

**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 RIGHT OF THE
PROVINCE OF BRITISH COLUMBIA

APPELLANT (Respondent)

and:

ALAN CAMERON WARD

RESPONDENT (Appellant)

**FACTUM
CANADIAN ASSOCIATION OF CHIEFS OF POLICE
PURSUANT TO RULE 55 OF THE *RULES OF THE SUPREME COURT OF CANADA***

OTTAWA POLICE SERVICE

Legal Services

474 Elgin Street

Ottawa, Ontario K1G 6H5

Mr. Vincent Westwick

Phone: (613) 236-1222

Fax: (613) 760-8127

Email: westwickv@ottawapolice.ca

Counsel for the Intervener, Canadian Association of Chiefs of Police (CACCP)

CITY OF VANCOUVER

453 West 12th Avenue
Vancouver, British Columbia
V5Y 1V4

Attention: Mr. Tomasz M. Zworski
Phone: (604) 873-7512
Fax: (604) 873-7445

Counsel for the Appellant
City of Vancouver

ATTORNEY GENERAL OF BRITISH COLUMBIA

1001 Douglas Street, 6th Floor
P.O. Box 9280, Station Provincial Government
Victoria, British Columbia
V8W 9J7

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

Counsel for the Appellant
Her Majesty the Queen in Right of the
Province of British Columbia

SAMUELS & COMPANY LLP

1400 - 1125 Howe Street
Vancouver, British Columbia
V6Z 2K8

Attention: Mr. Brian M. Samuels
Phone: (604) 602-9979
Fax: (604) 602-9978

Counsel for the Respondent

GOWLING LAFLEUR HENDERSON LLP

2600 - 160 Elgin St
P.O. Box 466, Stn "D"
Ottawa, Ontario
K1P 1C3

Attention: Mr. Henry S. Brown, Q.C.
Phone: (613) 233-1781
Fax: (613) 788-3433

Ottawa Agent for the Appellant

GOWLING LAFLEUR HENDERSON LLP

2600 - 160 Elgin St
P.O. Box 466, Stn "D"
Ottawa, Ontario
K1P 1C3

Attention: Mr. Henry S. Brown, Q.C.
Phone: (613) 233-1781
Fax: (613) 788-3433

Ottawa Agent for the Appellant

BURKE-ROBERTSON

70 Gloucester Street
Ottawa, Ontario
K2P 0A2

Attention: Mr. Robert E. Houston, Q.C.
Phone: (613) 566-2058
Fax: (613) 235-4430

Ottawa Agent for the Respondent

ATTORNEY GENERAL OF ONTARIO

Ministry of the Attorney General
of Ontario, Const. Division
4th - 720 Bay Street

Toronto, Ontario
M5G 2K1

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

BURKE -ROBERTSON

70 Gloucester Street
Ottawa, Ontario
K2P 0A2

Attention: Mr. Robert E. Houston, Q.C.
Phone: (613) 566-2058
Fax: (613) 235-4430

PROCUREUR GENERAL DU QUEBEC

1200, Route de l'Eglise
Ste-Foy, Quebec
G1V 4M1

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

NOEL & ASSOCIES

111, rue Champlain
Gatineau, Quebec
J8X 3R1

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

ATTORNEY GENERAL OF CANADA

123 – 2nd Avenue, S., 10th Floor
Saskatoon, Saskatchewan.
S7K 7E6

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

ATTORNEY GENERAL OF CANADA

Bank of Canada Building - East Tower
234 Wellington Street, Room 1212
Ottawa, Ontario
K1A 0H8

Attention : Mr. Christopher M. Rupar
Phone : (613) 941-2351
Fax: (613) 954-1920

**ABORIGINAL LEGAL SERVICE
OF TORONTO INC.**

415 Yonge St. Suite 803
Toronto, Ontario
M5B 2E7

Attention : Ms. Kimberly R. Murray
Phone : (416) 408-4041
Fax: (416) 408-4268

**SOUTH OTTAWA COMMUNITY
LEGAL SERVICES**

406 - 1355 Bank St
Ottawa, Ontario
K1H 8K7

Attention : Ms. Chantal Tie
Phone : (613) 733-0140
Fax: (613) 733-0401

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

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

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

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

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

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

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

Attention: Mr. Kent Etoach
Counsel for the Intervener, B.C. Civil Liberties
Assoc. et al.
Phone : (416) 979-6439
Fax: (416) 591-7333

