SCC 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 RIGHT OF THE
PROVINCE OF BRITISH COLUMBIA

APPELLANT (Respondent)

and:

ALAN CAMERON WARD

RESPONDENT (Appellant)

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

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PART 1: STATEMENT OF FACTS

OVERVIEW OF APPEAL

1. This appeal involves an award of damages in favour of the Respondent, granted pursuant to s. 24(1) of the *Charter of Rights and Freedoms* ("*Charter*")[1], arising from a good faith search of the Respondent conducted for safety purposes by correctional officers on admission to the Vancouver Jail.

2. The question on this appeal is: does section 24(1) of the *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 on the part of the infringer?

3. Public officials are often required to exercise discretion in performing statutory and common law duties. In many cases, the exercise of discretion requires the public official to balance one public interest against another, or to balance the constitutional rights and freedoms of one segment of the public against that of another. For example, anyone who was to be arrested and placed in a cell, like the Respondent, would want to be sure that none of the other prisoners had drugs or weapons. However, that same individual would be reluctant to be strip-searched himself. Thus, in exercising discretion, correctional officers must balance the privacy interests of the prisoner being searched against the safety interests of jail staff and other prisoners.

4. If the exercise discretion is made in good faith, the general rule is that the law does not provide a remedy in damages for an honest, but mistaken, exercise of statutory discretion.

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[1] Part I of the *Constitution Act, 1982*, being Sch. B to the *Canada Act 1982* (U.K.), 1982, c. 11.

5. The Appellant, Her Majesty the Queen in right of the Province of British Columbia ("Province"), says the rationale that underlies this general principle of public law operates in the same way in respect of an action for infringement of *Charter* rights as it does in respect of an action for any other erroneous exercise of statutory authority. Furthermore, in considering a remedy that is appropriate and just under s.24(1) of the *Charter* a court should select remedy that vindicates the right at issue, while minimally intruding into effective and efficient governance, especially if the breach of rights is inadvertent and not tainted by *mala fides*.

Introduction

6. On August 1, 2002, Mr. A. Cameron Ward (the "Respondent") was arrested by officers of the Vancouver Police Department (the "VPD") and taken by them to the Vancouver City Jail (the "Jail") where he was held for several hours before being released without charge.

> ***Reasons for Judgment, British Columbia Supreme Court ("RFJ, BCSC")***
> **Joint Appellants' Record ("JAR"), Volume I, p. 10, paragraphs 5, 6**

7. The decisions to arrest the Respondent, to take him to the Jail, to hold him there, and eventually to release him without charge were all made by officers of the VPD and not by the "Province or any of the Province's employees or servants.

> ***RFJ, BCSC*, JAR, Volume I, pp. 27, 29, paras. 57, 66**

8. The Respondent's claims against the Province in this action relate solely to the Province's role in the operation of the Jail at the relevant time, and the decision to search the Respondent upon admission to the Jail pursuant to the policy which then existed.

> ***Further Amended Statement of Claim*, JAR, Volume I, pp. 143-152**

The Search Policy

9. In August 2002, the Jail was a "correctional centre" and a "shared facility", as defined in the *Correction Act*, R.S.B.C. 1996, c.74, and was jointly operated by the Province's Corrections Branch and the VPD. There was one VPD officer known as the "Officer in Charge" (or "OIC") at the Jail, but it was otherwise staffed by employees of the Province's Corrections Branch. In accordance with the *Criminal Code*, the OIC had authority over all pre-remand prisoners at the Jail.

***Vancouver Jail Policy and Procedure Manual*, JAR, Volume IV, p. 187**
***Correction Act*, R.S.B.C. 1996, c.74, ss. 1 & 13.1**

10. The Jail housed individuals arrested by the VPD pending their first court appearance, remanded prisoners, and those awaiting transfer to other correctional facilities. The offences for which these individuals were incarcerated ranged from minor crimes such as shoplifting to major crimes such as murder. The operation of the Jail was described in the following terms in *R. v. Douglas*, 2003 BCPC 392 ("*Douglas*") at paragraph 73:

> The jail is a large custodial centre serving the entire City of Vancouver. Between 50 and 150 detainees pass through the centre on any given day. The jail must accommodate a variety of prisoners within its secure premises. There are persons who are to be detained for short periods to sober up and be released. There are prisoners who are awaiting a decision by the OIC to be released or held over for a bail hearing that day or the next day. There are prisoners who have been considered for release by the OIC and are in fact awaiting a bail hearing. There are prisoners who have been detained and are awaiting transport to other institutions. There are prisoners who have come to the jail from other institutions for court appearances and there are prisoners who have been sentenced by the Court and are awaiting transport to other institutions.

11. Section 19 of the *Correctional Centre Rules and Regulations*, B.C. Reg. 284/78 required all prisoners to be searched on admission to a provincial correctional facility, such as the Jail. In August 2002, section 19 provided:

> 19(1) On admission of an inmate to a correctional centre the person of the inmate and his possessions shall be searched by an officer of the same gender as the inmate.
>
> (2) Once an inmate has been admitted to a correctional centre an officer shall only conduct such further searches where
>
> (a) the director so authorizes, or
>
> (b) an officer has reasonable and probable ground to believe that the inmate is in possession of any contraband, in which case the officer shall search the inmate and provide a written report to the director within 12 hours.

12. In August 2002, the director of operations at the Jail was Peter Coulson, an employee of the Province's Corrections Branch. At trial he described the search practices at the Jail at that time and the reasons for those practices. There were five categories of prisoners:

a. prisoners on remand and those brought to the Jail from other custodial institutions for court appearances;

b. prisoners brought in by the police and immediately charged with an offence (other than a by-law offence);

c. prisoners brought in by the police to be held in Jail but not immediately charged with an offence (referred to as prisoners "held pending investigation" or "HPIs");

d. prisoners brought in by the police to be charged with by-law offences and immediately released;

e. intoxicated individuals arrested for public drunkenness and brought in by the police to be held until they sobered up, and to be released without being charged with an offence.

Evidence of Peter Ford Coulson, **JAR, Vol. III, p. 154, line 7 – p. 159, line 15**

13. In 2002, all prisoners except intoxicated individuals and by-law offenders were strip-searched upon arrival at the Jail. By-law offenders and severely intoxicated persons brought to the Jail to sober up were not routinely strip-searched because there was no opportunity for them to mingle with the general jail population. Intoxicated persons were held in "drunk tanks" separate from the general jail population, until they became sober, and then were released through a door that opened directly from the drunk tank area to the street. By-law offenders were taken directly to the booking desk where they were charged and then released through the same door directly onto the street.

RFJ, BCSC, **JAR, Volume I, pp. 33 - 34, paras. 76, 80**
Evidence of Peter Ford Coulson, **JAR, Volume III, p. 154, line 10 – 30**

14. Correctional officers under the supervision of Mr. Coulson reported to him on a "regular basis" the discovery of weapons and drugs and drug paraphernalia in the course of strip searches at the Jail. These included hypodermic needles, pocket knives, scissors, sharpened screwdrivers, scalpels, imitation handguns, and pepper spray. The list of contraband also included weapons that would not have been found through a search by a metal detector including sharpened toothbrushes and plastic credit cards shaved so they could be used as weapons.

Evidence of Peter Ford Coulson, **JAR, Vol. III, p. 172, line 47 – p. 173, line 30**

15. Following the search process, prisoners were placed in a holding cell while the admission process was completed and then placed with the general population in a cell until they were released, transferred to another correctional facility, or taken to court.

