Court File No. 33089

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of British Columbia)

B E T W E E N:

CITY OF VANCOUVER

Appellant

A N D:

ALAN CAMERON WARD

Respondent

A N D B E T W E E N:

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

Applicant

AND:

ALAN CAMERON WARD

Respondent

FACTUM OF THE RESPONDENT ALAN CAMERON WARD

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

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

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

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

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

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

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

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

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

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

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

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

ATTORNEY GENERAL OF ONTARIO
Ministry of the Attorney General
Of Ontario, Const. Division
4th – 720 Bay Street
Toronto, ON. M5G 2K1

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

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

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

PROCUREUR GENERAL DU QUÈBEC
1200, Route de l'Église
Ste-Foy, Quebec. G1V 4M1

Ms. Isabelle Harnois
(418)643-1477 / (418)646-1695

NOËL & ASSOCIÈS
111 rue Champlain
Gatineau, Quebec. J8X 3R1

Mr. Pierre Landry
(819)771-7393 / (819)771-5397

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

Mr. Mark R. Kindrachuk
(306)975-4765 / (306)975-5013

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

Mr. Christopher Rupar
(613)941-2351 / (613)954-1920

ABORIGINAL LEGAL SERVICE OF TORONTO INC.
415 Yonge St. Suite 803
Toronto, ON. M5B 2E7

Ms. Kimberly R. Murray
(416)408-4041 / (416)408-4268

SOUTH OTTAWA COMMUNITY LEGAL SERVICES
406 – 1355 Bank Street
Ottawa, ON. K1H 8K7

Ms. Chantal Tie
(613)733-0140 / (613)733-0401

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

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

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

Ms. Colleen Bauman
Ottawa Agent

(613)235-5327 / (613)23-3041

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

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

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

Mr. Stephen J. Grace
Ottawa Agent

(613)233-1146 / (613)233-7190

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

Mr. Vincent Westwick
Counsel for the Intervener, Canadian
Association of Chiefs of Police

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

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

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

Ms. Kelly Doctor
Ottawa Agent

(613)235-5327 / (613)23-3041

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

Mr. Kent Roach
Counsel for the Intervener, B.C. Civil Liberties
Assoc. et al. (416)979-6439 / (416)591-7333

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

Ms. Kelly Doctor
Ottawa Agent
(613)235-5327 / (613)23-3041

TABLE OF CONTENTS

PART I: OVERVIEW AND STATEMENT OF FACTS

OVERVIEW OF APPEAL

1. The essence of this case is that the Appellants seek to fetter the discretion of the courts under s. 24(1) of the *Charter* by transforming what is now an exception into a general rule. Whereas this Court has only required a finding of bad faith, abuse of power, or other tortious conduct for section 24(1) damages in cases where a law has been held invalid under section 52 of the *Constitution Act, 1982*, (referred to hereinafter as "s. 52 cases") the Appellants would extend the same requirement to all damage awards under the *Charter*. In doing so the Appellants ask this Court to ignore the broad discretionary authority under section 24(1), and argue for a hard rule that would undermine the ability of judges to tailor appropriate and just remedies to suit the myriad of cases that come before them. In effect, the Appellants ask that government actors who violate *Charter* rights without statutory authorization be given the same immunity as applies to those who follow democratically enacted laws.

2. S. 24(1) of the Charter was drafted in plain and simple language, with the intention of conferring the widest possible discretion on the judiciary. This intention has been recognized by this Court:

> "It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases ..."
>
> ***Mills v. The Queen*, [1986] 1 S.C.R. 863 at p. 965**

3. The notion of creating common law rules to limit judicial remedial discretion under section 24(1) and fetter constitutionally enshrined remedial discretion has been previously rejected by this Court:

> "The power of the superior courts under s. 24(1) to make appropriate and just orders to remedy infringements or denials of Charter rights is part of the supreme law of Canada. It follows that this remedial power cannot be strictly limited by statutes or rules of the

> common law. We note, however, that statutes and common law rules may be helpful to a court choosing a remedy under s. 24(1) insofar as the statutory provisions or common law rules express principles that are relevant to determining what is 'appropriate and just in the circumstances'."
>
> ***Doucet-Boudreau v. Nova Scotia (Minister of Education)*** **[2003] 3 S.C.R. 3 at para. 51.**

4. The importance of judicial discretion in respect of *Charter* remedies is clear. Judges are called upon to fashion a remedy that most fairly balances the competing values and interests before them, and in doing so, they should be able to apply the fullest range of remedies available. To fetter this discretion would, in a case such as this one, deprive the innocent victim of any effective remedy.

5. In the present case, an ordinary citizen (Mr. Ward) was minding his own business on the streets of Vancouver, moving in a direction away from the Prime Minister's event, when despite there being no reasonable grounds to believe that he had done anything wrong, he was abruptly stopped by the police. Mr. Ward was questioned in respect of a crime that never occurred, had his assertions of innocence ignored, was detained against his will and was humiliatingly handcuffed in front of an on-looking public. The police then searched his pockets, found his identification, including his Law Society membership card. Having heard Mr. Ward's answers and having seen his identification, the police knew at this point that he was a lawyer. They also knew that Mr. Ward was moving away from, and not towards, the location of the feared crime. Understandably, Mr. Ward became frustrated and his voiced frustrations drew the attention of others nearby. In response, the police hauled him to jail (the facility is referred to herein as the "Jail").

6. At the Jail, Mr. Ward was subjected to what this Court has described in *Golden* as a "serious infringement of privacy and personal dignity". Without being allowed to contact a lawyer, Mr. Ward was strip-searched. He was then locked in a three-foot wide cell with no furnishings and was kept there for most of the afternoon. In all, Mr. Ward was unlawfully imprisoned for a period of between three-and-a-half to four hours. Meanwhile, his car was unlawfully and unjustifiably seized.

