

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

CITY OF VANCOUVER

APPELLANT (Respondent)

and:

ALAN CAMERON WARD

RESPONDENT (Appellant)

AND BETWEEN:

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

APPELLANT (Respondent)

and:

ALAN CAMERON WARD

RESPONDENT (Appellant)

**FACTUM OF THE INTERVENER
ABORIGINAL LEGAL SERVICES OF TORONTO INC.**

**ABORIGINAL LEGAL SERVICES
OF TORONTO INC.**

415 Yonge Street, Suite 803
Toronto, ON. M5B 2E7

Kimberly R. Murray
Co-Counsel for the Intervener,
Aboriginal Legal Services of Toronto
Tel: (416) 408-4041 ext. 225
Fax: (416) 408-4268

GOWLING, LAFLEUR, HENDERSON

LLP, Barristers & Solicitors
2600 – 160 Elgin Street
Ottawa, ON. K1P 1C3

Ottawa Agent for the Intervener

Tel: (613) 786-0212
Fax: (613) 788-3500

FALCONER CHARNEY LLP
8 Prince Arthur Avenue
Toronto, ON. M5R 1A9

Julian N. Falconer
Co-Counsel for the Intervener,
Aboriginal Legal Services of Toronto

Tel: (416) 408-4041 ext. 225
Fax: (416) 408-4268

SAMUELS & COMPANY, LLP
Barristers & Solicitors
1400 - 1125 Howe Street
Vancouver, B.C. V6Z 2K8

Mr. Brian M. Samuels
Counsel for the Respondent
Tel: (604) 602-9979
Fax: (604) 602-9979

CITY OF VANCOUVER
453 West, 12th Avenue
Vancouver, B.C. V5Y 1V4

Mr. Tomasz M. Zworski
Counsel for the Appellant,
City of Vancouver
Tel: (604) 873-7512
Fax: (604) 873-7445

**ATTORNEY GENERAL OF
BRITISH COLUMBIA**
1001 Douglas Street, 6th Floor
Victoria, B.C. V8W 9J7

Mr. Bryant Alexander Mackey
Tel: (250) 356-8847
Fax: (250) 356-5707

ATTORNEY GENERAL OF ONTARIO
Ministry of the Attorney General
Of Ontario, Const. Division
4th - 720 Bay Street

**GOWLING, LAFLEUR, HENDERSON
LLP, Barristers & Solicitors**
2600 – 160 Elgin Street
Ottawa, ON. K1P 1C3

Ed Van Bommel
Ottawa Agent for the Intervener

Tel: (613) 786-0212
Fax: (613) 788-3500

BURKE-ROBERTSON, LLP
Barristers & Solicitors
70 Gloucester Street
Ottawa, ON. K2P 0A2

Mr. Robert E. Houston, Q.C.
Ottawa Agent for the Respondent
Tel: (613) 236-9665
Fax: (613) 235-4430

**GOWLING, LAFLEUR, HENDERSON
LLP, Barristers & Solicitors**
2600 - 160 Elgin Street
Ottawa, ON. K1P 1C3

Mr. Henry S. Brown, Q.C.
Ottawa Agent for the Appellant
Tel: (613) 232-1781
Fax: (613) 788-3433

**GOWLING, LAFLEUR, HENDERSON,
LLP, Barristers & Solicitors**
2600 – 160 Elgin Street
Ottawa, ON, K1P 1C3

Mr. Henry S. Brown, Q.C.
Tel: (613) 232-1781
Fax: (613) 788-3433

BURKE-ROBERTSON
Barristers & Solicitors
70 Gloucester Street
Ottawa, ON. K2P 0A2

Toronto, ON. M5G 2K1

Mr. Joshua Hunter
Tel: (416) 326-4460
Fax: (416) 326-4015

PROCUREUR GENERAL DU QUEBEC
1200, Route de l'Eglise
Ste-Foy, QB. G1V 4M1

Ms. Isabelle Harnois
Tel: (418) 643-1477
Fax: (418) 646-1695

ATTORNEY GENERAL OF CANADA
123 – 2nd Avenue, S., 10th Floor
Saskatoon, SK. S7K 7E6

Mr. Mark R. Kindrachuk
Tel: (306) 975-4765
Fax: (306) 975-5013

SACK, GOLDBLATT, MITCHELL
1100 - 20 Dundas Street
Toronto, ON. M5G 2G8

Mr. Louis Sokolov
Counsel for the Intervener, Association
In Defence of the Wrongly Convicted
Tel: (416) 979-6439
Fax: (416) 591-7333

