Court File No. 33089

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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(Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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I. OVERVIEW AND STATEMENT OF FACTS

1. The respondent was detained in a correctional facility and strip-searched, despite not being charged with any crime. The appellants belatedly concede that in subjecting the respondent to this indignity, and in illegally searching his vehicle, their employees breached his *Charter* rights, however they contend that he should not be compensated in any way for their misconduct.

2. In an attempt to shield all state actors from the consequences of their unlawful conduct, the appellants and other governments ask this Court to replace settled law about the need for a broad and purposive interpretation of the *Charter*, with a broad and sweeping immunity which would prevent courts from carrying out the duty vested in them by s. 24 to fully vindicate *Charter* rights.

3. The proposed immunity is irreconcilable with the supreme law of Canada and the consistent judgments of this Court concerning the importance of effective *Charter* remedies.

II. RESPONSE TO THE QUESTION IN ISSUE

4. The Criminal Lawyers Association (Ontario) submits that the constitutional question before the Court should be answered in the affirmative.

III. ARGUMENT

Courts Should Not Be Needlessly Handcuffed

5. There is a fundamental inconsistency in the position taken by the appellants and the government interveners. Apart from some passing acknowledgements about the desirability of dealing effectively with *Charter* breaches, the various government factums focus on the need for 'efficient' government, to the exclusion of all other considerations.

6. For example, while the Province of British Columbia acknowledges at the outset of its argument that the "first and paramount" consideration for *Charter* remedies is that they be effective in redressing a breach of *Charter* rights,[1] its argument is focussed, in its entirety, on the risks supposedly associated with doing so, and the resulting need to hobble the power of courts under s. 24(1). In fact, the Province posits that a court's proper object in fashioning a constitutional remedy is explicitly *not* to provide relief to the individual victim of a *Charter* breach, but rather, is limited to encouraging governments to comply "with constitutional norms, in

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[1] *Factum of Her Majesty in right of British Columbia* ¶39.

a manner that accords with the interests of society as a whole"[2] in the future. It follows, according to the appellant, that courts should be prohibited from awarding damages to redress *Charter* breaches, except in very limited circumstances.

7. The text of s. 24(1) does not justify any such gloss on courts' remedial powers. The authority to grant "such remedy as the court considers appropriate and just in the circumstances", is not qualified at all, much less in the narrow and one-sided manner proposed by the governments. On the contrary, because of its "broad language" and the "myriad roles" s. 24(1) must play, it "should be allowed to evolve to meet the challenges and circumstances" of the varied cases which come before the courts:

> "... That evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case."[3]

Charter *Rights Paramount*

8. In fashioning a test for the availability of damages under s. 24(1) for a breach of *Charter* rights, the starting point should be vindicating the right, not excusing the wrong, or conveniencing the wrong-doer.

> In selecting an appropriate remedy under the *Charter* the ***primary concern*** of the court must be to apply the measures that ***will best vindicate the values expressed in the*** **Charter** and to provide the form of remedy ... that best achieves that objective. This flows from the court's role as guardian of the rights and freedoms which are entrenched as part of the supreme law of Canada.[4]

9. This does not mean that courts should usurp Parliament's role. On occasion, judicial restraint is a legitimate concern when a *Charter* remedy is being fashioned, but it is certainly not the exclusive consideration.[5] As noted, it is not even the primary consideration.[6] Constraint is not an objective of the *Charter*, nor should it be the foundation of a test for appropriate remedies

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[2] *Ibid.* ¶86.
[3] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 ¶59.
[4] *Osborne v. Canada (Treasury Board)*, [1991] 1 S.C.R. 69 ¶70 [emphasis added].
[5] *Doucet-Boudreau*, *supra* note 3, ¶56 and see *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429 ¶103, reproduced *infra* ¶12.
[6] *Osborne*, *supra* note 4 ¶70.

under s. 24(1). The need to respect the separate roles of legislatures and courts "cannot be invoked to undermine the operation of a specific written provision in the Constitution".[7]

> Deference ends … where the constitutional rights that the courts are charged with protecting begin. … Determining the boundaries of the courts' proper role … cannot be reduced to a simple test or formula; it will vary according to the right at issue and the context of each case.[8]

10. As set out below, the question of judicial restraint only arises when courts are changing the law. It is irrelevant when the court is addressing specific operational wrongs which have harmed an individual, as demonstrated by the case at bar, in which no statute was struck down and no new law or policy was made. Where the court is applying existing laws, and determining remedies for the breach of those laws, they are doing what courts do, not what legislatures do, and there is no overriding need for restraint.