***R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83 at para. 99**

7. Finally, with no evidence against him, no grounds for a warrant, no charges laid, and no crime having ever occurred, Mr. Ward was at last released. To add insult to injury, his simple request for an apology was denied.

8. The only reason why this story continues is because, unlike the majority of falsely imprisoned and strip-searched citizens, Mr. Ward was a lawyer and had the assistance of other lawyers and the personal conviction to seek redress for the wrongs committed against him. He felt empathy for the many other innocent individuals, particularly the disadvantaged residents of the downtown eastside of Vancouver, who might be even more vulnerable to similar treatment and yet have no means of vindication.

9. After one week of trial, the trial judge found that Mr. Ward's fundamental rights and freedoms had been unjustifiably and unreasonably violated at the hands of the police and jailers on three accounts: the length of his detention, the strip-search of his person and the seizure of his car. In determining the appropriate remedy, the judge considered the facts and made modest but substantive awards in respect of the unlawful intrusion to privacy and personal dignity arising out of the strip search and detention, and awarded nominal damages in respect of the unlawful seizure of the car.

10. The Appellants ask this Court to find error in the judgment of Tysoe J., to hold that individuals subjected to the humiliation and insult to their fundamental rights and freedoms as in the case at bar should rarely be awarded damages, and to restrict the discretion of judges in crafting a remedy to suit the facts before them.

11. The Respondent disagrees with the Appellants' arguments on several fundamental bases:

a) a mere declaration, absent an award of damages, would deprive some individuals whose *Charter* rights have been violated of an appropriate and just (*i.e.*, an effective and

responsive) remedy. Judges hearing such cases should continue to have discretion to award damages for *Charter* breaches in appropriate cases;

b) victims of breaches of their *Charter* rights at the hands of police officers, prison guards and others acting without statutory authority should not also be required to prove bad faith, abuse of power or other tortious conduct as a precondition to the availability of damages for the *Charter* breach;

c) the Appellants seek to abolish the critical distinction between s. 52 cases and those in which no law is impugned as being contrary to the *Charter* (*i.e.*, "non-s. 52 cases"). To do so would ignore the reason why the rule in *Mackin* was created;

d) the argument of the Appellants that prospective remedies are more appropriate than retroactive remedies, purportedly based on the *Hislop* case, incorrectly applies the reasoning of that case; and

e) the "floodgates" argument alluded to by the Appellants is not supported by the record of *Charter* damages awards, or by the experiences in other Commonwealth countries.

Each of these points is expanded upon in Part III below. The Respondent's argument in Part III is structured based on the above five points.

STATEMENT OF FACTS

12. Mr. Ward is a high-profile civil rights lawyer who has represented claimants against the police in many cases.

***RFJ, BCSC*, JAR, Volume I, p. 9 para. 4**

13. When Mr. Ward was detained and arrested, he was moving in a direction away from Prime Minister Chretien.

***Evidence of Matthew Kelly*, JAR, Volume III, p. 79, lines 14 - 15**

14. When Mr. Ward was stopped by the police, there were no reasonable and probable grounds to believe that he had done anything for the purpose of assaulting the Prime Minister.

***RFJ, BCSC*, JAR, Volume I, p. 29 para. 64**

15. All of these events took place in relation to circumstances in which no crime ever occurred.

***RFJ, BCSC*, JAR, Volume I, p. 28 para. 62**

16. Mr. Ward had his assertions of innocence ignored, was detained against his will and was humiliatingly handcuffed in front of an on-looking public. The police then searched his pockets, and found his identification, including his Law Society membership card. Having heard Mr. Ward's answers and having seen his identification, the police knew at this point that he was a lawyer.

***Evidence of Alan Cameron Ward*, JAR Volume II, p. 26 line 8 - p. 28 line 35**

17. Mr. Ward was taken to the Jail. Without being allowed to contact a lawyer, Mr. Ward was strip-searched. He was then locked in a three-foot wide cell with no furnishings and was

kept there for most of the afternoon. In all, Mr. Ward was unlawfully imprisoned for a period of between three-and-a-half to four hours.

***Evidence of Alan Cameron Ward*, JAR Volume II, p. 32 lines 4 – 39**
***RFJ, BCSC*, JAR, Volume I, p. 28 para. 29 and 71,**

18. Mr. Ward's car was unlawfully and unjustifiably seized.

***RFJ, BCSC*, JAR, Volume I, p. 38 para. 92**

19. The events of August 1, 2002, have been humiliating to Mr. Ward, and have affected his perspective as a lawyer:

> One thing the event of August 1st, 2002 did was shake some of my core beliefs about the rule of law; my belief which I held before that date, that the police generally treated citizens with respect, fairness, and within the law, the legal obligations, especially those contained in the constitution of the country and the Charter of Rights. And I had always taken, because I had had a number of clients who, with allegations of police misconduct, I had always taken those complaints with a grain of salt, with some skepticism. And when I experienced firsthand that I, as a law-abiding citizen with no criminal record, acting perfectly lawfully, could be handcuffed; that my request to call a lawyer, as the Charter provides, would be ignored for more than an hour; that my request to have an explanation for what was happening to me would be ignored; that I could be essentially bundled away in a paddywagon, and taken to a jail and strip searched, and held in custody in a horrible, squalid cell, when I had done absolutely nothing wrong; it just, it just, as I say, rocked some of my core beliefs, the bedrock of what I built my, essentially, my working life on.

