Translated from the original French

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| Commission des droits de la personne et des droits de la jeunesse (Toussaint) c. Procureur général du Québec (Ministère de la Sécurité publique) | | | | | | 2023 QCTDP 21 |
| HUMAN RIGHTS TRIBUNAL | | | | | | |
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| CANADA | | | | | | |
| PROVINCE OF QUEBEC | | | | | | |
| DISTRICT OF | | | QUÉBEC | | | |
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| No.: | 200-53-000094-214 | | | | | |
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| DATE: | November 3, 2023 | | | | | |
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| PRESIDING: | | THE HONOURABLE | | CHRISTIAN BRUNELLE | | | |
| WITH THE ASSISTANCE OF ASSESSORS: | | | | | Mtre Pierre Deschamps  Mtre Monique Rousseau | |
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| COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, acting in the public interest and on behalf of SAMUEL TOUSSAINT | | | | | | |
| Plaintiff | | | | | | |
| v. | | | | | | |
| ATTORNEY GENERAL OF QUEBEC (IN RIGHT OF THE MINISTÈRE DE LA SÉCURITÉ PUBLIQUE) | | | | | | |
| and | | | | | | |
| KEVIN LECLERC | | | | | | |
| and | | | | | | |
| JONATHAN BELCOURT | | | | | | |
| and | | | | | | |
| JEAN-RENÉ BROUSSEAU | | | | | | |
| and | | | | | | |
| HUGUES COMEAU-BASTIEN | | | | | | |
| and | | | | | | |
| JEAN-BRUNO GAGNON | | | | | | |
| and | | | | | | |
| FRÉDÉRIC BOUCHARD | | | | | | |
| and | | | | | | |
| MICHAEL DUBÉ-BLOUIN | | | | | | |
| and | | | | | | |
| MYKEL BROUSSEAU | | | | | | |
| and | | | | | | |
| SÉBASTIEN ROBITAILLE | | | | | | |
| Defendants | | | | | | |
| and | | | | | | |
| **SAMUEL TOUSSAINT** | | | | | | |
| Victim and complainant | | | | | | |
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| JUDGMENT | | | | | | |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | | | | | | |
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1. The Commission des droits de la personne et des droits de la jeunesse (CDPDJ), acting in the public interest and on behalf of Samuel Toussaint, submits that the Ministère de la Sécurité publique (MSP) and correctional officers (COs) Kevin Leclerc, Jonathan Belcourt, Jean-René Brousseau, Hugues Comeau-Bastien, Jean-Bruno Gagnon, Frédéric Bouchard, Michael Dubé-Blouin, Mykel Brousseau, and Sébastien Robitaille practised discrimination against Mr. Toussaint on the basis of race, colour, and handicap, while he was serving an intermittent sentence of imprisonment, thereby interfering in a discriminatory manner with his rights under the *Charter of human rights and freedoms*[[1]](#footnote-2) (the *Charter*).
2. The CDPDJ, on behalf of Mr. Toussaint, asks that the Attorney General of Quebec (AGQ) and the defendant COs be solidarily condemned to pay $50,000 in moral damages.
3. The CDPDJ also asks that each of the COs be personally condemned to pay $2,000 in punitive damages for unlawful and intentional interference with Mr. Toussaint’s rights.
4. In addition, the CDPDJ asks the Tribunal to issue several orders against the AGQ in the public interest to ensure that all racial profiling practices in correctional facilities cease.
5. The AGQ denies that the COs of the MSP acted in a discriminatory manner in the circumstances and submits that the intervention with Mr. Toussaint was reasonable and proportionate, under the circumstances.
6. It should be noted that, at the outset of the trial, the Tribunal visited the premises where the facts in question took place and that the various pieces of evidence presented at the hearing included silent video recordings by static cameras at the Centre de détention de Québec (CDQ). The images recorded – some of them a little blurry – make it possible to view some of the sequences of events that are at issue.

# ISSUES

1. The Tribunal is asked to answer the following questions:
2. Has the CDPDJ successfully established, on a balance of probabilities, that Mr. Toussaint was subjected to discriminatory treatment based on handicap, race, and colour, thereby interfering with his right to full and equal recognition and exercise of his rights under sections 1, 4, 10, 24, 24.1, 25, and 26 of the *Charter*?
3. If so, has the AGQ shown that no accommodation measures were possible without exposing the COs to “undue hardship” or that their intervention was otherwise justified?
4. If not, what remedies should be awarded in favour of Mr. Toussaint, on the one hand, and in the public interest, on the other?

# BACKGROUND

1. The facts at the heart of this dispute took place at the CDQ on December 4, 2016.
2. Before providing as thorough an account as possible, the Tribunal finds it important to note that the parties’ versions overlap in several respects. Above all, it is their perceptions and interpretations of the events, as well as their evaluation of whether or not those events were discriminatory, that differ.
3. While some of the COs testified that they have little or no memory of the events, their [translation] “intervention reports” and their testimony all state essentially the same thing, with only a few small exceptions.
4. Mr. Toussaint is a Black man who, at the time of the events, was 21 years old and a student in an industrial electronics technical program at CEGEP de Limoilou.
5. On weekends, he was serving an intermittent sentence of imprisonment of 82 days for an assault conviction.[[2]](#footnote-3)
6. According to his intermittent sentence schedule,[[3]](#footnote-4) the sentence began on April 23, 2016, and was supposed to end on January 29, 2017.
7. On Sunday, December 4, 2016, around 9 a.m., he went to the CDQ to serve his 33rd weekend in confinement.

***Arrival at the facility***

1. Once near the admissions [translation] “garage”[[4]](#footnote-5) where inmates arrive to serve their intermittent sentences, Mr. Toussaint smoked a cigarette near a wall.
2. At the time, CO Jonathan Belcourt was in a car, patrolling the CDQ parking lot, conducting surveillance, and ensuring compliance with the rules and respect for the premises, property, and persons.
3. He observed Mr. Toussaint smoking near the building, which is prohibited by law.[[5]](#footnote-6) He approached, rolled down the side window of his vehicle, and told him that he was not authorized to smoke at that location. CO Belcourt said, [translation] “He never answered me”. He said that he found him [translation] “a little haughty, a little arrogant”.[[6]](#footnote-7)
4. Mr. Toussaint claims that he did not hear the instruction. He did not look at CO Belcourt and headed towards the door while smoking, eyes on the ground.
5. CO Belcourt did a U-turn and drove towards Mr. Toussaint, who was still smoking. He said that Mr. Toussaint blew smoke in his direction, [translation] “very arrogantly”.[[7]](#footnote-8)
6. He exited the vehicle to repeat that smoking was prohibited. At that point, Mr. Toussaint was 10 feet away from CO Belcourt.[[8]](#footnote-9) He turned to face him and threw his cigarette at him.
7. Mr. Toussaint says that, by doing so, he intended to show CO Belcourt that he was complying with his instruction.
8. The evidence is contradictory as to the trajectory of the cigarette butt. Mr. Toussaint testified that it did not reach the patrol car or CO Belcourt.
9. CO Belcourt, on the contrary, claims that it hit his bullet-proof vest at sternum level, and in his view, this was [translation] “almost assault”: [translation] “It’s that it’s bordering on assault, you know. He threw something at me; it was an assault. For sure he was going to a cell alone.”[[9]](#footnote-10)
10. He told Mr. Toussaint that his action would have consequences. He went to console 1 of the admissions station, where individuals serving intermittent sentences are received, to report the situation to the interim admissions unit manager, Kevin Leclerc:

[translation]

It was very brief. I went in, I told him that he... that he was probably intoxicated, he’d just thrown his cigarette butt at me, et cetera. So they made him come in right away, and they put him through as a priority, so that he wouldn’t stay outside, precisely so that it wouldn’t escalate outside.[[10]](#footnote-11)

1. When asked to explain why in his view Mr. Toussaint was apparently [translation] “not behaving normally”[[11]](#footnote-12) and [translation] “that he was oppositional”,[[12]](#footnote-13) CO Belcourt stated, [translation] “Well, it was really his non-verbal state. There were non-verbal signs. It was the way he nodded his head, the way he was looking at me. You know, you could really see he... like he was disengaging”.[[13]](#footnote-14)
2. When examined at the hearing about whether he had taken drugs on the morning of December 4, 2016, Mr. Toussaint provided the following equivocal answer: [translation] “No, not especially”.

***At the admissions station***

1. Unit Manager Leclerc was working admissions. About a hundred people were to be admitted that morning.
2. He was standing slightly back, while COs Maude Bérubé and Michael Dubé-Blouin were assigned to perform pat-down searches.
3. After being informed by CO Belcourt about the incident that took place outside the building, Mr. Leclerc noticed that Mr. Toussaint looked angry, that he was gesticulating, that he had shifty eyes, and that he was muttering and making insulting remarks like [translation] “you fuckers”, [translation] “bunch of pigs”, [translation] “I’m going to make you lose your jobs”, etc.
4. CO Dubé-Blouin states that Mr. Toussaint was [translation] “irritated”, that his attitude was provocative and arrogant, that he uttered insults, and that he refused to follow orders on a few occasions. His agitated behaviour and the fact that he was talking to himself and making religious-themed comments gave the impression that he was intoxicated.
5. Unit Manager Leclerc asked Mr. Toussaint to place his things in the locker, telling him, [translation] “Now, I just want things to go well.”[[14]](#footnote-15) He also asked him to remove his belt from his pants.
6. According to Unit Manager Leclerc, Mr. Toussaint threw his things in the locker but refused to remove his belt.
7. Mr. Toussaint testified that on his previous days in detention, the COs allowed him to keep his belt because it did not contain any metal pieces.
8. This explanation is somewhat supported by the following remarks made by Unit Manager Leclerc:

[translation]

... inside the facility, the intermittent inmates, and even regular inmates, don’t have the right to have belts, for example, with metallic ends. Because you roll it around the... the fist, and you can hit someone, you can break a window.[[15]](#footnote-16)

(Emphasis added)

1. The possibility of an inmate using a belt to commit suicide by hanging also cannot be ruled out.
2. Unit Manager Leclerc and CO Dubé-Blouin insisted that Mr. Toussaint remove his belt, but in vain. However, he was willing to allow CO Bérubé to remove it from him: [translation] “You .. you can take it off me. You’re “tight”, it wouldn’t bother me if you took it off me.”[[16]](#footnote-17)
3. Unit Manager Leclerc ordered Mr. Toussaint to place his hands against the wall. He pulled firmly on the belt, breaking one of the vertical loops on his pants.[[17]](#footnote-18)
4. Given how Mr. Toussaint was behaving, he suspected there was a mental health issue or possible intoxication. He wondered whether it was appropriate to direct him somewhere other than the gymnasium with the other intermittent inmates.
5. [translation] “Take him aside”, he decided. He chose to make him wait in cell 36 until he calmed down. In his opinion, his state should be reassessed, and he planned to transfer him after that to [translation] “temporary solitary” in cell 1 in department 5, where there is more surveillance and more coming and going, which would make it easier to observe him.
6. Mr. Toussaint had to transit through an outdoor space to be led to cell 36. He testified that he was left alone in the cold for around five minutes before the door of the building was opened to let him in.

***Cell 36***

1. This cell, described as a [translation] “waiting room”,[[18]](#footnote-19) is furnished with essentially a table and metal benches fastened to the ground. There is no bed, sink, or toilet.[[19]](#footnote-20)
2. While Mr. Toussaint was waiting in cell 36, the usual admissions procedure was applied to the other intermittent inmates.
3. Unit Manager Leclerc described this procedure. When they arrive, they sign their attendance card, place their personal effects (wallet, cellphone, keys, etc.) in a locker, and submit to a pat-down search, during which they must empty their pockets and remove their belt.
4. They then enter an adjoining room called the “bull pen” and wait to undergo a strip search in one of the three dedicated cubicles.[[20]](#footnote-21)
5. The strip search is performed to verify that the inmate is not bringing any weapons, drugs, or other prohibited objects with them, while also checking that they have no bodily injuries.
6. The man being searched must remove all his clothing, face the wall, spread his buttocks, turn around, lift his testicles, raise his arms, open his mouth, move his hair from his ears, and shake out his hair.
7. Mr. Toussaint testified that he waited alone in cell 36 for more than an hour without being told why the usual procedure of being strip searched and escorted to the gymnasium was not being followed.
8. The Tribunal has watched a silent video recording from a static camera in cell 36 between 10:29 a.m. and 10:31 a.m.[[21]](#footnote-22) It appears that these images were relayed in real time to a console attended by a CO who could intervene if needed.
9. It shows Mr. Toussaint alone, seated at a table, his arms and hands alongside his body. He is calm and slightly swaying his shoulders from left to right. He testified that he remained calm and tried to relax.
10. According to Unit Manager Leclerc, [translation] “it didn’t look too bad” and [translation] “he actually looked fine”.[[22]](#footnote-23)
11. Then Unit Manager Lecler and four other COs – Frédéric Bouchard, Jean-René Brousseau, Michael Dubé-Blouin, and Mykel Brousseau – entered cell 36.
12. According to the evidence, these types of interventions generally involve several COs in order to outnumber the inmate, especially one who appears to be intoxicated: [translation] “Better to be many than few”, says Unit Manager Leclerc. [translation] “We’re happy to be as many people as possible”, adds CO Dubé-Blouin.
13. Unit Manager Leclerc spoke to Mr. Toussaint briefly. According to the testimony of the COs, he told him that he would be placed in solitary confinement for the entire day as a temporary measure and asked him to face the wall so that he could be handcuffed.
14. It appears that inmates brought to solitary confinement in another part of the facility are always handcuffed before being moved to avoid any risk of the COs [translation] “being injured”.[[23]](#footnote-24) Handcuffing them with their hands behind their back limits any sudden movements.
15. Mr. Toussaint says he asked why he was being handcuffed, and Unit Manager Leclerc merely instructed him not to resist.
16. To the COs who were there, Mr. Toussaint appeared to be intoxicated. He insulted them, his speech was incomprehensible and disjointed, he spoke to God, and he warned them against the divine punishment awaiting them.
17. According to the COs, Mr. Toussaint was not cooperating, and this was displayed verbally, not through hetero-aggressive actions. CO Jean-René Brousseau refers to [translation] “mild” resistance, and his colleagues Dubé-Blouin and Bouchard describe it as [translation] “passive”.
18. The images of the scene appeared to show Mr. Toussaint responding verbally to Unit Manager Leclerc. The Tribunal sees no sign of physical aggression on his part.
19. About 25 seconds after the COs entered cell 36, he stood up and faced the wall with his hands behind his back, from which it can be concluded that he obeyed the instructions of Unit Manager Leclerc.
20. The COs then handcuffed him, and there was no apparent resistance on the part of Mr. Toussaint. [translation] “I did what they told me,” he says.
21. Mr. Toussaint testified that his arms hurt from the upward pressure and the joint lock on his wrists exerted by the two COs escorting him.
22. The COs were making him walk backwards, without telling him where he was going. He had never seen an inmate being escorted backwards, and he did not understand why the COs were making him walk that way. He thought they were making fun of him, and he decided to respond in kind by lifting his feet from the ground: [translation] “I wanted to fool them,” he admits.
23. Several of the CO acknowledged that it is not common for inmates to be escorted backwards.[[24]](#footnote-25) This technique limits the physical strength of the person being moved by throwing them off balance.
24. It was apparently used because Mr. Toussaint was insulting them, making threats and, according to Unit Manager Leclerc, tried to [translation] “kick him twice”.[[25]](#footnote-26)

[translation]

When he wanted to, you know, gesticulate more, and then wanted to kick, then tried to get to us, well, we changed our escort method to ensure our safety. So we led him backwards...

...

Because also, he was totally off balance going backwards. So he was... You know, he couldn’t kick us again, he couldn’t... You know, it’s a lot better that way. So this method, that’s why we moved him that way. The officers decided to move him like that to bring him... to the cell.[[26]](#footnote-27)

1. A viewing of the images captured by the camera does not reveal the slightest attempt by Mr. Toussaint to kick them.

***Escort towards cell 1 of department 5***

1. A second video recording is from a fixed camera located in the corridor leading to department 5.[[27]](#footnote-28)
2. Mr. Toussaint was led backwards down the corridor, where a low wall about 6 inches thick is located about 20 feet from the door to cell 36. This low wall, approximately 3 feet high, splits the width of the corridor into two: on one side are four steps, and on the other, an access ramp. [translation] “It’s not wide,” says Unit Manager Leclerc.
3. When Mr. Toussaint and the COs leading him arrived where the low wall begins, the two COs holding his right arm took the ramp, while the CO holding his left arm took the stairs. CO Mykel Brousseau walked a few steps in front of them, and Unit Manager Leclerc followed close behind.
4. Because Mr. Toussaint was being forced to walk backwards, he obviously did not see the low wall. Thrown off balance, he had to lift first his right leg off the ground then his left leg over the low wall, until he found himself in a semi-horizonal position, but still being escorted by the COs, who kept going at the same pace. Once they were past the wall, he put his feet back on the ground and continued to be led backwards.
5. When he lifted his feet in the air to avoid the low wall, some of the COs interpreted this movement as an attempt to kick them.
6. A third video recording[[28]](#footnote-29) shows another segment of the route taken while he was being escorted to department 5.
7. Unit Manager Leclerc and the four other COs have their backs to the camera and are leading Mr. Toussaint, still walking backwards, down a corridor. At the hearing, Mr. Toussaint said, [translation] “I was losing my pants.” He was also wondering, [translation] “Where are we going?”.
8. These images reveal no aggressive actions on Mr. Toussaint’s part whatsoever.
9. A fourth video recording[[29]](#footnote-30) is from a fixed camera installed in an office with a large window at the end of the corridor leading to the department 5 cells. These images show the reflection in the office window of a female CO sitting behind the screens of a surveillance console.
10. This was the very first time Mr. Toussaint had been in this part of the prison, which is used for specific purposes. Some cells are used for solitary confinement for disciplinary breaches, and others, including cells 10 and 12, are for preventive isolation.
11. CO Jean-Bruno Gagnon had just finished his night shift in department 5. When he saw his colleagues leading Mr. Toussaint backwards down the corridor towards cell 1, he joined them.
12. According to the COs escorting Mr. Toussaint, he was not physically threatening during the trip to department 5, but he was uncooperative, put up passive resistance, and at times allowed himself to be dragged.
13. However, as stated above, in the absence of any explanation as to why he was forced to move backwards – even though he was already handcuffed – and because he believed that he was being mocked, he lifted his feet from the ground for the first time in cell 36, causing his weight to be momentarily supported entirely by the COs escorting him.
14. When he lifted his feet from the ground for the second time, he was trying to avoid the low wall in the middle of the corridor. At that point, he was stretched out between the COs on either side of him, who were taking two different paths.
15. That said, the images in evidence show no sign of physical aggression from Mr. Toussaint against the COs, despite the perceptions of Unit Manager Leclerc and CO Jean-René Brousseau to the contrary.
16. What is more, the few seconds between the three recordings make it highly unlikely that there was any sudden display of physically aggressive behaviour by Mr. Toussaint, who appears quite calm in the videos.

