSC on January 5, 2021. He appears to acknowledge that his grievance of the refusal has not been finally determined. However, he argues that he is entitled to seek a

remedy from the Courts before the resolution of his grievance and that CSC is required to defer the review of his grievance pending the Court process.

[13] Mr. Ewert argues that repeated refusals by CSC to lower his security classification and transfer him to a medium- or minimum-security institution constitute arbitrary detention. He submits that his detention in various maximum-security institutions was unwarranted. He adds that, as he is now classified at the minimum-security level, he should not be housed in the Federal Training Centre given that it is both a medium- and minimum-security institution. More generally, he submits that the Federal Training Centre is not the least restrictive environment, as required by the CCRA.

[14] Mr. Ewert alleges that his detention is not humane. He submits that he has not been involved in any incidents while in custody and he is not dependent on drugs or alcohol. He submits that he has participated in programs and observed all conditions imposed on him. Based on this account, Mr. Ewert submits that the cumulative effect of CSC's conduct toward him demonstrates cruel and unusual punishment contrary to section 12 of the *Charter*. He adds that his incarceration has become "unreasonable", which he submits is a ground to request the orders he seeks.

[15] He identifies the issues on this motion (using his words) as:

- Whether it is appropriate for the Plaintiff to seek a remedy prior to the conclusion of the final grievance appealing the negative decision on his voluntary transfer application;

- Whether it is appropriate in certain circumstances, such as these in the instant case, for the Court to impose an injunction or injunctions as preventative measures against actions that have not yet occurred;
- Whether holding a prisoner at a higher level of security than warranted by their security classification constitutes arbitrary detention, contrary to section 9 of the *Charter*;
- Whether the totality of the circumstances in this case constitutes a contravention of section 12 of the *Charter*; and
- Whether the Court has the jurisdiction to declare that the integrity of a sentence has been diminished.

A. *The Plaintiff's Notice of Constitutional Question*

[16] Mr. Ewert filed a Notice of Constitutional Question following receipt of the Defendant's Memorandum of Fact and Law in response to this motion. He sets out six questions, which restate a similar question in different ways. The first stated question asks:

Is it constitutional for subsection 18(3) of the *Federal Courts Act* to restrict the "extraordinary" remedies provided for by way of subsections 18(1) and (2) only to judicial review while, pursuant to subsection 5(4), all Federal Court judges have the same jurisdiction, power and authority of a judge of the Federal Court of Appeal ... [and] vice versa?

[17] In the Notice of Constitutional Question, Mr. Ewert reiterates some of the details set out in his Statement of Claim and the within motion. He notes that the Defendant's position on this motion is that Mr. Ewert cannot obtain the extraordinary remedies he seeks in the context of an

action, rather only on an application for judicial review. Mr. Ewert argues that because the same Federal Court judge would have the authority to grant the remedies he requests in the context of a judicial review, it is unconstitutional to prohibit the judge from granting any appropriate remedy in any proceeding where *Charter* rights have been infringed.

#### IV. The Defendant's Submissions

[18] The Defendant submits that the Court cannot grant any of the orders sought by Mr. Ewert. Generally, the Defendant submits that the relief sought by way of motion is unrelated to and far exceeds the relief sought by Mr. Ewert in his action, which remains to be determined. The Defendant adds that Mr. Ewert cannot obtain by interlocutory motion the same relief sought in his action. The Defendant argues that Mr. Ewert's attempt to circumvent the legislative framework is an abuse of process.

[19] With respect to CSC's refusal to transfer Mr. Ewert to the lower security Kwi Institution, the Defendant submits that this must be challenged by way of an application for judicial review, which can only occur after a final decision is rendered in the grievance process, as prescribed by the CCRA.

[20] With respect to the injunctive relief sought, the Defendant submits that the Court cannot grant a permanent injunction on a motion and cannot grant an injunction where the underlying proceeding is an action. The Defendant further submits that Mr. Ewert is not seeking to stop any action or conduct but rather to prevent possible future acts (for example, placements, segregation, transfers, changes to security classifications). The Defendant adds that Mr. Ewert



has not satisfied the test for an interlocutory injunction established in *RJR-MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311, 111 DLR (4th) 385.

[21] With respect to the declaratory orders sought, the Defendant submits that the orders sought are not related to Mr. Ewert's allegations of an illegal search of his medicine bundle and the requirement to remove his headband and the resulting damages claimed. Rather, he seeks to have his sentence quashed, which can certainly not be done by this Court, and not on an interlocutory motion.