***Evidence of Alan Cameron Ward*, JAR Volume II, p. 65 lines 18 – 42**

20. Mr. Ward sought an apology, but did not receive one.

***Evidence of Alan Cameron Ward*, JAR Volume II, p. 66 lines 27 – 31**

21. One of Mr. Ward's objectives in pursuing this case was to help others in the Downtown Eastside of Vancouver, *i.e.* those who cannot afford to hire a lawyer, avoid being subjected to similar treatment

***Evidence of Alan Cameron Ward*, JAR Volume II p. 67, lines 1 - 6**

22. In answer to para. 8 – 13 of the factum of the Appellant Her Majesty the Queen in Right of the Province of British Columbia ("HMTQ"), the written policy at the Jail was:

> "A strip search *will be done* for new prisoners; *it is deemed necessary* because of the following:
>
> - the seriousness of the offence
> - charges against the prisoner are associated with evidence hidden on the body
> - at the time of the arrest, weapons were involved
> - the accused is known to be violent and/or to carry weapons
> - there is possible danger to personnel and prisoners in the Jail
>
> *A strip search will not usually be done on a Bylaw offender unless there is a threat to the safety and security of the Jail."*
>
> [emphasis added]

***RFJ, BCSC*, JAR, Volume I, p. 36, para. 83**

23. As noted by the trial judge, the policy itself is ambiguous. On its face, it is internally inconsistent and nonsensical. In practice, the first four of the listed factors were ignored, and the last factor (possible danger to personnel and prisoners in the Jail) was deemed to apply to all prisoners. Mr. Coulson confirmed, in his evidence, that the first four factors were irrelevant.

***RFJ, BCSC*, JAR, Volume I, p. 36, para. 84**
***Evidence of Peter Ford Coulson*, JAR Volume III, p. 184, lines 4 - 44**

24. Mr. Ward was never integrated into the general prison population. He was released by the Officer in Charge ("OIC") without being charged, and was kept segregated from the others in the Jail at all times. His situation was not unusual; not all prisoners are integrated with the general prison population.

> ***Evidence of Alan Cameron Ward*, JAR Volume II, p. 34, lines 24 - 27**
> ***Evidence of Peter Ford Coulson*, JAR Volume III, p. 186, lines 17 - 24**

25. While HMTQ states at para. 17 of its factum that the BC Corrections Branch had legal advice that *Golden* did not apply to strip-searches at the Jail, that opinion was never produced in this lawsuit.

26. There are additional facts in this case that are relevant to the assertion in the factum of HMTQ, at para. 89 that Canadians should rely upon the hope and expectation that governments will comply with declaratory orders. The history of the BC Government and other government actors across the country in this regard does not inspire such confidence. Particularly relevant are the following facts, described in more detail below:

a) The decision of this Court in *Golden* contained legal findings and directions regarding strip searches in custodial settings, and those findings and directions clearly apply to the Jail. However, even after *Golden*, the BC Corrections Branch has had to be pushed, prodded, and admonished by lower courts to change its strip-search policy;

b) Despite an admonishment by the BC Provincial Court in *Douglas*, the BC Corrections Branch has not complied with the constitutional requirement to allow new prisoners the right to telephone counsel before being strip searched; and

c) There are numerous examples of government officials, including the police, failing to comply with decisions of this Court with respect to the *Charter* rights of individuals. This is discussed further below.

27. At trial, the BC Corrections Branch took the position that *Golden* had no application to strip searches at the jail.

***Evidence of Peter Ford Coulson*, JAR Volume III, p. 190, lines 32 - 41**

28. The decision in *Douglas* also contained an admonition by the Court that absent exigent circumstances, a prisoner should not be searched by force until he or she has had an opportunity to contact legal counsel for advice. Mr. Coulson confirmed that the BC Corrections Branch failed to comply with this direction from the Court.

***R. v. Douglas*, 2003 BCPC 392 at para. 94**
***Evidence of Peter Ford Coulson*, JAR Volume III, p. 188 lines 1 - 36**

29. The General Occurrence report prepared by the Police concluded that the matter of Mr. Ward was a case of mistaken identity.

***Evidence of Sharon Petit*, JAR Volume III, p. 134, lines 13 - 30**

30. Contrary to the assertions found in para. 17 and 22 of Factum filed by the Appellant City of Vancouver (the "City"), that the police acted in good faith, the trial judge did not make any finding of good faith or bad faith with respect to the seizure of Mr. Ward's car, which is the only act by the police that is relevant to the City's appeal.

31. There was, however, a finding by the trial judge of unreasonable conduct by the police in seizing the car. This finding formed the basis for the declaratory order. The City has chosen not to appeal that finding. The City must therefore be taken to have accepted that the police acted unreasonably. Unreasonable behaviour cannot fairly be characterized as "innocent", contrary to the City's characterization in para. 47 of its factum.

***RFJ, BCSC*, JAR, Volume I, p. 38, para. 92**

32. The trial judge made no finding, one way or the other, with respect to whether the seizure of the car constituted tortious conduct. He did not find that there had been no conversion, *i.e.* no tort, he simply did not rule on that issue.

33. In the City's factum at para. 46, it states that in regards to the police decision not to search Mr. Ward's car, "it was a good faith effort to balance their public duty to prevent and investigate crime with the Respondent's privacy rights." With respect, that is not correct. As noted by the trial judge, the car was never searched because, "Detectives Brydon and Petit decided that there were insufficient grounds to obtain a search warrant." In other words, the police had no right to search the car, and the police had no public duty in that regard to balance.