***Cell 1***

1. The Tribunal did not have the benefit of viewing the images of the COs’ intervention inside cell 1 because the camera in that cell was defective.
2. This is particularly unfortunate because of Unit Manager Leclerc’s justification for his decision not to bring Mr. Toussaint to the infirmary, despite his [translation] “state”, which is described as [translation] “like being in a daze”:

[translation]

I couldn’t send him there, but I had to keep an eye on him. Also, we’re limited in terms of cameras there [in the infirmary], so...

...

Cell 1 has a camera. We’d be able to keep an eye on him. [[30]](#footnote-31)

(Emphasis added)

1. Mr. Toussaint was made to face the back wall of cell 1, not knowing what to expect. He was told to kneel, but he objected.
2. The COs planned to remove his handcuffs, perform a strip search, then leave him alone in the cell, without authorization to join the other inmates in the gymnasium for the rest of the day.
3. [translation] “So that did not please him at all,”[[31]](#footnote-32) says Unit Manager Leclerc. [translation] “He wasn’t happy, and that’s when he became disorganized as well”.[[32]](#footnote-33)
4. He shouted and kept insulting the COs, while also begging for help and strength from God. According to the incantation recited by Mr. Toussaint, [translation] “God’s anger would come lashing down upon us”, summarized CO Gagnon.
5. The COs struggled to establish contact with Mr. Toussaint, whom Unit Manager Leclerc describes as [translation] “out of touch”.[[33]](#footnote-34)
6. Once CO Jean-René Brousseau removed the handcuffs, Mr. Toussaint turned his shoulders and lifted an arm in the air, which the COs perceived as an attempt to commit assault. According to CO Bouchard, [translation] “any movement other than what is requested” is seen as an attempted assault.
7. Mr. Toussaint was immediately pushed towards the wall and held in an “arm lock”, causing him pain and allowing them to reassert control over him.
8. He was brought to the ground, face down, by one of the COs striking his fists twice on his sciatic nerve, another applying a wrist lock, and a third applying a joint lock. According to them, Mr. Toussaint was sweating and very agitated, refusing to obey instructions, and putting up strong resistance.
9. Mr. Toussaint admits that he stiffened his arms and struggled to avoid being taken down to the dirty and [translation] “disgusting” floor of the cell.[[34]](#footnote-35) He testified that the COs lay him on the ground in front of the toilet, hit him, and told him to [translation] “shut his trap” and follow orders.
10. He was handcuffed again and then turned onto his left side to avoid obstructing his breathing and possibly causing positional asphyxia.
11. Some COs held his wrists and ankles as he continued to yell. Unit Manager Leclerc even states that [translation] “he was growling”.[[35]](#footnote-36)
12. The situation in cell 1 was chaotic. [translation] “We had no idea how to get out of there without getting hurt”, says CO Jean-René Brousseau.
13. At this point, CO Hugues Comeau-Bastien, who was familiar with use of force techniques, was beginning his shift. He heard the yelling from the cell and went to help.
14. [translation] “I was happy”, admits Unit Manager Leclerc, who saw CO Comeau-Bastien [translation] “as [his] saviour”: [translation] “I needed help”.
15. With the Unit Manager’s agreement, CO Comeau-Bastien took charge of the intervention. He tried to establish contact with Mr. Toussaint to convince him to cooperate with the strip search:

[translation]

... the most vivid memory I have is the inmate’s physical resistance during the intervention.

But, in terms of his mental state, I have no specific memory that he was at that level.[[36]](#footnote-37)

1. He testified that he repeatedly asked Mr. Toussaint, who was lying on his side, to turn his face to the ground to be disrobed for his strip search, failing which his clothes would be cut off.
2. Unable to count on his cooperation, he asked for a “Hoffman”[[37]](#footnote-38) knife to cut the clothing.
3. CO Gagnon went to the console to get the curved-blade knife, which is used sometimes to cut the rope around a hanged person’s neck, sometimes to [translation] “cut clothes”.[[38]](#footnote-39)
4. The mention of a knife made a strong impression on Mr. Toussaint, who at the time was lying on the ground, handcuffed, and utterly frightened.
5. [translation] “The insults were flying”, he says. Some of the COs ridiculed his situation: [translation] “Look where you are now.” He claims he heard the following insults: [translation] “Shut your mouth with your God”, [translation] “Fucking nigger”...
6. CO Comeau-Bastien attacked the clothing with the knife.
7. Mr. Toussaint felt the knife against the back of his neck. He says he heard some of the COs laughing. [translation] “Why are you doing this to me?” he asked.
8. The first knife did not work properly, so a second, sharper one was needed. [translation] “The knife fell into my hands”, explained CO Dubé-Blouin, who took over: [translation] “I was new,” he says. [translation] “I was just starting”. [translation] “It really marked me”.
9. Mr. Toussaint struggled and resisted. As a result, several COs intervened to keep him on the ground. [translation] “I reacted defensively”, he admits. [translation] “I got tense”. The COs performed ankle locks. Another CO held his left elbow and pressed on the ulnar nerve, causing him pain. A third had him in an arm lock, while CO Comeau-Bastien struck him three times on the tibial nerve to reduce his resistance.
10. [translation] “They cut all my clothes” says Mr. Toussaint.
11. Once completely stripped, he was kept face down on the ground, near the toilet bowl, with his hands handcuffed behind him, while several people came and went in cell 1.
12. Ten COs took part in or were present for the intervention. In addition to Unit Manager Leclerc, COs Michael Dubé-Blouin, Jean-René Brousseau, Frédérick Bouchard, Mykel Brousseau, Jean-Bruno Gagnon, and Hugues Comeau-Bastien were present. CO Sébastien Robitaille, who was starting his shift, and two female COs were also present in front of the open cell door at some point. One of the female COs stayed in the doorway for about 5 minutes.
13. CO Comeau-Bastien decided to place Mr. Toussaint in a cell containing less furniture so that COs with helmets and shields could be deployed to perform the strip search and safely conclude the intervention.
14. CO Mykel Brousseau checked whether another cell compatible with these requirements was available.

***Cell 12***

1. After Unit Manager Leclerc made sure that another cell was free and that COs with helmets and shields were ready to mobilize, some of the COs lifted Mr. Toussaint to a standing position and started moving him towards cell 12.
2. A reinforced escort led him towards the cell, handcuffed and completely naked.
3. According to Mr. Leclerc, at that point, Mr. Toussaint [translation] “was no longer in touch with reality”[[39]](#footnote-40) and was totally shaken.[[40]](#footnote-41)
4. Once they were in cell 12, the video recorded by the static camera[[41]](#footnote-42) shows that Mr. Toussaint was led to the back of the room and positioned with his face to the wall.
5. Up to nine COs can be counted in the cramped cell. [translation] “There were a lot of people”, admitted Unit Manager Leclerc under cross-examination. [translation] “I saw that there were too many people”. [translation] “Some had left their stations to come and see” and [translation] “some were not under my jurisdiction, so to speak”.[[42]](#footnote-43)
6. [translation] “People were laughing”, Mr. Toussaint laments. He describes an [translation] “uproar in the cell”.
7. CO Comeau-Bastien told him to kneel. He explains the order by saying that he was not dealing with a [translation] “perfectly cooperative” person and that he would have [translation] “worked standing up” if he had been.[[43]](#footnote-44) He was also not dealing with a [translation] “hugely disorganized” person, which would have justified [translation] “working lying on the ground”:[[44]](#footnote-45)

[translation]

I decided to work with Mr. Toussaint in a kneeling position.

So, it was really his degree of resistance since the beginning of the intervention that led me to believe that I should work in a kneeling position to ensure the security of the staff and of the inmate.[[45]](#footnote-46)

1. Because Mr. Toussaint resisted dropping to a kneeling position, COs Jean-René Brousseau and Robitaille, the latter the huskiest of all the COs, struck him in the sciatic nerve region, provoking a [translation] “biomechanical dysfunction”[[46]](#footnote-47) that caused him to kneel.
2. Mr. Toussaint wanted to stand up, while the COs who were in physical control of him sought to keep him in a kneeling position. He ended up collapsing to the ground in a lateral position.
3. [translation] “I was totally panicked”, Mr. Toussaint testified. He said he was afraid he was going to die.
4. CO Gagnon went to get gas masks, in anticipation of using an inflammatory agent with an oleoresin capsicum base (OC).[[47]](#footnote-48)
5. Then CO Comeau-Bastien performed a [translation] “tactical contamination”[[48]](#footnote-49) using a glove coated with the inflammatory agent – MK9 or cayenne pepper – that he swiped over Mr. Toussaint’s face, provoking an immediate burning sensation.
6. The effects were felt for a moment, and then the COs holding Mr. Toussaint down by means of joint locks, shouted at him to stop resisting.
7. CO Comeau-Bastien then sprayed the irritating agent directly into Mr. Toussaint’s face.
8. In Unit Manager Leclerc’s view, it was the right thing to do: [translation] “We pepper sprayed him because, you know, we’d reached that point. We couldn’t get out of the situation without us... without our safety being endangered. So it was the only way, you know, to do it. That was it”.[[49]](#footnote-50)
9. Mr. Toussaint describes [translation] “a liquid that burned the skin” and that dripped down his face, torso, and onto his [translation] “private parts”.
10. According to Unit Manager Leclerc, Mr. Toussaint, naked and handcuffed, said at that point, [translation] “Okay, it’s fine, do what you have to do”, which CO Jean-René Brousseau echoed in similar terms: [translation] “Okay, it’s fine, it’s all right, I’ve had enough”.
11. [translation] “We obtained the subject’s cooperation”, summarizes CO Comeau-Bastien

***The decontamination room***

1. Mr. Toussaint was then led naked to the decontamination room, referred to as the [translation] “vacuum”.
2. CO Bouchard went to get the hose for the [translation] “handheld shower”.
3. Then Mr. Toussaint was given a brief, lukewarm shower. [translation] “It was quick”, he says.
4. He testified that the CO who was maneuvering the shower head rubbed it on his face and his mouth.
5. No one has contradicted this last statement before the Tribunal.

***Cell 10***

1. Mr. Toussaint, still completely naked and handcuffed, was then led to cell 10, because cell 12 was now contaminated by the inflammatory agent.
2. He displayed no signs of aggression. His physical appearance was that of a person who was frightened and weakened.
3. The images recorded by the static camera,[[50]](#footnote-51) which was functioning in cell 10, show COs Comeau-Bastien and Robitaille leading Mr. Toussaint to the corner of the room and forcing him to kneel, facing the wall. They held him in an arm lock. Another colleague was with them, wearing gloves and a helmet and carrying a rectangular synthetic glass shield, as well as another who was gloved and holding a canister of the irritating agent. Other COs remained in the background.
4. A nurse appeared in the room and asked about Mr. Toussaint’s condition after being exposed to the OC.
5. [translation] “My brain hurts, and I feel nauseous” he said, but the nurse merely checked his vital signs and blood pressure. [translation] “It wasn’t his business” to look into it any further, laments Mr. Toussaint.
6. His handcuffs were removed around 11:09 a.m. He remained kneeling, facing the corner of the room.
7. The strip search was performed. Three COs visually confirmed that he was not hiding anything in his mouth, between his buttocks, under his arms, under his feet, in his hair, or under his scrotum.
8. Then the COs all retreated one by one, walking backwards out of the cell. The one holding the shield was the last to leave; he never took his eyes off Mr. Toussaint, still naked and kneeling on the ground in a corner of the cell, with his back turned.
9. Mr. Toussaint was left alone, completely naked in this concrete room, furnished only with a basin and a steel toilet.
10. He spent the rest of the day there, without clothing, food, or a mattress, suffering from a headache and the fear of being disfigured by the burns from the inflammatory agent.

***Leaving the facility***

1. In the late afternoon, Mr. Toussaint, still naked, was handcuffed again and escorted by four COs towards cell 34 to undergo another strip search, on his knees and facing the wall.
2. He was told that a disciplinary report would be made. He says that one of the COs even told him the following: [translation] “You’re lucky because we’d keep you here”.
3. Since his clothes had been cut up and could no longer be used, Mr. Toussaint was given used clothing to wear home.
4. He had to wear a T-shirt featuring the acronym “CDQ” written in black felt marker, followed by “(prison)” in smaller letters.
5. He recovered a bag containing his cut-up clothing and the personal effects he had deposited that morning in a locker at the admissions station. Then he went to his car and phoned his father. [translation] “I needed him”.
6. Then he went home, [translation] “in shock”.

\* \* \*

1. After its investigation, which took several years, the CDPDJ filed its judicial application on April 19, 2021. The application was served on each of the CO defendants on April 20, 2021, and then on the AGQ on April 30, 2021.

# ANALYSIS

1. Before discussing the merits of the dispute, the Tribunal must rule on an objection to the evidence raised at the hearing by the CDPDJ.
2. In support of their defence, the defendants filed computer summaries from the court ledger[[51]](#footnote-52) to establish that Mr. Toussaint apparently committed criminal offences other than those for which he was serving his intermittent sentence of imprisonment.
3. It appears from these exhibits (D-8 and D-15) that those offences all took place *after* December 4, 2016.
4. In principle, whether a given act is discriminatory is assessed on the facts known by the perpetrator at the time he committed them.[[52]](#footnote-53)
5. Certainly, evidence from a time after the facts in dispute is not automatically inadmissible. However, it must [translation] “help clarify” whether the discriminatory conduct alleged against a party was justified when it occurred.[[53]](#footnote-54)
6. In *Commission des droits* *de la personne et des droits de la jeunesse (Lecavalier et autres) c. Ville de Montréal (SPVM)*,[[54]](#footnote-55) the Tribunal wrote:

[translation]

[64] There is no rule prohibiting a party from establishing a fact subsequent to the facts underlying an action. Indeed, article 170 [of the *Code of Civil Procedure*] allows a party to allege in his defense any material facts, even material facts that have arisen since the application was instituted. According to the general rule established in article 2857 [of the *Civil Code of Québec*], restated in section 123 of the *Charter* and confirmed by the Supreme Court, subsequent evidence is admissible only if relevant to the case.

[65] Subsequent fact evidence is thus admissible exceptionally, only if it sheds light on the events in dispute.

(Emphasis added)

(References omitted)

1. In this case, the Tribunal must essentially determine whether or not the conduct of the COs was unlawfully discriminatory against Mr. Toussaint on December 4, 2016.
2. The fact that Mr. Toussaint was subsequently charged with offences under the *Criminal Code* is therefore not relevant to making such a demonstration.
3. Because “*ex post facto* evidence is admissible only if relevant to the case”,[[55]](#footnote-56) the CDPDJ’s objection should be upheld, and exhibits D-8 and D-15 should not be taken into consideration.
4. The matter must now be decided on the merits.

## Discrimination

1. In paragraph 62 of its factum, the CDPDJ argues:

[translation]

... in the performance of their duties and while they were in a position of authority, the defendants violated the complainant’s right to the full and equal recognition and exercise of the right to personal security and inviolability, the right to the safeguard of his dignity, the right not to be subjected to unreasonable searches, as well as his rights, as a detained person, to be treated with humanity and respect, and to receive separate treatment appropriate to his mental condition, the whole without distinction or exclusion based on race, colour, or handicap, contrary to sections 1, 4, 10, 12, 24.1, 25 and 26 of the *Charter of human rights and freedoms*, CQLR c. C‑12…[[56]](#footnote-57)

1. Whatever form the discrimination alleged by the plaintiff took, the method of analysis – governed by the wording of section 10 of the *Charter* – is the same:

[35]  … s. 10 requires that the plaintiff prove three elements: “(1) a ‘distinction, exclusion or preference’, (2) based on one of the grounds listed in the first paragraph, and (3) which ‘has the effect of nullifying or impairing’ the right to full and equal recognition and exercise of a human right or freedom”…[[57]](#footnote-58)

(References omitted)

1. The CDPDJ raises three personal characteristics that allegedly played a role in the treatment Mr. Toussaint was subjected to: “race”, “colour”, and “handicap”.
2. Although a person’s “race”[[58]](#footnote-59) and their skin “colour”[[59]](#footnote-60) can be distinguished, the analysis of this dispute does not require this distinction to be made.[[60]](#footnote-61)
3. That said, the Tribunal intends to analyze the issue of discriminatory treatment based on handicap and that based on race/colour in two separate sections.