> ***Evidence of Peter Ford Coulson,* JAR, Volume III, p. 159, line 7 – 38**
> ***RFJ, BCSC* JAR, Volume I, p.17, para. 30**

16. It is a relevant fact that in August 2002, the leading Canadian judgment on the topic of strip-searches was *R. v. Golden,* [2001] 3 S.C.R. 679, 2001 SCC 83 ("*Golden*"). *Golden* arose from a particularly brutal strip-search conducted in public view in a restaurant by police officers seeking to extract narcotics from between Mr. Golden's buttocks for the purpose of securing evidence to support a charge of trafficking. The majority concluded that the search infringed Mr. Golden's *Charter* rights. The Court directed his acquittal on the trafficking charge. At paragraph 96 is the following passage:

> It may be useful to distinguish between strip searches immediately incidental to arrest, and searches related to safety issues in a custodial setting. We acknowledge the reality that where individuals are going to be entering the prison population, there is a greater need to ensure that they are not concealing weapons or illegal drugs on their persons prior to their entry into the prison environment. However, this is not the situation in the present case. The type of searching that may be appropriate before an individual is integrated into the prison population cannot be used as a means of justifying extensive strip searches on the street or routine strip searches of individuals who are detained briefly by police, such as intoxicated individuals held overnight in police cells…[emphasis added].

17. At that time, the Corrections Branch received legal advice that *Golden* did not apply to safety searches conducted upon admission to the Jail, and so made no changes to the strip-search policy prior to the judgment in *Douglas*.

> ***Evidence of Peter Ford Coulson,* JAR, Volume III, p. 180, lines 32 - 41**

18. In 2003, the British Columbia Provincial Court released its decision in *Douglas*. The accused in *Douglas* had applied for a judicial stay of proceedings on a charge of assaulting a police officer. Among the grounds for the application was the fact that the accused had been strip-searched at the Jail pursuant to the policy described above. The accused argued that in light of *Golden* a blanket strip-search policy violated section 8 of the *Charter*.

> ***Douglas*, para. 2**

19. Judge Bruce concluded that a blanket strip-search policy was justified at the Jail for those prisoners, like Ms. Douglas, who were detained and thus were inevitably mixed with the general Jail population. However, her Honour in *obiter dicta* did not consider the strip-search policy to be reasonable in relation to prisoners awaiting a determination by the OIC as to whether they will be held or immediately released.

***Douglas*, paras. 80, 81**

20. As a result of the *Douglas* decision, Corrections Branch made operational changes at the Jail in early 2004. Prisoners with no apparent history at the Jail, and who were not charged with drug or violence-related crimes, were subject to a search by way of a "pat down" frisk and the use of a metal detector. These prisoners were then kept in a cell away from the general Jail population, recently converted for this use, until the OIC decided whether they would be released on a Promise to Appear. If the prisoners were not released, they would be required to go through a strip search at that point before being introduced into the general population.

***Evidence of Peter Ford Coulson,* JAR, Volume III, p. 168, lines 15 - 40**

21. Corrections Branch took steps in early 2004 to make structural alterations and changes in procedure at the Jail in order to respond to the concerns expressed by Judge Bruce in her judgment of November 2003. These changes allowed prisoners to be isolated from the general population (although not from each other) until a decision was made by the OIC regarding their release.

***Evidence of Peter Ford Coulson,* JAR, Vol. III, p. 168, line 41–p. 169, line 33**

22. During the hearing of the case in *Douglas*, a proposed class action was filed against the Province. In that action, the two plaintiffs present themselves to be representative of "*the class of all individuals strip-searched at the Vancouver Jail after December 6, 2001*". December 6, 2001 is the date of release of the decision in *Golden, supra.* The question of how the principles in *Golden* apply in a custodial setting to safety searches remains a live issue in the case today: *Thorburn* v. *British Columbia (Ministry of Public Safety)*, 2006 BCSC 1613.

<u>The Search of the Respondent</u>

23. The Respondent was arrested by VPD officers in the Chinatown district of Vancouver during a public ceremony attended by then-Prime Minister Chrétien. The Respondent was

stopped initially by police because they believed he was the person overheard threatening to throw a pie at the Prime Minister. The exchange between the Respondent and the VPD officers on the street escalated to the point that the Respondent was arrested by them for breach of the peace and held pending investigation into a charge of assault.

***RFJ, BCSC* JAR, Volume I, pp. 9, 21, paras. 1,2,41**

24. The Respondent was taken by the VPD officers by police wagon to the Jail. A VPD officer completed a Vancouver Jail Arrest Report - known institutionally as the "Jail 8" - in favour of the Respondent. On the Jail 8, the officer indicated that Mr. Ward had been detained on a charge of breach of the peace and "assault (HPI)", which meant the Respondent was being held pending investigation for assault.

***RFJ, BCSC,* JAR, Volume I, p. 15, 16, paras. 24, 25**
***Exhibit 11*, JAR, Volume IV, p. 25**

25. The search of the Respondent was conducted by two correctional officers. The Respondent was asked to remove his clothing and offer it for inspection, and he did so, with the exception of his underwear. He then objected to disrobing further. The corrections staff briefly consulted with the OIC, and the balance of the search was not conducted.

***RFJ, BCSC* JAR, Volume I, p. 17, para. 28**
***Evidence of Alan Cameron Ward,* JAR, Vol. II, p. 32, line 38 – p. 33, line 33**

26. The Respondent was allowed to put his clothes back on and then placed in a small cell labeled "Intox" where he spent several hours before his eventual release.

***RFJ, BCSC,* JAR, Volume I, p. 17, para. 29**

The Trial Judgment

27. The Respondent brought two claims for damages against the Province in the action: a common law claim in negligence and a claim based on breach of section 8 of the *Charter*, the right to be secure against, *inter alia*, an unreasonable search[2]. The claim in negligence was not pursued by the Respondent at trial and was dismissed by the learned trial judge.

***Further Amended Statement of Claim*, JAR Volume I, pp. 143-152**

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[2] On appeal, the Respondent asked the court to find that he had been assaulted by the corrections officers who searched him, however the court refused that suggestion holding that the Respondent had failed to plead common law assault in respect of the search: *RFJ, BCCA*, JAR, Volume I, pp 75-78, at paras. 38–45.

***RFJ, BCSC* JAR, Volume I, p. 39, para. 96**

28. The trial judge concluded that the strip search of the Respondent was not reasonable in the circumstances, and held that Corrections Branch's written policy did not authorize a search in these circumstances, or alternatively if it did then the policy was unreasonable. The trial judge's criticism of the search was not directed at the manner of the search and he made the following findings of fact:

> There was no evidence that anyone assaulted or battered Mr. Ward in connection with the strip search. He was asked to remove his clothes and he complied until all of his clothes other than his underwear were taken off. When he refused to take off his underwear, there was no threat of harm and, indeed, he was told that he did not have to take them off. He was never touched during the strip search.
>
> …
>
> The actions of the corrections staff in conducting the strip search of Mr. Ward were not malicious, high-handed or oppressive.

***RFJ, BCSC*, JAR Volume I, pp. 37-38, 48 at paras. 86, 89, 128**

29. The trial judge held that an award of damages under section 24(1) of the *Charter* was an appropriate remedy for the breach of the Respondent's section 8 rights, as he interpreted the principles articulated in *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13 ("*Mackin*") to be restricted to cases in which a section 24(1) remedy is sought in conjunction with a declaration of constitutional invalidity:

> In the case at bar, I have not declared any legislative provision to be unconstitutional. I have held that the search of Mr. Ward by corrections staff of the Provincial Government pursuant to s.19 of the *Correctional Centre Rules and Regulations* and the seizure of Mr. Ward's car were unconstitutional because they violated section 8 of the *Charter*.

***RFJ, BCSC*, JAR Volume I, pp. 43,44 , para. 109, 113**

30. Accordingly, the remedy granted by the trial judge against the Province included both a declaration that the Respondent's right under section 8 of the *Charter* had been infringed, and an award of damages in the amount of $5000.

***RFJ, BCSC*, JAR Volume I, p. 49, at para. 130**

The Court of Appeal Judgment

31. The Province appealed the trial judgment to the Court of Appeal for British Columbia. The focus of the appeal was the appropriateness and juridical basis of the $5000 damages award as a remedy for breach of *Charter* rights, in addition to declaratory relief.