***RFJ, BCSC*, JAR, Volume I, p. 38, para. 91**

PART II: QUESTION IN ISSUE

34. The Respondent takes no issue with the question as stated in the Appellants' facta. However, the question in issue refers to "bad faith, abuse of power, or tortious conduct." As discussed below in Argument, the exercise of government power, done in bad faith, maliciously or through abuse of power, falls within the tort of abuse of authority or misfeasance of public office, and is actionable at common law. Therefore, the constitutional question before this Court may be simplified as follows:

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

PART III: ARGUMENT

INTRODUCTION – THE FIVE ISSUES

35. As stated above, the Respondent has several principal disagreements, referred to below as the "five issues" with the arguments made by the Appellants. To expand upon the points identified in Part I above:

The First Issue: Declaration Alone Not Effective or Responsive

36. A declaration alone would, in many cases, deprive individuals whose *Charter* rights have been violated of an effective and responsive remedy. In some cases, even where no bad faith or other tortious conduct can be shown, damages may be the most appropriate and just remedy for breach of constitutional rights. The discretion of the courts to grant a remedy tailored to each situation should not be fettered.

37. It is a well-recognized principle that "...a purposive approach should be applied to the administration of Charter remedies as well as to the interpretation of Charter rights."

***R v. Gamble*, [1988] 2 S.C.R. 595, at p. 641**

38. It is also established by this Court that "[A] purposive approach to remedies requires at least two things. First the purpose of the right being protected must be promoted: the courts must craft responsive remedies. Second the purpose of the remedies provision must be promoted: courts must craft effective remedies." (emphasis in the original). A declaration simply states what the law is for the future; it does nothing to remedy the wrong that has been done to the victim.

***Doucet-Boudreau v. Nova Scotia (Minister of Education)* [2003] 3 S.C.R. 3 at para. 25**

The Second Issue: Tortious Conduct

39. Victims of breaches of their *Charter* rights should not also be required to prove bad faith, abuse of power or other tortious conduct as a precondition to the availability of damages. There is no logical connection between (a) the availability of damages for a proven *Charter* breach and (b) proving a concurrent tort. There is no relevant policy or principle that supports a requirement for such a victim to also prove a tort before damages may be available for the former. The only policy exception to the latter point, the *Welbridge/Mackin* exception, which is discussed below, does not apply in a non-s. 52 case.

> ***Welbridge Holdings Ltd. v. Greater Winnipeg*** **[1971] S.C.R. 957 at pp. 969 - 970**
> ***Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick (Minister of Finance),*** **[2002] 1 S.C.R. 405, 2002 SCC 13 at para. 79**

40. Some cases involving *Charter* breaches do not involve concurrent torts. In those cases, a victim should not be deprived of a remedy simply because the scope of rights protected under the common law is not identical to the scope of rights protected under the *Charter*. There should be greater protection for constitutionally recognized rights.

41. Further, to require proof of a tort as a pre-condition to availability of damages for a *Charter* breach would render the *Charter* meaningless to the victim in most cases. Claims of *Charter* breaches that are not accompanied by concurrent torts would be unrecoverable, thereby shifting the loss from government actors who committed the breaches to the victims. For those breaches that are concurrent with a tort, the victim could simply sue in tort, and the *Charter* would add nothing in most cases.

42. Finally, in some cases, a court may consider awarding "vindicatory" damages. If there is no concurrent tort, the victim would be deprived of that remedy.

43. In the alternative, if this Court is inclined to create a threshold test for the award of damages for a *Charter* breach, it is submitted that that test should be one of unreasonable conduct by the defendant. Reasonableness is the test explicitly set out in s. 8 and some other

provisions of the *Charter*, and has been suggested as an appropriate test by various learned commentators.

The Third Issue: the *Mackin* Exception

44. The Appellants seek to abolish the critical distinction between s. 52 cases and non-s. 52 cases. To abolish that distinction would ignore the reasons for the exception (under *Mackin*) to the general rule that damages are available as a remedy.

***Mackin, supra,* at para. 79**

45. There are well-established policy reasons why s. 52 cases should be treated differently from non-s. 52 cases. Those reasons pre-date the *Charter*. A s. 52 case can arise when a government actor is simply complying with empowering legislation that is later struck down. It is a long-standing principle that government actors should not face liability if they act pursuant to a statute or regulation that is later struck down.

46. A government actor should not be deterred from following democratically enacted legislation until such time as it is declared invalid. Conversely, in a non-s. 52 case, government actors should be deterred from violating people's rights where they have the discretion to opt for a non-*Charter*-infringing alternative.

The Fourth Issue: Retrospective versus Prospective

47. HMTQ, in its factum at para. 42, argues that *Charter* remedies "are primarily aimed at prospective deterrence not retrospective correction and compensation" (citing *Hislop)*. With respect, that is an incorrect statement of the law. The reasoning in *Hislop* is based on situations where a judicial decision has changed the law. In *Hislop*, this Court stated, "A substantial change in the law is necessary, not sufficient, to justify purely prospective remedies." The present case does not involve any change in the law. It has always been the law in Canada that individuals who have had their *Charter* rights violated are entitled to damages under s. 24(1), except in a s. 52 case.

***Canada (Attorney General) v. Hislop,* [2007] 1 S.C.R. 429, 2007 SCC 10, at para. 99**

The Fifth Issue: Floodgates

48. The spectre of opening the floodgates to damages awards, raised by the Appellants, is contradicted by the record of both the small volume of *Charter* litigation in which damages have been awarded, and the modest awards by courts since the enactment of the *Charter*. In addition, the record across the Commonwealth shows that awards of damages for breaches of constitutional rights have been restrained.

49. In the almost thirty years since the *Charter* was enacted, there has been only a handful of cases where damages have been awarded to victims of *Charter* violations, and the damages awarded in most of those cases have been modest. This record exists in the absence of any rule restricting *Charter* s. 24(1) by barring damages for *Charter* breach in non-s. 52 cases. This record, which is discussed in more detail below, exists because of the common law principles governing damages awards, the conservative approach taken to awards of damages for *Charter* breach, and the almost prohibitive cost of pursuing such claims.