TORYS LLP
3000 - 79 Wellington Street, W.
Toronto, ON. M5K 1N2

Mr. Stuart Svonkin
Counsel for the Intervener, Canadian
Civil Liberties Association
Tel: (416) 865-8139
Fax: (416) 865-7380

OTTAWA POLICE SERVICE
Legal Services
474 Elgin Street
Ottawa, ON. K1G 6H5

Mr. Vincent Westwick

Mr. Robert E. Houston, Q.C.
Tel: (613) 236-9665
Fax: (613) 235-4430

NOEL & ASSOCIATES
111 rue Champlain
Gatineau, QB. J8X 3R1

Mr. Pierre Landry
Tel: (819) 771-7393
Fax: (819) 771-5397

ATTORNEY GENERAL OF CANADA
234 Wellington St., Room 1212
Ottawa, ON. K1A 0H8

Mr. Christopher Rupar
Tel: (613) 941-2351
Fax: (613) 954-1920

SACK, GOLDBLATT, MITCHELL
500 – 30 Metcalfe Street
Ottawa, ON. K1P 5LR

Ms. Colleen Bauman
Ottawa Agent
Tel: (613) 235-5327
Fax: (613) 235-3041

MACLAREN, CORLETT
1625 – 50 O'Connor Street
Ottawa, ON. K1P 6L2

Mr. Stephen J. Grace
Ottawa Agent
Tel: (613) 233-1146
Fax: (613) 233-7190

Counsel for the Intervener, Canadian
Association of Chiefs of Police

Tel: (613) 236-1222 xt. 5990
Fax: (613) 760-8127

SACK, GOLDBLATT, MITCHELL
1100 - 20 Dundas Street
Toronto, ON. M5G 2G8

Mr. Sean Dewart
Counsel for the Intervener, Criminal
Lawyers Association (Ontario)
Tel: (416) 979-6439
Fax: (416) 591-7333

UNIVERSITY OF TORONTO
84 Queen's Park
Toronto, ON. M5S 2C5

Mr. Kent Roach
Counsel for the Intervener,
B.C. Civil Liberties Assoc. et al.

Tel: (416) 979-6439
Fax: (416) 591-7333

SACK, GOLDBLATT, MITCHELL
500 – 30 Metcalfe Street
Ottawa, ON. K1P 5L4

Ms. Kelly Doctor
Ottawa Agent

Tel: (613) 235-5327
Fax: (613) 235-3041

SACK, GOLDBLATT, MITCHELL
500 – 30 Metcalfe Street
Ottawa, ON. K1P 5L4

Ms. Kelly Doctor
Ottawa Agent

Tel: (613) 235-5327
Fax: (613) 235-3041

TABLE OF CONTENTS

<u>DESCRIPTION</u>	<u>PAGE NO</u>
PART I: OVERVIEW	1
PART II: STATEMENT OF POSITION	2
PART III: STATEMENT OF ARGUMENT	2
A. Intentions of the State as a Determinant of what is Appropriate and Just	2
B. The limited role of intention in <i>Charter</i> analysis	5
C. Interpreting s. 24(1) of the <i>Charter</i> through the lens of equality	6
D. The appellants' proposed test for <i>Charter</i> damages is inconsistent with an equality-based approach to section 24(1)	8
PART IV: POSITION ON COSTS	10
PART V: INTERVENER'S POSITION	10
PART VI: TABLE OF AUTHORITIES	12
PART VII: STATUTE/REGULATION/RULE	14