> ***Reasons for Judgment of the British Columbia Court of Appeal* ("*RFJ, BCCA*"), JAR Volume I, p. 78 - 80, paras. 46 - 49**

32. The Respondent cross-appealed on the issue of quantum, and brought a separate appeal from the trial judgment alleging the trial judge erred in finding his initial arrest lawful, and in awarding damages for wrongful imprisonment that were inordinately low. The two appeals were heard together and both appeals failed.

> ***RFJ, BCCA*, JAR Volume I, p. 90, 91, paras. 67 - 70**

33. A majority of the Court of Appeal dismissed the Province's appeal. Mr. Justice Low, writing for the majority, agreed with the trial judge that *Mackin* did not apply to claims for damages under section 24(1) of the *Charter* that were premised on the actions of government agents, rather than the constitutional validity of a statute. The majority's focus was on the efficacy of declaratory relief to remedy a "past wrong":

> For the kind of breach that occurred in the present case, however, only a past wrong is under consideration. A declaration of breach, therefore, has no ongoing benefit and is not a remedy at all. It is really nothing more than a finding of fact that may not, by itself, effectively redress the past wrong. To require that the breach be accompanied by a tort or by bad faith to justify an award of damages in many cases will give to the victim of the breach only a pyrrhic victory, not a true remedy.

> ***RFJ, BCCA*, JAR Volume I, p. 89, para. 63**

34. Madam Justice Saunders, in dissent, would have allowed the Province's appeal. In her view damages were not an appropriate remedy for a breach of the Respondent's section 8 *Charter* rights on either of the alternative bases identified by the trial judge: a. the Corrections Branch incorrectly interpreted the policy to permit an unreasonable search; b. the search policy itself was unreasonable.

> 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 their proper course of action.

***RFJ, BCCA*, JAR Volume I, p. 98, 99, paras. 89, 90, 91**

PART II – QUESTION IN ISSUE

35. The Chief Justice has stated the following constitutional question on this appeal and that question constitutes the sole matter before the court:

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

PART III – ARGUMENT

Introduction

36. In 1991, this Court commented that "no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages" under s.24(1) of the *Charter*.

***RJR-Macdonald v. Canada (Attorney General)*, [1991] 1 S.C.R. 311 at p. 342**

37. Outside the context of acts or omissions pursuant to statutes later declared invalid, Canadian law still has no authoritative answer to the question of when an award of *Charter* damages is appropriate and just, or how such damages should be measured. Lower courts have not converged on an approach for either liability or quantum.[3] On liability, some have required bad faith, some negligence, and some have allowed strict liability where a *Charter* breach has been found. The general tendency in the lower courts is toward a requirement of a mental state on the part of the government actor that reflects more culpability than mere negligence. On quantum, some have permitted *per se* damages based on the importance of the right, and others have required independent injury or loss.

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[3] E.g., *Lord v. Allison*, [1986] 3 B.C.L.R. (2d) 300 (S.C.) (damages awarded despite finding good faith and without finding of negligence); *R. v. R.G.F.*, [1991] 90 Nfld. & P.E.I.R. 113 (S.C.T.D.) ($1,000 *per se* damages for inadvertent remand for extra day; no bad faith); *Stenner v. British Columbia (Securities Commission)*, [1993] 23 Admin. L.R. (2d) 247 (S.C.) (no damages for good faith breach of *Charter*), aff'd [1996] 141 D.L.R. (4th) 122 (C.A.); *McGillivray v. New Brunswick* (1994), 116 D.L.R. (4th) 104 at 108 (N.B.C.A.) (*Charter* damages not allowed for prosecution within jurisdiction and in absence of proof of *mala fides*); *Leroux v. Montréal (Communauté Urbaine de)*, [1997] R.J.Q. 1971 (Sup. Ct. Que) ($45,000 compensatory damages and $10,000 in exemplary damages for inadvertent unlawful arrest and detention); *Auton (Guardian at litem of) v. British Columbia (Minister of Health)*, [2001] 197 D.L.R. (4th) 165 (S.C.) ($20,000 awarded apparently on strict liability basis as *per se* damages), aff'd (2002), D.L.R. (4th) 411 (C.A.), rev'd on other grounds, [2004] 3 S.C.R. 657; *Neufeld v. Manitoba*, 2002 MBCA 123 (triable issue as to *Charter* damages in absence of bad faith); *Ilnicki v. MacLeod*, 2003 ABQB 465, aff'd 2005 ABCA 349 ($5,000 damages awarded for unconstitutional strip search without malice, bad faith or gross negligence); *Morin v. Prince Edward Island Regional Administrative Unit No. 3 School Board*, [2004] 233 Nfld. & P.E.I.R. 271 (S.C.T.D.), var'd 2005 PESCAD 14 (*per se* damages for violation of freedom of expression of $75,000; rejected requirement of malice or bad faith); *Campbell v. Canada*, 2004 TCC 460 ($1,000 *per se* damages for s. 15 breach in tax case), rev'd on other grounds 2005 FCA 420; *Bevis v. Burns* (2006), 269 DLR (4th) 696, 2006 NSCA 56; *Ferri v. Ontario (Attorney General)*, 2007 ONCA 79 at para. 108 (action for *Charter* damages requires proof of wilfulness or *mala fides*); *Hawley* v. *Bapoo*, 2007 ONCA 503 (*Charter* damages require proof of *mala fides* or wilfulness); *Trociuk* v. *British Columbia*, 2008 BCSC 1597 (no *Charter* damages without negligence or bad faith); *Whatcott* v. *Schluff*, 2009 SKQB 56 (*Charter* damages require proof of recklessness or malice); *Neumann v. Canada*, 2009 BCSC 324 ($1 million in *Charter* damages for search beyond scope of warrant to search home office).

38. However, Canadian jurisprudence *has* converged regarding the principles governing constitutional remedies in general, and these principles are comparable with those applied elsewhere in the Commonwealth and the United States. These governing principles do not support an award of damages to the Respondent in the present case.

Constitutional Remedies: First Principles

39. The first, and paramount, principle of remedies under Canadian constitutional law establishes that when a citizen applies to a court of competent jurisdiction any remedy must be effective in bringing the legal and political system into compliance with the constitution and its values. The remedy must vindicate the right:

> 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 to those whose rights have been violated that best achieves that objective.

***Osborne v. Canada (Treasury Board),* [1991] 2 S.C.R. 69 at para. 70**

40. This vindication principle is a necessary corollary of Canada's status as a federal *constitutional* democracy, founded on the rule of law and respect for the rights of minorities. If constitutional remedies do not effectively bring governments into compliance with the constitution, then the constitution ceases to have effect as the supreme law.

41. The second countervailing principle is that the remedy should intrude as little as possible on the exercise of authority by the legislative and executive branches of government. If two remedies would be effective in bringing government into compliance with the constitution, then the one that leaves the elected branches of government with the greatest freedom to act are preferred. Remedies must be appropriately restrained:

> At the same time, the court must be sensitive to its proper role in the constitutional framework and refrain from intruding into the legislative sphere beyond what is necessary to give full effect to the provisions of the Charter.

Osborne, supra.

42. The third principle is that *Charter* remedies are primarily aimed at prospective deterrence, not retrospective correction or compensation. The overarching objective is to ensure

future government compliance with constitutional norms. Although retrospective remedies, such as damages, are possible, they are not inevitable, especially when judicial decision-making has effectively changed the law.

> ***Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429, 2007 SCC 10 ("*Hislop*"), at paragraphs 81-108.**

43. These principles together imply that damages should not normally be available under s.24(1) of the *Charter* to remedy good faith government action. Declaratory relief acknowledging the breach of right is necessarily less intrusive than damages, and the Canadian experience demonstrates that such relief is effective as the impetus for governmental reform as appropriate. Only if an applicant under section 24(1) can show that declaratory relief will not be effective to vindicate a breach of *Charter* rights – usually in circumstances where a government official acts in bad faith, abuses his or her power, or otherwise acts in tortious fashion – will damages be the minimum necessary remedy to effect change and future compliance.

<u>Constitutional Remedies: Efficacy and Restraint</u>

44. The principle that constitutional remedies should reflect the minimum necessary to vindicate the right is found throughout this Court's jurisprudence.

