

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

CITY OF VANCOUVER

Appellant
(Respondent)

- and -

ALAN CAMERON WARD

Respondent
(Appellant)

AND BETWEEN:

**HER MAJESTY THE QUEEN IN THE RIGHT OF
THE PROVINCE OF BRITISH COLUMBIA**

Appellant
(Appellant)

- and -

ALAN CAMERON WARD

Respondent
(Respondent)

- and -

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PART I - OVERVIEW OF INTERVENER'S POSITION AND STATEMENT OF FACTS

1. Nearly three decades ago, the *Charter* fundamentally changed the relationship between individuals and the state by enshrining constitutionally-protected legal rights for persons subjected to the criminal justice system. This Court, and lower Canadian
5 Courts, have consistently recognized this fact, using the *Charter* as a means to vindicate the rights of Canadians and provide a meaningful check against state power, often departing from long standing pre-*Charter* common law principles.

2. The Appellants would have this Court effectively abandon this approach in the context of this case. They seek to limit the remedial mandate conferred by section
10 24(1) to be no broader than common law remedies for miscarriage of justice. AIDWYC submits that this parsimonious approach is fundamentally discordant with the purposes of the *Charter* and of section 24(1) in particular. Persons who have suffered miscarriages of justice (AIDWYC's constituency), including, in many cases, years of imprisonment, suffer equally at the hands of the state whether the cause was
15 abuse of power, negligence or systemic failings. The traditional fault-based torts that address misconduct in the administration of justice offer very limited means for redress and compensation and provide poor guidance as to what just and appropriate remedies are to give effect to the rights of persons who are victims of miscarriage of justice.

20 3. Although tort law may be used to inform *Charter* analysis, it is submitted that the Court must do so cautiously, with regard to the fundamental distinctions between these bodies of law. A framework cultivated from *Charter* jurisprudence, and from compensation cases in the context of miscarriage of justice, rather than a rote

adoption of tort law concepts, offers a more suitable means to achieve effective and responsive remedies to breaches of legal rights under the *Charter*.

4. AIDWYC accepts and adopts the facts as set in the factum of the Respondent.

PART II - QUESTION IN ISSUE

5. The question in issue on this appeal is as follows:

Does section 24(1) of the *Canadian Charter of Rights and Freedoms* authorize a court of competent jurisdiction to award damages for an infringement of a right or freedom guaranteed by the Charter in the absence of bad faith, an abuse of power or tortious conduct committed by the infringer?

6. AIDWYC submits that as a matter of established jurisprudence, and sound policy, this question must be answered in the affirmative.

PART III - STATEMENT OF ARGUMENT

A. Statutory interpretation does not favour Appellants' position

7. *Charter* remedies, like *Charter* rights must be given a generous and expansive interpretation.¹ In part, this has been attributed to the language of section 24(1) which confers "the widest possible discretion on a court to craft remedies."² From the standpoint of statutory interpretation, "[i]t is difficult to imagine language which could give the court a wider and less fettered discretion."³

¹ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 ¶ 24.

² *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 ¶ 18.

³ *Mills v. The Queen*, [1986] 1 S.C.R. 863 at 965.

8. There is nothing in the text of the *Charter* itself to support the restriction on remedy proposed by the Appellants. Section 32 makes clear that the application of the *Charter* is broad (applying to the Parliament and government of Canada and legislature and government of each province) and expansive (applying to all matters within their respective authority). By contrast, the exceptions to the *Charter's* application are narrow and express. Nowhere does the language of the *Charter* suggest that there should be immunity granted to government officials who act in good faith. Indeed, section 24(1) is directed toward the ability of claimants to apply for remedies and not public officials who caused or contributed to the breach.

10 **B. Appellants Misapply Tort Law Principles to *Charter* Remedies**

9. It is well settled that the common law must evolve in a manner consistent with the fundamental values enshrined in the *Charter*.⁴ However, the inverse is not necessarily true. Rather, in the case of section 24(1), common law principles may serve a limited role of being “helpful” but, AIDWYC cautions, they should be applied carefully.⁵

10. The Appellants urge this Court to read-in principles of tort liability to *Charter* remedy analysis, without consideration of the historical development of tort law as a means for compensation and without appreciation for the vastly different context in which “private” tort law has emerged as opposed to “public” *Charter* law. Moreover, they blur the distinction between the two stages of any tort action, liability and

⁴ *R. v. Golden*, [2001] 3 S.C.R. 679 ¶ 86.

⁵ *Doucet-Boudreau*, *supra* note 1 at ¶51, 105.

quantification of damages,⁶ suggesting that the fault requirements inherent in *liability* analysis should be incorporated into a *Charter* consideration of *remedy*.