PART I – OVERVIEW

1. Aboriginal Legal Services Toronto is a non-profit organization that was incorporated to assist Aboriginal people gain access to, and control over, justice related issues that affect them. The availability of damages for the breaches of one's rights guaranteed by the *Canadian Charter of Rights and Freedoms* is of critical importance to the community that ALST serves.
2. ALST represents clients and constituents that have historically and systemically been denied justice by the Canadian legal system. Often, this denial of justice took the form of paternalistic policies clothed in "good intentions". The shameful legacy of these "well-intentioned" policies continues to this day. While "hope springs eternal", it is unrealistic and naïve to assume that such encroachments on the rights of society's most vulnerable will never be perpetuated and repeated through new policies. Respectfully, by giving effect to the appellants' position that the determination of what is an "appropriate and just" remedy for a *Charter* violation is to be driven by the "good intentions" of the state actor, this Honourable Court would be closing the remedial door to those who remain victim to "well intentioned policies" and who are entitled to rigorous redress for *Charter* infringements.
3. The *Charter* embodies the values and aspirations of Canadian society, values that are antithetical to Canada's treatment of Aboriginal people. The intervenor argues below that the restrictive interpretation advanced by the appellants is simply untenable in light of the French wording of s. 24(1) which speaks to the right to apply to the Court "pour obtenir la réparation" as the descriptor for s. 24(1) remedial rights. It is respectfully submitted that this Honourable Court should resist adopting restrictive approaches to *Charter* remedies that risk "closing the door" to Canada's most vulnerable. While criteria for appropriate and just remedies are important, ultimately a Court of Competent jurisdiction must not be handcuffed in the essential exercise of doing what is appropriate and just to render the victim whole: "remettre en état ce qui a subi un dommage".¹
4. The fundamental equality principles that have emerged from this Honourable Court's section 15 jurisprudence should also infuse the analysis of what is an appropriate and just remedy pursuant to s.24(1). Seen through the "lens of equality", it is apparent that the restrictive

¹ Larousse, *Petit Larousse*, 1991 (Librairie, Larousse) at p. 837.

approach to *Charter* damages advocated by the appellants would create an internal inconsistency in the interpretive approach thus far taken to the *Charter*. If permitted to develop in a manner consistent with its larger purposes, the *Charter* represents a gateway for Aboriginal people to obtain meaningful redress for their ongoing exclusion and discrimination. As such, ALST submits that this Honourable Court should follow its existing jurisprudence regarding section 24(1) of the *Charter* and maintain flexibility in crafting responsive and effective remedies.

5. ALST adopts the facts as stated by the respondent.

PART II – STATEMENT OF POSITION

6. ALST's submits that the stated constitutional question should be answered in the affirmative.

PART III – STATEMENT OF ARGUMENT

A. Intentions of the State as a Determinant of what is Appropriate and Just:

“L'Enfer est Plein de Bonnes Volontés ou Desires - The Road to Hell is Paved with Good Intentions”

7. While the appellants emphasize the intention of government officials in determining whether damages are an appropriate and just remedy for a *Charter* breach, many of the worst deprivations of Aboriginal people's rights have been affected through “well intentioned” policies. To position the intention of the infringer as the threshold for damages would be to ignore this history. ALST respectfully submits that this Honourable Court should have regard to the broader social and historical context affecting Aboriginal people in answering the constitutional question before it.

8. The Royal Commission on Aboriginal People (“RCAP”) characterized the social conditions among Aboriginal people as being “unacceptable in a country that the United Nations rates as the best place in the world to live”. RCAP found that the living standards for Aboriginal People “did not come close to those of non-Aboriginal people” with respect to life expectancy, illness, education, housing, water and sanitation systems, and employment. RCAP attributed

these problems to the loss of land and resources, destruction of Aboriginal economies and social institutions, and the denial of nationhood.²

9. This Honourable Court has previously acknowledged the appalling social conditions affecting Aboriginal people, and the resultant over-incarceration and estrangement from the criminal justice system:

The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem... The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders. There are many aspects of this sad situation which cannot be addressed in these reasons.³

10. The disadvantage experienced by Aboriginal people is reinforced by widespread racism, including stereotypes relating to “credibility, worthiness, and criminal propensity”. These stereotypes reflect “... a view of native people as uncivilized and without a coherent social or moral order”.⁴

11. The social conditions and racism affecting Aboriginal people have resulted in a disproportionate level of interaction with law enforcement. In particular, Aboriginal people are disparately subjected to highly intrusive personal searches, including strip searches:

Furthermore, we believe it is important to note the submissions of the ACLC and the ALST that African Canadians and Aboriginal people are overrepresented in the criminal justice system and are therefore likely to represent a disproportionate number of those who are arrested by police and subjected to personal searches, including strip searches... As a result, it is necessary to develop an appropriate framework governing strip searches in order to prevent unnecessary and unjustified strip searches before they occur.⁵

² Royal Commission on Aboriginal Peoples (1996), *People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples*, <http://www.ainc-inac.gc.ca/ap/pubs/rpt/rpt-eng.asp>.

³ *R. v. Gladue*, [1999] 1 S.C.R. 688 at paras. 64-65; See also *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 at para. 60.