Presumption of Retrospective Relief

11. Apart from failing to acknowledge that the paramount object of a *Charter* remedy is the effective vindication of *Charter* rights (rather than making room for 'efficient' government), the appellants' argument suffers from a second, fatal, flaw. They posit that retrospective relief is presumptively inappropriate in cases of *Charter* breaches, when in fact the opposite is true.

12. It is simply wrong to say, as the Province does, that "*Charter* remedies are primarily aimed at prospective deterrence, not retrospective correction or compensation", and in arguing that "the overarching objective" of *Charter* remedies "is to ensure future government compliance with constitutional norms",[9] the Province completely misstates the law in *Canada v. Hislop*. In fact, the common law presumes that remedies *will* be retrospective, and it is incumbent on the government to demonstrate the need for exclusively prospective remedies, which by definition, leave past wrongs unaddressed.[10]

13. In *Hislop*, the Court contrasted the general presumption that remedies are retrospective, with the desirability of prospective, declaratory relief in *some* cases, which depart from what it called the "Blackstonian paradigm." Generally, as in the case at bar, courts discover existing law,

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[7] *Newfoundland Treasury Board v. N.A.P.E.*, [2004] 3 S.C.R. 381 ¶104.
[8] *Doucet-Boudreau, supra* note 3 ¶36.
[9] *Factum of Her Majesty in right of British Columbia* ¶42.
[10] *Hislop, supra* note 5 ¶103 and ff.

and apply it to alleged misconduct which has already occurred. Occasionally, courts change existing laws, and create new ones which ought not to be applied retroactively.

> … Courts are adjudicative bodies that in the usual course of things are called upon to decide the legal consequences of past happenings [and] generally grant remedies that are retroactive to the extent necessary to ensure that successful litigants will have the benefit of the ruling. …
>
> … [W]here a judicial ruling changes the existing law or creates new law, it ***may, under certain conditions***, be inappropriate to hold the government retroactively liable. An approach to constitutional interpretation that makes it possible to identify, in appropriate cases, a point in time when the law changed, makes it easier to ensure that persons and legislatures who relied on the former legal rule while it prevailed will be protected. In this way, a balance is struck between the legitimate reliance interests of actors who make decisions based on a reasonable assessment of the state of the law at the relevant time on one hand and the need to allow constitutional jurisprudence to evolve over time on the other.[11]

Threshold Burden on Government

14. This Court has held that in order to insulate themselves from retroactive remedies, governments must establish as a "threshold" matter that the law has changed "substantially",[12] and that they relied in good faith on the law as it stood previously. In *Hislop*, the Court described how this threshold factor had been applied in *Miron v. Trudel*:[13]

> In *Miron*, it would not have been appropriate for the Court to limit the retroactive effect of the remedy and grant a purely prospective remedy. ***First, the government did not meet the threshold factor of showing a substantial change from the existing law***… . The Court's holding in *Miron* — that the vehicle insurance legislation's definition of 'spouse' violated s. 15 — was not a substantial change from the existing law. To the contrary, it reflected an understanding of s. 15 of the *Charter* that was already understood by the Ontario Legislature in the context of the Ontario *Human Rights Code* and other provincial legislation. Because the finding of a s. 15 infringement in *Miron* did not represent a substantial change in the law, it would have been inappropriate to limit the retroactive effect of its decision.[14]

15. A state actor who breaches the law as it exists has not relied on the law, he or she has simply ignored it, or acted in ignorance of it.[15] His or her good faith is immaterial since it is settled in this very context that ignorance of the law is no excuse:

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[11] *Hislop, supra* note 5 ¶103 [emphasis added].
[12] *Ibid.* ¶105.
[13] *Miron v. Trudel*, [1995] 2 S.C.R. 418.
[14] *Hislop, supra* note 5 ¶105 [emphasis added].
[15] *Reasons for Judgment, British Columbia Supreme Court*, Joint Appellants' Record, Volume I, pp. 36-37, ¶83-86.