45. For example, in *Mahe v. Alberta,* [1990] 1 S.C.R. 342 ("*Mahe*"), a group of francophone parents brought an action against the provincial government claiming that their minority language rights under s. 23 of the *Charter* were being violated because they were not given "management and control" of francophone schools in Edmonton. This Court refrained from rewriting the *School Act* and its attendant regulation and instead issued broad declarations about the principles that should govern minority language instruction and facilities in Edmonton. This Court invoked the vindication and restraint principles at paragraph 96:

> For these reasons I think it best if the Court restricts itself in this appeal to making a declaration in respect of the concrete rights which are due to the minority language parents in Edmonton under s. 23. Such a declaration will ensure that the appellants' rights are realized while, at the same time, leaving the government with the flexibility necessary to fashion a response which is suited to the circumstances. As the Attorney General for Ontario submits, <u>the government should have the widest possible discretion in selecting the institutional means by which its s. 23 obligations are to be met; the courts should be loath to interfere and impose what will be necessarily procrustean standards, unless that discretion</u>

> <u>is not exercised at all, or is exercised in such a way as to deny a constitutional right.</u>

46. In *Doucet-Boudreau v. Nova Scotia (Minister of Education),* [2003] 3 S.C.R. 3, 2003 SCC 62 ("*Doucet-Boudreau*"), this Court returned to the issue of the appropriate remedies for ensuring compliance with minority language education rights. At issue was an order by a Supreme Court of Nova Scotia judge that the Province report to the court on prescribed dates regarding compliance with a schedule to build schools and provide programs to francophone parents and students. The majority decided that the lengthy history of inaction and the positive nature of minority language rights justified the mandatory order. The dissenting judges held that the reporting order was unnecessarily intrusive and did not provide procedural justice to the parties. Both the majority and dissenting judgments express the importance of effective and responsive remedies that are minimally intrusive on the legislative and executive branches.

47. For example, at paragraph 25, Justices Iacobucci and Arbour JJ. reasoned that a constitutional remedy must promote the purpose of the right (be "responsive") and must promote the purpose of the remedies provision itself (be "effective"). At the same time, in paragraphs 33 and following, they emphasized the importance of respecting the independent constitutional roles of the executive and legislative branches:

> In other words, in the context of constitutional remedies, courts must be sensitive to their role as judicial arbiters and not fashion remedies which usurp the role of the other branches of governance by taking on tasks to which other persons or bodies are better suited. Concern for the limits of the judicial role is interwoven throughout the law.

48. Similarly, Justices LeBel and Deschamps, in dissent, described the need for "*efficacy* and imagination in the development of constitutional remedies," noting that efficacy should be subject to "a proper awareness of the nature of the role of courts in our democratic political regime, a key principle of which remains the separation of powers": *Doucet-Boudreau*, para. 94. LeBel and Deschamps JJ. specifically noted, at paragraph 117, that this deferential principle applied to executive and legislative functions, and was limited only by the requirements of efficacy:

> Courts are called upon to play a fundamental role in the Canadian constitutional regime. When needed, they must be assertive in enforcing constitutional rights. At times, they have to grant such relief

> as will be required to safeguard basic constitutional rights and the rule of law, despite the sensitivity of certain issues or circumstances and the reverberations of their decisions in their societal environment. Despite — or, perhaps, because of — the critical importance of their functions, courts should be wary of going beyond the proper scope of the role assigned to them in the public law of Canada. In essence, this role is to declare what the law is, contribute to its development and to give claimants such relief in the form of declarations, interpretation and orders as will be needed to remedy infringements of constitutional and legal rights by public authorities. Beyond these functions, an attitude of restraint remains all the more justified, given that, as the majority reasons acknowledge, Canada has maintained a tradition of compliance by governments and public servants with judicial interpretations of the law and court orders.

49. The common juridical thread in these cases for the purposes of this appeal is that constitutional remedies affecting the legislative and executive branches of government should be efficacious in bringing about compliance and, to the extent consistent with efficacy, should minimally intrude into the effective functioning of government.

50. This Court has recognized that retroactive remedies that interfere with the allocation of public resources are particularly intrusive.

> Courts ought also consider whether a retroactive remedy would unduly interfere with the constitutional role of legislatures and democratic governments in the allocation of public resources.
>
> ***Hislop*, at paragraph 100;**
> ***Schachter v. Canada*, [1992] 2 S.C.R. 679 at 710.**

51. It does not follow that damages are never an appropriate and just remedy. However, it *does* follow that a plaintiff seeking constitutional damages must demonstrate that declaratory relief will be ineffective, and that is precisely what the Respondent in the present case has failed to do.

Charter Remedies are Prospective, not Corrective

52. The unassailable proposition that *Charter* remedies need to be effective (the "vindication" principle) raises the question of how that efficacy is to be judged. Tort law remedies are primarily retrospective and corrective; they compensate for losses in the past or, more abstractly, they correct injuries to the legal order. Tort remedies may also deter future

harmful conduct, but that is not their primary justification. Tort damages are (at least usually) compensation for past injuries to private-law rights. Public law remedies, on the other hand, are typically about bringing about compliance with the law in the future and are therefore prospective in object, if not always in effect.

53. For example, exclusion of evidence under s. 24(2) of the *Charter* is not "a remedy for police misconduct", but is only available to avoid the future harm of having the administration of justice brought into disrepute: see *R. v. Collins,* [1987] 1 S.C.R. 265 at paragraph 31, this point reaffirmed in *R. v. Grant,* [2009] S.C.J. No. 32, 2009 SCC 32 at paragraphs 69-70:

> Section 24(2)'s focus is not only long-term, but prospective....
>
> Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term repute of the justice system.

54. Similarly, the object or aim of stays of proceedings where delay or other breaches of the *Charter* have defeated the possibility of conducting a fair trial is necessarily prospective. As with exclusion of evidence, the stay of proceedings is designed to prevent future harm and is not used to compensate an accused or discipline the state: *R. v. O'Connor*, [1995] 4 S.C.R. 411.

55. Some common remedies are prospective both in object and in effect. Examples include transition periods and suspended declarations of invalidity, which as noted in *Hislop,* at paragraph 90, are effectively prospective. Neither of these remedies attempts to correct past rights violations or unlawful incursions by the state into *Charter*-protected freedoms.

56. Even in the case of immediate declarations of invalidity, the qualified immunity from damages for officials acting under invalid statutes that is set out in *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347 ("*Guimond*") and *Mackin* means that the courts make no attempt to retrospectively correct, absent proof of *mala fides.*

57. The issue raised by the present appeal is how these overarching remedial principles apply to the particular constitutional remedy sought in the present case: an award of damages under section 24(1) of the *Charter* for breach of a *Charter* right. While this Court has yet to directly address the question, the remedial principles reviewed above point to an answer: <u>An award of</u>

damages should not be available as a remedy under s. 24(1) of the *Charter*, unless a less intrusive remedy – such as declaratory relief – is inadequate to meet the objective of vindication.

58. The recognition that damages are an exceptional remedy under the *Charter* is consistent not only with this Court's jurisprudence on constitutional remedies, but also with the developing case law from other jurisdictions. Our recent past has seen a steady increase in statutory and constitutional protections for human rights throughout the world. With that development, courts here and elsewhere have been forced to grapple with remedial issues of the type raised in the instant case. While much, of course, depends on the unique constitutional and statutory protections at issue, case law from other jurisdictions provides guidance in considering the objectives and availability of monetary remedies for the infringement of constitutional or statutorily-protected rights in Canada.

Commonwealth Law on Damages for Breach of Rights

New Zealand

59. The New Zealand Bill of Rights Act 1990 ("BORA") is a statute of the New Zealand Parliament which sets out the rights and freedoms of citizens of New Zealand, but which does not have constitutional force. Section 27 (and BORA as a whole) is silent as to the remedies available for breaches of BORA itself.