⁴ *R. v. Williams*, [1998] 1 S.C.R. 1128 at para. 58.

⁵ *R. v. Golden*, [2001] 3 S.C.R. 679 at para. 83; See also Linden (2007), *Report of the Ipperwash Inquiry*, Volume 2 at pp. 273-277.

12. One of the ironies of Canadian history is that many of the federal and provincial government policies that have contributed to the disadvantage faced by Aboriginal people and communities were animated by “good intentions”. These “good intentions” were often clothed in concepts such as protection, civilization and assimilation, and found their expression in legislation such as the 1857 *Act to Encourage the gradual Civilization of Indian Tribes in the Province and to amend the Laws respecting Indians*.⁶ The myriad of laws affecting “Indians” culminated in the enactment of the *Indian Act*, which controlled every aspect of an “Indian’s” life from birth to death.⁷

13. “Good intentions” supported *Indian Act* provisions that *inter alia* barred Indians from leaving reserve lands without the permission of an Indian agent, prevented Indians from hiring lawyers to make claims against the government, outlawed Indian cultural ceremonies, and exiled Indian women from their communities if they married non-Indian men. Regrettably, Canadian courts were complicit in the enforcement of these provisions, also purportedly based on “good intentions”⁸:

“The language of the [Indian Act] embodies the accepted view that these aborigenes are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation”.⁹

14. The most tragic example of the impact of “good intentions” is the Indian Residential Schools policy. RCAP described the intentions underlying the policy, and its terrible legacy as follows:

Put simply, the residential school system was an attempt by successive governments to determine the fate of Aboriginal people in Canada by appropriating and reshaping their future in the form of thousands of children who were removed from their homes and communities and placed in the care of strangers... Marching out from the schools, the children, effectively re-socialized, imbued with the values of European culture, would be the vanguard of a magnificent metamorphosis: the 'savage' was to be made 'civilized', made fit to take up the privileges and responsibilities of citizenship.

⁶ Royal Commission on Aboriginal Peoples (1996), *Looking Forward, Looking Back* (Ministry of Supply and Services Canada) at p. 271-273.

⁷ Royal Commission on Aboriginal Peoples (1996), *Looking Forward, Looking Back* (Ministry of Supply and Services Canada) at p. 291-298.

⁸ The “enfranchisement” of Indian women was upheld by this Honourable Court in *Bedard*. These provisions described as UNHCR found them to be “an unjustifiable breach” of an Indian woman’s rights under article 27 of the *International Covenant in Civil and Political Rights*; 31 July 1981 (CCPR/C/DR (XIII)/R.6, 24)

⁹ *Lavell v. Canada (Attorney General)*, [1974] S.C.R. 1349 at 1360, citing *Rand J. in St. Ann’s Island Shooting and Fishing Club Limited v. The King*, [1950] S.C.R. 211 at 219.

Tragically, the future that was created is now a lamentable heritage for those children and the generations that came after, for Aboriginal communities and, indeed, for all Canadians.¹⁰

15. Prime Minister Harper apologized to Aboriginal people on behalf of all Canadians for Canada's role in the Indian Residential Schools system. In doing so, Prime Minister Harper acknowledged the devastating impact of what at the time was seen as a "well-intentioned" policy:

Two primary objectives of the Residential Schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture. These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it was infamously said, "to kill the Indian in the child". Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country...

The government now recognizes that the consequences of the Indian Residential Schools policy were profoundly negative and that this policy has had a lasting and damaging impact on Aboriginal culture, heritage and language. While some former students have spoken positively about their experiences at residential schools, these stories are far overshadowed by tragic accounts of the emotional, physical and sexual abuse and neglect of helpless children, and their separation from powerless families and communities.¹¹

16. ALST respectfully submits that, given these experiences of Aboriginal people and the inherent vulnerabilities of society's weakest to political policies cast as "being for their own good", the intentions of government officials should not be controlling or determinative in any analysis of remedies under section 24(1) of the *Charter*.

B. The limited role of intention in *Charter* analysis

17. The analysis above is consistent with this Honourable Court's general approach to *Charter* interpretation. This Honourable Court has consistently rejected any notion that intention is determinative of the scope of rights or the entitlement to a remedy under the *Charter*. This jurisprudence recognizes the reality that serious violations of *Charter* rights can occur in the absence of intention. From its inception, the primacy of effects over purpose has been a

¹⁰ Royal Commission on Aboriginal Peoples (1995), Volume One: Looking Forward, Looking Back, Part Two: False Assumptions and a Failed Relationship; Chapter 10 – Residential Schools, p. 335.