11. This approach is ill-founded. The “essential characteristic” of tort law is a “fault-based system of accident compensation”.⁷ It has developed, over hundreds of years,
5 as a means of preventing injury through deterrence and punitive sanction. The “compensation” aspect of tort law did not emerge until the 19th century.⁸ It has never acted as a comprehensive system of compensation for injury and, arguably, is ineffective in compensating injured persons in the vast majority of cases.⁹

12. Tort law has historically been concerned with the conduct of private individuals
10 and institutions. Only in relatively recent times has tort law been extended to apply to governments.¹⁰ In the context of a tort claim arising out of a miscarriage of justice, a plaintiff must generally show that the impugned conduct fall’s outside the official’s jurisdiction by, for example, being unreasonable, malicious, or executed in bad faith.¹¹ Although claims in negligence may lie against police officers for negligent
15 investigation, claims of gross negligence or even recklessness will not provide a basis for liability against Crown Attorneys. On the contrary, a plaintiff must establish that the

⁶ *Factum of Her Majesty in right of British Columbia* ¶ 85.

⁷ Lewis Klar, *Tort Law*, 4th ed. (Scarborough: Carswell, 2008) at 10.

⁸ John G. Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998) at 9.

⁹ Stephen D. Sugarman, “Doing Away with Tort Law” (1985) 73 Cal. L. Rev. 555 at 591-596.

¹⁰ Glanville Williams, *Crown proceedings, an account of civil proceedings by and against the Crown as affected by the Crown Proceedings Act, 1947* (London: Stevens, 1948) at 17.

¹¹ *Miazga v. Kvello Estate*, 2009 SCC 51; *Odhavji Estate v. Woodhouse*, [2003] S.C.R. 263.

defendant deliberately intended to subvert or abuse his or her office.¹² Thus, the state of mind of the alleged tortfeasor is integral to a determination of liability.

13. However, in the context of the *Charter*, state of mind is generally considered at the liability stage (i.e. the violation of the *Charter* right), or in the unique context of a determination under section 24(2).¹³ Imposing a fault requirement independent from *Charter* right violation “sits uneasily with fundamental principles of *Charter* interpretation which stress the effects as opposed to the purposes of state action.”¹⁴

C. Tort Law Does Not Provide Just and Appropriate Remedies for Miscarriage of Justice

10 14. The stringent fault requirements in tort law (including those recently articulated by this Court in *Miazga*) significantly restrict the proportion of persons who, although victims of miscarriage of justice, can look to the courts for compensation for injury. Indeed, there are several common causes for miscarriage of justice which will not easily give rise to tort liability, most notably the phenomenon of “tunnel vision”.¹⁵

15 15. In *Hill v. Hamilton-Wentworth Regional Police Services Board*, this Court recognized that the historical tort remedies for wrongful prosecution or wrongful conviction were incomplete and, as a result, extended liability to negligent acts

¹² *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129. See also *Miazga*, *supra* note 11.

¹³ Kent Roach, *Constitutional Remedies in Canada*, (Aurora: Cartwright Group Ltd., 2009) ¶ 11.560.

¹⁴ *Ibid.*

¹⁵ See, for example, the discussion in Federal/Provincial/Territorial Heads of Prosecutions Committee Working Group, *Report on the Prevention of Miscarriages of Justice*, (Ottawa: Department of Justice, 2004) at 35-41.

committed by police investigators. This evolution of the common law, although helpful to some, nonetheless leaves many potential victims of wrongful prosecution or wrongful conviction without an adequate opportunity for redress.¹⁶ In his report regarding *The Inquiry Regarding Thomas Sophonow*, the Honourable Justice Peter Cory observed:¹⁷

It is sufficient to note that potential claimants in an action for malicious prosecution would be unlikely to succeed in demonstrating a lack of reasonable and probable grounds and malice against the police or prosecutors. Such an action could only succeed in exceptional circumstances where malicious or unlawful conduct has been established. Professor Kaiser strongly contends in his writing that *the law of torts has not developed an effective recovery mechanism for the wrongfully convicted*. (A. Kaiser, *Wrongful Conviction and Imprisonment Towards an End to the Compensatory Obstacle Course* (1989), 9 Windsor Y.B. Access Justice 96 at 112). *I agree with him*.

16. The Appellants contention that damages ought not be awarded pursuant to section 24(1) for government actions absent bad faith, fails to acknowledge that many instances of wrongful prosecution and conviction may not involve misconduct on the part of police and Crown prosecutors. "Good faith" exercises of statutory discretion have led to some of the most infamous miscarriages of justice in this country.¹⁸ As stated by Professor Roach:¹⁹

¹⁶ Hill, *supra* note 12 ¶ 35.

¹⁷ The Honourable Peter Cory, *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: Manitoba Justice, 2001) at 93 [emphasis added].

¹⁸ See, for example, The Honourable Edward MacCallum, *Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard* (Saskatoon: The Commission, 2008).

¹⁹ Kent Roach, "The Attorney General and the Charter Revisited" (2000) 50 U. Toronto L.J. 1 at 13.