50. Both the record across the Commonwealth of restrained awards of damages for breaches of constitutional rights, and the principles underlying such awards as set out in the Commonwealth authorities, support the view that the "floodgates" argument is not well founded. The leading Commonwealth cases in this area are discussed below.

DETAILED DISCUSSION OF THE FIVE ISSUES

A INSUFFICIENCY OF DECLARATIONS AS EFFECTIVE AND RESPONSIVE REMEDIES

51. In this section of the argument, the following points are discussed:

i) "effective and responsive" is the test established by this Court for remedies under s. 24(1). The test relates to the purpose of the section of the *Charter* that has been breached, in this case s. 8. A mere declaration may be, in the words of the *B.C. Court of Appeal* below, "a pyrrhic victory, not a true remedy";

***RFJ, BCCA*, JAR Volume 1, p. 89, para. 63**

ii) courts have in some cases criticized the police, customs officials and other government actors for failures to abide by courts' statements of the law, including their obligations and citizens' rights, under the *Charter*. This history illustrates that in at least some cases of *Charter* breaches, declarations are neither effective nor responsive remedies;

iii) one of the purposes of damages is compensation. A declaration does nothing to achieve that purpose; and

iv) other Commonwealth jurisdictions, in dealing with constitutional breaches, are consistent in holding that damages should be available in appropriate cases as a remedy for a constitutional breach.

i) The "effective and responsive" test

52. The remedies available under s. 24(1) of the *Charter* must be both effective and responsive. Further, s. 24(1) should be given a generous and expansive interpretation:

> 24 The requirement of a generous and expansive interpretive approach holds equally true for *Charter* remedies as for *Charter* rights (*R. v. Gamble*, [1988] 2 S.C.R. 595 (S.C.C.); *R. v. Sarson*, [1996] 2 S.C.R. 223 (S.C.C.); *Ontario v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81 (S.C.C.) ("*Dunedin*")). In *Dunedin*, McLachlin C.J., writing for the Court, explained why this is so. She stated, at para. 18:
>
> > [Section] 24(1), like all *Charter* provisions, commands a broad and purposive interpretation. This section forms a vital part of the *Charter*, and must be construed generously, in a manner that best ensures the attainment of its objects . . . . Moreover, it is remedial, and hence benefits from the general rule of statutory interpretation that accords remedial statutes a "large and liberal" interpretation . . . Finally, and most importantly, the language of this provision appears to confer the widest possible discretion on a court to craft remedies for violations of *Charter* rights. In *Mills*, McIntyre J. observed at p. 965 that "[i]t is difficult to imagine language which could give the court a wider and less fettered discretion". This broad remedial mandate for s. 24(1) should not be frustrated by a "narrow and

technical" reading of the provision . . . . [Reference omitted.]

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

***Doucet-Boudreau supra,* at para. 24 and 25**

53. The purpose of s. 8 is "to protect individuals from unjustified state intrusion upon their privacy. That purpose requires means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place." (emphasis in the original)

***Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 160**

54. According to this Court in *Feeney, Hunter* also says, regarding s. 8 rights, "...the purpose of the Charter is to prevent unreasonable intrusion on privacy, not to sort them out from reasonable intrusions on an *ex post facto* analysis." (emphasis in the original)

***R. v. Feeney*, [1997] 2 S.C.R. 13, at p. 47, para. 45**

55. This principle was recognized by the BC Court of Appeal in the case at bar:

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. Because the breach would not usually affect anybody other than the party directly involved, limiting the available remedy as suggested by the Province would render the individual rights provisions in the *Charter* less than purposive in many cases. Depending on the circumstances of the particular

> case, the remedy might be neither responsive nor effective. This is the case with respect to the strip search of Mr. Ward because it amounted to a significant *Charter* breach.
>
> ***RFJ, BCCA*, JAR Volume 1, p. 89, para. 63**

56. In *Taunoa*, Blanchard J. at para. 254 identified the need to "strike effectively at [the] source" of a constitutional infringement, and continued at para. 255:

> In undertaking its task the court is not looking to punish the State or its officials. For some breaches, however, unless there is a monetary award there will be insufficient vindication and the victim will rightly be left with a feeling of injustice. In such cases the court may exercise its discretion to direct payment of a sum of monetary compensation which will further mark the breach and provide a degree of solace to the victim which would not be achieved by a declaration or other remedy alone. This is not done because a declaration is toothless; it can be expected to be salutary, effectively requiring compliance for the future and standing as a warning of the potentially more dire consequences of non-compliance. But, by itself or even with other remedies, a declaration may not adequately recognise and address the affront to the victim. Although it can be accepted that in New Zealand any government agency will immediately take steps to mend its ways in compliance with the terms of a court declaration, it is the making of a monetary award against the State and in favour of the victim which is more likely to ensure that it is brought home to officials that the conduct in question has been condemned by the court on behalf of society.
>
> [emphasis added]
>
> ***Taunoa v. The Attorney General*, [2007] NZSC 70; aff'g [2005] NZCA 312, [2006] 2 N.Z.L.R. 457, at para. 254 – 255**

ii) Failure by Government Actors to Abide by Courts' Decisions and Directions

57. HMTQ argues (in its factum at para. 89) that, "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." This argument fails to distinguish between declaratory orders and statements of the law.