### **The distinction/exclusion**

1. In *Bombardier*, the Supreme Court of Canada described the first stage of the analysis as follows:

[42] The first element of discrimination is not problematic. The plaintiff must prove the existence of differential treatment, that is, that a decision, a measure or conduct “affects [him or her] differently from others to whom it may apply”... This might be the case, for example, of obligations, penalties or restrictive conditions that are not imposed on others”.[[61]](#footnote-62)

1. After passing through the admissions station on the morning of December 4, 2016, Mr. Toussaint was separated from the other inmates arriving to serve their intermittent sentences.
2. He was the only one brought to a secure area outside the building, where he was left in the cold [translation] “without a coat” for three to five minutes before the door was opened for him and he was escorted to cell 36.
3. During that time, the other inmates went to the area of the prison containing cubicles, where they can remove their clothing themselves in preparation for the strip search, which they undergo in a standing position,[[62]](#footnote-63) and then retrieve their clothing. [translation] “Many of us get undressed at the same time”, Mr. Toussaint testified as he described the usual procedure that was followed when he had gone to serve his weekend sentence before.
4. In addition, on December 4, 2016, after undergoing a strip search in a kneeling position and subsequently being decontaminated from the inflammatory agent sprayed in his face, Mr. Toussaint was left alone, naked, and wet in cell 10, without a mattress and without any food, until he was released from the prison at the end of the day.
5. In comparison, the other inmates serving intermittent sentences like him were together in the gymnasium;[[63]](#footnote-64) their clothing was not taken away, and they received a meal.
6. At this first stage, the Tribunal need not consider the reasons Mr. Toussaint was the subject of a distinction or exclusion in comparison with the other inmates.
7. It is sufficient to note that he was the subject of differential treatment, and that is indeed the case.

### **The grounds invoked**

#### ***The “handicap”***

1. On the morning of December 4, 2016, CO Belcourt was the first to intervene with Mr. Toussaint.
2. His intervention sought to ensure compliance with the regulation that prohibited smoking near the correctional facility.
3. He verbally informed Mr. Toussaint that he could not smoke at that location but did not receive an answer.
4. After doing a U-turn in his patrol car, CO Belcourt exited his vehicle and approached Mr. Toussaint, who threw his cigarette at him.
5. Mr. Toussaint states that, by this action, he wanted to show that he was obeying the order by throwing the cigarette butt on the ground.
6. CO Belcourt states that the butt hit him on his sternum, which he considers to be an assault: [translation] “It’s unacceptable”, he testified.[[64]](#footnote-65)
7. He recounted that Mr. Toussaint blew smoke at him first, and that his attitude was arrogant and oppositional. He was not behaving normally, he was keeping to himself, and he was frowning.
8. In his opinion, he was [translation] “probably intoxicated”.
9. On the issue of his intervention with Mr. Toussaint and the trajectory of the cigarette butt, the Tribunal accepts CO Belcourt’s version because it is more credible.
10. First, a reasonable person who intends to dispose of a cigarette butt safely does not throw it towards another person. Smokers sometimes let the butt fall to the ground and then crush it out, although it must be said that this way of doing things is not environmentally ideal.
11. Second, CO Belcourt’s testimony was specific and detailed. He explained that in the weeks before this incident he had intervened in an animated discussion between Mr. Toussaint and another CO. He apparently helped defuse the situation, which concluded with a positive conversation and some laughter when he said that he had attended the same school as Mr. Toussaint’s older brother.
12. Third, CO Belcourt has no interest in testifying to please the management of the correctional facility or his colleagues, since he has changed careers and has not worked in the prison environment for two years.

\* \* \*

1. CO Belcourt’s perception that Mr. Toussaint might have been intoxicated when he was admitted was reported immediately to Unit Manager Leclerc.
2. Once in the admissions garage, Mr. Toussaint underwent a pat-down search like the other inmates.
3. He appeared angry. He was hurling insults and was agitated. He was dropping things and talking to himself. He made comments of a religious nature. CO Dubé-Blouin thought he was intoxicated.
4. Unit Manager Leclerc, who was there at the time, wondered whether Mr. Toussaint was intoxicated or whether he had mental health problems: [translation] “We don’t really know him”, he stated.
5. He decided to bring Mr. Toussaint temporarily to cell 36, described as a [translation] “stimulus-free” cell.
6. After more than an hour, Unit Manager Leclerc and four COs entered this cell to handcuff Mr. Toussaint’s hands behind his back and march him backwards to cell 1.
7. Once in that cell, which contained a bed and a bench for eating, Mr. Toussaint was positioned with his face to the back wall. The COs removed Mr. Toussaint’s handcuffs, and he stretched his arms and turned around immediately, which was perceived as an assault: [translation] “He became disorganized” and [translation] “He spun around”, according to Unit Manager Leclerc, who ordered Mr. Toussaint brought to the ground.
8. The COs in the room, some of whom were members of the emergency correctional response team (CERT), struggled to control Mr. Toussaint, who was “growling” and calling for divine punishment. [translation] “He put up strong resistance”, according to Unit Manager Leclerc, who described his state as [translation] “like in a daze” and [translation] “out of it”.
9. The joint locks performed by the COs on Mr. Toussaint and the pain they should have caused him did not seem to be a deterrent.
10. [translation] “It made no sense”, stated Unit Manager Leclerc, who began to think that Mr. Toussaint was intoxicated because he seemed to be insensitive to pain, maybe due to the effect of a drug like PCP.[[65]](#footnote-66)

\* \* \*

1. CO Jean-René Brousseau testified that Mr. Toussaint displayed several signs of intoxication.
2. Although he did not smell of alcohol, the CO says that he observed that his pupils were dilated; ; he had a coated mouth; he was drooling heavily; and his saliva was white and stringy. His muscles were constantly contracted; his statements were [translation] “delirious” and aggressive; and he was [translation] “extremely resistant”.
3. [translation] “He was not reacting to pain”, the CO observed. This is [translation] “a maximum threat index”, [translation] “extreme”.
4. CO Mykel Brousseau testified that Mr. Toussaint was conducting himself like an intoxicated person. He describes his state as “strange” and his speech as rambling: [translation] “The words didn’t make sense”
5. According to him, Mr. Toussaint was putting up major physical resistance and had very little receptivity to pain.
6. CO Dubé-Blouin was at admissions on the morning of December 4, 2016. He says that Mr. Toussaint was [translation] “weird”, [translation] “annoyed”, and [translation] “mouthy”, and that he was making “religious statements”. At that point, through his behaviour and his speech, he [translation] “stood out from the rest”. He likens his [translation] “strange state” to that of an intoxicated person: [translation] “He was not behaving normally”.
7. CO Robitaille says that Mr. Toussaint was [translation] “very agitated” and [translation] “on edge”. He was [translation] “yelling” and seemed [translation] “to be delirious”. He ignored the instructions he was given.
8. CO Gagnon stated that Mr. Toussaint was making threats and acting in a way that was aggressive and [translation] “combative”, expending a lot of energy despite the pressure being put on his left ulnar nerve to cause [translation] “temporary pain”.
9. CO Comeau-Bastien intervened once Mr. Toussaint was lying on the ground in cell 1. He described him as [translation] “disorganized” and [translation] “excessively resistant” and reports a [translation] “chaotic situation”.
10. He specified that even when an inmate is intoxicated, the physical intervention remains [translation] “exactly the same”, even though the orders given are shorter, more specific, and more concise.

\* \* \*

1. From the evidence as a whole, it appears quite clear that Mr. Toussaint was presenting a [translation] “disturbed mental state” – to adopt the term used by the expert in the use of force, Patrick Léveillé – on the morning of December 4, 2016.
2. It is likely that this state was the result of having taken a drug of some kind.
3. At the hearing, when counsel for the CDPDJ asked Mr. Toussaint, [translation] “Did you take something?”, she obtained the following answer, which was equivocal, to say the least: [translation] “No, not especially”.
4. The use of the adverbial phrase attenuates the meaning of the “no” that precedes it. [translation] “Not especially” can be understood as [translation] “not really”, [translation] “not all that much”, [translation] “not excessively”, or [translation] “nothing out of the ordinary”. Nevertheless, it suggests that a certain amount of drug use could be at issue.
5. That said, does the fact that Mr. Toussaint’s mental state might have been affected by a psychoactive substance allow him to argue that, on December 4, 2016, he had a “handicap” within the meaning of the *Charter*?
6. In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*,[[66]](#footnote-67) the Supreme Court of Canada put forward a “broad definition of the word “handicap””:[[67]](#footnote-68)

[81]  It is important to note that a “handicap” may exist even without proof of physical limitations or the presence of an ailment. The “handicap” may be actual or perceived and, because the emphasis is on the effects of the distinction, exclusion or preference rather than the precise nature of the handicap, the cause and origin of the handicap are immaterial…[[68]](#footnote-69)

(Emphasis added)

1. The Supreme Court subsequently summarized its judgment, saying that “the notion of the subjective perception of a handicap was accepted in a case relating to the application of the *Quebec Charter*”.[[69]](#footnote-70)
2. In another decision, this one concerning the constitutional equality guarantees the State is bound to uphold under section 15 of the *Canadian Charter of Rights and Freedoms*,[[70]](#footnote-71) the Court stated:

[39]  … while the notions of impairment and functional limitation (real or perceived) are important considerations in the disability analysis, the primary focus is on the inappropriate legislative or administrative response (or lack thereof) of the state. Section 15(1) is ultimately concerned with human rights and discriminatory treatment, not with biomedical conditions.[[71]](#footnote-72)

(Emphasis added)

1. It is therefore necessary to guard against placing too much importance on an impairment or limitation characterizing a biomedical condition of some sort – whether temporary,[[72]](#footnote-73) episodic,[[73]](#footnote-74) or permanent[[74]](#footnote-75) – and to focus instead on the reaction (or lack thereof) of the COs and of its effects on Mr. Toussaint.
2. That said, when Unit Manager Leclerc and several COs observed on December 4, 2016, that Mr. Toussaint was not behaving [translation] “normally” and seemed both disconnected from reality and insensitive to pain, they nevertheless refused to adapt their interventions accordingly.
3. In so doing, they compromised his right to substantive equality, which [translation] “is not always achieved through strict equality or identical treatment” and [translation] “may sometimes require the application of differential treatment adapted to the needs of the persons in question”.[[75]](#footnote-76)
4. They failed to reasonably accommodate this inmate’s perceived “handicap” and to perform an “individualized assessment”[[76]](#footnote-77) of the situation, thus breaching the duty of reasonable accommodation inferred from section 10 of the *Charter*.
5. This duty, it will be recalled, constitutes “a core and transcendent human rights principle”[[77]](#footnote-78) and “a core principle of the *Quebec Charter*”.[[78]](#footnote-79) Its application does not stop at the prison doors.[[79]](#footnote-80)

#### ***“Race” and “colour”***

1. In its resolution of July 2, 2020,[[80]](#footnote-81) made following its investigation, the CDPDJ reported an event that allegedly took place while Mr. Toussaint was in cell 10, after being subjected to the OC and the subsequent brief decontamination. It wrote, [translation] “[a]ccording to the complainant, in that cell, one of the officers made the following remarks to him: [translation] “you’re a fucking nigger, you’re not going to do anything with your life, look at where you are now””.
2. At the hearing, Mr. Toussaint repeated that these racist insults had been directed at him. However, this statement was made in the portion of his testimony describing what he underwent in cell 1.
3. He was unable to identify the CO who uttered these insults
4. All the defendants deny uttering those insults or even hearing them.
5. CO Dubé-Blouin says that he has [translation] “no memory” of it.
6. [translation] “I would remember”, says CO Comeau-Bastien. [translation] “Personally, that would have shocked me”.
7. CO Mykel Brousseau is even more explicit, saying the following about this type of comment: [translation] “It isn’t part of my values”, [translation] “It upsets me”, and [translation] “It’s something that affects me”.
8. In addition, CO Dubé-Blouin noted the following in his intervention report regarding Mr. Toussaint: [translation] “He yelled a lot of insults at other inmates while he was changing cells”.[[81]](#footnote-82)
9. During the visit to the facility on the first day of the trial, the Tribunal moved around a wing where inmates were shouting and exchanging insults between cells. It is therefore possible that the racist insults Mr. Toussaint said he received were from another inmate.
10. There is another possibility that should not be played down: [translation] “there, the code of silence reigns supreme, that subculture spanning both sides of the prison bars at all times of day or night (no one speaks, no one knows, no one sees or hears). The cost of breaking it is high. Very high.” [[82]](#footnote-83)
11. That said, a party alleging to have suffered racial discrimination is not absolutely required to provide direct evidence.
12. The following excerpt, drafted as part of an application to evaluate work done by police officers, also applies in a prison context:

[translation]

It is obviously very rare, except in the case of an outright admission, to find direct evidence that actions performed by a police officer against a citizen were motivated by the colour of the citizen’s skin. More often than not, the evidence is circumstantial.[[83]](#footnote-84)

1. In fact, [translation] “racial profiling is generally a clandestine practice that can arise from unconscious stereotypes”,[[84]](#footnote-85) such that [translation] “proof of racial profiling is rarely made through direct evidence”.[[85]](#footnote-86)

[translation]

[254]  It would be wrong to [translation] “require direct evidence of racial profiling without considering the inferences that may be drawn from the circumstantial evidence or the assessment of that evidence in light of the teachings set out in the literature on racial profiling.[[86]](#footnote-87)

1. More than 25 years ago, the Supreme Court of Canada urged all judges to take “judicial notice” of the “history of discrimination” affecting Black persons in Canada, citing with approval the following excerpt from the Court of Appeal for Ontario:

Racism, and in particular anti-black racism, is a part of our community’s psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes.[[87]](#footnote-88)

(Emphasis added)

1. Hence, in *Miller*, the Tribunal acknowledged that it [translation] “must take judicial notice of and bear in mind the history of discrimination that certain disadvantaged groups in Canadian society have suffered, including racism and discrimination against persons suffering from mental health problems”. [[88]](#footnote-89)
2. Then, in *Nyembwe*,[[89]](#footnote-90) the Tribunal recognized the importance of taking judicial notice of the social context of an allegation of racial profiling, and that no expert evidence is needed to document the phenomenon:

[translation]

[176]  When called upon to decide whether actions are motivated by racial profiling, the Tribunal must consider and take judicial notice of the past discrimination suffered by certain disadvantaged groups in Canadian society, including racism and anti-black racism, the prevalence of which is directly linked to the history of slavery and the subjugation of persons of African ancestry in Canada.

[177]  Given that that studies on racial profiling are rare, it is fortunate that expert evidence is not systematically required to explain to the courts how racism manifests itself or how conscious and unconscious stereotypes about racialized persons play a role in situations submitted to the courts....

[178]  Racial profiling is generally the expression of an unconscious societal bias. Sociological studies provide statistics on the rate at which racialized persons are assaulted. The studies note that this number is inexplicably disproportionate in relation to non-racialized groups and identify the behaviours that have a discriminatory effect on these populations.

(Emphasis added)

1. In *R. v. Le*,[[90]](#footnote-91) the Supreme Court of Canada wrote that “[m]embers of racial minorities have disproportionate levels of contact with the police and the criminal justice system in Canada”.[[91]](#footnote-92) It based this conclusion on reports, studies, and other credible documents of which the courts may take judicial notice.[[92]](#footnote-93)
2. That said, there appear to be relatively few empirical studies on the treatment of racialized minorities in the prison environment.[[93]](#footnote-94)
3. Nevertheless, the CDPDJ filed in evidence the Office of the Correctional Investigator Annual Report 2021-2022, [[94]](#footnote-95) which includes a chapter entitled “Update on the Experiences of Black Persons in Canadian Federal Penitentiaries”.
4. Although this section of the document describes the situation prevailing in certain federal penitentiaries – including the medium-security facility in Cowansville, Quebec – it reveals that, in these penitentiaries, Black inmates:

* “represented 9.2% of the overall incarcerated population, despite representing about 3.5% of the Canadian population”;[[95]](#footnote-96)
* are for the majority “young men with the largest proportion of Black individuals falling between the ages of 18 and 30 years”;[[96]](#footnote-97)
* “were disproportionately involved in use of force incidents”.[[97]](#footnote-98) More specifically, Black, Indigenous and people of colour “accounted for 60% of all uses of force, while representing 44% of the federally incarcerated population”,[[98]](#footnote-99) which led the correctional investigator to conclude that “race is significantly and uniquely associated with the application of force in federal prisons”.[[99]](#footnote-100)
* “were consistently overrepresented for discretionary charges such as disobeying an order or a rule”[[100]](#footnote-101) between 2016 and 2021; and
* “experience discrimination by correctional officials through the use of racist language, as well as being ignored and disregarded in ways that increase feelings of marginalization, exclusion and isolation”.[[101]](#footnote-102)

1. In *Nyembwe*, the Tribunal had the benefit of a sociologist’s expert report explaining the stereotypes “associated with Black men in general and in Quebec in particular”,[[102]](#footnote-103) which led to the following conclusion:

Racism against black men is influenced by a set of negative stereotypes imagined and driven by the collective imagination since the 17th century to justify the treatment of slaves, stereotypes that portray them as being more criminal, physically stronger, more violent, more aggressive, more threatening, poorer, and less intelligent than white men. These stereotypes – absorbed by a part of the population, consciously or not – lead police officers to more rapidly and automatically suspect black men of being involved in criminal activity, and to treat them more severely and with more force than white men. This situation is well-known to the courts.[[103]](#footnote-104)

(Emphasis added)

1. Although the Tribunal is not able to find that the racist comments reported were uttered by any specific CO, the fact nevertheless remains that the deployment of an abnormally high number of COs and the disproportionate force they employed to compel Mr. Toussaint to submit to the strip search are fully consistent with these stereotypes,[[104]](#footnote-105) which fuel racial discrimination in a prison environment.
2. In *Bombardier*, the Supreme Court of Canada found that it was sufficient for the action of the person to whom the contested distinction or exclusion is imputed to be “based in part” on the ground of discrimination invoked, or in other words, that this ground “need only have contributed”[[105]](#footnote-106) to the impugned act, even if that contribution was unconscious.[[106]](#footnote-107)
3. In light of the evidence, it appears inconceivable that the widespread stereotypes relating to race or colour had no influence whatsoever, even unconsciously, on the COs intervention, given their brutal and indeed inhuman treatment of Mr. Toussaint until he left the facility at the end of the day on December 4, 2016.