SACK, GOLDBLATT, MITCHELL
500 - 30 Metcalfe Street
Ottawa, Ontario
K1P 5L4

Attention : Ms. Colleen Bauman
Phone : (613) 235-5327
Fax: (613) 235-3041

MACLAREN CORLETT
Suite 1625
50 O'Connor Street
Ottawa, Ontario
K1P 6L2

Attention: Mr. Stephen J. Grace
Phone : (613) 233-1146
Fax: (613) 233-7190

SACK, GOLDBLATT, MITCHELL
500 - 30 Metcalfe Street
Ottawa, Ontario
K1P 5L4

Attention: Ms. Kelly Doctor
Phone : (613) 482-2464
Fax: (613) 235-3041

SACK, GOLDBLATT, MITCHELL
500 - 30 Metcalfe Street
Ottawa, Ontario
K1P 5L4

Attention: Ms. Kelly Doctor
Phone : (613) 482-2464
Fax: (613) 235-3041

TABLE OF CONTENTS

	PAGE
PART I - STATEMENT OF FACTS	1
PART II - STATEMENT OF ISSUES	1
PART III –ARGUMENT	1
A“form of strict liability”	1
“In the circumstances”	2
Good faith	3
Unfair to the Person Against Whom the Award is Being Made	5
Objectives for Section 24(1) Remedies	6
The Right to be Heard	7
Contradictory Messages	9
Conclusion	10
PART IV- COSTS	10
PART V - ORDER SOUGHT	10
PART VI - TABLE OF AUTHORITLES	11
PART VII - STATUTES AND RULES	12

PART I - STATEMENT OF FACTS

1. The Intervener, the Canadian Association of Chiefs of Police (CACP), takes no position with respect to the facts of this case.

PART II - STATEMENT OF ISSUES

2. The Constitutional Question in this appeal is stated as follows:

Does section 24(1) of the *Canadian Charter of Rights and Freedoms (Charter)* 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?

3. The CACP respectfully submits that the answer to the above question is no.

PART III - ARGUMENT

A “form of strict liability”

4. Awarding damages in the absence of bad faith, an abuse of power or tortious conduct by the infringer will create a “form of strict liability”.
5. This “form of strict liability” is described by Saunders J.A., dissenting, in paragraphs 88 and 89 in the court below:

A third basis for a *Charter* damages award under section 24 may be simply as a marker - a recognition - of the *Charter* breach. In that sense nominal damages may be appropriate. However, this appears to me to be a form of strict liability. Such an approach seems to me problematic given the number of occasions in which such damages are not awarded, and would carry the potential for arbitrariness.

Here no tort was committed by the corrections officers, and the question becomes whether there should be strict liability for damages for a *Charter* breach. In my view, the answer is no. I consider, absent a tort, that something more is required, whether it is a degree of deliberation in the *Charter* breach, wilful blindness, or bad faith. In other words, I do not consider damages should be awarded for a *Charter* breach where the trial judge is satisfied the individuals in question, without *mala fides*, simply made a mistake as to the proper course of action.

[Emphasis added]

6. A “form of strict liability”, as defined by Saunders J.A. in this context would mean that police officers would be liable for damages on proof only of the infringement without any consideration of their *mala fides* or *bona fides*.

7. These constitutional damages would be awarded on the basis of a “form of strict liability”, that is by operation of law, once the breach had been determined. This constitutional remedy would be awarded without a determination or even consideration of the actions or roles of the police officers involved.

8. In this “form of strict liability”, police would have awards of damages made against them as a constitutional remedy without ever having the opportunity to present their *bona fides*, and without ever having the opportunity to lead evidence of the circumstances that might cause that court to decide not to award damages.

9. Many issues faced by police are novel, not having been previously considered by courts in a *Charter* context. In such circumstances, individual police officers cannot know that their actions will violate the *Charter* nor can police services be expected to have developed appropriate risk management strategies. However, these police officers would still be subject to an award of damages against them.

10. It is neither “appropriate” nor “just” for constitutional damages to be determined on the basis of any “form of strict liability”, without the consideration of the good faith or bad faith of the individual police officers involved.

“In the circumstances”

11. By use of the words “in the circumstances”, drafters of section 24(1) clearly contemplated that courts must look at the circumstances surrounding the infringement or denial of the right.

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.

Charter of Rights and Freedoms, Part I of the Constitutional Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

12. While unquestionably the circumstances surrounding the person infringed must be considered in choosing a remedy that is appropriate and just, there is no authority to suggest that the circumstances of the infringement and the circumstances of the infringer should not also be considered “in the circumstances”.