58. There are troubling examples, including the case at bar, where government actors have failed to comply with earlier judicial statements of the law. It is apparent that there is a

continuing problem of non-compliance by police forces with this Court's ruling in *Golden* and subsequent court decisions regarding unlawful strip-searches. A clear example is a recent case involving yet another unlawful strip search by police. The accused was stopped for a driving offence, and failed a breathalyzer test. He was then arrested at the roadside, and the police performed a pat-down search, which revealed nothing. He was taken to the police station, where the police emptied his pockets and removed his shoes. The police decided to detain Mr. Samuels for several hours until his blood alcohol level had come down. The police then conducted a strip-search of Mr. Samuels. It was their standard procedure to conduct a strip-search of anyone who was to be held in a cell, despite there being no specific concern about the individual. In this regard, the *Samuels* case is on all fours with the case at bar. The Court stated:

> [80] Despite the considerable body of reported cases in which the courts have time and again frowned upon the way police have conducted such strip searches, it is apparent to me something is missing in their conduct whereby the rights of short term detainees are not being taken seriously. Whether it is a lack of training or an attitude, I cannot say. However, to be frank, what I can say, is that the message does not appear to be getting through. ...
>
> [81] We have now traveled some distance from *Golden*. Repeatedly, the courts have addressed and censured the practice of routinely strip searching short term detainees, largely for drinking and driving offences. ...
>
> [emphasis added]

***R. v. Samuels*, 2008 ONCJ 85 at para. 80 - 81**

59. In the BC Provincial Court decision in *Drury*, which post-dated *Golden*, the court noted the "reluctance" of the Appellants to comply with the decisions in *Golden* and *Douglas*. While the date of the *Drury* decision is shortly after the *Douglas* decision, and it is not known on what evidence the Court made the statement cited below, it is clear that the Court had evidence before it suggesting either reluctance or failure by the Corrections Branch to comply with both *Golden* and *Douglas*;

> The evidence suggests an unfortunate failure at the Vancouver Jail, or simply reluctance, to bring the practice of strip-searching into conformity with *Golden* and *Douglas*, and the practice concerning the release of prisoners into conformity with s. 503(1) of the

> *Criminal Code* and *Lau*. This is not satisfactorily explained. I conclude that there is no suitable remedy other than a stay of the proceedings against Mr. Bush.
>
> ***R. v. Drury*, 2004 BCPC 0188 at para. 76**

60. Another example of non-compliance is found in the *Little Sisters* case, in which Iacobucci J. in dissent noted the failure by government actors (customs officials) to act in accordance with earlier jurisprudence. There is no disagreement with this statement in the majority reasons for judgment.

> As this episode makes clear, Memorandum D9-1-1 is only Customs' interpretation of s. 163(8); there is no guarantee that it conforms with what this Court said in *Butler*. In fact, for over two years Memorandum D9-1-1 was directly at odds with our jurisprudence.
>
> ***Little Sisters Book & Art Emporium v. Canada (Minister of Justice)* [2000] 2 S.C.R. 1120, 2000 SCC 69, at para. 180**

61. This Court in the above-cited *Little Sisters* case, recognized that there are other potential problems with declaratory relief:

> The need to strike down the Customs legislation as it applies to expressive materials is reinforced by comparison with the alternative remedy adopted by both the courts below, and by Binnie J. in this Court. Declarations are, in many cases, an appropriate constitutional remedy. As Kent Roach has summarized in his *Constitutional Remedies in Canada* (looseleaf ed., updated 1999), at para. 12.30, declarations are often preferable to injunctive relief because they are more flexible, require less supervision, and are more deferential to the other branches of government. However, declarations can suffer from vagueness, insufficient remedial specificity, an inability to monitor compliance, and an ensuing need for subsequent litigation to ensure compliance: see *ibid.*, at para. 12.320.
>
> [emphasis added]
>
> ***Little Sisters, supra*, at para. 258.**

62. As stated, the decision of the BC Provincial Court in *Douglas* also contained this admonition from the Court regarding the right to counsel:

> ...In these circumstances, and absent exigent circumstances, a prisoner should not be searched by force until they have had an opportunity to contact legal counsel for advice.

> The difficulty finding a private space to facilitate a telephone call is a minor concern when compared to the fundamental rights at stake.
>
> ***Douglas, supra*, at para. 94**

63. However, Mr. Coulson confirmed at trial (in late 2006) that the BC Corrections Branch had also failed to comply with this direction from the Court.

> ***Evidence of Peter Ford Coulson*, JAR Volume III, p. 188, lines 1 - 36**

64. One has only to search for cases in which evidence against an accused is excluded due to infringement of the accused's rights, in order to see that there are many instances where government actors have not complied with court rulings. Exclusion of evidence may be an effective and responsive remedy in a criminal case, but in a civil case such as the case at bar, it does not apply.

65. It is therefore apparent that, at least in some instances, Canadians cannot rely "...on the hope and expectation that governments will take steps to comply with declaratory orders." While, as the City says in its factum, quoting from para. 32 of this Court's decision in *Doucet-Boudreau*, that "Canada has had a remarkable history of compliance with court decisions by private parties and by all institutions of government," the last line of that paragraph is critical: "...we must never take it for granted but always be careful to respect and protect its importance, otherwise the seeds of tyranny can take root." For that reason, the judiciary must retain in its tool-kit the power to award damages where government actors have ignored court rulings. A declaration, or even a series of declarations, may be insufficient.

iii) Purposes of Awards of Damages

66. The availability of damages for individual victims of breaches of *Charter* rights is consistent with general principles and purposes of awards of damages. The role of the courts includes making determinations with respect to damages. Maintaining the discretionary powers of courts under *Charter* s. 24(1) to find that damages are an appropriate remedy, and to quantify such awards, is consistent with the language and purposes of the *Charter*.

67. At common law, in the context of tort or breach of contract, the general rule is that the purpose of an award of damages is compensation.