### **The nullification / impairment of the right to equality**

1. Section 10 of the *Charter* requires a finding of discrimination at first sight (or *prima* *facie* discrimination) if the contested distinction or exclusion has the effect of nullifying or impairing the full and equal recognition and exercise of any of the rights or freedoms guaranteed by the *Charter*.
2. The CDPDJ submits that the treatment inflicted on Mr. Toussaint had a prejudicial effect on him that impaired his right to equality by depriving him of the recognitions of his right:

* to personal security, inviolability, and freedom;[[107]](#footnote-108)
* to the safeguard of his dignity;[[108]](#footnote-109)
* to obtain, without discrimination, the services ordinarily offered to the prison population;[[109]](#footnote-110)
* not to be subjected to unreasonable search;[[110]](#footnote-111)
* to be treated, as a detained person, “with humanity and with the respect due to the human person”;[[111]](#footnote-112) and
* to receive, as a detained person, separate treatment appropriate to his age and mental condition.[[112]](#footnote-113)

1. At this third stage of the analysis, the focus must remain on the anti-discrimination standard. It is clear that the plaintiff need not establish a violation of any of those rights or freedoms whose recognition or exercise would have been compromised by discrimination:

[53]  … the plaintiff must show that the distinction, exclusion or preference affects the full and equal exercise of a right or freedom guaranteed to him or her by the *Charter*. The *Charter*… does not protect the right to equality *per se*; this right is protected only in the exercise of the other rights and freedoms guaranteed by the *Charter….*

[54]  This means that the right to non‑discrimination cannot serve as a basis for an application on its own and that it must necessarily be attached to another human right or freedom recognized by law. However, this requirement should not be confused with the independent scope of the right to equality; the *Charter* does not require a “double violation”..., which would make s. 10 redundant….[[113]](#footnote-114)

(Emphasis added)

(References omitted)

1. In other words:

[139]  … for a claim to succeed under s. 10, the equality provision, the complainant must show that the exercise of one of the rights and freedoms guaranteed by the QuebecCharter other than equality was affected in a discriminatory way but without having to show that that right or freedom was independently violated.[[114]](#footnote-115)

(Emphasis added)

(References omitted)

1. This means that section 10 guarantees [translation] “a broad right to equality in the enjoyment of all rights and freedoms set out in the *Charter*”.[[115]](#footnote-116)
2. In this case, Mr. Toussaint was deprived of the possibility of full and equal enjoyment of some of his most fundamental rights and freedoms because of the treatment the COs subjected him to without regard to his mental state or to the fact that he belongs to a group traditionally exposed to stereotyping, particularly in prison settings.
3. It cannot be denied that this situation had a [translation] “negative impact”[[116]](#footnote-117) on him and that it was disadvantageous and prejudicial to him.[[117]](#footnote-118)
4. The Tribunal therefore concludes that the CDPDJ has established *prima facie* discrimination against Mr. Toussaint.

## Justification

1. In *Bombardier*, the Supreme Court of Canada wrote:

[64] … If... the defendant succeeds in justifying his or her decision or conduct, there will have been no violation, not even if *prima facie* discrimination is found to have occurred. In practical terms, this means that the defendant can either present evidence to refute the allegation of prima facie discrimination, put forward a defence justifying the discrimination, or do both.[[118]](#footnote-119)

(Emphasis added)

1. The defence may differ depending on whether the discrimination was based on a “handicap” or was related to “race/colour”. These grounds should be dealt with in separate sections.

### ***The defence of “undue hardship” in matters involving a “handicap”***

1. The establishment of *prima facie* discrimination is the first of two steps in the analysis.[[119]](#footnote-120)
2. The second step concerns the justifications the defendant may attempt to raise to avoid incurring liability for failure to accommodate a person with a “handicap”: “Second, the defendant can... justify his or her decision or conduct on the basis of the exemptions provided for in the applicable human rights legislation or those developed by the courts”.[[120]](#footnote-121)
3. The Quebec *Charter* does not contain specific justificatory provisions conferring any exemption whatsoever on correctional facilities or members of their staff who commit discriminatory acts towards an inmate.
4. Yet this does not mean they are deprived of a “defence of justification”.[[121]](#footnote-122) Here, it is based on the notion of “undue hardship” developed in the case law as a limit to the duty of reasonable accommodation inferred from section 10 of the Quebec *Charter*:[[122]](#footnote-123) “The duty to accommodate is not unlimited; its scope in any particular case is defined by the symmetrical concepts of “reasonable accommodation” and “undue hardship””.[[123]](#footnote-124)
5. These remarks of the Supreme Court of Canada, made in the context of the relationship between an employer and the victim of a work-related injury, can also apply, with the necessary adaptations, to the relationship between a correctional facility and an inmate:

[92]  Inflexibility, short of undue hardship, in the application of an employer’s employment standards is a failure to accommodate and, consequently, a discriminatory practice. Unlike the Act, the origin of the disability does not matter for the Quebec *Charter*; while it need not be a workplace accident, it includes disability arising from such an accident. A failure by the employer to reasonably accommodate its disabled employee is discriminatory as it constitutes a violation of the disabled employee’s right to equality…[[124]](#footnote-125)

(Emphasis added)

1. Also in a labour law context, the Court noted:

[22]  The importance of the individualized nature of the accommodation process cannot be minimized. The scope of the duty to accommodate varies according to the characteristics of each enterprise, the specific needs of each employee and the specific circumstances in which the decision is to be made…[[125]](#footnote-126)

1. By analogy, the accommodation process in a correctional environment is adjusted on the basis of the characteristics of the prison facility – including “its public policy responsibilities”,[[126]](#footnote-127) the special needs of the inmates there, and the specific circumstances in which decisions about them are made.
2. Paraphrasing the “operative principles” of reasonable accommodation in a workplace environment as defined in the case law, we may transpose them to a prison environment as follows:

* [the correctional facility] is not required to establish that it is “impossible... to accommodate” the [inmate perceived as having a disturbed mental state], only that nothing else reasonable or practical could be offered”;
* “an individualized analysis is required”;
* “the duty to accommodate includes both procedural and substantive duties”; and
* “the undue hardship threshold means [a correctional facility] will always bear some sort of hardship”.[[127]](#footnote-128)

1. In sum, the determination of whether a hardship caused by the accommodation is “undue” depends largely on a contextual analysis: [translation] “[t]he duty to accommodate must be assessed taking into account all the unique features of the context of the intervention”.[[128]](#footnote-129)
2. What can be said about this context?
3. ***First,*** Mr. Toussaint was serving an intermittent sentence of imprisonment. According to expert Philippe Bensimon, a doctor of criminology (PhD) who worked for Correctional Service Canada for 27 years, this type of sentence is given to people who have committed acts that are [translation] “of minor seriousness”[[129]](#footnote-130) and who therefore represent a low risk of dangerousness: [translation] “These sentences are for offenders who are not socially or physically dangerous, as established in light of, among other things, a presentence report”.[[130]](#footnote-131)
4. [translation] “It’s primary school”, testified the expert, offering a metaphor. He insists on the importance of distinguishing this status from that of a convict serving a continuous sentence, who [translation] “remains confined within four walls 24 hours a day” and who must learn [translation] “to deal with his new environment, rub shoulders with staff and fellow inmates... day and night”.[[131]](#footnote-132) As Unit Manager Leclerc states, for example, [translation] “the intermittents never walk around alone in the facility”.[[132]](#footnote-133) Safety reasons justify why contact with the regular population is avoided.[[133]](#footnote-134)
5. ***Second***, Mr. Toussaint, who was only 21 years old at the time, was going through the prison admissions[[134]](#footnote-135) for the 33rd week in a row, and his record documented no events suggesting that his behaviour posed a risk to the safety of the COs.
6. This leads to the following observation from expert Bensimon: [translation] “the inmate’s profile and his sentence with less than two months left before its legal expiry were ignored, both clinically and in terms of security, even though this is at the very least basic information that must be considered before any use of force”.[[135]](#footnote-136)
7. ***Third***, from his arrival at the prison on December 4, 2016, Mr. Toussaint’s conduct suggested that he was, so to speak, [translation] “spaced out” and that he was not behaving [translation] “normally”. CO Belcourt told Unit Manager Leclerc, who himself made the same observation during the admission procedure and throughout the entire intervention that followed:

[translation]

* “I could see he was like not his usual self”;[[136]](#footnote-137)
* “I said to myself: Was he using? And then, he... You know, he didn’t seem to come back, you know, even when we were talking to him”;[[137]](#footnote-138)
* “Because now, we needed to know: Was he intoxicated?”;[[138]](#footnote-139)
* “I’ve seen guys, they... You know, they start climbing all over, agitated delirium that I, at one point, I thought Mr. Toussaint was doing that too”.[[139]](#footnote-140)
* “Because he was having a crisis”.[[140]](#footnote-141)
* “He wasn’t happy, and that’s when he became more disorganized”;[[141]](#footnote-142)
* “We preferred not to take a chance with his... either his intoxication, or his mental health”;[[142]](#footnote-143)
* “That means, then, he was disorganized again;[[143]](#footnote-144)
* “That’s when I said to myself: “For sure he’s intoxicated””;[[144]](#footnote-145)
* “Maybe he’s in an agitated delirium”;[[145]](#footnote-146)
* “Was it drugs? Was it his mental health?”;[[146]](#footnote-147)
* “Several times, I tried to establish contact with him”;[[147]](#footnote-148)
* “I think he was no longer there. ... He might have been in an agitated delirium, drug use. You know, he was disoriented”;[[148]](#footnote-149)
* “we had somebody who... who was no longer in touch with reality”;[[149]](#footnote-150)
* “he was disorganized, and he was disconnected from... from reality surely”;[[150]](#footnote-151)
* “You know, the person wasn’t there anymore”;[[151]](#footnote-152)
* “He looked like he was still disconnected”;[[152]](#footnote-153)
* “Well, as I said earlier, from the beginning I suspected a... you know, that he used drugs or a mental health issue. ... As I said earlier, I said it earlier, I said: “You know, look, that guy, you know, we kind of wonder whether maybe mental health”.[[153]](#footnote-154)
* “It might have been mental health, you know”;[[154]](#footnote-155)
* “He looked like he was talking to himself”;[[155]](#footnote-156)
* “He wasn’t there anymore, and he was growling and...”[[156]](#footnote-157)

1. In the view of the Tribunal, Mr. Toussaint’s problematic conduct when he arrived at the prison and the perception that he might have been intoxicated or experiencing a mental health problem justified removing him from the other inmates and bringing him to cell 36, which was used as a [translation] “waiting room”.
2. [translation] “I waited”, Mr. Toussaint testified, specifying that it was the first time that the wait time was so long; usually it was no more than 20 or 30 minutes.
3. The subsequent arrival of Unit Manager Leclerc and four COs with the intention of handcuffing him and moving him elsewhere clearly made a strong impression on him.
4. In that regard, expert Bensimon wrote:

[translation]

... handcuffing did not require the intervention of five COs, whatever the position of the inmate, who at no time assaulted any of the members present.

... Regardless of the inmate’s position, handcuffing is performed by one or two staff members, not three or five.[[157]](#footnote-158)

1. Once handcuffed with his hands behind his back, Mr. Toussaint was escorted while being forced to walk backwards. He had never seen an inmate being moved this way. To him, it was [translation] “totally incomprehensible”, yet all they did was repeat, over and over again, [translation] “It’s procedure”.
2. This was the very first time he had been brought to department 5. Once in cell 1, he was ordered to face the wall, with both knees on the ground: [translation] “I didn’t want to kneel”, he admits.
3. The plan was to perform the strip search. Because he resisted, he was brought to the ground, his face against the dirty cell floor.
4. [translation] “I heard them talking about a knife”, [translation] “a knife that they needed”, he says. [translation] “I was afraid”.
5. All indications are that he became disorganized as of that moment. [translation] “I had a defensive reaction”, he admits, saying that he was [translation] “afraid, in distress”.
6. Expert Bensimon raised the possibility of [translation] “a disability related to a state of stress and/or physical and emotional pain, given the turn of events and the number of COs present”,[[158]](#footnote-159) adding that [translation] “a state of emotional stress” cannot [translation] “be mistaken for violence”.[[159]](#footnote-160) In his opinion, [translation] “coercion too quickly supplanted any type of communication or helping relationship”.
7. For the Tribunal, there were at the time ample indications that the intervention under way was being performed on a person who did not understand the instructions being given to him or whose mental state was seriously disturbed.
8. [translation] “He didn’t seem to understand”, said Unit Manager Leclerc, who was in charge of the intervention. By his own admission, he recognized at that moment that [translation] “He wasn’t doing well”.
9. At the time, an accommodation measure was needed to stop the intervention and avoid the disproportionate use of force[[160]](#footnote-161) against an individual who was difficult to control despite the presence of an abnormally high number of COs being deployed around him.
10. ***Fourth,*** the facility’s procedures allowed for the application of [translation] “a reasonable alternate solution”. In an Instruction entitled “*Prise en charge d’une personne incarcérée et gestion des documents légaux”*[[161]](#footnote-162) (taking charge of an inmate and managing legal documents), the Direction générale des services correctionnels of the MSP recommends that the staff in its facilities perform a summary assessment of the physical and mental health of all persons taken into custody. Subsection 5.2.1 states the following:

[translation]

Does the person appear intoxicated? Are the person’s comments coherent? ... More specifically, the goal of the assessment is to determine whether the person is in a state permitting lockup and, if they are, whether they have needs requiring specific interventions.[[162]](#footnote-163)

(Emphasis added)

1. This same subsection of the Instruction breaks down the specific needs of an inmate that must be dealt with when their state does not require being brought to the hospital.

[translation]

(e.g., intoxication, incontinence, suicidal tendencies, psychiatric issues, anxiety, nervousness, panic, minor physical injuries), the person must be admitted and have access to an appropriate intervention as soon as possible (e.g., hygiene measures, first aid, assistance of a worker).[[163]](#footnote-164)

(Emphasis added)

1. Incidentally, this overlaps with the concern expressed in expert Bensimon’s report, based on his experience as [translation] “clinician in the criminal field for 34 years”:

[translation]

How can it be that every type of helping relationship or non-coercive approach was or seems to have been ignored by the staff on guard duty at reception, if it is true, as the COs claim, that Samuel Toussaint appeared, seemed, was, or could have been in a perceived abnormal or intoxicated state... ?[[164]](#footnote-165)

1. Why did they not simply direct Mr. Toussaint to the infirmary?
2. Unit Manager Leclerc submits that he could not send him there because he would have been near people who [translation] “have either committed sexual abuse or have mental health problems”[[165]](#footnote-166) or those who move about [translation] “in wheelchairs”. He adds:

[translation]

... it’s really typical, you know... mental health there, you know, it’s... it’s something. And bringing in someone new, when I haven’t analyzed the person, things like that, I’m not the one who decides that.

...

Also, we’re limited in terms of cameras there, so...[[166]](#footnote-167)

1. First, cell 1 also had no functioning cameras. Second, nothing shows that any steps were taken with the infirmary to determine whether it was possible to accommodate Mr. Toussaint safely in the circumstances.
2. “More than mere negligible effort is required to satisfy the duty to accommodate”.[[167]](#footnote-168)
3. Of course, no one contests the fundamental importance of security in a prison, whether of staff, inmates, or visitors. It has even become an international norm regarding which there is a broad consensus: “The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times”.[[168]](#footnote-169)
4. However, absolute security is “impossible to attain”.[[169]](#footnote-170) That is why only an “excessive” or “serious risk” to the safety of others may constitute “undue hardship”.[[170]](#footnote-171) Subjective and absolutist notions of safety seem to have provided more guidance for the decisions of Unit Manager Leclerc, who believes that [translation] “[i]t’s always necessary to think of the worst, ultimately”.[[171]](#footnote-172)
5. And yet, a viewing of the video recordings reveals no hetero-aggressive actions by Mr. Toussaint towards the COs, which leads expert Bensimon to write that he [translation] “**at no time** presented a risk” to their safety:[[172]](#footnote-173) “None of the images show or tend to show any strike delivered by Mr. Samuel Toussaint”; [[173]](#footnote-174) [translation] “None of the video images tend to indicate any aggressive posture...”;[[174]](#footnote-175) [translation] “the inmate **did not commit assault**”.[[175]](#footnote-176)
6. We must recall, while making adaptations for the prison context, “the settled law that routine strip searches are inappropriate where the individual is being held for a short time in... cells, is not mingling with the general prison population, and where the [COs] have no legitimate concerns that the individual is concealing weapons that could be used to harm themselves or others”.[[176]](#footnote-177)
7. ***Fifth***, the correctional facility receiving a person with a “handicap” must deal with that condition in a way that mitigates the negative consequences for that person.
8. As soon as Mr. Toussaint became disorganized in cell 1 even though he was handcuffed with his hands behind his back, lying prone on the ground, and being held down by four COs, the situation required, at a minimum, accommodation in the form of a [translation] “time out” for de-escalation purposes on the one hand, and an intervention better adapted to the circumstances,[[177]](#footnote-178) on the other:

[translation]

[230] Defusing conflicts using de-escalation techniques and the least amount of force necessary in the circumstances can constitute accommodation measures that police officers [or COs] may implement when intervening with persons with mental health problems.[[178]](#footnote-179)

(Emphasis added)