> People generally conduct their affairs based on their understanding of what the law requires. Governments in this country are no different. Every law they pass *or administrative action they take* must be performed with an eye to what the Constitution requires. *Just as ignorance of the law is no excuse for an individual who breaks the law, ignorance of the Constitution is no excuse for governments.*[16]

16. The appellants seek a qualified immunity, and in particular, say that governments should be relieved of the obligation to provide retrospective relief for their unconstitutional conduct, unless they have acted in bad faith. They seek the immunity on the strength of the following public law principal:

> Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded.[17]

17. Contrary to the appellant's arguments, however, this proposition does not confine retrospective damage awards to instances where the government has acted in bad faith or abused its powers. As set out above, the qualified immunity is directed to instances where the law has changed. If the law has not changed, the impugned actions were wrong when they occurred, and there can be no suggestion that the goal posts have moved.

18. The appellants ignore this, and consequently misconstrue this Court's judgment in *Mackin v. New Brunswick*. There, the Court dealt with a claim for damages arising from the mere *enactment* of unconstitutional legislation. After the legislation had been struck down, and the law thus changed, the Court turned to the appropriate balance between protecting constitutional rights and the need for effective government. The Court was clear in *Mackin* that the immunity is limited, and applies only where the law is changed:[18]

> According to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is ***subsequently*** declared to be unconstitutional .... In the legal sense, therefore, both public officials and legislative bodies enjoy <u>limited immunity</u> against actions in civil liability based on the fact that a legislative instrument is invalid. With respect to the possibility that a legislative assembly will be held liable for enacting a statute that is subsequently declared unconstitutional, R. Dussault and L. Borgeat confirmed in their *Administrative Law: A Treatise* that:

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[16] *Hislop*, *supra* note 5 ¶103 [emphasis added].

[17] *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405 ¶79 cited in *Hislop*, *supra* note 5 ¶102.

[18] *Mackin*, *supra* ¶78 [footnotes omitted] [<u>emphasis in original</u>] [***emphasis added***].

> In our parliamentary system of government, Parliament or a legislature of a province cannot be held liable for anything it does in exercising its legislative powers. The law is the source of duty, as much for citizens as for the Administration, and while a wrong and damaging failure to respect the law may for anyone raise a liability, it is hard to imagine that either Parliament or a legislature can as the lawmaker be held accountable for harm caused to an individual following the enactment of legislation.

19. Thus, in both *Guimond v. Quebec* and *Mackin*, (after clarifying in both cases that the rule was not absolute), this Court held that a claim for damages under s. 24(1) cannot "generally" be combined with a declaration of invalidity under s. 52 of the *Constitution Act, 1982*, i.e. where a statute is struck down.[19] This logic is unassailable, but by definition is only applicable where the alleged constitutional wrong is of a legislative nature, and does not apply where the misconduct is operational. For the purposes of qualified immunity, a governmental body at "... the operating level is different in kind from the same [body] at the legislative or quasi-judicial level...".[20]

20. Further, public law immunity has never been absolute. After the government has met the threshold of establishing that there has been a substantial change in the law, courts will then balance various competing factors in fashioning a remedy. Although completely overlooked by the appellants, this includes fairness to both litigants:

> ... in *Miron*, all of the factors discussed above — good faith reliance by governments, fairness to the litigants and the need to respect the constitutional role of legislatures — favoured a retroactive remedy. In a number of cases, however, these factors may pull in different directions, with some factors favouring a retroactive remedy and others favouring a purely prospective remedy. In such cases, once the "substantial change" threshold criterion is met, it may be appropriate to limit the retroactive effect of the remedy based on a <u>balancing</u> of these other factors. This balance must be struck on a case-by-case basis.[21]

Immunity for Quasi-Judicial and Ministerial Acts

21. Apart from overstating the reach of qualified public law immunity, the appellants and government interveners have conflated the role of legislatures with the roles of the executive and

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[19] *Mackin, supra* note 17 ¶81, *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347 ¶19.