13. Even Low J.A., in the British Columbia Court of Appeal, acknowledges the need for contextual approach at paragraph 64: “Appropriate and just remedies must be determined judicially from case to case.”

14. In considering a constitutional remedy that is “appropriate and just”, the court should consider the circumstances of the person infringed but also the circumstances of the infringement; how it occurred and why. Such consideration of the “how” and “why” must surely include circumstances including the good faith and *bona fides* of the persons committing the infringement.

Good faith

15. The good faith analysis as a starting point was the accepted approach in two recent decisions of the Ontario Court of Appeal as well as a decision of the New Brunswick Court of Appeal where leave to appeal to this Court was refused.

***Hawley v. Bapoo*, [2007] O.J. No. 2695. (“Hawley”)**

***Ferri v. Ontario (Attorney General)*, [2007] O.J. No. 397. (“Ferri”)**

***McGillivray v. New Brunswick* (1994), 116 D.L.R. (4th) 104 at 108 (N.B.C.A.), leave to appeal refused, [1994] S.C.C.A. No.408.**

16. In *Hawley v. Bapoo*, the Court states at paragraphs 8 and 9 as follows:

The trial judge went on to hold that *mala fides* or wilfulness to breach the *Charter* were not essential prerequisites to awarding damages as a remedy under section 24(1). Subsequent to the release of the trial judge's reasons, this Court delivered judgment in *Ferri v. Ontario (Attorney General)*, [2007] O.J. No. 397. At para. 108, LaForme J.A., writing for the

majority, held that liability for a constitutional tort under section 7 of the *Charter* requires proof of wilfulness or mala fides. LaForme J.A. said the following:

Liability for a constitutional tort, such as under ss. 6 and 7 of the *Charter* as claimed here by Ferri and Mammoliti, requires wilfulness or *mala fides* in the creation of a risk or course of conduct that leads to damages. Proof of simple negligence is not sufficient for an award of damages in an action under the *Charter*: *McGillivray v. New Brunswick* (1994), 116 D.L.R. (4th) 104 at 108 (N.B.C.A.), leave to appeal refused, [1994] S.C.C.A. No. 408.

Juriansz J.A., who dissented on other points, concurred with the majority on the need for mala fides or wilfulness as a prerequisite for an award of damages for a constitutional tort under the *Charter* (para. 167).

17. The Court of Appeal of Ontario in *Hawley* and *Ferri* has clearly recognized the merits of analysing and evaluating the intentions of the involved police officers (their good faith) in the *Charter* infringement when deciding upon the appropriate and just remedy.

18. Another example of where good faith of police officers is a factor is found where a criminal court is considering whether to exclude evidence pursuant to section 24(2) of the *Charter*.

In the end, therefore, one can say with some confidence that good-faith action by the police, in reliance on the ostensible state of the law at the time of obtaining the evidence, is a factor that weighs in the scale on the side of admitting the evidence.

Hogg, Peter: *Constitutional Law of Canada* (looseleaf), at page 41-23.

19. A further example can be seen in the public official immunity where bad faith is a required element before *Charter* damages are awarded against public officials.

Qualified immunities for the good faith of State officials have been widely recognized in the United States and in the Canadian cases to date.

Roach, Kent: *Constitutional Remedies in Canada* (looseleaf), at page 11-22.

20. Furthermore, the analysis of public immunity has been expanded to include when officials rely on judicial authorization. As an example, Roach cited the case *Persaud v. Ottawa (City) Police*, (1997) 143 D.L.R. (4th) 326 at p. 332, 32 O.R. (3d) 349 (Div. Ct.) ("*Persaud*").

Roach, *supra* at page 11-27 and 11-28.

21. In *Persaud*, damages for a breach of the *Charter* were based on a good faith search under a defective warrant. Roach, at page 11-28, discussed the decision of the Divisional Court in overturning the decision to award damages in the absence of the bad faith of the police officers. The Court concluded: “the mere failure to disclose sufficient written information in obtaining a search warrant, or the enforcing of a warrant later held to be invalid, will not of itself attract personal liability, at least where good faith is established.”

22. Police are public authorities. Individual police officers exercise discretionary, sometimes instantaneous decisions in critical and adverse situations on a 24 hour a day, 7 day a week basis.

23. In exercising their statutory and public duties, individual police officers must continually assess and apply a wide range of statutory authority and judicial pronouncements emanating from courts across Canada. These duties place police officers in the eye of the *Charter* storm.