1. Cutting off Mr. Toussaint’s clothing, an action started by CO Comeau-Bastien – who had taken over, to Unit Manager Leclerc’s great relief – and then completed by CO Dubé-Blouin, exacerbated the situation, which CO Comeau-Bastien himself and CO Jean-René Brousseau already described as [translation] “chaotic”.
2. Mr. Toussaint was already completely without clothing when the COs, locked in the mindset whereby a strip search had to be performed at all costs, moved him to cell 12.
3. Led to the back of this cramped room, he was struck and forced to kneel. CO Comeau-Bastien rubbed his hand clad in a glove imbued with an inflammatory agent across his face, then sprayed the same agent directly in Mr. Toussaint’s eyes, immediately provoking an intense burning sensation.
4. In this regard, expert Bensimon stated, [translation] “Video P-6 does not show the minimum regulatory distance of 3 to 6 feet when the eyes are targeted by the OC liquid spray propellant”.[[179]](#footnote-180)
5. [translation] “I didn’t want to die”, testified Mr. Toussaint. [translation] “I was afraid of dying”.
6. The images viewed show that no fewer than nine COs, two of them carrying shields, were at the scene.
7. Commenting on Patrick Léveillée’s report, the use of force expert retained by the defendants, who states that this approach complied with [translation] “good practices” in this context, expert Bensimon wrote, [translation] “The excessive number of COs present, the use of hitting, and the use of chemical and/or inflammatory agents thus appear to be a common way of proceeding when dealing with a single man who is naked and lying with his face on the ground, in view of everyone”.[[180]](#footnote-181)
8. The duty to accommodate requires the body who is bound by it to be flexible in applying its standards and procedures.[[181]](#footnote-182)
9. Once Mr. Toussaint was completely naked and observable from every angle by several COs, the risk that he possessed an object dangerous to himself or others was greatly reduced. This is perhaps what led Unit Manager Leclerc to say that [translation] “from what [he] can remember, the search took place in cell 1”.[[182]](#footnote-183)
10. From that point on, the persistence on performing the search according to the usual procedure[[183]](#footnote-184) without regard to Mr. Toussaint’s condition or to the need to allow him to regain his senses is akin to a relentlessness incompatible with the very notion of accommodation.
11. ***Sixth***, once Mr. Toussaint was decontaminated and summarily examined by the nurse, he was left alone from11:10 a.m. onwards in cell 10, naked and suffering.
12. All indications are that no one was concerned with his state for the rest of the day, until he left the facility and went home.
13. But if he was [translation] “in an abnormal state, delirious, or intoxicated”, and if [translation] “his mental balance presented some sort of dangerousness giving rise to the use of force”, as the defendants submit, how can we explain Mr. Toussaint’s release at 4 p.m. that same day, [translation] “with no other form of preventive control”? This question, aptly raised by expert Bensimon,[[184]](#footnote-185) and which is in line with the rationale of reasonable accommodation, has remained without an answer, even after ten days of trial.
14. That said, in light of the evidence as a whole and the relevant contextual elements, the Tribunal finds that the defendants have not established that “undue hardship” rendered it impossible to put in place an accommodation to deal reasonably with Mr.  Toussaint’s “handicap” on December 4, 2016.

### ***Rebuttal of the allegation of racial profiling***

1. The party alleged to have engaged in a discriminatory practice based on race or skin colour may attempt to rebut such an allegation.[[185]](#footnote-186)
2. All the COs who testified before the Tribunal denied that they said or even heard racist insults aimed at Mr. Toussaint. Moreover, the AGQ, on the basis of expert Léveillée’s report, maintains that they acted according to good practice in the use of force.
3. That said, in such situations, the existence of [translation] “unusual treatment” of a Black person may reveal racial profiling in comparison with the White majority:

[translation]

With respect to racial profiling, the plaintiff must prove that the treatment to which they were subjected by a person in authority is unusual. In other words, was there, according to the – generally circumstantial – evidence available, improper behaviour by a police officer as compared with usual practices in similar circumstances?[[186]](#footnote-187)

(Emphasis added)

(References omitted)

1. Because COs, like the police, are [translation] “persons in authority”, the [translation] “unusual treatment” of a Black inmate may make it difficult to rebut the allegation of racial profiling made against them.
2. It is sufficient to invoke a few pieces of evidence to illustrate the “unusual treatment” suffered by Mr. Toussaint.
3. ***First,*** he was treated with the same firmness that would have been used on a hardened criminal, whereas he was 21 years old, having his first experience in prison, and, moreover, serving an intermittent sentence, which according to expert Bensimon is a punishment reserved for convicts presenting low levels of dangerousness. This last statement by the expert is logical and corroborated by the fact that Mr. Toussaint was allowed to leave at the end of the day.
4. ***Second,*** it appears highly exceptional that an inmate serving an intermittent sentence should have to submit, under duress of COs, to the cutting up of his personal clothes with a Hoffman knife.
5. ***Third***, escorting a totally naked male inmate through corridors from one cell to another, in view of two female COs, is clearly not a common practice. Mr. Christian Thibault, Director of the CDQ at the time of the events at issue, admits that [translation] “it isn’t the usual practice”[[187]](#footnote-188) to move an inmate within the interior of the facility when he is completely naked. He adds that [translation] “it isn’t common”[[188]](#footnote-189) to allow female COs to have visual access to a totally unclothed male inmate.
6. Moreover, according to the applicable rule, [translation] “strip searches must always be done out of sight, in accordance with the principle of respect for human dignity set out in the *Charter of human rights and freedoms* and the *Canadian Charter of Rights and Freedoms*”.[[189]](#footnote-190)
7. ***Fourth,*** it is abnormal to mobilize such a high number of COs to intervene with Mr. Toussaint. Indeed, Director Thibeault acknowledges, [translation] “The agents were very, very numerous”. Nothing can justify the presence near the end of the intervention of at least nine of them – some active, others mere [translation] “spectators”[[190]](#footnote-191) – in a very small cell, facing a young man who was naked, handcuffed, and unstable, unless they wanted to make such an impression on him that it bordered on intimidation.
8. ***Fifth,*** the decontamination procedure used did not comply with standards. According to Mr. Toussaint’s testimony, which is not contradicted on this point, the CO who performed this procedure rubbed his face with the shower head. Moreover, the length of the decontamination was much shorter that what is prescribed by the Instruction, which requires [translation] “washing the contaminated skin” and [translation] “rinsing the eyes thoroughly with lukewarm water for at least 15 minutes”.[[191]](#footnote-192)
9. ***Sixth,*** once through the decontamination station, Mr. Toussaint was escorted to cell 10, naked and wet. He remained there until he left at the end of the day, without receiving towels, clothing – not even an anti-suicide smock – a mattress, or a meal. These are all unusual breaches, in the words of Director Thibeault himself:

[translation]

* “we don’t usually leave anyone naked in a cell”;[[192]](#footnote-193)
* “this isn’t a practice we encourage, that’s for sure, to leave someone there, because it’s his dignity”.[[193]](#footnote-194)

1. According to the applicable instruction, [translation] “once the search is over, the leader asks a worker to cover the [inmate] using an anti-suicide smock”.[[194]](#footnote-195) That was not done. And yet, this type of garment [translation] “easily slides over the feet and can be adjusted properly despite the existence of restraining material on the feet and the hands”.[[195]](#footnote-196)
2. Regarding the fact that Mr. Toussaint was not served a meal, Director Thibeault was astonished: [translation] “That’s excessively rare. Because food, in detention, is extremely important”.[[196]](#footnote-197)
3. It seems necessary to recall that the penitentiary system must not further aggravate the inherent suffering of imprisonment[[197]](#footnote-198) and that all detainees are entitled to receive good quality food from the penitentiary administration at usual hours,[[198]](#footnote-199) as well as separate and sufficient bedding.[[199]](#footnote-200)
4. ***Seventh,*** because Mr. Toussaint’s clothing was cut and torn earlier in the day, he received used clothing from Unit Manager Leclerc to wear home. The T-shirt he was given was undoubtedly white when first manufactured but was apparently irremediably soiled and torn, in addition to being identified with “CDQ” and “(prison)” in permanent felt marker.
5. In cross-examination, Director Thibeault squarely admitted that the T-shirt was non-compliant.
6. It is difficult in these conditions not to bring to mind the internationally applicable rule whereby an inmate’s clothing “shall in no manner be degrading or humiliating”[[200]](#footnote-201) and that when authorized to leave the prison, the person’s clothing must be “inconspicuous”.[[201]](#footnote-202)
7. Section 9 of the *Regulation under the Act respecting the Québec correctional system*[[202]](#footnote-203) enshrines an inmate’s right, when authorized to leave the facility, to receive clothing “that does not identify the person as an inmate”.
8. The cumulative effect of these derogations or [translation] “unusual conduct that departs from generally accepted practice” [[203]](#footnote-204) is so significant that the most rational or likely explanation for the conduct of the COs is that it was related, whether consciously or not, to the race or colour of the young inmate subjected to these practices.[[204]](#footnote-205)
9. Ultimately, the Tribunal finds that Mr. Toussaint was the victim of unlawful discrimination leading to the use of force against him which was unnecessary and disproportionate, and which demands a remedy in his favour.

## Remedies

1. The CDPDJ’s claim is in three parts. On the one hand, it claims $50,000 for the moral injury suffered by Mr. Toussaint, which it imputes solidarily to the AGQ, as employer, and to each of the COs involved in the events.
2. On the other hand, it asks that each of the CO defendants be personally condemned to pay $2,000 in punitive damages, without regard to the different degrees of involvement they may each have had in the events.
3. Lastly, it seeks various orders in the public interest, including the development and dissemination of a strategic plan to address discriminatory profiling and for the holding of a mandatory training session on the topic for all staff of the correctional facilities under the MSP.

### **Moral injury**

1. Mr. Toussaint feared for his life. He testified that he was overwhelmed by a [translation] “variety of emotions” after the events, saying that he was [translation] “desperate”, [translation] “disoriented”, [translation] “completely destroyed”, [translation] “broken”, [translation] “humiliated”, [translation] “inferior”, and [translation] “no longer safe”.
2. When he got home on December 4, 2016, he could not relate the [translation] “extremely serious” situation he had just experienced to his father: [translation] “couldn’t express myself”, he said. [translation] “I was crying, I wanted to die”.
3. He testified, [translation] “What happened to me was horrible”.

[translation]

This event destroyed me. I have no self-confidence anymore. I’m afraid of everything. I felt inferior to White men, to men with white-coloured skin... I had no self-esteem left, I was ashamed of myself, I felt dirty... It continues still today... and with the years of work on myself, I didn’t want to allow it to keep harming my existence... Since that day... yes, I have drug problems... and after that my drug use considerably increased because I was trying to forget that. Ultimately, it hasn’t stopped... I’ll live with it, I keep moving forward, and the day I got the letter from the Human Rights Tribunal, I had like a ray of hope about this... Because I found that treatment really degrading, humiliating even as an inmate, I think I had rights...

1. The feeling of injustice led him to take steps with the police department of the city of Québec, the Sûreté du Québec, and the Protecteur du citoyen du Québec, apparently without success: [translation] “No answer”, he laments.
2. His fall 2016 semester at Cegep was irremediably undermined: [translation] “I couldn’t continue”.

\* \* \*

1. Mr. Toussaint’s parents gave emotional testimony about the condition their son was in when he got home from the correctional facility on December 4, 2016, and in the weeks that followed.
2. His father, Mr. Serge Toussaint, who has had a career as a teacher and school principal, testified that he received a call from his son around 4 p.m.
3. He and his spouse, Ms. Marie-Andrée Duré, a nurse who happened to be close to him at the time, heard his [translation] “panicked voice” over the telephone: [translation] “Dad, I was abused, they want to destroy me”.
4. Their son took a certain amount of time to get home, and he remained alone in his car for about 15 minutes before finally coming inside the house around 5:30 p.m., wearing a torn T-shirt.[[205]](#footnote-206)
5. Once inside, he handed his father the bag he was given at the prison containing his shredded clothes (sweater,[[206]](#footnote-207) pants,[[207]](#footnote-208) and underwear[[208]](#footnote-209)) that were now irreparable because of the effect of the Hoffman knife.
6. He promptly took refuge in his room, uttering multiple [translation] “cries of distress” as described by the father, who was troubled by his son, who had been [translation] “massacred”, who was [translation] “in a state of shock”, and who yelled [translation] “they almost killed me!”.
7. He cried out [translation] “all night”: [translation] “He didn’t speak; he just screamed”, the parents said.
8. At one point on December 5, the parents heard their son make suicidal statements. Ms. Duré testified, [translation] “I was panicking. That wasn’t my son!”
9. Desperate, the parents called the 8-1-1 service for help and then tried to convince their son to go to the hospital. He refused. [translation] “I didn’t trust anyone”, he says.
10. Finally, on the morning of December 6, 2016, he agreed to go to the emergency room at Hôpital St-Sacrement in the city of Québec, accompanied by his parents.
11. He remained in the hospital for about 30 days, receiving care for his mental condition.[[209]](#footnote-210) First he was at Hôpital Enfant-Jésus, then at the Institut universitaire en santé mentale de Québec.
12. According to his intermittent sentence schedule,[[210]](#footnote-211) he did not return to prison until January 8, 2017.
13. By January 29, 2017, he had served his full intermittent sentence.
14. It appears that the treatment he was subjected to on December 4, 2016, profoundly affected him and has had damaging and lasting repercussions.
15. His life was completely destroyed, his father fumes. [translation] “They created a monster”.
16. His mother, who knew her son as a cheerful person who loved life, deplores that the correctional facility, which was supposed to work on his rehabilitation, [[211]](#footnote-212) instead helped destroy him: [translation] “Samuel doesn’t exist anymore”.

\* \* \*

1. Determining an appropriate monetary remedy to compensate for the moral injury a person suffers as a result of the violation of their fundamental rights is a difficult exercise, since no accounting or mathematical formula can be used to calculate it. Rather, the issue is how to “assign a cash value to a qualitative loss”.[[212]](#footnote-213) In reality, dollars do not have the power to restore a wounded soul.
2. That said, the case before us must be compared with other analogous cases in which non-pecuniary damages were awarded as roughly similar compensation to victims whose injuries are alike.[[213]](#footnote-214)
3. In the recent case of *Louis c. Procureur général du Québec*,[[214]](#footnote-215) the plaintiff, who was charged with murder, was detained pending trial. After being placed in solitary confinement for a disciplinary breach, he had to be moved to a different cell to make room for another inmate suspected of hiding objects in his body cavities.
4. When the transfer was taking place, the intervention team felt that Mr. Louis was not moving as quickly as they wanted him to and not fully cooperating. A CO used an inflammatory agent on him, spraying it through the serving hatch in the cell door. The intervention team then conducted a hard entry for the purpose of handcuffing Mr. Louis.
5. The Court of Québec stated the following:

[translation]

The video recording shows that no fewer than eight officers intervened at one point or another during the few minutes that elapsed between the hard entry into the cell and the extraction of Mr. Louis. When exiting the cell, Mr. Louis was upright but being forced to walk backwards. He was held by an officer on both sides.[[215]](#footnote-216)

1. He was then escorted to a decontamination station. He complained that the water was too hot and increased the burning sensation.
2. He was then led to a cell where he was forced into a kneeling position, face against the back wall, to have his clothing cut off. He was then led back to the shower, completely naked but still handcuffed, with the entire intervention team present.
3. Once back in the cell, a nurse came to examine him while he was still forced to remain in a kneeling position. At that point there were nine persons surrounding him and [translation] “no measures were taken to protect his privacy”.[[216]](#footnote-217)
4. Mr. Louis testified that he was kicked directly in the face during the COs' intervention. Four of his teeth were damaged.
5. In this regard, the Court stated:

[translation]

Mr. Louis was kicked in the face while he was lying on the ground, his hands cuffed behind his back and surrounded by several correctional officers wearing their protective equipment and carrying batons. There is no possible justification for such actions in these circumstances. Prudent and diligent correctional officers do not conduct themselves in this manner when exercising their duties. With respect for the contrary view, the use of such measures against an inmate constitutes an unreasonable use of force. The custody exercised by a correctional facility over an inmate does not authorize such methods to maintain control over this person.[[217]](#footnote-218)

1. The Court therefore awarded Mr. Louis compensation of $15,000 for moral injury in relation with [translation] “the violation of his dignity and the flagrant lack of respect he experienced when he was kicked in the face”.[[218]](#footnote-219)
2. It should be noted that Mr. Louis, who was not serving an intermittent sentence, given the seriousness of the charge against him, sought a sanction for the kick he received in the mouth in his application, not the entire CO intervention.
3. In *Régie intermunicipale de police des Seigneuries c. Michaelson*[[219]](#footnote-220) – a case that is nearly 20 years old – a police officer went to Mr. Michaelson’s residence because, unbeknownst to him, his dog had just bitten an adolescent.
4. The dog threatened the police officer, who drew his weapon but kept it pointing down, along his thigh. The police officer told the dog’s owner that he would not hesitate to kill the dog if he was attacked.
5. Mr. Michaelson gave the dog to his son, who took it into the house immediately. Mr. Michaelson was beside himself with anger. He demanded that the police officer leave his property, but in vain.
6. A brief scuffle ensued.
7. The police officer ordered Mr. Michaelson to place his hands on the hood of his car because he was under arrest, but Mr. Michaelson refused to comply.
8. The police officer pepper sprayed Mr. Michaelson three times until the man managed with great effort to take refuge in his home.
9. Mr. Michaelson’s son tried to help his father. The officer chased after him, threw him on the ground in front of the garage, handcuffed him, and placed him in the back seat of the patrol car.
10. The father and son were ultimately brought to the police station, where, for the first time, they learned why the police officer had gone to their home.
11. They were detained the entire evening then finally released. The father was acquitted of the charges of obstructing a peace officer and assault laid against him.
12. The Superior Court assessed the moral injury suffered due to psychological trauma, pain, and inconvenience, including the obligation to undergo a criminal trial – without the extrajudicial fees, which were claimed under another head – at $20,000.
13. On appeal, the Court of Appeal of Quebec upheld this conclusion and provided the following explanation:

[translation]

[41] In this case, [Mr.] Michaelson was arrested after being pepper sprayed. The pain was intense. The effects lasted several hours. The neighbours witnessed his arrest. ...