¹¹ Government of Canada (June 11, 2008), *Statement of Apology – to former students of Indian Residential Schools*.

foundational principle for the interpretation of rights guaranteed by the *Charter*.¹² The constitutional character of the *Charter* signaled a fundamental shift from the narrow and impoverished understanding of rights that characterized common law and Bill of Rights jurisprudence to a broad, purposive and public interest approach.¹³

18. Significantly, the “intention” of the infringer is not determinative to the availability of the exclusionary remedies pursuant to section 24(2) of the *Charter*. Although section 24(2) is explicitly focused prospectively on societal interests (as opposed to remedying past wrongs to an individual), “good faith” is but one factor to be considered in determining whether evidence is to be excluded. “Good faith” on the part of police officers is not determinative of whether evidence obtained in violation of the *Charter* will be admitted.¹⁴

19. ALST submits that it would be inconsistent with this Honourable Court’s general approach to *Charter* interpretation to narrow the availability of a s. 24(1) remedy to such an extent that the violator’s “bad faith” or intention is a threshold requirement for damages. Rather, as argued below, the broad and purposive approach to *Charter* principles should be reflected in both the interpretation of substantive rights and consequent remedies for breaches of those rights.

C. Interpreting s. 24(1) of the *Charter* through the lens of equality

20. This Honourable Court has previously recognized that substantive *Charter* rights should be interpreted in a manner consistent with the principles and purposes of section 15’s equality guarantee.¹⁵ The “interpretative lens of the equality guarantee” ensures that the *Charter*

¹² For example, see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para. 88; *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143 at para. 37; *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 at para. 16-17, 26; *R. v. Golden*, [2001] 3 S.C.R. 679 at para. 95.

¹³ See *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para. 88; *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143 at para. 25-34; *Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.*, [1984] 2 S.C.R. 145 at pp. 9-10; *R. v. Therens*, [1985] 1 S.C.R. 613 at paras. 44-45, 47.

¹⁴ *R. v. Grant*, 2009 SCC 32 at paras. 68, 73 & 75; *R. v. Harrison*, 2009 SCC 34 at paras. 62, 71-74.

¹⁵ *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 at para. 20; *Law v. Canada*, [1999] 1 S.C.R. 497 at para. 53; *Auton v. British Columbia*, [2004] 3 S.C.R. 657 at para. 25.

“responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of s. 15”.¹⁶

21. The purposive approach to the interpretation of substantive *Charter* rights is equally applicable to the interpretations of the remedy provisions of the *Charter*¹⁷ and is consistent with the specific language of section 24(1), which invites an examination of the broader social and historical context affecting the *Charter* claimant. By empowering a court to order a remedy that is appropriate and just “in the circumstances”, section 24(1) requires an assessment of all of the circumstances affecting the claimant, including his or her position of historical disadvantage and political and social vulnerability.

22. Accordingly, ALST submits that the interpretive lens of the equality guarantee should inform the interpretation of section 24(1) of the *Charter*. Disadvantaged individuals and groups have an acute interest in an interpretation of *Charter* remedies that fully accounts for the broader social and historical context of disadvantage and exclusion. A narrow and restrictive approach to *Charter* remedies that ignores equality principles is unresponsive to the reality affecting disadvantaged individuals and groups who may have very different perceptions and experiences with the “well-intentioned” exercise of government power.

...equality rights jurisprudence has long recognized that even governments having the best of intentions may nevertheless act in a manner that has the unintentional effect of discriminating against minorities that are not well understood by those in power. This fundamental insight of equality jurisprudence has yet to be applied to remedial jurisprudence.¹⁸

23. This Honourable Court has developed certain principles underlying the equality guarantee which ensure that its “strong remedial purpose” is achieved. ALST submits that the

¹⁶ *New Brunswick (Minister of Health and Community Services) v. G. (J.) [J.G.]*, [1999] 3 S.C.R. 46 at para. 115; *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143 at para. 52 (“The section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the Charter.”); *R. v. Mills*, [1999] 3 S.C.R. 668 at paras. 90-94 (Equality concerns must also inform the contextual circumstances in which the rights of full answer and defence and privacy will come into play); *R. v. Osolin*, [1993] 4 S.C.R. 595 at para. 166 (the use of s.15 to interpret the limits of sections 7 and 11(d)); *R. v. Williams*, [1998] 1 S.C.R. 1128 at para. 48 (the use of s.15 to interpret the scope of the right to a fair trial pursuant to s.11(d)); *R. v. Golden*, [2001] 3 S.C.R. 679 at para. 90 (the use of equality principles to interpret the scope of s.8); *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 (“Dunedin”) at para.18; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 at para.24-25.