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The malice standard is anachronistic because it presumes that prosecutorial abuses are caused by ill-willed individuals rather than organizational factors such as extensive workload, poor standard operating procedures, and what the Kaufman Inquiry has recently described as the tunnel vision afflicting the Guy Paul Morin prosecution.

17. As the Honourable Sydney Robins explained in his *Advisory Opinion on the Issue of Compensation for Steven Truscott*:²⁰

10

It was the state, through the operation of the criminal justice system, that inflicted the harm on Mr. Truscott. We are all dependent upon the proper functioning of the criminal justice system and we must all share the burden of its errors. Through no fault of his own, Mr. Truscott suffered as a result of one of those errors. His loss should be borne by the community as a whole, and not by Mr. Truscott alone. *The state has a moral obligation – an obligation that springs from a sense of justice and equity – to provide some redress to Mr. Truscott.* The public's interest in the proper administration of justice – and, indeed, the public's conscience – demand that a payment be made.

15

20

18. In addition to this moral obligation, Canada has an obligation as a signatory to the *International Covenant on Civil and Political Rights* which provides:²¹

9(5) Anyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation.

25

14(6) When a person has by a final decision been convicted of a criminal offence and subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as

²⁰ The Honourable Sydney Robins, *In the Matter of Steven Truscott Advisory Opinion on the Issue of Compensation* (Toronto: Ministry of the Attorney General, 2008) at 33 [emphasis added].

²¹ *International Covenant on Civil and Political Rights*, (19 December 1966) 999 U.N.T.S. 171, 1976 Can. T.S. No. 47. The ICCPR and the Optional Protocol were ratified by Canada and came into force on March 23, 1976.

a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact and time was wholly or partly attributable to him.

19. Tort law does not give effect to this moral obligation and requirement under
5 international law.

D. No Sound Basis to Limit the Discretion of Courts to Grant Just and Appropriate Remedies under section 24(1)

20. In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, this Court outlined five principals which define an appropriate remedy under section 24(1) of the *Charter*,
10 none of which include a finding of misconduct on the part of public officials. An appropriate remedy must (i) meaningfully vindicate the rights of the claimant; (ii) respect the different constitutional roles of courts and legislatures; (iii) reflect the court's adjudicative competence and expertise; (iv) be fair to state actors who have breached the *Charter*, subject to the full vindication of *Charter* rights; and (v) be
15 creative and innovative, as necessary, to evolve to meet the challenges of individual cases.²² In *Canada (Attorney General) v. Hislop*, it clarified that where a retrospective remedy is sought, such as damages, courts must consider additional factors when there has been a substantial change in the law.²³

²² *Doucet-Boudreau*, *supra* note 1 ¶ 55-59.

²³ *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429 ¶ 99-100.

21. These factors must be applied on a case by case basis, for “it is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion”.²⁴

22. AIDWYC submits that applying these factors, the cases in which damages are found to be just and appropriate will likely be relatively rare. For example, in cases of an unreasonable delay under section 11(b) or an unreasonable search under section 8, the claimant may have already been granted an appropriate and just remedy of a stay of proceedings or a declaration. Depending on the facts of the particular case, these may be sufficient to vindicate the rights involved. However for some, including those instances where innocent persons have been imprisoned for many years, there is generally no remedy, short of monetary damages, that can provide adequate compensation.

23. AIDWYC submits that judges can appropriately exercise the broad discretion granted by the *Charter* to determine in which (relatively few) cases just and appropriate remedies should include damages. This Court has already articulated the kinds of factors that may be relevant to this exercise of discretion including: the nature of the right and situation/experience of the claimant,²⁵ whether the claimant is factually innocent,²⁶ and the availability of other equally effective and responsive remedies.²⁷

²⁴ *Mills*, *supra* note 3 at 965; *Doucet-Boudreau*, *supra* note 1 ¶ 52.

²⁵ *Doucet-Boudreau*, *supra* note 1 ¶ 55.

²⁶ See discussion of Charron J. in *Hill*, *supra* note 12 ¶ 157-167.

²⁷ *Miron v. Trudel*, [1995] 2 S.C.R. 418 ¶ 180.

24. The *in terrorem* arguments made by the Appellants and government intervenors that the “floodgates” will open and a “chilling effect” will follow are no different than those made in *Hill* and *Nelles v. Ontario* ²⁸ and just as speculative. As in *Hill* there is no convincing evidence before this Court to indicate that prospective defendants will be overwhelmed by litigation or be chilled from responsibly carrying out their duties.²⁹

PART IV– COSTS

25. AIDWYC does not seek costs.

PART V – ORDER SOUGHT

26. AIDWYC takes no position on the disposition of the appeal.

27. AIDWYC requests leave to make oral submissions at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

January 4, 2010



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²⁸ *Nelles v. Ontario*, [1989] 2 S.C.R. 170.

²⁹ *Hill*, *supra* note 12 ¶ 57, 61.

PART VI - TABLE OF AUTHORITIES

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