60. In *Simpson v. Attorney General*, [1994] 3 NZLR 667 ("*Baigent's case*"), the New Zealand Court of Appeal first held that compensation in the form of "public law damages" was available for an infringement of rights guaranteed by BORA even in the absence of express remedial provision. *Baigent's case* recognized that damages *may* be an appropriate remedy, but provided little in the way of principled guidance as to when such an award was appropriate.

61. In subsequent decisions, the New Zealand courts drew a distinction between a private cause of action in tort, and the "public law" remedy of an award of damages under BORA:

> The private law proceeding is bipolar (between two parties); it is retrospective (it looks to events which have already occurred); right and remedy have historically been seen as intertwined; the dispute is very much self-contained; and the whole case is still essentially party-initiated and controlled.

> Cases based upon violations of the [New Zealand] Bill of Rights are about the vindication of statutory policies which are not "just" private: they have overarching, public dimensions. The context of such a proceeding necessarily changes, in at least 3 ways. First, the case is not a winner-takes-all kind of case. Damages are an economic concept. [New Zealand] Bill of Rights cases routinely involve a rearrangement of social relations between the parties, and sometimes with third parties. The object is to promote mutual justice, and to protect the weak from the strong. Secondly, the future consequences of such a case are every bit as important as the past, and the particular transgression. Thirdly, there is a distinct interface with public administration, and indeed, the governance of a given jurisdiction.

***Manga v. Attorney General*, [2000] 2 NZLR 65 (H.C.), at paras. 125-126**

62. The recent decision of the New Zealand Supreme Court *Taunoa v. Attorney General*, [2008] 1 NZLR 429 (SC) ("*Taunoa*") provides the most extensive review to date of the principles which guide an award of BORA damages.

63. The judgments in *Taunoa* start from the common premise that BORA damages do not fill the same function as common law damages. BORA damages are a public law remedy to be awarded at the discretion of the court where necessary to fulfill the objective of "vindication" of a breach of rights. The goal of such an award is less to compensate the plaintiff than to ensure an end to the breach and securing future compliance:

> [I]t is to be remembered that an award of Bill of Rights Act damages does not perform the same economic or legal function as common law damages or equitable compensation; nor should it be allowed to perform the function of filling perceived gaps in the coverage of the general law, notably in this country in the area of personal injury. In public law, making amends to a victim is generally a secondary or subsidiary function. It is usually less important than bringing the infringing conduct to an end and ensuring future compliance with the law by government agencies and officials, which is the primary function of public law. Thus the award of public law damages is normally more to mark society's disapproval of official conduct than it is to compensate for hurt to personal feelings.

***Taunoa* at para. 259, per Blanchard J.**

64. Given the public nature of the remedy of damages for human rights violations, and the primary importance of vindication rather than compensation as a remedial goal, a majority of the Court in *Taunoa* (Blanchard, Tipping and McGrath JJ.) viewed damages as not only a discretionary remedy but an extraordinary one. In most cases, a declaration will suffice to meet

the goal of vindication by giving express recognition to the importance of the right while at the same time deterring future breaches:

> The court's finding of a breach of rights and a declaration to that effect will often not only be appropriate relief but may also in itself be a sufficient remedy in the circumstances to vindicate a plaintiff's right. That will often be the case where no damage has been suffered that would give rise to a claim under private causes of action and, in the circumstances, if there is no need to deter persons in the position of the public officials from behaving in a similar way in the future. If in all the circumstances the court's pronouncement that there has been a breach of rights is a sufficiently appropriate remedy to vindicate the right and afford redress then, subject to any questions of costs, that will be sufficient to meet the primary remedial objective.
>
> ***Taunoa* at para. 368 per McGrath J.**

65. An important point noted by the Court is that the public nature of the remedy also permits the court to take account of broader societal interests in determining whether to exercise the discretion to award damages in any particular case. Any award of damages for a breach of BORA will be paid out of the public purse. Whether a monetary award is "just" must be considered not just from the vantage point of the individual plaintiff but also from that of the wider public who have an interest in the continued funding of public services. (*Taunoa* at para. 311, per Tipping J.)

United Kingdom

66. A related body of case law has emerged in the United Kingdom on monetary remedies under the UK Human Rights Act 1998. This Act was enacted in order to give greater effect to rights and freedoms guaranteed under the European Convention on Human Rights. Section 6 of the Act makes it unlawful for any public authority to act in a way that is incompatible with Convention rights. The "Rights and Freedoms" guaranteed by the Convention are attached as Schedule 1 to the Act. Unlike BORA, the Human Rights Act 1998 contains an express power on the part of the courts to award damages to remedy an unlawful act by a public authority. Section 8 of the UK act expressly authorizes a court to grant a remedy it "considers just and appropriate", and which is "necessary to afford just satisfaction to the person in whose favour it is made".

67. The remedial provision in the Human Rights Act, 1998 was judicially considered in *Anufrijeva v. Secretary of State for the Homeland,* [2004] 1 All E.R. 833 (Eng. C.A.). In

Anufrijeva, the Court of Appeal distinguished the character of the remedy provided under section 8 of the Act and a private law cause of action in tort:

> The remedy of damages generally plays a less prominent role in actions based on breaches of the articles of the Convention, than in actions based on breaches of private law obligations where, more often than not, the only remedy claimed is damages.
>
> Where an infringement of an individual's human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance. This is reflected in the fact that, when it is necessary to resort to the courts to uphold and protect human rights, the remedies that are most frequently sought are the orders which are descendants of the historic prerogative orders or declaratory judgments. The orders enable the court to order a public body to refrain from or to take action, or to quash an offending administrative decision of a public body. Declaratory judgments usually resolve disputes as to what is the correct answer in law to a dispute.
>
> ***Anufrijeva*, at paras. 52-53**

68. In considering whether to award compensation, the Court at paragraph 56 in *Anufrijeva* stated there is a "balance to be drawn between the interests of the victim and those of the public as a whole". The discretion inherent in the "just and appropriate" language of section 8 of Human Rights Act, 1998 is governed not only by the interests of the individual claimant but rather broader societal interests:

> In their analysis of the phrase "just and appropriate", *Scorey & Eicke* [*Human Rights Damages, Principles and Practice*] consider the case law in respect of similarly phrased statutes in Canada and South Africa and conclude that it would not be surprising if the English courts took an approach similar to that of those jurisdictions. In essence this involves determining an "appropriate" remedy in light of the particular circumstances of the individual victim whose rights have been violated, having regard to what would be "just", not only for that individual victim, but also for the wider public who have an interest in the continued funding of a public service: para A4-036. <u>Damages are not an automatic entitlement but, as I also indicate, a remedy of "last resort":</u> para A4-040. [Emphasis added]
>
> ***Anufrijeva*, at para. 56**

69. In *R (on the application of Greenfield) v. Secretary of State for the Home Department*, [2005] UKHL 14 ("*Greenfield*"), the House of Lords expressly approved of the distinction drawn in *Anufrijeva* between a private cause of action and an action for damages under the Human

Rights Act, 1998. In respect of the latter, the House of Lords agreed that the question of compensation will be of "secondary, if any, importance" to the primary objective of bringing the infringement to an end. The House of Lords also rejected the suggestion that in determining the amount of compensation a claimant might rely on damage precedents outside the Human Rights Act, 1998 context:

> First, the 1998 Act is not a tort statute. Its objects are different and broader. Even in a case where a finding of violation is not judged to afford the applicant just satisfaction, such a finding will be an important part of his remedy and an important vindication of the right he has asserted. Damages need not ordinarily be awarded to encourage high standards of compliance by member states, since they are already bound in international law to perform their duties under the convention in good faith, although it may be different if there is felt to be a need to encourage compliance by individual officials or classes of official.

***Greenfield*, at para. 19.**

Constitutional Damages in the United States

70. United States' law has taken a different approach to the question of damage remedies for constitutional breaches, a fact that is not surprising in light of that country's unique constitutional, social and civil rights history. Actions for constitutional damages in the US take a tort-driven approach, focusing on compensation and deterrence as the driving considerations.