[22] The Defendant seeks their costs of this motion. The Defendant submits that Mr. Ewert's motion is vexatious, as it is redundant, seeks to circumvent the appropriate legislative framework, seeks remedies beyond the Court's jurisdiction, is supported by an overly long and unfocused motion record, which includes references to unrelated events and attaches countless exhibits that do not support the remedies sought.

A. *The Defendant's Response to the Constitutional Question*

[23] The Defendant submits that the proposed constitutional question is deficient. The Defendant submits that Mr. Ewert fails to set out any basis to find that subsection 18(3) is unconstitutional; he has not established how subsection 18(3) violates any *Charter* right or other constitutional provision nor demonstrated any causal link between subsection 18(3) and an infringement of his *Charter* rights. The Defendant adds that Mr. Ewert's submission amounts to an issue of statutory interpretation regarding the remedies that the Federal Court may grant.

[24] The Defendant notes that subsection 18(3) does not take away any remedy pursuant to section 24 of the *Charter*. The Defendant submits that Mr. Ewert can pursue his arguments regarding the refusal of his transfer in other applications, for example, after pursuing the applicable grievance process. The Defendant adds that Mr. Ewert has not established that the existing grievance process is inadequate; he only alleges that the process takes years and judicial review takes months.

V. The Plaintiff Has Not Established that Subsection 18(3) Is Unconstitutional

[25] As noted by the Federal Court of Appeal in *Kimoto v Canada (Attorney General)*, 2011 FCA 291 at para 20, a Notice of Constitutional Question must clearly set out the grounds for finding that a particular statutory provision is unconstitutional. In addition, Form 69 requires that the contents of the Notice set out the legal basis for each constitutional question and the nature of the constitutional principles to be argued.

[26] I agree with the Defendant that Mr. Ewert has failed to articulate how subsection 18(3) of the *Federal Courts Act*, RSC 1985, c F-7, infringes his *Charter* rights or any other constitutional provision. The question he proposes arises from his apparent dissatisfaction with the interlocutory relief or extraordinary remedies available in the context of an action as opposed to judicial review. Mr. Ewert's real complaint is that he cannot have his many allegations determined and the relief he seeks granted by way of this motion. This is not a constitutional issue. Mr. Ewert is not prevented from pursuing his many allegations; however, he must use the legislative framework and the applicable Rules to do so.

[27] Section 18 of the Federal Courts Act does not apply because Mr. Ewert's underlying proceeding is not an application for judicial review. If the underlying proceeding were an application for judicial review of a decision or other matter, Mr. Ewert could seek extraordinary remedies pursuant to subsection 18 in appropriate circumstances. However, in the context of his action, there is no decision or other matter for the Court to enjoin, quash or grant declaratory relief against. Mr. Ewert's action must take its course; he must prove the allegations in his Statement of Claim at trial.

[28] The origins and scope of sections 17 and 18 were explained by the Federal Court of Appeal in *Canada v Tremblay*, 2004 FCA 172 at paras 9-10 and 12, in the context of determining whether the respondent should have proceeded by way of action or judicial review:

[9] Section 18 of the Act deals with discretionary remedies which formerly fell under prerogative writs, to which were added injunctions and declarations, having their roots in equity. These remedies are said to be "extraordinary" because they are generally not allowed if other remedies are also available (D. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada*, (Toronto: Canvasback Publishing, c. 3-1).

[10] Section 18 confers exclusive original jurisdiction to the Federal Court to exercise judicial review remedies against any federal board, commission or other tribunal. It is the cornerstone of the Act, which was adopted in 1971 after the Supreme Court of Canada's decision in *Three Rivers Boatman Ltd. v. Canada (Labour Relations Board)*, [1969] S.C.R. 607. The Parliament of Canada then ensured that federal boards, commissions or other tribunals, whose activities are spread across Canada, would not be subjected to potentially contradictory decisions from one province to the next. Henceforth, they would come under the superintending and reforming power of the Federal Court of Canada.

[...]

[12] Section 17 of the Act also addresses claims for relief against the Crown or its servants. The word "relief" in section 2 of

the Act is defined to include a declaration. The remedies of section 17 are claimed by way of an action (subsection 17(5) of the Act).

[References omitted.]

[29] An oral hearing of Mr. Ewert's Notice of Constitutional Question, as he requested, is unwarranted. The constitutional question was raised in the context of Mr. Ewert's motion in writing and has been determined in that context.