¹⁷ *Ontario v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 (“Dunedin”) at para.18; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 at para.24-25.

¹⁸ Kent Roach, “Remedial Consensus and Dialogue Under the Charter: General Declarations and Delayed Declarations of Invalidity”, (2002) 35 *U.B.C. L. Rev.* 211 – 270 at paras. 20-21.

following equality principles ought to infuse the analysis of what is an appropriate and just remedy pursuant to s.24(1):

- Courts should approach their analysis from the perspective of the claimant including pre-existing historical disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group.¹⁹
- The purpose of infusing equality principles is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, **but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society**.²⁰
- Intent of the violator is not determinative. The stated purpose of legislation or government action need not be accepted at face value.²¹

24. Just as the constitutional nature of *Charter* rights signaled a shift to a broad and purposive approach to the rights it guarantees, the constitutional dimension to *Charter* infringements necessarily elevates the remedy. The application of the above-described equality principles would ensure that the broad remedial purposes of s. 24(1) in particular and the *Charter*, in general, are achieved. To have meaning in the lives of Aboriginal people, any approach to *Charter* remedies must take account of the perspective of Aboriginal people and the broader context of social and historical disadvantage. It must address itself to ameliorating the position of Aboriginal people within Canadian society. Most importantly, it must acknowledge the reality that Aboriginal people have been devastated by “well-intentioned” policies and that a purportedly benign purpose should never bar appropriate redress in respect of *Charter* violations.

D. The appellants’ proposed test for *Charter* damages is inconsistent with an equality-based approach to section 24(1)

25. ALST respectfully submits that the appellants’ general approach to *Charter* damages is contrary to equality principles and a plain reading of section 24(1). ALST’s submission will focus on two aspects of the appellants’ flawed approach.

26. First, the appellants contend that the remedial purposes of the *Charter* can generally be satisfied with declaratory relief, and that monetary compensation is largely unnecessary.²² ALST

¹⁹ *Law, supra* at paras. 59-63.

²⁰ *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 66 [emphasis added].

²¹ *Gosselin, supra* at paras. 26-27.

²² See the factum of the Province of British Columbia at paras. 43, 51, 80-90; factum of the City of Vancouver at para. 29-33, 54, 57.

submits that the history of government response to issues affecting Aboriginal people demonstrate that declarations by themselves have not resulted in significant changes. Judicial inquiries regarding Aboriginal people in the criminal justice system have generated thousands of recommendations; what they have not generated is action. Similarly, although this Honourable Court gave clear guidance in *Gladue* on the sentencing principles designed to reduce reliance on incarceration for Aboriginal offenders, the rates of Aboriginal overrepresentation have continued to climb.²³ This record demonstrates that something more than judicial guidance is required.²⁴

27. There are various functions for damages, including compensatory and denunciatory purposes. It is submitted that any interpretation of section 24(1) must be broad enough to encompass denunciatory “public interest” damages in an appropriate case. ALST submits that *Charter* damages, in addition to vindicating breaches of individual rights, are capable of playing a significant role in modifying behaviour. This Court has recognized that private litigants may perform “socially useful” functions in vindicating the public interest in the context of punitive damages for non-constitutional tort proceedings.²⁵ ALST submits that the case for damages being awarded to private litigants to protect the public interest is more compelling in the *Charter* context. It is submitted that the danger of the appellants’ approach to s. 24(1) *Charter* damages, is that, in requiring bad faith by the infringer, it simply recycles the conventional punitive damages analysis for s. 24(1) remedies and thereby fails to take into account the constitutional dimensions to the rights and remedies in issue.

28. Significantly, the French language version of section 24(1) uses the term “réparation”, which is translated in English to mean “compensation”.²⁶ The use of the word “réparation”

²³ *R. v. Gladue*, [1999] 1 S.C.R. 688 at paras. 64-65; Jonathan Rudin (2009), “Addressing Aboriginal Overrepresentation Post-*Gladue*: A Realistic Assessment of How Social Change Occurs”, 54 *Criminal Law Quarterly* 447 at 451.