[20] *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957 at 968, per Laskin J. (as he was), cited in *Mackin, supra* note 17 ¶78 as authority for the existence of a qualified public law immunity

[21] *Hislop, supra* note 5 ¶107 [emphasis in original]. The need to balance interests is completely overlooked in the *obiter dicta* of the Court of Appeal for Ontario in *Wynberg v. Ontario* (2006), 269 D.L.R. (4th) 435, and the absolutist conclusions at ¶191-202 of *Wynberg* cannot, with respect, be reconciled with this Court's reasons in *Hislop*.

other state functionaries. The rule of law is premised on the assumption that courts should not tread on the purview of Parliament, but will routinely review the conduct of public officials. The governments' reliance on caselaw about the need for courts to defer to legislatures, in support of an argument for deference to every civil servant, regardless of his or her function or conduct, at all levels of government, is therefore inapposite and legally presumptuous.

22. Some state actors enjoy some immunities in some circumstances. For example, Crown prosecutors exercising in their "quasi-judicial" roles as "ministers of justice" can only be sued if they act maliciously. In *Miazga v. Kvello Estate*,[22] this Court affirmed a limited immunity for Crown prosecutors because of their unique role in the administration of the criminal justice system, thereby distinguishing them from, for example, police officers who this Court has recently determined, can be sued in simple negligence, i.e. in the absence of bad faith.[23] Contrary to the argument advanced by the federal government, the discretion of law enforcement officials to strip-search citizens detained without charge cannot be equated with the "quasi-judicial function" of a Crown prosecutor determining whether to initiate, continue or stay criminal proceedings.[24]

23. The exercise of truly Ministerial discretion is protected in the same way as the discretion of a Crown prosecutor,[25] however for ordinary state actors, the rule is that "discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*."[26] Notably, this is a matter of substantive, not remedial, law. The question stated by the Chief Justice in the case at bar presupposes that liability for a breach of the *Charter* has been established. Therefore, it begs (or avoids) the question before the Court to argue that *relief* should invariably be denied in the absence of bad faith, merely because the presence of *bona fides* sometimes precludes a finding of liability, for some state actors.

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[22] *Miazga v. Kvello Estate*, 2009 SCC 51.

[23] *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129.

[24] *Factum of Attorney General of Canada* ¶41-42. Similarly, the recitation of facts at ¶15-22 of the Province's factum is inconsistent with the trial judge's findings at ¶83-86 of his reasons. As the Province concedes at ¶20 of its factum, when it chose to follow the law set out in ¶96 of *R. v. Golden*, [2001] 3 S.C.R. 679, it did so by making simple operational changes. There was nothing akin to ministerial discretion in this exercise, or in the decision to hold persons who had not been charged with an offence with the general prison population, thereby subjecting them to a strip-search.

[25] *Attorney General of Canada v. Inuit Tapirisat et al.*, [1980] 2 S.C.R. 735 at 753-755, *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 ¶54, *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 ¶136.

[26] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 ¶56.

The Test

24. In *Doucet-Boudreau v. Nova Scotia*, this court outlined five principals which define an appropriate remedy under s. 24(1) of the *Charter*. An appropriate remedy must (i) 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 creative and innovative, as necessary, to evolve to meet the challenges of individual cases.[27]

25. With all of the foregoing in mind, the CLA submits that the Court should delineate the following principles to be applied when state actors who have been found to have breached a plaintiff's *Charter* rights ask a court to deny damages or other retrospective relief, or otherwise assert that the full panoply of remedies contemplated by s. 24(1) ("such remedy as the court considers appropriate and just in the circumstances") should be restricted:

(a) There should be a presumption against restricting courts' remedial powers, unless the need to do so has been clearly justified.

(b) The government must establish as a threshold matter that the law has changed substantially.

(c) No court should countenance a *Charter* breach which is not effectively remedied in some way.

(d) Subject to the effective vindication of the *Charter* right which has been breached, courts should balance (i) the government's reasonable reliance on the law as it stood; (ii) fairness to *both* litigants; (iii) the need to respect the constitutional role of legislatures; and (iv) the nature of the public function in question.[28]

Presumption Against Reading **Charter** *Narrowly*

26. Like any provision of the *Charter*, s. 24(1) should be given a "purposive"[29] and "generous interpretation, avoiding what has been called the 'austerity of tabulated legalism', to give individuals the full measure of the fundamental rights and freedoms referred to".[30] It "is difficult to imagine language which could give the court a wider and less fettered discretion" than s.