24. In discussing good faith considerations in section 24(2) of the *Charter*, Steven Penney says: “The good faith exception recognizes that police often perform their difficult work in an atmosphere of legal uncertainty, and that even well-intentioned well-trained officers will make mistakes in the heat of the moment”.

Steven Penney, “Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence Under Section 24(2) of the Charter” (2004) 49 McGill L.J. 105 at page 143.

25. To ignore the good faith of individual police officers in the consideration of section 24(1) remedies is not consistent with other applications of good faith in *Charter* remedies, but more importantly, is not “appropriate and just” in the circumstances.

Unfair to the Person Against Whom the Award is Being Made

26. In determining the meaning of the words “appropriate and just” in section 24(1) of the *Charter* in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 SCC 62 (“*Doucet*”), this Court stated at paragraph 58 that fairness to the party against whom the order

is made is one of the general principles governing constitutional remedies, among others, for remedies under section 24.

Fourth, an appropriate and just remedy is one that, after ensuring that the right of the claimant is fully vindicated, is also fair to the party against whom the order is made. The remedy should not impose substantial hardships that are unrelated to securing the right.

27. While it is entirely appropriate and just to award damages where there is bad faith, an abuse of power or tortious conduct committed by the infringer, it is not fair, nor is it appropriate and just to the person against whom the order is made to award damages where there is no bad faith, an abuse of power or tortious conduct by the person responsible for the infringement.

28. It is also unfair to have a process where the alleged infringer is denied an opportunity to have his or her good faith and *bona fides* considered by the court.

Objectives for Section 24(1) Remedies

29. Saunders J.A., dissenting, in paragraph 86 in the Court below says that not every loss is compensable:

The caution applied by courts where compensation comes from the public purse and where the official's actions are committed in the exercise of discretion on behalf of the public, without malice or bad faith, soundly establishes that not every loss arising from a mistake made by a public official is compensable.

30. This Court in *Doucet* has stated at paragraph 25 that remedies under section 24(1) must be both responsive and effective:

Purposive interpretation means that remedies provisions must be interpreted in a way that provides "a full, effective and meaningful remedy for *Charter* violations" since "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach" (*Dunedin, supra*, at paras. 19-20). A purposive approach to remedies in a *Charter* context gives modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies.

31. These pronouncements are entirely reconcilable. Simply because compensation may not be available in good faith situations under section 24(1), does not mean that courts can not be “responsive” and “effective”. Nor does it mean that courts cannot craft remedies that speak to deterrence, or are purposive or instructional, all of which would be valuable.

32. The consideration by a court of an appropriate and just remedy under section 24(1) does not stop when compensation is not available. There continues to be a broad range of constitutional remedy options available. For example, the merits of constitutional remedies without damages are also addressed by Saunders J.A, dissenting, in paragraph 85 in the Court below:

Where, as here, neither malice nor bad faith is found, and where, as the trial judge seems to hold, the individuals conducting the search thought they were acting in accordance with a policy, there seems to me to be little accomplished by an award of damages that is not already accomplished by a trial process calling attention to their error.

The Right to be Heard

33. The determination of whether there was an infringement of a right or freedom under the *Charter* can be made in two ways: by a civil court in an action commenced by the person who was the subject of the alleged infringement, (as in the case at bar where there was no criminal trial held), or on a *voir dire* in the context of a criminal trial.

34. In those situations where the infringement has been determined by a criminal court and the person infringed then commences a legal action for constitutional remedies in a civil court, that court has the following two procedural options:

- a. The court may accept the decision of the criminal court and then move forward to determine the quantum of damages, (“a form of strict liability”);
- b. The court may not accept the decision of the criminal court and make its own determination.

If this appeal is rejected, both of the above options would present procedural unfairness in respect of the police officers involved.

35. For example, in the first situation where the civil court adopts the decision of the criminal court on the existence of the *Charter* infringement, the police officers involved will never have the right to be heard on the issue of the *Charter* infringement. These police officers would not have been a party to the original criminal trial, and as a result, would not have had the right to be heard on the issue of the infringement when it was originally considered by the criminal court. More specifically, the involved police officers would not have been represented by counsel at criminal court, nor would they have had the right to call evidence, cross examine witnesses or make submissions on the issue of the infringement at the criminal trial.

36. Once the civil court adopts the decision of the criminal court on the existence of the *Charter* infringement, the only issue left to be determined within that civil trial is the quantum of damages. In this situation, police officers will be subject to an award of damages without ever having had an opportunity to be heard at the civil trial; to call evidence, cross examine witnesses or make submissions.