²⁴ Royal Commission on Aboriginal Peoples (1996), *Bridging the Cultural Divide* (Ministry of Supply and Services Canada) at p. 284-285.

²⁵ *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 at para. 44

²⁶ The *Larousse Dictionnaire Française* defines “réparation” in the legal context as: “Dédommagement d'un préjudice par la personne qui en est responsable, soit par le rétablissement de la situation antérieure, soit par le versement d'une somme d'argent, c'est-à-dire de dommages-intérêts. (On dit parfois réparation civile).” (<http://www.larousse.fr/index/dictionnaires/francais>). The Government of Ontario’s *Lexique bilingue de termes législatifs* translates compensation into French with the word “réparation” (http://www.onterm.gov.on.ca/lexicon_e.html). Collins Robert, *Dictionnaire français-anglais – anglais-français* (HarperCollins Publishers, Inc: New York, 2003 5th ed.) defines “réparation” *inter alia* as “compensation” in English and “dommages-intérêts” in French.

indicates that monetary compensation is explicitly contemplated as an individual remedy for a breach of the *Charter*. To the extent that there is any ambiguity in the English language version, the rule of internal consistency requires that the English and French versions of the same section should be interpreted in the same way.²⁷ Thus, it is submitted that compensation for individual breaches of the *Charter* is not only permitted by the specific language of section 24(1), but lies at the heart of the provision.²⁸

29. Second, the appellants advance the submission that section 24(1) has a prospective, as opposed to retrospective, focus.²⁹ A textual analysis of the English version of section 24(1) makes it clear that both retrospective and prospective remedies are contemplated. Section 24(1) entitles a person to a remedy both where *Charter* rights have been “infringed” (suggesting a remedy directed at past breaches) as well as “denied” (suggesting a forward-looking remedy).

30. The equality-based approach suggested above supports an interpretation of section 24(1) that does not deprecate the retrospective aspect of *Charter* remedies. Equality principles require that a court closely examine pre-existing historical disadvantage, vulnerability, stereotyping or prejudice experienced by the individual or group. In addition, equality’s focus on the perspective of the claimant requires that section 24(1) provide meaningful remedies for individuals whose rights have been violated, as opposed to declarations intended to prevent future breaches of the *Charter* rights of the public at large.

PART IV – POSITION ON COSTS

31. ALST seeks no costs and respectfully requests that no costs be ordered against it.

PART V – INTERVENER’S POSITION

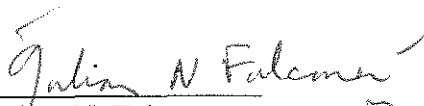
32. It is respectfully submitted that the appeal should be dismissed. ALST respectfully requests that it be granted 20 minutes to make oral argument at the hearing of the appeal.

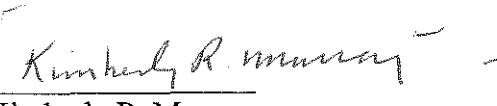
²⁷ *R. v. Kapp*, [2008] 2 S.C.R. 483 at para. 87

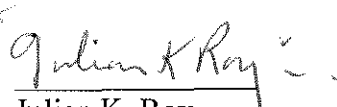
²⁸ Similarly, in *Ravndahl v. Saskatchewan* [2009] 1 S.C.R. 181 at para. 16, this Honourable Court recognized the distinction between personal claims for constitutional relief and claims for declarations of invalidity.

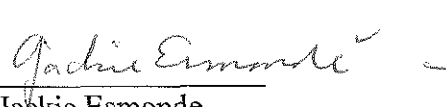
²⁹ See factum of the Province of British Columbia at paras. 42-43, 52-58; factum of the City of Vancouver at paras. 51-52.

DATED AT TORONTO THIS 4th DAY OF JANUARY 2010.