Waddams, S.M: *The Law of Damages* (loose-leaf) at para. 11.10

68. Common law principles governing assessment of damages also reflect the level or degree of culpability of a defendant in various circumstances. For example, in the law of trespass, courts award a lower level of damages even where there is no culpability of the defendant, *i.e.*, inadvertence or acting with a *bona fide* belief in title versus wilfulness, negligence or fraud.

***Shewish v. MacMillan Bloedel Ltd.* (1990), 48 B.C.L.R. (2d) 290 (C.A.) at pp. 294-5 and 297**
***Lower Nicola Indian Band v. Trans-Canada Displays Ltd.*, 2001 BCSC 1461 at para. 30 – 31**

Aggravated Damages

69. In some situations, plaintiffs might request awards of aggravated damages, which are a type of compensatory damages. Where a *Charter* breach has occurred, the physical or economic harm to the victim may be of low or minimal monetary value when gauged by reference to traditional awards of damages. Canadian case law shows that aggravated damages are sometimes awarded to provide compensation for intangible losses, such as humiliation. Commonwealth cases recognise distress and humiliation, including that caused by strip-searches, as compensable losses where constitutional rights have been breached.

***Vorvis v. ICBC*, [1989] 1 S.C.R. 1085 at p. 1099j**
Waddams, S.M.: *The Law of Damages* (loose-leaf) at para. 4.180 and 11.160
***Dunlea v. Attorney-General*, [2000] NZCA 84, [2000] 3 N.Z.L.R. 136, at para. 82**
***Merson v. Cartwright*, [2005] UKPC 38 at para. 14 and 22**
***Taunoa, supra*, (NZSC) at para. 100 and 322**

70. The availability of such an award in cases of breaches of *Charter* rights is consistent with the purpose of aggravated damages. In *Huff v. Price,* the court applied the principles in *Vorvis* as follows (at para. 48):

> [48] So aggravated damages are an award, or an augmentation of an award, of compensatory damages for non-pecuniary losses. They are designed to compensate the plaintiff, and they are measured by the plaintiff's suffering. Such intangible elements as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, loss of faith in friends or colleagues, and similar matters that are caused by the conduct of the defendant; that are of the type that the defendant should reasonably have foreseen in tort cases or had in contemplation in contract cases; that cannot be said to be fully compensated for in an award for pecuniary losses; and that are sufficiently significant in depth, or duration, or both, that they represent a significant influence on the plaintiff's life, can properly be the basis for the making of an award for non-pecuniary losses or for the augmentation of such an award. An award of that kind is frequently referred to as aggravated damages. It is, of course, not the damages that are aggravated but the injury. The damage award is for aggravation of the injury by the defendant's high-handed conduct.

***Huff v. Price* (1990), 51 B.C.L.R. (2d) 282 (C.A.) at para. 48**

71. Canadian courts have not been quick to award aggravated damages, or to award large amounts under that head of damage. Rather, courts have held that plaintiffs cannot expect a monetary award for every instance of upset or hurt feeling.

Punitive or Exemplary Damages

72. In exceptional cases, punitive or exemplary damages are awarded, not to compensate the victim of the wrongful act, but to punish the perpetrator. They may be awarded where a defendant's conduct has been malicious, oppressive or high-handed, and where punishment and deterrence are rationally required. However, courts do not make disproportionately large punitive damages awards that "overshoot[s] its purpose and becomes irrational."

***Vorvis, supra,* at pp. 1098j - 1099j**
***Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129, at para. 196-197**
***Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18, at para. 111**

iv) Damages for Constitutional Breaches – Commonwealth Jurisprudence

73. In the context of breaches of constitutional rights, courts in other Commonwealth jurisdictions have considered issues such as the circumstances in which damages should be available, the principles and purposes which govern the awarding of such damages, the relationship between constitutional rights and common law principles of liability and damage assessment, and quantification of damages. The Respondent submits that the jurisprudence from other jurisdictions provides an informative and useful perspective on the issues raised in the present appeal.

74. In other Commonwealth jurisdictions it is now well-established that damages may be an appropriate remedy for breach of constitutional or quasi-constitutional rights, regardless of whether a contemporaneous tort was committed, and regardless of whether the constitution in question contains a remedial provision. As early as 1971, the Judicial Committee of the Privy Council said, in the context of a request for "redress" under the Constitution of Guyana:

> "They [procedural questions] are of great importance in themselves, for Chapter II of the Constitution of Guyana will have a hollow ring unless the fundamental rights which it bestows upon "every person in Guyana" are buttressed by an effective legal remedy."
>
> ***Jaundoo v. Attorney-General of Guyana*, [1971] A.C. 972 (J.C.P.C.) at p. 978 H**

75. In the leading cases canvassed below, courts have held that damages for breach of a constitutional right may be awarded concurrently with, and where appropriate as supplementary to, common law damages for tort.

76. If it were held in the present case that proof of a tort were a pre-condition to the awarding of damages for breach of a *Charter* right, then Canadian law would diverge sharply from the law as developed in other Commonwealth countries.

77. *Baigent's Case,* which arose in New Zealand, is a seminal and much-cited Commonwealth authority. It involved an unlawful search of the plaintiffs' home even after police realized that they were at the wrong house in their effort to locate a drug dealer. The

police were alleged to have said, "... while we are here we'll have a look around anyway." The case established that, despite the absence from the New Zealand Bill of Rights Act ("BORA") of a remedial provision such as *Charter* s. 24(1), damages are available in some circumstances to persons whose rights under BORA have been violated. *Baigent's Case* supports the following approach:

(a) damages are available for breach of BORA whether or not a concurrent tort occurred;

(b) where there is a concurrent tort and award of damages therefor, damages for breach of BORA are still available if the remedy in tort is insufficient to compensate for the breach of BORA and vindicate the rights in question;

(c) the presence of malice or bad faith is not a precondition to an award of damages for breach of BORA. Rather, their existence would support a common law tort claim which would lie in addition to the BORA claim, and the claims would be concurrent;

(d) damages awarded under common law claims should be taken into account when quantifying the BORA damages, to avoid double recovery; and

(e) vindication of breached BORA rights is an important purpose of awarding damages for such breaches.