37. In the result, police officers would face an adverse award of damages without ever having had the opportunity to answer the allegations or have the right to be heard on the infringement notwithstanding that matter had been litigated in two trials in two different courts.

38. Faced with this procedural conundrum, police services would seriously have to consider whether to routinely seek standing at criminal trials where parties are alleging infringement of the *Charter* as a result of police action, if only to ensure their right to be heard on the existence of the *Charter* infringement.

39. Seeking standing in criminal trials under these circumstances will add inordinate complexity and delay to criminal proceedings and will impose significant financial burden on individual police services and their public authority funders.

Contradictory Messages

40. Dealing with the second procedural option at paragraph 34, where the civil court does not accept the decision of the criminal court, that civil court would then be required to re-litigate the issue of the alleged *Charter* infringement. This raises the distinct possibility of the civil court coming to a different conclusion than the criminal court on whether the infringement occurred. This would mean there could be conflicting decisions from the criminal court and the civil court arising from the same incident. This procedural consequence is problematic for the police officers, their police services as well as the person alleging the infringement. It is also a result which the community will not readily understand.

41. Contradictory decisions can arise in other ways as well. Generally police conduct that does not involve bad faith, an abuse of power or tortious conduct does not attract disciplinary consequences when assessed by police services or their oversight bodies. Such conduct may be considered a performance issue, suitable for corrective behaviour or training but generally does not involve a punitive response. Therefore, where individual police officers have acted in good faith, the expectation is that officers will not face a disciplinary or punitive response.

42. Therefore, in good faith situations, where civil courts award constitutional damages against a police officer, but police services and their oversight bodies do not impose disciplinary measures, there will again be contradictory and conflicting decisions from different legal proceedings arising from the very same fact situation.

43. Contradictory and conflicting decisions from different legal proceedings on the same fact situation is confusing and therefore is not good public policy.

44. In addition to a contradictory and conflicting decision, such a result sends mixed messages to individual police officers and their police services. This translates into confusion and uncertainty for police training, policies and practices.

45. From the perspective of police services, it further introduces an unnecessarily negative component to the all-important relationship between the police and their community by detracting

from public confidence and introducing uncertainty to the public expectations of how police perform their duties.

46. Further, in order to avoid disillusionment about situations where police officers demonstrated good faith, individual police officers need clarity, consistency and certainty from both the courts and police oversight bodies.

Conclusion

47. The CACP submits that the constitutional question ought to be answered in the negative.

PART IV- COSTS

48. The CACP makes no submissions as to costs.

PART V - ORDER SOUGHT

49. The CACP seeks permission to present an oral argument on the appeal.

50. The CACP seeks an order allowing this appeal and:

- a. varying the judgment of the British Columbia Court of Appeal in appeal no. CA034785 to allow the City's cross-appeal and to set aside the award of costs of the cross-appeal in favour of the Respondent; and
- b. varying the judgment of the British Columbia Supreme Court in action no. SO30038 by striking out the award of damages for breach of the *Charter*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Ottawa, in the Province of Ontario, this 4th day of January, 2010.

Vincent Westwick, Counsel for the Intervener,
Canadian Association of Chiefs of Police (CACP)

PART VI - TABLE OF AUTHORITIES

Authorities	Paragraph
<i>Doucet-Boudreau v. Nova Scotia (Minister of Education)</i> , [2003] 3 S.C.R. 3, 2003 SCC 62.	26, 30
<i>Ferri v. Ontario (Attorney General)</i> , [2007] O.J. No. 397.	15, 16, 17
<i>Hawley v. Bapoo</i> , [2007] O.J. No. 2695.	15, 16, 17
Hogg, Peter: <i>Constitutional Law of Canada</i> (looseleaf).	18
<i>McGillivray v. New Brunswick</i> (1994), 116 D.L.R. (4th) 104 at 108 (N.B.C.A.), leave to appeal refused, [1994] S.C.C.A. No.408.	15, 16
<i>Persaud v. Ottawa (City) Police</i> , (1997) 143 D.L.R. (4th) 326 at p. 332, 32 O.R. (3d) 349 (Div. Ct.).	20, 21
Roach, Kent: <i>Constitutional Remedies in Canada</i> (looseleaf).	19, 20, 21
Steven Penney, “Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence Under Section 24(2) of the Charter” (2004) 49 McGill L.J. 105.	24

PART VII - STATUTES AND RULES

Charter of Rights and Freedoms, Part I of the Constitutional Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11