Julian N. Falconer


Kimberly R. Murray


Julian K. Roy


Jackie Esmonde

PART VI – TABLE OF AUTHORITIES

Authorities	Paragraph
<i>Auton v. British Columbia</i> , [2004] 3 S.C.R. 657 at para. 25.	20
<i>Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.</i> , [1984] 2 S.C.R. 145 at pp. 9-10.	17
Collins Robert, <i>Dictionnaire français-anglais – anglais-français</i> (HarperCollins Publishers, Inc: New York, 2003 5 th ed.) .	28
<i>Doucet-Boudreau v. Nova Scotia (Minister of Education)</i> , [2003] 3 S.C.R. 3 at para. 24-25.	20, 21
<i>Eaton v. Brant County Board of Education</i> , [1997] 1 S.C.R. 241 at para. 66.	23
<i>Gosselin v. Quebec (Attorney General)</i> , [2002] 4 S.C.R. 429 at para. 16-17, 20, 26-27.	20, 23
Government of Canada (June 11, 2008), <i>Statement of Apology – to former students of Indian Residential Schools</i> .	15
Government of Ontario, <i>Lexique bilingue de termes législatifs</i> (http://www.onterm.gov.on.ca/lexicon_e.html)	28
Larousse, <i>Petit Larousse</i> , 1991 (Librairie, Larousse) at p. 837.	3
<i>Larousse Dictionnaire Francaise</i> (http://www.larousse.fr/index/dictionnaires/francais)	28
<i>Lavell v. Canada (Attorney General)</i> , [1974] S.C.R. 1349 at 1360.	13
<i>Law v. Canada</i> , [1999] 1 S.C.R. 497 at para. 53, 59-63.	20
<i>Law Society of British Columbia v. Andrews</i> , [1989] 1 S.C.R. 143 at para. 25-34, 37, 52.	17, 23
Linden (2007), <i>Report of the Ipperwash Inquiry</i> , Volume 2 at pp. 273-277.	11
<i>New Brunswick (Minister of Health and Community Services) v. G. (J.) [J.G.]</i> , [1999] 3 S.C.R. 46 at para. 115.	20
Kent Roach, “Remedial Consensus and Dialogue Under the Charter: General Declarations and Delayed Declarations of Invalidity”, (2002) 35 <i>U.B.C. L. Rev.</i> 211 – 270 at paras. 20-21.	22
<i>Ravndahl v. Saskatchewan</i> [2009] 1 S.C.R. 181 at para. 16	28
<i>R v. 974649 Ontario Inc.</i> , [2001] 3 S.C.R. 575 at para. 18.	20, 21
<i>R. v. Big M Drug Mart Ltd.</i> , [1985] 1 S.C.R. 295 at para. 88.	17, 20
<i>R. v. Gladue</i> , [1999] 1 S.C.R. 688 at paras. 64-65.	9, 26
<i>R. v. Golden</i> , [2001] 3 S.C.R. 679 at para. 83, 90, 95.	11, 20
<i>R. v. Grant</i> , [2009] SCC 32 at paras. 68, 73, 75.	18
<i>R. v. Harrison</i> , [2009] SCC 34 at paras. 62, 71-74.	18
<i>R. v. Kapp</i> , [2008] 2 S.C.R. 483 at para. 87.	28
<i>R. v. Mills</i> , [1999] 3 S.C.R. 668 at paras. 90-94.	20
<i>R. v. Osolin</i> , [1993] 4 S.C.R. 595 at para. 166.	20
<i>R. v. Therens</i> , [1985] 1 S.C.R. 613 at paras. 44-45, 47.	17

<i>R. v. Williams</i> , [1998] 1 S.C.R. 1128 at para. 48, 58.	10, 20
Royal Commission on Aboriginal Peoples (1996), <i>Bridging the Cultural Divide</i> (Ministry of Supply and Services Canada) at p. 284-285.	26
Royal Commission on Aboriginal Peoples (1996), <i>Looking Forward, Looking Back</i> (Ministry of Supply and Services Canada) at p. 271-273, 291-298.	12, 14
Royal Commission on Aboriginal Peoples (1996), <i>People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples</i> , http://www.ainc-inac.gc.ca/ap/pubs/rpt/rpt-eng.asp .	8
Jonathan Rudin (2009), "Addressing Aboriginal Overrepresentation Post-Gladue: A Realistic Assessment of How Social Change Occurs", 54 <i>Criminal Law Quarterly</i> 447 at 451.	26
<i>Sauvé v. Canada (Chief Electoral Officer)</i> , [2002] 3 S.C.R. 519 at para. 60.	9
<i>Whiten v. Pilot Insurance Co.</i> , [2002] 1 S.C.R. 595 at para. 44.	27

PART VII: STATUTE/REGULATION/RULE

Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, ss. 15(1), 24(1), 24(2).

Equality Rights

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Enforcement

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Droits à l'égalité

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

Recours

Recours en cas d'atteinte aux droits et libertés

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

Irrecevabilité d'éléments de preuve qui risqueraient de déconsidérer l'administration de la justice

(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.