71. At the same time, the U.S. courts have crafted absolute and qualified immunity defences that are reflective of the types of concerns that have limited monetary remedies in other jurisdictions: the need for deference both to the legislative branch of government and to officials tasked with the exercise of statutory discretion; the concern with over-deterrence; and pressures on the public purse. Thus U.S. courts have approached the issue with a distinct analytical framework, but the end result is consistent with other common law jurisdictions reviewed above: damages are generally not available for a violation of constitutional rights in the absence of willful misconduct by a government official.

72. The majority of constitutional tort actions in the United States are brought under federal statute 42 U.S.C. § 1983 ("Section 1983"), which provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…

73. In *Monroe v. Pape*, 356 US 169 (1961), the US Supreme Court first recognized that Section 1983 provided a cause of action for a breach by state officials of the plaintiff's federal statutory and constitutional rights. Ten years later in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court concluded that a similar remedy was available under the Fourth Amendment for misconduct by federal officials that breached a plaintiff's constitutional rights.

74. As a result of the unique features of US constitutional law, actions for damages for "constitutional torts" can only be brought against personal defendants in their individual capacities, rather than in their "official" capacities as government actors. With respect to Section 1983, claims against the state and state actors are barred by the sovereign immunity principle in the Eleventh Amendment to the US Constitution. The US Supreme Court has similarly held that sovereign immunity shields the federal government from damages claims under the *Bivens* doctrine, although it does not shield federal officials in their individual capacity.

> ***Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989) (neither a state nor state official in his official capacity is a "person" for the purposes of a Section 1983 action); *Federal Deposits Inc. v. Meyer*, 510 U.S. 471 (1994) (*Bivens* action against federal government or agencies barred by sovereign immunity).**

75. Although on its face Section 1983 admits no immunities to such actions, the Supreme Court has developed qualified and absolute immunity defences which are available to individual defendants facing Section 1983 or *Bivens* claims. In terms of policy rationale, the Court has held that these immunities are necessary to ensure fairness to those who wield state power, to avoid over-deterring state actors as they perform important public functions, and to keep in check the high social costs generated by civil rights litigation.

> ***Butz v. Economou*, 438 US 478 (1978); *Pearson v. Callahan*, 128 S Ct. 1702 (2009).**

76. Absolute immunity shields certain officials – e.g., legislators, judges, prosecutors – from having to pay damages for alleged constitutional infringements when they are performing "core" functions of their positions.

> ***Tenney v. Brandhove*, 341 U.S. 367 (1951) (absolute immunity for legislators); *Pierson v. Ray*, 386 U.S. 547 (1967) (immunity for judges); *Imbler v. Patchtman*, 424 U.S. 409 (1976) (immunity for prosecutors).**

77. Of broader application is the qualified immunity that protects all other government servants from civil damages insofar as their conduct does not violate "clearly established" laws or constitutional standards. The issue of whether the conduct of a government servant has violated clearly established law requires consideration of the contours of the constitutional right in question. The proper inquiry is whether the contours of that right are sufficiently clear and widely known that a reasonable person would know that his or her actions were unlawful.

> ***Harlow v. Fitzgerald*, 457 U.S. 800 (1892); *Anderson v. Creighton*, 483 U.S. 635 (1987); *Pearson v. Callahan*, 128 S.Ct. 1702 (2009).**

78. These principles were recently confirmed by the U.S. Supreme Court in a case involving the unconstitutional strip-search of a 13-year old girl by school officials. Despite finding the search to have breached the student's *Fourth Amendment* right, the court applied the qualified immunity principle in favour of those who conducted the search and held that no damages were available to remedy the breach. Further, it bears emphasis that the qualified immunity applies only to claims for damages under Section 1983 or *Bivens*, it does not preclude the granting of injunctive relief.

> ***Redding v. Safford Unified School District*, 129 S. Ct. 2633 (2009).**
> ***Behrens v. Pelletier*, 116 S. Ct. 834 (1996)**

79. The policy concerns that underlie these US public law immunities are similar to those that have driven the restrictions on the availability of public law damage awards in other jurisdictions, including Canada. In particular, these concerns emphasize the importance of judicial restraint in crafting constitutional remedies to meet the objective of vindication.

<u>The Canadian *Charter*</u>

80. The foregoing review leads back to the question of what principles should guide the availability of damages as a remedy under section 24(1) for breach of *Charter* rights. Existing

Canadian jurisprudence already provides a clear direction that is consistent with the evolution of public law in other jurisdictions.

81. *Guimond* and *Mackin* were concerned with the remedial of section 24(1) of the *Charter* and the circumstances in which it might be considered "appropriate and just" to award damages. In these decisions, this Court established the critical view that: 1) a damage award under section 24(1) is discretionary; and 2) in exercising such discretion the courts can (and should) consider broader public interests. For example, in *Mackin,* at paragraph 79, the Court recognized the general public law immunity from damages for good faith action by government servants, and stated:

> In theory, a plaintiff could seek compensatory and punitive damages by way of an "appropriate and just" remedy under section 24(1) of the Charter. <u>The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a Charter context. Thus, the government and its representatives are required to exercise their powers in good faith and to respect the "established and indisputable" laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable.</u> Otherwise, the effectiveness and efficiency of government action would be excessively constraint. [emphasis added]

82. Regarding such discretionary remedies as damages for *Charter* breaches, a court must give effect to a fundamental principle articulated in the following terms by this court in *London (City)* v. *RSJ Holdings Inc.*, [2007] 2 S.C.R. 588, 2007 SCC 29 at paragraph 39:

> …in exercising its discretion, the court cannot act in an arbitrary manner. The discretion must be exercised judicially and in accordance with established principles of law.

83. To the same effect in *Hislop* this Court, at paragraph 117, rejected the argument that a retroactive remedy should be granted for a section 15 violation where such a remedy would impose a large fiscal burden on government:

> Achieving an appropriate balance between fairness to individual litigants and respecting the legislative role of Parliament may mean that *Charter* remedies will be directed more toward government action in the future and less toward the

correction of past wrongs. In the present case, the Hislop class's claim for a retroactive remedy is tantamount to a claim for compensatory damages flowing from the underinclusiveness of the former *CPP*. Imposing that sort of liability on the government, absent bad faith, unreasonable reliance or conduct that is clearly wrong, would undermine the important balance between the protection of constitutional rights and the need for effective government that is struck by the general rule of qualified immunity. A retroactive remedy in the instant case would encroach unduly on the inherently legislative domain of the distribution of government resources and of policy making in respect of this process.

84. In the present case, a majority of the Court of Appeal rejected the application of *Mackin* outside of cases in which a statute had been declared unconstitutional. It is difficult to understand the basis for the dividing line drawn by the Court of Appeal. *Mackin* is concerned with striking the appropriate balance between the enforcement of constitutional rights and the need to protect government and government actors whose unconstitutional conduct is not deliberate or even negligent. *Mackin* expressly recognizes that such public law considerations must factor into the granting of a *Charter* remedy.

***RFJ, BCCA*, JAR Volume I, p. 84 – 88, paras. 57 - 61**

85. The qualified immunity established in *Mackin* is entirely consistent with the remedial goals of the *Charter*, and the role of the Courts in ensuring compliance with constitutional norms. If a government actor has not acted in bad faith (or even negligently), and his or her conduct is only later found to be unconstitutional, the only goal that can be served by an award of damages is to compensate the individual plaintiff. With respect, individual compensation should not be the sole basis for an award of damages under the *Charter* because that would transform the *Charter* into a purely private law model.

86. Our understanding of constitutional remedies to date (derived both from the language of the *Charter* and judicial decision) is that the objective is less the provision of an individual remedy than the enforcement of compliance with constitutional norms, in a manner that accords with the interests of society as a whole. If this is true of the remedies sought in *Hislop* and *Grant*, then why would the same not be true of the remedy sought by Mr. Ward?