#### VI. The Plaintiff's Motion Is Dismissed

[30] Mr. Ewert seeks to have his many concerns remedied and his many allegations determined in one proceeding and in a summary way without adhering to the *Federal Courts Act* or the *Federal Courts Rules*.

[31] I agree with the Respondent that Mr. Ewert raises new issues and allegations and seeks broad remedies by way of this motion that go far beyond the issues raised in his underlying action, which seeks damages and other declaratory orders arising from an alleged illegal search of his medicine bundle.

[32] Given that Mr. Ewert has been engaged in other litigation, which he described in his submissions and affidavit, he is likely aware of the distinction between an application for judicial review, an action and a motion. Although he may be frustrated by the applicable legal and procedural requirements and the delays in resolving his many issues, the Court cannot simply abandon the law and usurp the process and Rules, including that Mr. Ewert establish all his

allegations with sufficient evidence, and that the Defendant have the opportunity to challenge the allegations and respond.

[33] The declaratory orders Mr. Ewert seeks by way of this motion are not related to the allegations and damages claimed in Mr. Ewert's action. For example, Mr. Ewert seeks a remedy regarding the refusal of his request for a transfer to the Kwi Healing Village. The transfer decision postdates Mr. Ewert's Statement of Claim. Moreover, it is unrelated to his allegations regarding the search of his medicine bundle.

[34] Similarly, a declaration regarding the status of multi-level institutions is unrelated to the underlying action. As the Defendant notes, the CCRA grants the Commissioner of CSC the authority to assign classifications to a penitentiary or areas within a penitentiary. Any declaration regarding the constitutionality of section 29.1 of the CCRA is not an issue to be determined on this motion or, more generally, by motion at all.

[35] Any declaration that Mr. Ewert's *Charter* rights have been infringed based on the allegations set out in his Statement of Claim—as he seeks in his action— must be determined at trial. Declarations should generally not be sought by way of motions (*Novopharm Limited v Eli Lilly Canada Inc*, 2009 FCA 138 at para 9) and cannot be sought in the context of a motion within an action.

[36] Similarly, the injunctions Mr. Ewert seeks regarding his potential future transfers, security classifications, or other actions by CSC are speculative and are not related to the

allegations in his Statement of Claim. Moreover, the extraordinary relief of an injunction cannot be granted in the context of an action.

[37] With respect to other questions set out in Mr. Ewert's Memorandum of Fact and Law, I would answer as follows:

- By way of this motion, Mr. Ewert cannot obtain a declaration or other order with respect to CSC's refusal of his request to be transferred to Kwi. The proper procedure would be to pursue an application for judicial review depending on the outcome of the final grievance.
- The Court cannot issue an injunction by way of motion in the context of an action. In addition, Mr. Ewert has not met, nor even addressed, the legal test to be met for an injunction.
- The determination of the security classification of a person incarcerated in a federal penitentiary is within the authority of the CSC. The processes set out in the CCRA govern the person's recourse against a classification that they dispute. The Court cannot usurp that process.
- Mr. Ewert's reliance on the "totality of the circumstances in this case" to argue that his rights pursuant to section 12 have been infringed is not an issue for determination on a motion that arises in the context of his action for damages.

[38] With respect to the Defendant's submission that costs should be awarded against Mr. Ewert, I acknowledge the Defendant's concerns that it has been forced to expend time and

effort to respond to an unmeritorious motion with a large record of questionable relevance, and which seeks to circumvent the law and the Court's processes. I agree that the inability of a plaintiff to pay is not generally an impediment to awarding costs. However, an award of costs is within the Court's discretion. In the present circumstances, I decline to order costs for this motion.

**ORDER in file T-2069-19**

**THIS COURT ORDERS that:**

1. The Motion is dismissed.
2. There is no order for costs.

"Catherine M. Kane"

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Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-2069-19

**STYLE OF CAUSE:** JEFFREY G. EWERT v HER MAJESTY THE QUEEN

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO  
RULES 359 and 369 OF THE *FEDERAL COURTS RULES***

**REASONS FOR ORDER AND ORDER:** KANE J.

**DATED:** OCTOBER 22, 2021

**WRITTEN REPRESENTATIONS BY:**

Jeffrey Ewert

FOR THE PLAINTIFF

Julien Dubé-Sénécal

FOR THE DEFENDANT

**SOLICITORS OF RECORD:**

None

FOR THE PLAINTIFF

Attorney General of Canada  
Montréal, Quebec

FOR THE DEFENDANT