...

[42] The trial judge did not elaborate on the exact nature of these [moral] damages. To determine the amount, the evidence allowed the judge to take the following into consideration: (1) pain, suffering, and inconvenience in connection with the clearly abusive use of pepper spray; (2) humiliation and damage to his reputation in front of his neighbours; (3) psychological stress; and (4) moral damages as a result of his unlawful arrest and abusive detention. All of these factors lead me to conclude that the damages awarded, although undoubtedly generous, do not justify the Court’s intervention.[[220]](#footnote-221)

1. In *Kosoian v. Société de transport de Montréal*,[[221]](#footnote-222) the appellant was arrested and her personal effects were searched after she failed to hold on to an escalator handrail in the metro despite a police officer’s order to do so.
2. The Supreme Court of Canada found that compensation of $20,000 was appropriate, and provided the following explanation:

When she took the escalator in the Montmorency subway station that evening, Ms. Kosoian certainly did not expect to end up sitting on a chair in a room containing a cell with her hands cuffed behind her back, nor did she expect to have her personal effects searched by police officers. I have no difficulty believing that such an experience caused her significant psychological stress.[[222]](#footnote-223)

1. That said, while the colour of the skin of the plaintiffs in *Louis*, *Michaelson*, and *Kosoian* do not appear to have influenced the treatment they received at the hands of the persons in authority, this immutable personal characteristic that forms part of Mr. Toussaint’s identity was a factor[[223]](#footnote-224) in the demeaning, humiliating, and traumatizing treatment the COs inflicted on him.
2. It is well established that for some offenders, the “experience of prison is harsher due to systemic racism”.[[224]](#footnote-225) Mr. Toussaint experienced this, and he has emerged forever damaged.
3. In matters involving racial profiling, where the victim did not receive treatment as harsh or degrading as Mr. Toussaint did, the Tribunal has awarded compensation for moral damages in the following amounts:

* $10,000 for a citizen of Arab origin who was subjected to racial insults by a police officer who conducted a background search without grounds in the context of a simple parking offence; [[225]](#footnote-226)
* $8,000 to a Black citizen stopped by the police at night, who was interrogated three times about possession of an illegal object or drugs, arrested, and subjected to a pat-down search before his vehicle was unlawfully towed for an unpaid fine;[[226]](#footnote-227)
* $10,000 to a Black citizen who was driving a luxury car whom the police stopped for no reason in front of the daycare where he had dropped off his young child;[[227]](#footnote-228)
* $15,000 to a Black citizen who was stopped by police, arrested, handcuffed, searched, and charged with disturbing the peace when he clearly did not match the description of the suspect sought;[[228]](#footnote-229)
* $8,000 to a Black citizen who was stopped by police officers who had done a U-turn to follow and intercept him because of his colour.[[229]](#footnote-230)

1. It should be noted that none of the victims in these cases had a mental condition that was also disturbed and required an adapted intervention as a reasonable accommodation.
2. In this case, Mr. Toussaint found himself lying on the dirty floor of a cell, his hands handcuffed behind his back, subjected to blows and joint holds by at least four COs before all of his clothes were cut off his body so that he was completely naked. He had to walk down the corridors of the prison without even a thread of clothing to conceal at a minimum his private parts. An inflammatory agent was used on him twice, provoking intense pain in his eyes and on the front of his body. After being roughly and rather quite hastily decontaminated, he remained wet and naked, and was placed in a cell without a mattress and without any clothing or food for the rest of the day, before having to return home wearing a torn, dirty, and stigmatizing T-shirt.
3. Psychologically, the event affected him to such an extent that he had to be hospitalized for the several weeks that followed and was thus unable to complete his semester at Cegep.
4. In light of the evidence as a whole and the precedents, the Tribunal finds that compensation of $40,000 is appropriate in the circumstances.

\* \* \*

1. As employer, the AGQ is bound to answer for actions committed by its subordinates, the COs, in the performance of their duties.[[230]](#footnote-231)
2. Let us now consider the solidary condemnation sought by the CDPDJ against the COs.
3. In cases involving racial profiling by police officers, the Tribunal has generally found that there was solidarity between them and the employer.[[231]](#footnote-232)
4. It must be noted that the number of interveners with the victim in those cases was comparatively limited, which made it easier to determine the respective degrees of responsibility for the discrimination that was proved.
5. In this case, nine COs are being sued personally.
6. It is difficult to conclude that CO Belcourt acted in a discriminatory manner, as his role was essentially limited to informing Unit Manager Leclerc of the fact that Mr. Toussaint had thrown a cigarette butt at him before going through admissions.
7. As for COs Jean-René Brousseau, Comeau-Bastien, Gagnon, Bouchard, Dubé-Blouin, Mykel Brousseau, and Robitaille, their levels of involvement vary. Some intervened physically with Mr. Toussaint, while others played a supporting role.
8. It is true that part of their interventions was recorded by the surveillance cameras, but the images viewed are in general not very clear, and the interactions between them were numerous and took place in very confined spaces where they were all close together and wearing similar uniforms. This makes it very difficult to isolate their individual actions. Moreover, there are no images showing what happened in cell 1 – where things took a turn for the worse – or in the decontamination room.
9. In addition, the COs’ written reports[[232]](#footnote-233) and their testimony sometimes diverge or are silent about which of them committed certain actions against Mr. Toussaint.
10. That said, article 1480 of the *Civil Code of Québec*[[233]](#footnote-234) sets out the following rule:

**1480.**  Where several persons have jointly participated in a wrongful act or omission which has resulted in injury or have committed separate faults each of which may have caused the injury, and where it is impossible to determine, in either case, which of them actually caused the injury, they are solidarily bound to make reparation therefor.

1. In *Montréal (Ville) v. Lonardi*,[[234]](#footnote-235) the Supreme Court of Canada noted that two conditions must be met for this provision to apply:

[19] ... First, it must be impossible to determine which person actually caused the injury. Second, there must have been either “join[t participation] in a wrongful act which has resulted in injury” or “separate faults each of which may have caused the injury”.

1. The intervention with Mr. Toussaint was the result of a concerted action, first under the orders of Unit Manager Leclerc, then under those of CO Comeau-Bastien to whom Leclerc delegated the lead of the use of force operations.
2. This was the work of a team, where each of the COs acted interdependently with his or her colleagues, with a “common intention”[[235]](#footnote-236) not “spontaneously and independently”.[[236]](#footnote-237)
3. In the view of the Tribunal, the failure to accommodate the “handicap” that Mr. Toussaint was dealing with arises from a glaring overestimation of his dangerousness and was based on racial prejudice and stereotypes.
4. “Join[t participation] in a wrongful act” resulted in a moral injury, and it is impossible to isolate their individual actions to precisely identify the perpetrators of the injury, especially because these stereotypes can be unconscious.
5. In *Lonardi*,[[237]](#footnote-238) the Supreme Court of Canada wrote:

[36] ... The liability provided for in art. 1480 *C.C.Q.* favours compensation of the victim. This objective is readily understandable in cases in which fault is established but it is impossible to prove a causal connection between the fault and the injury suffered by the victim.

(Emphasis added)

1. In this case, compensation for the victim should be all the more favoured because the requirement of a “causal connection” has been removed in cases involving discrimination.[[238]](#footnote-239) In the Court’s opinion, it “elevate[d] the test beyond what is required, since human rights jurisprudence focuses on the discriminatory effects of conduct rather than on the existence of an intention to discriminate or of direct causes”:[[239]](#footnote-240)

[51] A close relationship is not required in a discrimination case under the *Charter*, however. To hold otherwise would be to disregard the fact that, since there may be many different reasons for a defendant’s acts, proof of such a relationship could impose too heavy a burden on the plaintiff. Some of those reasons may, of course, provide a justification for the defendant’s acts, but the burden is on the defendant to prove this. It is therefore neither appropriate nor accurate to use the expression “causal connection” in the discrimination context. [[240]](#footnote-241)

1. Ultimately, the civil law rules must sometimes be softened to combat discrimination and its insidious manifestations more effectively:

[translation]

[T]he principle of integration into the general civil liability regime is not always appropriate in discrimination cases under section 10 of the *Charter*. We know, for example, that the notion of causation has been set aside by the courts in cases of indirect discrimination. The analysis in such cases focuses on the concrete consequences or effects of an otherwise neutral policy on an identifiable group protected by section 10. Because indirect discrimination may have been established without the knowledge of its perpetrator in good faith, how can fault be at issue? And how can we require a causal connection to be entitled to reparation when indirect discrimination expressly eliminates this requirement? It goes without saying that the regime established by the *Charter* in sections 10 and 49 must apply notwithstanding the rules of the *Civil Code*…[[241]](#footnote-242)

1. These last comments echo those of the Supreme Court of Canada in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*: [[242]](#footnote-243)

[26] … We should also not lose sight of the fact that enactments such as the *Quebec* *Charter* occasionally require intervention that is in no way related to the law of civil liability. It is sometimes necessary to put an end to actions or change practices or procedures that are incompatible with the *Quebec Charter* even where there is no fault within the meaning of the law of civil liability. The law of civil liberties may draw upon the law of civil liability where circumstances warrant. The law of delict does not set limits on the enforcement of the law of civil liberties.

1. That said, all the COs involved acted under the orders of Unit Manager Leclerc.
2. He was clearly overwhelmed by the events when he agreed that CO Comeau-Bastien should take over in cell 1, given the situation that has been described as already chaotic.
3. At that point, everyone could see that Mr. Toussaint was in a disturbed mental state and that this made him apparently insensitive to pain.
4. Unit Manager Leclerc had the authority to implement accommodation measures and to stop the intervention under way to provide a moment of respite to a person who, handcuffed and lying on the ground, presented no real danger.
5. What is more, the many derogations from the usual prison practices we have observed also reveal significant gaps in leadership.
6. All in all, the Tribunal finds that the AGQ, Unit Manager Leclerc, and COs Jean-René Brousseau, Comeau-Bastien, Gagnon, Bouchard, Dubé-Blouin, Mykel Brousseau, and Robitaille should be condemned solidarily to pay Mr. Toussaint $40,000.

### **Punitive damages**

1. The CDPDJ asks that each of the nine CO defendants be condemned to pay $2,000 in punitive damages.
2. Under section 49 of the *Charter*, such a condemnation requires establishing “unlawful and intentional interference” with the protection of Mr. Toussaint against discrimination.
3. It appears clear that all the actions taken by the COs to physically control him and force him to undergo a strip search were voluntary.
4. However, the “intention” required is not the intention to commit an act, but rather the intention to bring about the consequences of that act:

[121] ... there will be unlawful and intentional interference within the meaning of the second paragraph of s. 49 of the *Charter* when the person who commits the unlawful interference has a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct, or when that person acts with full knowledge of the immediate and natural or at least extremely probable consequences that his or her conduct will cause.[[243]](#footnote-244)

(Emphasis added)

1. In this case, the evidence does not support a finding that, aside from Unit Manager Leclerc, each of the eight CO defendants’ “state of mind was such that they intended to harm Mr. [Toussaint] or had knowledge of the adverse consequences their conduct would have for him”.[[244]](#footnote-245)
2. It is essentially the desire to subject him to the usual and mandatory strip search procedure without putting their own security at risk that motivated some of the COs to perform physical holds on him and then to use chemical restraints with the OC to get him to obey. In short, they carried out orders: [translation] “We always listen to the boss”, says CO Dubé-Blouin.
3. Obviously, following orders is not a licence to avoid all condemnation to pay punitive damages. There may be situations where the order given is so unreasonable that public order requires disobeying, not blindly executing: [translation] “an employee can refuse to obey when the employer’s instructions constitute abuse of right because they are unreasonable or discriminatory”.[[245]](#footnote-246)
4. That said, while it may be deplorable that the COs were apparently insensitive to Mr. Toussaint’s disturbed mental state and his needs, such recklessness is not sufficient for punitive damages to be awarded against them. Indeed, “an individual’s recklessness, however wild and foolhardy, as to the consequences of his or her wrongful acts”[[246]](#footnote-247) does not satisfy the test of “intentional” interference within the meaning of section 49 of the *Charter*.

\* \* \*

1. Unit Manager Leclerc’s situation is different, however. As the manager in charge who was on site at every phase of the intervention with Mr. Toussaint, he did not adapt to the circumstances and review the methods his team employed to minimize the use of force against an individual whose mental state was obviously disturbed.
2. He had control, and he had the power to avoid the use of disproportionate force against a 21-year-old inmate serving an intermittent sentence who, by all appearances, was not able to properly grasp the instructions the COs were giving him.
3. The brutal treatment reserved for Mr. Toussaint and the lack of consideration for his state in particular and of his person in general could not be without consequence on his psychological health.
4. A reasonable person knows or should know that this type of treatment can entail “immediate and natural or at least extremely probable consequences”[[247]](#footnote-248) in the form of trauma with long-lasting effects.
5. That said, article 1621 of the *Civil Code of Québec*[[248]](#footnote-249) sets out certain criteria that must guide the Tribunal when determining the value of punitive damages in a given case:

**1621.**  Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfil their preventive purpose.

Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor’s fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person.

1. Mr. Leclerc is no longer Unit Manager and no longer works in a correctional facility.
2. Nothing is known of his patrimonial situation, and the evidence does not indicate whether a third person could be required to pay the reparations.
3. At the hearing, when returning from a recess, the Tribunal was informed of the content of a discussion held in its absence between Mr. Toussaint’s father and Mr. Leclerc.
4. When asked about it, Mr. Leclerc stated:

[translation]

I told him that I hoped things were going well for his family, and that I thought it was a pretty big thing to be here today.

1. In the view of the Tribunal, a condemnation to pay $1,500 in punitive damages is sufficient to serve the objectives of punishment, deterrence, and denunciation established in the case law.[[249]](#footnote-250)

### **Orders in the public interest**

1. The CDPDJ asks for orders to compel the MSP to:

* Develop, implement, and disseminate to its staff a strategic plan on discriminatory profiling;
* Design and offer a periodic training or awareness-raising session on discriminatory profiling to all staff of correctional facilities in Quebec, along with a process to formally assess the knowledge acquired.

1. Section 80 of the *Charter* authorizes the Tribunal to render orders that not only repair the injury suffered by the victim of discrimination, but that also contain measures necessary in the public interest, so long as they have a connection with the dispute, are supported by the relevant evidence, and are appropriate in light of all the circumstances.[[250]](#footnote-251)
2. In the view of the Tribunal, these conditions are met here.
3. The evidence reveals that the COs have received no specific training on racial profiling or on how to intervene with a person who is disabled due to a mentally disturbed state.
4. Considering the documented phenomenon of the overrepresentation of Black persons in prisons, it is troubling that correctional facility staff are not more aware of the phenomenon of racial profiling and the prejudices and stereotypes that affect those targeted by it.
5. In a predominantly White environment such as the Québec city region – incidentally, none of the defendants is a Black man – the need to make staff aware of this reality is all the more critical.
6. Moreover, the smiles on the faces of some of the COs while watching the video recordings speak volumes as to the apparent indifference among their ranks to the humiliating treatment Mr. Toussaint received.
7. As for mental health problems, they obviously exist in prisons,[[251]](#footnote-252) and in some circumstances undoubtedly require the implementation of accommodation measures. This dispute is an example of such a case.
8. If the Tribunal had not had the video evidence, it would have been difficult to believe Mr. Toussaint’s account, given how egregiously and inhumanely he was treated on December 4, 2016.
9. The establishment of educational measures is imperative to prevent this type of misconduct from reoccurring behind these walls, where the public and the media are allowed no oversight at all:

[translation]

By definition, ... the nature of any closed custody environment is such that persons detained in it are necessarily in a vulnerable state, regardless of their sex, age, physical condition, life experience, or sentence length.[[252]](#footnote-253)

**FOR THESE REASONS, THE TRIBUNAL:**

1. **GRANTS** the application in part;
2. **CONDEMNS** the defendants, the Attorney General of Quebec, Kevin Leclerc, Jean-René Brousseau, Hugues Comeau-Bastien, Jean-Bruno Gagnon, Frédéric Bouchard, Michael Dubé-Blouin, Mykel Brousseau, and Sébastien Robitaille, solidarily, to pay the complainant, Samuel Toussaint, the amount of $40,000 in moral damages, plus interest at the legal rate and the additional indemnity under article 1619 of the *Civil Code of Québec* as of August 28, 2020;
3. **CONDEMNS** Kevin Leclerc to pay the complainant the amount of $1,500 in punitive damages, plus interest at the legal rate and the additional indemnity under article 1619 of the *Civil Code of Québec*, as of the date of this judgment;
4. **DISMISSES** the application brought against the defendant JonathanBelcourt;
5. **ORDERS** the defendant Attorney General of Québec (Ministère de la Sécurité publique):

**TO DEVELOP AND IMPLEMENT** a strategic plan to address discriminatory profiling that includes the following elements**:**

1. Reference to the existence of the phenomenon of discriminatory profiling in prison environments and the possibility of conscious or unconscious prejudice during such interventions;
2. The principal types of prejudice associated with the various *Charter*-protected groups, including Black people in particular;
3. The principal signs of differential or unusual treatment that are characteristic of discriminatory profiling in interventions in prison environments;
4. The identification of the most effective measures to counter discriminatory profiling in interventions in prison environments; and
5. The consequences of the phenomenon of discriminatory profiling on *Charter*-protected persons and groups;
6. **TO DISSEMINATE** this strategic plan or any formal policy or instruction aimed at countering discriminatory profiling to all correctional officers (COs) and all other current and future employees, supervisors, and managers of the Établissement de détention de Québec and other correctional facilities under the authority of the Ministère de la Sécurité publique, and **TO SEND** a copy thereof to the Commission, the whole within one (1) year from the date of this judgment;
7. **TO OFFER,** within one (1) year of this judgment and subsequently on a regular basis, a training and/or awareness-raising session on discriminatory profiling to all correctional officers (COs) and all other current and future employees, supervisors, and managers of the Établissement de détention de Québec and of the other correctional facilities under the authority of the Ministère de la Sécurité publique that includes the following elements:
8. A review of the case law on discriminatory profiling;
9. A review of the literature on the social context of discriminatory profiling in interventions in prison environments;
10. Reference to the existence of the phenomenon of discriminatory profiling in prison environments and the possibility of conscious or unconscious prejudice during such interventions;
11. The principal types of prejudice associated with the various *Charter*-protected groups, including Black people in particular;
12. The principal signs of differential or unusual treatment that are characteristic of discriminatory profiling in interventions in prison environments;
13. The identification of the most effective measures to counter discriminatory profiling in interventions in prison environments;
14. The consequences of the phenomenon of discriminatory profiling on *Charter*-protected persons and groups;
15. **RECOMMENDS** that, within the limits of its management rights as an employer, the Ministère de la Sécurité publique also provide a formal process to assess the knowledge acquired through the training or awareness-raising session.
16. **UPHOLDS** the orders to keep Exhibits P-5, P-6, P-7, D-12, and D-13 under seal and to allow only the parties and their counsel to consult them.
17. **WITH LEGAL COSTS** in favour of the plaintiff, including expert fees.