87. Starting from the premise that the primary goal of the remedial provisions of the *Charter* is to put an end to *Charter* violations and to secure future compliance with the law by government actors, a declaration is a sufficient remedy in this case. The trial judge found that

the search of the Respondent was conducted non-negligently and in good faith. At the time, the Corrections Branch employed a search practice that was only later found to violate constitutional norms, and that practice was changed with the first judicial criticism (*Douglas*). An award of damages can serve no further purpose from the perspective of the goals of the *Charter*.

88. Indeed, the importance of the declaration as a remedy is apparent in this country since the decision in *Holland v. Saskatchewan*, [2008] 2 S.C.R. 551, 2008 SCC 42, recognizing that a failure by government to comply with a declaration is actionable in negligence.

89. Thus, Canadians can rely not only on the hope and expectation that governments will take steps to comply with declaratory orders, but also on the reality that those governments will be liable in tort if they do not.

Conclusion

90. The error in the reasoning of the Court of Appeal in the present case is that the majority starts from the premise that the primary objective of a section 24(1) damages remedy is personal compensation:

> For the kind of breach that occurred in the present case, however, only a past wrong is under consideration. A declaration of breach, therefore, has no ongoing benefit and is not a remedy at all. It is really nothing more than a finding of fact that may not, by itself, effectively redress the past wrong. To require that the breach be accompanied by a tort or by bad faith to justify an award of damages in many cases will give to the victim of the breach only a pyrrhic victory, not a true remedy.
>
> ***RFJ, BCCA*, JAR Volume I, p. 89, para. 63**

91. The Province submits that the dissent of Saunders J.A. reflects more closely the preferred analytical framework. The critical point of divergence between Saunders J.A. and the majority is found in paragraph 85:

> For damages under section 24 of the Charter, one basis may be, as with other Charter remedies, to "correct" behaviour of the persons who have caused the Charter infringement, or to provide rebuke. On this theory, damages are not so much intended to compensate the wronged individual as to censure the person who have breached his or her rights. 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 the error.
>
> ***RFJ, BCCA*, JAR Volume I, p. 97, para. 85**

92. Saunders J.A. correctly rejected the proposition that the purpose of *Charter* damages is to compensate the individual plaintiff, and the Province respectfully asks this Court to endorse this view, along with the vindication and restraint principles, in allowing this appeal and answering the constitutional question in the negative.

PART IV – COSTS

93. The Province seeks costs on a party and party scale.

PART V – ORDER SOUGHT

94. The Province seeks an order allowing this appeal and:

a. varying the judgment of the British Columbia Court of Appeal in appeal no. CA034766 to allow the Province's appeal and to set aside the award of costs of the cross-appeal in favour of the Respondent;

b. varying the judgment of the British Columbia Supreme Court in action no. S030038 by striking out the award of damages for breach of the *Charter*; and

c. awarding the Province costs in this Court and costs of its appeal in the Court of Appeal for British Columbia.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

Dated: October 19, 2009

Bryant MacKey & Karen Horsman

Bryant Mackey and **Karen Horsman**
Counsel for the Appellant, Her Majesty the Queen in right of the Province of British Columbia

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20.	*RJR-Macdonald v. Canada (Attorney General),* [1991] 1 S.C.R. 311	36
21.	*R (on the application of Greenfield) v. Secretary of State for the Home Department*, [2005] UKHL 14 (HL)	69
22.	*Schachter* v. *Canada*, [1992] 2 S.C.R. 679	50

PART VII: LEGISLATION

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

Correction Act, R.S.B.C. 1996, c.74

Correctional Centre Rules and Regulations, B.C. Reg. 284/78

New Zealand Bill of Rights Act 1990

UK Human Rights Act 1998

42 U.S.C. § 1983

Canadian Charter of Rights and Freedoms

Department of Justice Canada Ministère de la Justice Canada

Français

Schedule B

Constitution Act, 1982 (79)

Enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, which came into force on April 17, 1982

PART I

Canadian charter of rights and freedoms

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

a) freedom of conscience and religion;
b) freedom of thought, belief, opinion and expression, including freedom of the

press and other media of communication;
c) freedom of peaceful assembly; and
d) freedom of association.

Democratic Rights

Democratic rights of citizens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Maximum duration of legislative bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs of a general election of its members.

Continuation in special circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

Annual sitting of legislative bodies

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months

Mobility Rights

Mobility of citizens

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to move and gain livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

a) to move to and take up residence in any province; and
b) to pursue the gaining of a livelihood in any province.

Limitation

(3) The rights specified in subsection (2) are subject to

a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

Life, liberty and security of

7. Everyone has the right to life, liberty and security of the person and the right not to person

be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10. Everyone has the right on arrest or detention

a) to be informed promptly of the reasons therefor;
b) to retain and instruct counsel without delay and to be informed of that right; and
c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

a) to be informed without unreasonable delay of the specific offence;
b) to be tried within a reasonable time;
c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
e) not to be denied reasonable bail without just cause;
f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

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.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Official Languages of Canada

Official languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Official languages of New Brunswick

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Advancement of status and use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

English and French linguistic communities in New Brunswick

16.1. (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

Role of the legislature and government of New Brunswick

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.

Proceedings of Parliament

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

Proceedings of New Brunswick legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

Parliamentary statutes and records

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

New Brunswick statutes and records

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

Proceedings in courts established by Parliament

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

Proceedings in New Brunswick courts

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

Communications by public with federal institutions

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

a) there is a significant demand for communications with and services from that office in such language; or
b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

Communications by public with New Brunswick institutions

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

Continuation of existing constitutional provisions

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

Rights and privileges preserved

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

Language of instruction

23. (1) Citizens of Canada

a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

Continuity of language instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of

minority language instruction; and
b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

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.

General

Aboriginal rights and freedoms not affected by Charter

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Other rights and freedoms not affected by Charter

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Multicultural heritage

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Rights guaranteed equally to both sexes

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Rights respecting certain schools preserved

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.(93)

Application to territories and territorial authorities

30. A reference in this Charter to a Province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

Legislative powers not extended

31. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

Application of Charter

32. (1)This Charter applies

a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Exception

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

Exception where express declaration

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

Citation

34. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

IMPORTANT INFORMATION

[Link to Table of Legislative Changes which shows currency of each section of the Act.]

CORRECTION ACT

[RSBC 1996] CHAPTER 74

Contents

Section

Definitions

1 In this Act:

"contraband" means any of the following:

(a) an intoxicant;

(b) if possessed without prior authorization, a weapon, any component of a weapon or ammunition for a weapon, or anything that is designed to kill, injure or disable or is altered so as to be capable of killing, injuring or disabling;

(c) an explosive or bomb, or any component of an explosive or bomb;

(d) if possessed without prior authorization, any currency;

(e) if possessed without prior authorization, tobacco leaves or any products produced from tobacco in any form or for any use;

(f) if possessed without prior authorization, any other substance or thing that, in the opinion of the person in charge of a correctional centre, may threaten the management, operation, discipline or security of, or safety of persons in, the correctional centre;

"correctional centre" means a lawful place of confinement in British Columbia, including, without limitation, a jail, prison, lockup, place of imprisonment, camp, correctional institution, or place for treatment of alcoholics, and any land connected with it, but does not include, subject to the exception of a shared facility under section 13.1, any of the following:

(a) prisons or lockups operated by police forces or police departments;

(b) prisons or lockups operated by designated policing units, as defined in section 1 of the *Police Act*, or by designated law enforcement units, as defined in section 1 of the *Police Act;*

(c) penitentiaries under the control of Canada;

(d) a youth custody centre;

"court" includes the Court of Appeal, Supreme Court, Provincial Court and a justice of the peace;

"director" means the Director of the Investigation, Inspection and Standards Office;

"inmate" means a person who is sentenced to imprisonment, or lawfully detained, or is being confined for treatment, at a correctional centre, and includes a prisoner or trainee;

"minister" includes any person designated in writing by the minister;

"office" means the Investigation, Inspection and Standards Office;

"staff member" means a person holding an appointment under section 3 (1) and employed in a correctional centre and includes a person providing a service in a correctional centre under a contract with the minister;

"**work program**" means a program designed to assist inmates in acquiring work skills and to encourage them to engage in work;

Purpose

2 The purpose of this Act is to protect the community.

Staff

3 (1) Probation officers and other employees required for the purposes of this Act may be appointed under the *Public Service Act.*

(2) Persons appointed as described in subsection (1), except the director and employees in the office established under section 33, are peace officers while carrying out their duties under this Act and the regulations.