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[27] *Supra* note 3 ¶55-59.
[28] *Hislop*, *supra* note 5 ¶107.
[29] *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 ¶18 [*Dunedin*].
[30] *Min. of Home Affairs v. Fisher*, [1980] A.C. 319, 328 (P.C., Bermuda) per Lord Wilberforce in reference to Bermuda's bill of rights; quoted in *Hunter v. Southam*, [1984] 2 S.C.R. 145 at 156.

24(1)".[31] "Subject to the important qualification that a remedy must be appropriate and just in all the circumstances, there is no limit to the remedies which may be ordered under s. 24(1)."[32]

Threshold Question

27. As set out above, where the state asks that a remedy be exclusively prospective, (i.e., that past wrongs go unaddressed), it must establish as a "threshold" that there has been a "substantial" change in the law.[33]

No* Charter *Breach Without Effective Remedy

28. In every *Charter* case, the courts must be mindful of the judicial pronouncement that "it is a vain thing to imagine a right without a remedy". As the Chief Justice noted in *Dunedin*, "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach". In order to fulfill its role as guardian of the rights and freedoms guaranteed by the *Charter*, the Court must therefore do more than simply provide a remedy for *Charter* breaches; it must provide a meaningful remedy that vindicates the right infringed.[34]

29. It is appropriate to compensate plaintiffs for both pecuniary and (contrary to the submissions of the federal government)[35] non-pecuniary losses, such as damage to reputation, loss of enjoyment of life, or liberty, and hurt and humiliation. A remedy which fails to redress all compensable losses is ineffective in vindicating the right which has been breached. The manner of assessing damages should be no different than for a plaintiff who establishes a breach of subordinate laws, and there is no sound reason to artificially constrain trial judges from using their established expertise to do so. As in all cases, bad faith may justify punitive damages, however its absence is not a reason by itself to limit damages for compensable harm.

30. Not every *Charter* breach will give rise to a claim for damages. In the case at bar, the trial judge found that the municipal defendants had breached the respondent's *Charter* rights, but had not caused any compensable harm, and in keeping with established common law principles, he awarded only nominal damages. The humiliation of an unlawful strip search, conducted by

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[31] *Dunedin, supra* note 29 ¶18.

[32] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Scarborough: Carswell, 2008) at p. 40-36.

[33] *Hislop, supra* note 5 ¶105.

[34] *Ashby v. White* (1703), 92 E.R. 126 at 136; *Mills v. Canada*, [1986] 1 S.C.R. 863 at 971; *Dunedin, supra* note 29 ¶20; *Doucet-Boudreau, supra* note 3 ¶25, 55.

[35] *Factum of Attorney General of Canada* ¶78.

provincial government employees, was another matter and attracted a modest but substantive award of damages. As noted in the Court below, a declaration in these circumstance "has no on-going benefit and is not a remedy at all. It is really nothing more than a finding of fact …".[36]

Balancing Remaining Factors

31. The CLA submits that if, and only if, the government meets the threshold requirements for constraining the power of the court under s. 24(1), then the court should proceed to balance the following factors in order to ensure that a remedy is "just and appropriate" in the circumstances:

(a) Was the defendant's good faith reliance on the law as it stood reasonable?

(b) What remedy will be fair to both litigants? For example, what is the nature and magnitude of the victim's loss? Would declaratory relief be consequential for the plaintiff? Has the *Charter* claimant obtained other relief, such as a stay of proceedings, or the exclusion of evidence under s. 24(2)? Has the plaintiff's conduct disentitled him or her to discretionary relief, in accordance with established equitable principles? Has the government established with persuasive *evidence* that an award of damages would overwhelm the public purse, sufficient to nullify the victim's presumptive right to redress?[37]

(c) Does the proposed remedy trench on the role of Parliament or a legislature?

IV. COSTS

32. The CLA does not seek costs and asks that none be awarded against it.

V. ORDER SOUGHT

33. The CLA submits that the question before the Court should be answered in the affirmative and seeks leave to make oral argument at the hearing of the appeal.

Tim Gleason

Sean Dewart

[36] *Reasons for Judgment of the British Columbia Court of Appeal*, JAR, Volume I, p. 89, ¶63.

[37] For reasons analogous to those set out in *Newfoundland v. N.A.P.E.*, *supra* note 7, courts should be sceptical of government attempts to justify *Charter* breaches, and highly hesitant to leave breaches un-remedied, on the basis of budgetary constraints. See ¶71-72.

VI. TABLE OF AUTHORITIES

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