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|  | |
| **Mtre Lysiane Clément-Major and Mtre Erin Sandberg** | |
| BITZAKIDIS CLÉMENT-MAJOR FOURNIER | |
| For the plaintiff | |
|  | |
| **Mtre Alexie Lafond-Veilleux and Mtre Koryne Fradet** | |
| For the defendant | |
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|  | |
| Dates of hearing: November 21, 22, 23, 24, 25, 28, 29 and December 2, 2022 | |

1. CQLR c. C-12. [↑](#footnote-ref-2)
2. Exhibit D-3, Computer summary from court ledger downloaded on 22 November 2021. [↑](#footnote-ref-3)
3. Exhibit P-17, Intermittent sentence schedule, Ministère de la Sécurité publique du Québec, Établissement de détention de Québec. [↑](#footnote-ref-4)
4. Exhibit P-14, Pre-trial examination of Kevin Leclerc, 2 February 2022, at p. 20. [↑](#footnote-ref-5)
5. *Tobacco Control Act*, CQLR c. L-6.2., ss. 2(11) and 2.2. See also Exhibit D-9, Ministère de la Sécurité publique, Politique sur l’application de la Loi sur le tabac et portée de l’interdiction de fumer, Vol. 3, Sector 1, Section H, Exhibit 01. [↑](#footnote-ref-6)
6. Exhibit P-13, Pre-trial examination of Jonathan Belcourt, 3 February 2022, at p. 22. [↑](#footnote-ref-7)
7. *Ibid.* at p. 23. [↑](#footnote-ref-8)
8. *Ibid.* [↑](#footnote-ref-9)
9. *Ibid.* at p. 25. [↑](#footnote-ref-10)
10. *Ibid.* at pp. 29–30. [↑](#footnote-ref-11)
11. *Ibid.* at p. 23. [↑](#footnote-ref-12)
12. *Ibid.* at p. 25*.* [↑](#footnote-ref-13)
13. *Ibid*. at p. 37. [↑](#footnote-ref-14)
14. P-14, *supra* note 4 at p. 21. [↑](#footnote-ref-15)
15. *Ibid.* [↑](#footnote-ref-16)
16. *Ibid.* at p. 24. [↑](#footnote-ref-17)
17. Exhibit P-20, McKinley brand khaki pants. [↑](#footnote-ref-18)
18. P-14, *supra* note 4 at p. 29. [↑](#footnote-ref-19)
19. *Ibid*. at p. 30. [↑](#footnote-ref-20)
20. *Ibid*. at p. 34. [↑](#footnote-ref-21)
21. Exhibit P-2, Video of cell 36. [↑](#footnote-ref-22)
22. P-14, *supra* note 4 at p. 36. [↑](#footnote-ref-23)
23. *Ibid*. at p. 44. [↑](#footnote-ref-24)
24. This was a level 3 escort, the [translation] “most restrictive level of escort”: Exhibit D-12, Expert report of Patrick Léveillé, 6 July 2022, at pp. 8 and 10. [↑](#footnote-ref-25)
25. P-14, *supra* note 4 at p. 44. [↑](#footnote-ref-26)
26. *Ibid.* at pp. 44 and 45. [↑](#footnote-ref-27)
27. Exhibit P-3, Video (No. 1) of a corridor in Department 5. [↑](#footnote-ref-28)
28. Exhibit P-4, Video (No. 2) of a corridor in Department 5. [↑](#footnote-ref-29)
29. Exhibit P-5, Video (No. 3) of a corridor in Department 5. [↑](#footnote-ref-30)
30. P-14, *supra* note 4 at p. 31. [↑](#footnote-ref-31)
31. *Ibid.* at p. 33. [↑](#footnote-ref-32)
32. *Ibid.* at p. 32. [↑](#footnote-ref-33)
33. *Ibid.* at p. 59. [↑](#footnote-ref-34)
34. During their visit to the scene, the members of the Tribunal were able to observe the uncleanliness of the cell floors. [↑](#footnote-ref-35)
35. P-14, *supra* note 4 at p. 57. [↑](#footnote-ref-36)
36. Exhibit P-15, Pre-trial examination of Hugues Comeau-Bastien, 3 February 2022, at p. 40. [↑](#footnote-ref-37)
37. Exhibit D-16, Curved-blade stainless steel knife measuring 17 centimetres when deployed. [↑](#footnote-ref-38)
38. P-14, *supra* note 4 at p. 59. [↑](#footnote-ref-39)
39. P-14, *supra* note 4 at p. 85. [↑](#footnote-ref-40)
40. *Ibid*. at p. 86. [↑](#footnote-ref-41)
41. Exhibit P-6, Video (No. 4) of cell 12. [↑](#footnote-ref-42)
42. P-14, *supra* note 4 at p. 55. [↑](#footnote-ref-43)
43. Exhibit P-15, Pre-trial examination of Hugues Comeau-Bastien, 3 February 2022, at p. 38. [↑](#footnote-ref-44)
44. *Ibid.* [↑](#footnote-ref-45)
45. *Ibid.* at p. 39. [↑](#footnote-ref-46)
46. *Ibid.* at p. 44. [↑](#footnote-ref-47)
47. D-12, *supra* note 24 at p. 3. [↑](#footnote-ref-48)
48. P-15, *supra* note 36 at p. 44. [↑](#footnote-ref-49)
49. P-14, *supra* note 4 at p. 84. [↑](#footnote-ref-50)
50. Exhibit P-7, Video (No. 5) of cell 10. [↑](#footnote-ref-51)
51. Exhibit D-8, Computer summary of court ledger downloaded on 22 November 2021; Exhibit D-15, Computer summary of court ledger downloaded on 21 November 2022. [↑](#footnote-ref-52)
52. *Commission des droits de la personne et des droits de la jeunesse (Samson-Thibault) c. Ville de Québec*, 2021 QCTDP 23 at para. 56. [↑](#footnote-ref-53)
53. *Ibid*. at para. 57. [↑](#footnote-ref-54)
54. *Commission des droits de la personne et des droits de la jeunesse (Lecavalier et autres) c. Ville de Montréal (SPVM)*, 2021 QCTDP 24. [↑](#footnote-ref-55)
55. *Farber v. Royal Trust Co.*, 1997 CanLII 387 (SCC), [1997] 1 SCR 846 at para. 41; *Commission des droits de la personne et des droits de la jeunesse (Dorion et une autre) c. Englander*, 2021 QCTDP 17 at para. 53; *Commission des droits de la personne et des droits de la jeunesse (Sam) c. 9377-1905 Québec inc.*, 2022 QCTDP 3 at para. 86. [↑](#footnote-ref-56)
56. Factum of the plaintiff, 30 April 2021. [↑](#footnote-ref-57)
57. *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 SCR 789 at para. 35 [*Bombardier*]. [↑](#footnote-ref-58)
58. In *Commission des droits de la personne et des droits de la jeunesse (Nyembwe) c. Ville de Gatineau*, 2021 QCTDP 1 [*Nyembwe*], leave to appeal refused, *Ville de Gatineau c. Commission des droits de la personne et des droits de la jeunesse*, 2021 QCCA 339, the Tribunal noted in paragraph 185 (note 113): [translation] “Science has not proved that the concept of “race” is an objective reality”. [↑](#footnote-ref-59)
59. On that issue see Joshua Sealy-Harrington & Jonnette Watson Hamilton, “Colour as a Discrete Ground of Discrimination” (2018) 7:1 *Can J Hum Rts* 1; 2018 CanLIIDocs 106. [↑](#footnote-ref-60)
60. As Alexandre Morin writes in *Le droit à l’égalité au Canada*, 2nd ed. (Montreal: LexisNexis, 2012) at p. 116 (para. 327): [translation] “These terms are used as synonyms in the case law”. [↑](#footnote-ref-61)
61. *Bombardier*, *supra* note 57. See also *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43 at para. 36 [*Ward*]. [↑](#footnote-ref-62)
62. P-14, *supra* note 4 at p. 51 [↑](#footnote-ref-63)
63. Exhibit P-16, Pre-trial examination of Christian Thibeault, 2 February 2022, at p. 91. [↑](#footnote-ref-64)
64. This same expression is found in Exhibit D-4, Disciplinary breach report prepared by CO Belcourt on 4 December 2016. [↑](#footnote-ref-65)
65. In *R. v. Bouchard-Lebrun*, 2011 SCC 58, [2011] 3 SCR 575 at para. 79, the Supreme Court of Canada referred to the testimony of a psychiatrist stating that “half (50 percent) of subjects who take drugs containing PCP are likely to develop a psychotic condition when intoxicated”. In *Johnson c. Castilloux*, 2021 QCCS 1000 at para. 54, the Superior Court observed, on the basis of the testimony of a CO, that[translation] “the consumption of alcohol or certain drugs increases an individual’s physical strength”. [↑](#footnote-ref-66)
66. *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27, [2000] 1 SCR 665. [↑](#footnote-ref-67)
67. *Ibid*. at para. 71. [↑](#footnote-ref-68)
68. *Ibid.* In *Quebec (Commission des normes, de l’équité, de la santé et de la sécurité du travail) v. Caron*, 2018 SCC 3, [2018] 1 SCR 35 at para. 92 [*Caron*], the Court reiterated that “the origin of the disability does not matter for the Quebec *Charter*”. [↑](#footnote-ref-69)
69. *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 SCR 789 at para. 11 (italics added). See to the same effect *Syndicat des infirmières, inhalothérapeutes, infirmières auxiliaires du Coeur du Québec (SIIIACQ) c. Centre hospitalier régional de Trois-Rivières*, 2012 QCCA 1867 at para. 47, leave to appeal to SCC refused, 35130 (21 March 2013). [↑](#footnote-ref-70)
70. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, c. 11 (U.K.). [↑](#footnote-ref-71)
71. *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 SCR 703 at para. 39. [↑](#footnote-ref-72)
72. Daniel Proulx, “Fascicule 9: Droit à l’égalité” in JurisClasseur Québec, *Droit constitutionnel*, 6th ed. (Montreal: LexisNexis Canada, 2018) (loose-leaf revision 1 April 2018) at p. 9/58 (para. 108). [↑](#footnote-ref-73)
73. Morin, *supra* note 60 at p. 147 (para. 392); Laverne Jacobs et al., *Law and Disability in Canada: Cases and Materials* (Toronto: LexisNexis, 2021) at pp. 77–78 (paras. 3, 12). [↑](#footnote-ref-74)
74. *Commission des droits de la personne et des droits de la jeunesse (Grenier) c. Société de portefeuille du Groupe Desjardins (Assurances générales des Caisses Desjardins inc.)*, 1997 CanLII 47 (QC TDP) at pp. 6–7 (PDF). [↑](#footnote-ref-75)
75. Proulx, *supra* note 72 at p. 9/43 (para. 89). [↑](#footnote-ref-76)
76. *Caron*, *supra* note 68 (paras. 28 and 29). [↑](#footnote-ref-77)
77. *Ibid*. at para. 20. [↑](#footnote-ref-78)
78. *Ibid*. at para. 35. Indeed, the Supreme Court has long found that “reasonable accommodation [is] an integral aspect of equality”: *Commission scolaire régionale de Chambly v. Bergevin*, 1994 CanLII 102 (SCC), [1994] 2 SCR 525 at p. 544. [↑](#footnote-ref-79)
79. Section 1 of *Act respecting the Québec correctional system*, CQLR, c. S-40.1, also states that correctional services must be provided “in keeping with ... fundamental rights”. [↑](#footnote-ref-80)
80. Exhibit P-11, Resolution CP-770.2, 2 July 2020, at p. 2. [↑](#footnote-ref-81)
81. Exhibit D-1, Intervention reports, 4 December 2016, *en liasse* at p. 20. [↑](#footnote-ref-82)
82. Mélanie Martel & Philippe Bensimon, “L’état de vulnérabilité en milieu carcéral” in Barreau du Québec, *La protection des personnes vulnérables*, Vol. 527 (Montreal, Yvon Blais, 2023) 1 at p. 9. [↑](#footnote-ref-83)
83. *Gauthier et Aznar*, 2015 QCCS 218 at para. 90, leave to appeal refused, 2015 QCCA 753. See also *Dowd c. Lemay-Terriault*, 2021 QCCQ 4884 at para. 79; *Commission des droits de la personne et des droits de la jeunesse (Rezko) c. Montréal (Service de police de la ville de) (SPVM)*, 2012 QCTDP 5 [*Rezko*] at para. 184, leave to appeal refused, 2012 QCCA 1501. [↑](#footnote-ref-84)
84. *Pierre-Louis c. Québec (Ville de)*, 2014 QCCA 1554 at para. 36, leave to appeal to SCC refused, 36055 (16 July 2015). [↑](#footnote-ref-85)
85. *Nyembwe*, *supra* note 58 at para. 175. [↑](#footnote-ref-86)
86. *Commission des droits de la personne et des droits de la jeunesse (DeBellefeuille) c. Ville de Longueuil*, 2020 QCTDP 21 [*DeBellefeuille*] at para. 254, citing *R. c. Dorfeuille*, 2020 QCCS 1499 at para. 50. [↑](#footnote-ref-87)
87. *R. v. S. (R.D.),* 1997 CanLII 324 (SCC), [1997] 3 SCR 484 at para. 46, citing *R. v. Parks,* 1993 CanLII 3383 (ON CA), leave to appeal to SCC refused, 23860 (28 April 1994). This same excerpt is reproduced by the Supreme Court in *R. v. Spence*, 2005 SCC 71, [2005] 3 SCR 458 at para. 31. [↑](#footnote-ref-88)
88. *Commission des droits de la personne et des droits de la jeunesse (Miller et autres) c. Ville de Montréal (Service de police de la Ville de Montréal) (SPVM)*, 2019 QCTDP 31 at para. 156 [*Miller*]. [↑](#footnote-ref-89)
89. *Nyembwe*, *supra* note 58. [↑](#footnote-ref-90)
90. 2019 SCC 34, [2019] 2 SCR 692. [↑](#footnote-ref-91)
91. *Ibid*. at para. 90. [↑](#footnote-ref-92)
92. *Ibid*. at paras. 71, 84, and 260. [↑](#footnote-ref-93)
93. Sealy-Harrington & Watson Hamilton, *supra* note 59 at p. 12. [↑](#footnote-ref-94)
94. Exhibit P-18, Office of the Correctional Investigator Annual Report 2021-2022, [↑](#footnote-ref-95)
95. *Ibid*. at p. 45. Andrea S. Anderson, “Analysis: Considering Social Context Evidence in the Sentencing of Black Canadian Offenders” (2022) 45 Man. L.J. 152, 2022 CanLIIDocs 4187, notes on page 153 that the number of Black persons in the federal penitentiary system has increased by 80% since 2003. [↑](#footnote-ref-96)
96. P-18, *supra* note 94 at p. 46. [↑](#footnote-ref-97)
97. *Ibid.* at 41. [↑](#footnote-ref-98)
98. *Ibid.* at 57. [↑](#footnote-ref-99)
99. *Ibid.* [↑](#footnote-ref-100)
100. *Ibid.* at 58. [↑](#footnote-ref-101)
101. *Ibid*. at 41. [↑](#footnote-ref-102)
102. *Nyembwe*, *supra* note 58 at para. 160. [↑](#footnote-ref-103)
103. *Ibid.* [↑](#footnote-ref-104)
104. Denise G. Réaume, “Discrimination and Dignity” (2003) 63 La. L. Rev. 645 at 681: “Stereotypes are inaccurate generalizations about the characteristics or attributes of members of a group that can usually be traced back to a time when social relations were based more overtly on contempt for the moral worth of the group”, cited in *Québec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 SCR 61 at para. 202. Suzanne Bouclin & Patricia Harewood, “L’incidence des préjugés inconscients sur les processus de négociation et de médiation” (2022) 100 R. du B. Can. 515 at 518, 2022 CanLIIDocs 4227, note 9: [translation] “Stereotypes are cognitive constructions that contain unverified hypotheses about members of a social group”. [↑](#footnote-ref-105)
105. *Bombardie*r, *supra* note 57 at para. 48. See to the same effect *Procureure générale du Québec c. Association des juristes de l’État*, 2017 QCCA 103 at para. 36: [translation] “It is sufficient for the prohibited ground to have contributed to the alleged decisions or actions for them to be considered discriminatory”. [↑](#footnote-ref-106)
106. *Bombardier*, *ibid*. at paras. 1 and 41. [↑](#footnote-ref-107)
107. Section 1 of the *Charter*. [↑](#footnote-ref-108)
108. Section 4 of the *Charter*. [↑](#footnote-ref-109)
109. Section 12 of the *Charter*. [↑](#footnote-ref-110)
110. Section 24.1 of the *Charter*. [↑](#footnote-ref-111)
111. Section 25 of the *Charter*. [↑](#footnote-ref-112)
112. Section 26 of the *Charter*. [↑](#footnote-ref-113)
113. *Bombardier*, *supra* note 57. [↑](#footnote-ref-114)
114. *Ward*, *supra* note 61 at para. 139. [↑](#footnote-ref-115)
115. Daniel Proulx, “Le droit à l’égalité : pierre angulaire de la Charte québécoise?” (2015) *R.Q.D.I.* (special edition) 61 at 69. [↑](#footnote-ref-116)
116. *R.O. c. Ministre de l’Emploi et de la Solidarité sociale*, 2021 QCCA 1185 at para. 49. [↑](#footnote-ref-117)
117. *Procureure générale du Québec c. Association des juristes de l’État*, 2018 QCCA 1763 at paras. 77 to 80 [↑](#footnote-ref-118)