Temporary appointments

4 (1) Despite the *Public Service Act,* the minister may appoint employees required for the purposes of this Act to meet an actual or impending emergency.

(2) On request by a court and with the approval of the minister, a person may exercise the powers and discharge the duties of a probation officer without remuneration for the purposes and in the geographic area of British Columbia specified in the approval.

Probation officer's responsibilities

5 (1) A person who is appointed a probation officer under this Act

(a) is a probation officer for all of British Columbia,

(b) is an officer of every court in British Columbia,

(c) must prepare for the court reports as may be ordered by the court,

(d) has power to procure and report information as the court may require respecting a person convicted by the courts,

(e) is, if appointed a parole supervisor under the *Corrections and Conditional Release Act* (Canada), a peace officer under the jurisdiction of the government,

(f) must supervise parolees paroled under the *Parole Act,* and

(g) is, if attached to the staff of a correctional centre, subject to the directions of the person in charge of the correctional centre, and must assist in casework services and post release planning for inmates.

(2) A probation officer is responsible for the supervision of a person placed on probation by any

the certificate of health required by this section has been provided.

Agreement to house prisoners

13 (1) On behalf of the government, the minister may enter into an agreement with a municipality for the detention in a correctional centre of persons whose detention is chargeable to the municipality on terms for reimbursement of expenses as may be mutually agreeable.

(2) Agreements similar to those authorized under subsection (1) may be made for reimbursing municipalities for the expenses of detention in a municipal lockup of persons from in or outside the municipality whose detention is chargeable to the government.

(3) All persons lawfully acting under any agreement referred to in subsection (1) or (2) have full authority to detain persons and are empowered to do so.

(4) Lockups and other institutions used for the purpose of agreements made under this section are places of detention for the purposes and localities specified in the agreement.

Shared facility agreements

13.1 (1) In this section:

"police prisoner" means a person who is taken into or detained in custody but has not been remanded or committed to custody by a court;

"shared facility" means a correctional centre that also contains facilities for the detention of police prisoners.

(2) On behalf of the government, the minister may enter into an agreement with the City of Vancouver

(a) respecting the establishment, building, management, operation and security of a shared facility in Vancouver, British Columbia,

(b) respecting the provision of detention, security and other ancillary services for the shared facility, and

(c) for reimbursement of expenses incurred, by the government or the City of Vancouver, in relation to those matters under paragraphs (a) and (b).

Attendance of inmate or young person outside jail

14 (1) The minister may direct or authorize the employment or attendance of an inmate for any specific work, duty or purpose beyond the limits of a correctional centre.

(2) The degree of supervision of an inmate to whom subsection (1) applies must be determined by the person in charge of the correctional centre centre in consultation with the minister.

(3) During his or her employment or attendance under subsection (1), an inmate is subject to the rules, regulations and discipline of the correctional centres, so far as applicable, and must obey all

B.C. Reg. 284/78
O.C. 1843/78

Filed July 7, 1978
effective August 31, 1978

Correction Act;
Prisons and Reformatories Act (Canada)

CORRECTIONAL CENTRE RULES AND REGULATIONS

[includes amendments up to B.C. Reg. 255/2004]

Contents

Interpretation

1 In these regulations:

"Act" means the *Correction Act*;

"branch" means Corrections Branch;

"chaplain" means a chaplain employed or working under contract in a correctional centre;

"contraband" means a drug or weapon or any other object that may threaten the management, operation, discipline or security of a correctional centre;

"director" means the person in charge of a corrections centre and includes an officer authorized by the director to act in place of the director;

"Director of Inspection and Standards" means the Director of the Inspection and Standards Division established under the Act;

"district director" means the director of all correctional services within a district of the Province;

"disturbance" means an incident that interferes with the management, operation, discipline or security of a correction centre;

"drug" means a narcotic under the *Narcotic Control Act* (Canada) or a controlled drug included in Schedule G or a restricted drug included in Schedule H of the *Food and Drugs Act* (Canada);

"medical officer" means a person who, being a medical practitioner, is employed or working under contract as a medical officer for a correctional centre;

"officer" means an employee in the branch or a person working for the branch under contract;

"Ombudsman" means the Ombudsman appointed under the *Ombudsman Act* and includes a person to whom the Ombudsman has delegated any of his powers or duties pursuant to section 30 of that Act;

"possession" means possession as defined by the *Criminal Code* (Canada);

"privilege" means an entitlement, advantage or immunity granted to an inmate by the director but does not include a right of an inmate under an enactment of the Province or of Canada;

"privileged correspondence" means correspondence between

(a) an inmate and a member of Parliament, a member of the Legislative Assembly, the Ombudsman, the commissioner, a regional director, a district director, the Director of Inspection and Standards, a chaplain or the inmate's barrister and solicitor, and

(b) where an inmate is detained pursuant to the *Immigration Act* (Canada), the inmate and an immigration officer as defined in that Act;

"regional director" means the director of all correctional services within a region of the Province;

"rule" means a rule made under section 3;

"segregation cell" means, at a correctional centre, a cell that is located and designed to isolate an inmate, while housed in it, from contact with other inmates;

"unit" means a section of a correctional centre.

[am. B.C. Reg. 393/85, s. 1.]

Directors responsibilities

2 A director of a correctional centre is responsible, through the appropriate district director and regional director, to the commissioner for the management, operation, discipline, security and program of that correctional centre.

[am. B.C. Reg. 393/85, s. 2.]

Maintenance

3 (1) A director shall establish and maintain, in a form satisfactory to the commissioner,

(a) a chart illustrating the administrative structure,

(b) records concerning each inmate at his correctional centre, and

(c) rules for the orderly operation of the correctional centre pursuant to the responsibilities under section 2 of these regulations.

(2) On request by the commissioner, a director shall prepare and forward to him a report on any matter concerning an inmate or the correctional centre.

Contraband objects

18 (1) No person shall bring into or take from or assist in bringing into or taking from a correctional centre any contraband.

(2) A person who contravenes subsection (1) commits an offence and is liable to a fine of not more than $2 000 or to imprisonment for not more than 6 months, or to both.

(3) Where an officer has reason to believe that a person has committed, may be about to commit or is committing an offence under subsection (1), an officer of the same gender as the person may search the person or possessions of the person.

[en. B.C. Reg. 393/85, s. 5.]

Search of inmate

19 (1) On admission of an inmate to a correctional centre the person of the inmate and his possessions shall be searched by an officer of the same gender as the inmate.

(2) Once an inmate has been admitted to a correctional centre an officer shall only conduct such further searches where

(a) the director so authorizes, or

(b) an officer has reasonable and probable grounds to believe that the inmate is in possession of any contraband, in which case the officer shall search the inmate and provide a written report to the director within 12 hours.

[am. B.C. Reg. 393/85, s. 6.]

Seizure of contraband

20 (1) An officer who has reason to believe an object he finds

(a) in the possession of an inmate, or

(b) abandoned within the correctional centre

is contraband shall seize the object, record a description of it and the circumstances in which he seized it, and deposit it in a secure place within the correctional centre.

(2) The director shall return to the inmate from whom the object was seized, or deposit with the inmate's property surrendered under section 26 and add it to the inventory, an object seized under subsection (1) (a) unless

(a) it is determined under section 32 that the inmate breached section 28 (5) by reason of his possession of the object, or

(b) the object is required as evidence of an offence against an Act or regulation of the Province or of Canada.

(3) Where

(a) in the case of an object seized under subsection (1) (a), it is determined under section 32 that the inmate from whom the object was seized breached section 28 (5) by reason of his possession of the object, or