118. *Bombardier*, *supra* note 57. [↑](#footnote-ref-119)
119. *Ibid*. at paras. 36 and 37. [↑](#footnote-ref-120)
120. *Ibid*. at para. 37. It should be noted that the recent legislative amendment to section 9.1 of the *Charter* has broadened the possible justifications for discriminatory conduct, but this amendment has no effect here because the events underlying this dispute took place before this amendment. [↑](#footnote-ref-121)
121. *Ibid*. at para. 58. [↑](#footnote-ref-122)
122. *Caron*, *supra* note 68 at paras. 30 and 50. In paragraph 113 of that judgment, the Court even adds that “the duty to accommodate exists by virtue of the Quebec *Charter*”. [↑](#footnote-ref-123)
123. *Ibid*. at para. 25. [↑](#footnote-ref-124)
124. *Ibid*. at para. 92. [↑](#footnote-ref-125)
125. *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 SCR 161 at para. 22. [↑](#footnote-ref-126)
126. *Canada (Attorney General) v. Boulachanis*, 2019 FCA 100 at para. 31; *Louis c. Procureur général du Québec*, 2023 QCCQ 190 at para. 83. [↑](#footnote-ref-127)
127. *Caron*, *supra* note 68 at para. 29 (reference omitted). [↑](#footnote-ref-128)
128. *Mille*r, *supra* note 88 at para. 229. [↑](#footnote-ref-129)
129. Exhibit P-12, Second expert opinion report by Philippe Bensimon, criminologist (PhD), at p. 4. [↑](#footnote-ref-130)
130. *Ibid*. at 5. [↑](#footnote-ref-131)
131. *Ibid.* at 7. [↑](#footnote-ref-132)
132. P-14, *supra* note 4 at p. 111. [↑](#footnote-ref-133)
133. As the director of the CDQ incidentally admits, [translation] “it’s not good for the two to mix”: P-16, *supra* note 63 at p. 92. [↑](#footnote-ref-134)
134. Exhibit P-17, *supra* note 3. [↑](#footnote-ref-135)
135. P-12, *supra* note 129. [↑](#footnote-ref-136)
136. P-14, *supra* note 4 at p. 19. [↑](#footnote-ref-137)
137. *Ibid.* at p. 23. [↑](#footnote-ref-138)
138. *Ibid*. at p. 29 [↑](#footnote-ref-139)
139. *Ibid*. at p. 30. The term [translation] “Agitated delirium” is defined thus: [translation] “Agitated delirium is a distinct agitation syndrome with or without intoxication, that provokes cerebral disturbances or distress distinct from intoxication”. Exhibit D-13, Ministère de la Sécurité publique, *Trouble de santé et recours à la force* at p. 237 of 342. [↑](#footnote-ref-140)
140. P-14, *supra* note 4 at p. 31. [↑](#footnote-ref-141)
141. *Ibid*. at p. 32 [↑](#footnote-ref-142)
142. *Ibid*. at p. 35. [↑](#footnote-ref-143)
143. *Ibid.* at p. 52. [↑](#footnote-ref-144)
144. *Ibid*. at p. 53. [↑](#footnote-ref-145)
145. *Ibid.* [↑](#footnote-ref-146)
146. *Ibid*. at p. 54. [↑](#footnote-ref-147)
147. *Ibid*. at p. 56. [↑](#footnote-ref-148)
148. *Ibid*. at p. 59. [↑](#footnote-ref-149)
149. *Ibid*. at p. 85. [↑](#footnote-ref-150)
150. *Ibid.* at p. 87. [↑](#footnote-ref-151)
151. *Ibid.* [↑](#footnote-ref-152)
152. *Ibid*. at p. 90. [↑](#footnote-ref-153)
153. *Ibid*. at p. 91. [↑](#footnote-ref-154)
154. *Ibid*. at p. 105. [↑](#footnote-ref-155)
155. *Ibid*. at p. 110. [↑](#footnote-ref-156)
156. *Ibid*. at p. 120. [↑](#footnote-ref-157)
157. P-12, *supra* note 129 at p. 34. [↑](#footnote-ref-158)
158. *Ibid*. at p. 36. [↑](#footnote-ref-159)
159. *Ibid*. at p. 39. [↑](#footnote-ref-160)
160. As the Superior Court notes in *Johnson c. Castilloux*, *supra* note 65 at para. 133: [translation] “The use of force involves the risk of injury”. [↑](#footnote-ref-161)
161. Exhibit P-10, Ministère de la Sécurité publique du Québec, Direction générale des services correctionnels, Direction du conseil à l’organisation, *Prise en charge d’une personne incarcérée et gestion des documents légaux*, Vol. 2, Sector 1, Section A, Exhibit 01 (updated 2 May 2016). [↑](#footnote-ref-162)
162. *Ibid*. at p. 17 of 28. [↑](#footnote-ref-163)
163. *Ibid*. at p. 18 of 28. [↑](#footnote-ref-164)
164. P-12, *supra* note 129 at p. 9. [↑](#footnote-ref-165)
165. P-14, *supra* note 4 at pp. 30–31. [↑](#footnote-ref-166)
166. *Ibid.* at p. 31. [↑](#footnote-ref-167)
167. *Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC), [1992] 2 SCR 970 at p. 984. [↑](#footnote-ref-168)
168. *The United Nations Standard Minimum Rules for the Treatment of Prisoners*, United Nations General Assembly, UN Doc A/RES/70/175 (17 December 2015), Rule 1 (*Nelson* *Mandela* *Rules*). On the use of international norms for the purposes of interpreting domestic law, see in particular *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17 at para. 144; *Turbide Labbé c. Ministère de la Sécurité publique*, 2021 QCCA 1687; *Fournier c. Procureur général du Canada*, 2023 QCCS 2895 at para. 49; Martel & Bensimon, *supra* note 82 at p. 40; Michèle Rivet & Sylvie Gagnon, “Quelques considérations sur la Charte des droits et libertés de la personne du Québec et le droit carceral” in *Droits de la personne :* *l’émergence de droits nouveaux* (Cowansville, QC: Yvon Blais, 1993) 111 at p. 125. [↑](#footnote-ref-169)
169. *Multani v. Commission scolaire Marguerite‐Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256 at para. 46. [↑](#footnote-ref-170)
170. *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights),* 1999 CanLII 646 (SCC), [1999] 3 SCR 868 at para. 32; *Commission des droits de la personne et des droits de la jeunesse c. 9185-2152 Québec inc. (Radio Lounge Brossard)*, 2015 QCCA 577 at paras. 45 and 72. [↑](#footnote-ref-171)
171. P-14, *supra* note 4 at p. 31. [↑](#footnote-ref-172)
172. P-12, *supra* note 129 at p. 12 (Bold and underlining in original). [↑](#footnote-ref-173)
173. *Ibid.* at p. 13. [↑](#footnote-ref-174)
174. *Ibid*. at p. 27. [↑](#footnote-ref-175)
175. *Ibid*. at p. 29 (Bold in original). [↑](#footnote-ref-176)
176. *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 SCR 28 at para. 65. [↑](#footnote-ref-177)
177. According to the testimony of the director of the facility, an inmate’s refusal to be strip-searched requires a planned intervention, which must be authorized by the unit manager. [↑](#footnote-ref-178)
178. *Miller*, *supra* note 88 at para. 236. [↑](#footnote-ref-179)
179. P-12, *supra* note 129 at p. 47. [↑](#footnote-ref-180)
180. *Ibid*. at p. 40. [↑](#footnote-ref-181)
181. *Council of Canadians with Disabilities v. VIA Rail Canada Inc,*, 2007 SCC 15, [2007] 1 SCR 650 at para. 134; *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, [2008] 2 SCR 561 at para. 13; *Caron*, *supra* note 68 at para. 92. [↑](#footnote-ref-182)
182. P-14, *supra* note 4 at p. 66. [↑](#footnote-ref-183)
183. *Regulation under the Act respecting the Québec correctional system*, c. S-40.1, r. 1, ss. 21 and 27. [↑](#footnote-ref-184)
184. P-12, *supra* note 129 at pp. 10 and 54. [↑](#footnote-ref-185)
185. *Commission des droits de la personne et des droits de la jeunesse (Ducas) c. Ville de Repentigny (Service de police de la Ville de Repentigny)*, 2022 QCTDP 14 at para. 85 [*Ducas*]. [↑](#footnote-ref-186)
186. *DeBellefeuille*, *supra* note 86 at para. 141 [references omitted]. [↑](#footnote-ref-187)
187. P-16, *supra* note 63 at p. 77. [↑](#footnote-ref-188)
188. *Ibid*. at p. 35. [↑](#footnote-ref-189)
189. Exhibit D-10, Ministère de la Sécurité publique du Québec, Direction générale des services correctionnels, Direction du conseil à l’organisation, *Instruction relative à la fouille des personnes incarcérées, des lieux et des véhicules*, Vol. 2, Sector 1, Section I, Exhibit 09, section 5.1.2.1 at p. 8 of 20 (italics added). See in this respect *Commission des droits de la personne et des droits de la jeunesse (Duperron) c. Procureur général du Québec (Ministère de la Sécurité publique)*, 2022 QCTDP 18 at para. 45, leave to appeal granted, *Procureur général du Québec c. Commission des droits de la personne et des droits de la jeunesse (Duperron)*, 2023 QCCA 73. [↑](#footnote-ref-190)
190. At the hearing, Unit Manager Leclerc admitted there were some [translation] “curious people” there: [translation] “I saw that there were too many people”; [translation] “Some had left their stations to come see”; [translation] “I did not think of telling them to leave”. [↑](#footnote-ref-191)
191. Exhibit D-13, Ministère de la Sécurité publique du Québec, Direction générale des services correctionnels, *Instruction sur l’agent inflammatoire (utilisation)*, Vol. 3, Sector 1, Section S, Exhibit 05, section 5.7.2.1 at p. 29 of 342. [↑](#footnote-ref-192)
192. P-16, *supra* note 63 at p. 72. [↑](#footnote-ref-193)
193. *Ibid*. at p. 73. [↑](#footnote-ref-194)
194. Exhibit D-13, Ministère de la Sécurité publique, Direction générale adjointe à la sécurité, *Guide sur l’utilisation du bouclier rectangulaire*, 30 March 2022, at p. 330 of 342. [↑](#footnote-ref-195)
195. Exhibit D-13, Ministère de la Sécurité publique, Direction générale des services correctionnels, Direction de la sécurité, *Directives à appliquer lors d’un recours à la force sur une personne incarcérée qui ne porte pas de vêtements au moment de son escorte post intervention*, Document 116801, 4 May 2016, at p. 333 of 342. [↑](#footnote-ref-196)
196. P-16, *supra* note 63 at p. 77. [↑](#footnote-ref-197)
197. Nelson Mandela Rules, *supra* note 168, Rule 19(1). [↑](#footnote-ref-198)
198. *Ibid*., Rule 22. [↑](#footnote-ref-199)
199. *Ibid*., Rule 21. [↑](#footnote-ref-200)
200. *Ibid*., Rule 19(1). [↑](#footnote-ref-201)
201. *Ibid*., Rule 19(3). [↑](#footnote-ref-202)
202. *Supra* note 183. [↑](#footnote-ref-203)
203. *Commission des droits de la personne et des droits de la jeunesse (Peart et un autre) c. Ville de Montréal (Service de police de la Ville de Montréal, SPVM)*, 2018 QCTDP 15 at para. 91. [↑](#footnote-ref-204)
204. *DeBellefeuill*e, *supra* note 86 at para. 155. [↑](#footnote-ref-205)
205. Exhibit P-22, T-shirt bearing marks identifying the prison (CDQ). [↑](#footnote-ref-206)
206. Exhibit P-19, Beige sweater with black and white stripes. [↑](#footnote-ref-207)
207. P-20, *supra* note 17. [↑](#footnote-ref-208)
208. Exhibit P-21, Underwear. [↑](#footnote-ref-209)
209. Exhibit D-5, Ordonnances de garde en établissement. [↑](#footnote-ref-210)
210. P-17, *supra* note 3 at p. 2. [↑](#footnote-ref-211)
211. Sections 1 and 2 of the *Act respecting the Québec correctional system*, *supra* note 79, include “the reintegration of offenders into the community” among the “General Principles” at the foundation of this *Act*. [↑](#footnote-ref-212)
212. *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 SCR 211 at para. 62. [↑](#footnote-ref-213)
213. *Cinar Corporation v. Robinson*, 2013 SCC 73, [2013] 3 SCR 1168 at para. 106. [↑](#footnote-ref-214)
214. *Supra* note 126. [↑](#footnote-ref-215)
215. *Ibid*. at para. 42. [↑](#footnote-ref-216)
216. *Ibid*. at para. 47. [↑](#footnote-ref-217)
217. *Ibid*. at para. 127. [↑](#footnote-ref-218)
218. *Ibid*. at para. 139. [↑](#footnote-ref-219)
219. *Régie intermunicipale de police des Seigneuries c. Michaelson*, 2004 CanLII 46882 (QC CA). [↑](#footnote-ref-220)
220. *Ibid.* [↑](#footnote-ref-221)
221. *Kosoian v. Société de transport de Montréal*, 2019 SCC 59, [2019] 4 SCR 335. [↑](#footnote-ref-222)
222. *Ibid*. at para. 139 [↑](#footnote-ref-223)
223. *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360 at para. 33; *Bombardier*, *supra* note 57 at para. 52; *Ward*, *supra* note 61 at para. 36. [↑](#footnote-ref-224)
224. *R. v. Hills*, 2023 SCC 2 at para. 135. [↑](#footnote-ref-225)
225. *Rezko*, *supra* note 83 at para. 274. [↑](#footnote-ref-226)
226. *Commission des droits de la personne et des droits de la jeunesse (Mensah) c. Ville de Montréal (Service de police de la Ville de Montréal)*, 2018 QCTDP 5 at para. 330 [*Mensah*]. [↑](#footnote-ref-227)
227. *DeBellefeuille*, *supra* note 86 at para. 238. [↑](#footnote-ref-228)
228. *Nyembwe*, *supra* note 58 at para. 524. [↑](#footnote-ref-229)
229. *Ducas*, *supra* note 185 at para. 131. [↑](#footnote-ref-230)
230. *Civil Code of Québec*, S.Q. 1991, c. 64, art. 1463. [↑](#footnote-ref-231)
231. *Rezko*, *supra* note 83 at para. 287; *Mensah*, *supra* note 226 at para. 356; *DeBellefeuille*, *supra* note 86 at para. 328; *Nyembwe*, *supra* note 58 at para. 589; *Ducas*, *supra* note 185 at para. 147. [↑](#footnote-ref-232)
232. Exhibit D-1. [↑](#footnote-ref-233)
233. *Supra* note 230. [↑](#footnote-ref-234)
234. *Montréal (Ville) v. Lonardi*, 2018 SCC 29, [2018] 2 SCR 103. [↑](#footnote-ref-235)
235. *Ibid*. at para. 68. [↑](#footnote-ref-236)
236. *Ibid*. at para. 7. [↑](#footnote-ref-237)
237. *Ibid.* [↑](#footnote-ref-238)
238. Proulx, *supra* note 72 at p. 9/49 (para. 100): [translation] “The causal connection, deemed to be too close to the notion of intent, has even been replaced by a simple requirement for correlation between the ground and the differential treatment”. [↑](#footnote-ref-239)
239. *Bombardier*, *supra* note 57 at para. 49. [↑](#footnote-ref-240)
240. *Ibid*. at para. 51. [↑](#footnote-ref-241)
241. Proulx, *supra* note 72 at p. 9/98. [↑](#footnote-ref-242)
242. *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, *supra* note 69. [↑](#footnote-ref-243)
243. *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, *supra* note 212 at para. 121. [↑](#footnote-ref-244)
244. *Hinse v. Canada (Attorney General)*, 2015 SCC 35 (CanLII), [2015] 2 SCR 621 at para. 165. [↑](#footnote-ref-245)
245. Pierre Verge, Gilles Trudeau & Guylaine Vallée, *Le droit du travail par ses sources* (Montreal: Thémis, 2006) at p. 351. [↑](#footnote-ref-246)
246. *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, *supra* note 212. [↑](#footnote-ref-247)
247. *Ibid.* [↑](#footnote-ref-248)
248. *Supra* note 223. [↑](#footnote-ref-249)
249. *de Montigny v. Brossard (Succession)*, 2010 SCC 51, [2010] 3 SCR 64 at paras. 51 and 52. [↑](#footnote-ref-250)
250. *Bombardie*r, *supra* note 57 at para. 103; *Commission des droits de la personne et des droits de la jeunesse (Felicin) c. Les Automobiles Brisson in*c., 2019 QCTDP 9 at para. 104. [↑](#footnote-ref-251)
251. Martel & Bensimon, *supra* note 82 at p. 11. [↑](#footnote-ref-252)
252. *Ibid.* at p. 5. [↑](#footnote-ref-253)