***Simpson v. Attorney-General (Baigent's Case)*, [1994] 3 N.Z.L.R. 667 (C.A.), at p. 678 per: Cooke P.**
***Dunlea, supra*, at para. 53 - 58**

78. In *Ramanoop,* the Judicial Committee considered the Constitution of Trinidad and Tobago. The remedial provision in that constitution (s. 14) includes a broad right to apply for "redress". After referring with approval to Cooke P.'s judgment in *Baigent's Case* and Thomas J.'s judgment in *Dunlea*, the Board stated at para. 17-21 of *Ramanoop*:

> 17. Their Lordships view the matter as follows. Section 14 recognises and affirms the court's power to award remedies for contravention of chapter I rights and freedoms. This jurisdiction is an integral part of the protection chapter I of the Constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of state power. Section 14 presupposes

that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the state's violation of a constitutional right. This jurisdiction is separate from and additional to ("without prejudice to") all other remedial jurisdiction of the court.

18. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

19. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasises the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions 'punitive damages' or 'exemplary damages' are better avoided as descriptions of this type of additional award.

20. For these reasons their Lordships are unable to accept the Attorney General's basic submission that a monetary award under section 14 is confined to an award of compensatory damages in the traditional sense. Bereaux J stated his jurisdiction too narrowly. The matter should be remitted to him, or another judge, to consider whether an additional award of damages of the character described above is appropriate in this case. Their Lordships dismiss this appeal with costs.

[emphasis added]

***Attorney General of Trinidad and Tobago v. Ramanoop,* [2006] 1 A.C. 328, [2005] UKPC 15 at para. 17 - 20**

79. The foregoing paragraphs from *Ramanoop* were quoted and applied by the Judicial Committee in a case involving breach of the Constitution of the Bahamas, *Merson v. Cartwright.* The remedial provision of the Bahamian Constitution, s. 28, is similar to the Trinidadian

provision considered in *Ramanoop*, and provides that the Supreme Court has jurisdiction to grant "redress" for infringements of constitutional rights. In *Merson* the Board held at para. 18:

> These principles [quoted from para. 17-20 of *Ramanoop*] apply, in their Lordships' opinion, to claims for constitutional redress under the comparable provisions of the Bahamian constitution. If the case is one for an award of damages by way of constitutional redress – and their Lordships would repeat that 'constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course' (para 25 in *Ramanoop*) – the nature of the damages awarded may be compensatory but should always be vindicatory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount. The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary.
>
> ***Merson, supra,* at para. 18**

80. The passages quoted above from *Ramanoop* and *Merson* were cited with approval by the Judicial Committee in *Subiah v. Attorney General of Trinidad and Tobago*.

> ***Subiah v. Attorney General of Trinidad and Tobago*, [2008] UKPC 47, at para. 11**

81. In *Merson*, after concluding that the grievous infringement of Ms. Merson's rights justified a substantial award of damages, the Board considered the issues of concurrent common law wrongs (the defendants were found to have committed assault and battery, false imprisonment and malicious prosecution) and duplication of damages. The Bahamian Constitution includes a restrictive provision in s. 28(2), quoted below, which has no parallel in the Canadian *Charter*:

> Provided that the Supreme Court shall not exercise its power under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.

***Merson, supra*, at para. 3**

82. Despite that restrictive provision, the Board awarded damages over and above those awarded for the torts that were committed, in order to vindicate Ms. Merson's constitutional rights:

> 20. We turn to the duplication issue. Many of the things done to Ms Merson were ingredients of one or other of the nominate torts as well as being infringements of her constitutional rights. But there was not a complete overlap. Moreover the wholesale contempt shown by the authorities, in their treatment of Ms Merson, to the rule of law and its requirements of the police and prosecution authorities, makes this, in our opinion, a very proper case for an award of vindicatory damages. There can be no objection, on the facts of this case, to an award to Ms Merson both of damages for the nominate torts and of vindicatory damages for the infringements of her constitutional rights.

***Merson, supra*, at para. 20**

83. Whether there are overlapping tort and constitutional breaches, damages are available. *Merson* was a situation where the breach of constitutional rights and the concurrent torts were said not to overlap completely.

84. Damages have also been awarded where there was no concurrent tort, such as in *Taunoa*. It is noteworthy that in *Taunoa*, one of the Crown's unsuccessful arguments against an award of damages was that, "The Bill of Rights breach was not motivated by malice, but occurred in good faith."

***Taunoa, supra*, (NZSC) at para. 108 per Elias C.J, para. 371 per McGrath J.**
***Taunoa, supra*, (NZCA) at para. 150**

85. Damages for breach of constitutional rights where there was no concurrent tort were also upheld by the Judicial Committee of the Privy Council in *Durity v. Attorney-General of Trinidad & Tobago*. In that case the breach of constitutional rights led to the suspension of the plaintiff

magistrate. The Board cited *Ramanoop, supra*, and *Inniss, infra*, regarding the approach that should be taken when awarding damages for such breaches:

> In most cases something more than a declaration that the Constitution has been infringed will be necessary. Compensation measured by the comparable common law measure of damages may be awarded if the person has suffered damage, but in principle this may not suffice as the fact that the right that has been violated was a constitutional right adds an extra dimension to the wrong. An additional award may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right that has been violated and to deter further breaches. As punishment in the strict sense is not its object, the expressions 'punitive', 'aggravated' or 'exemplary' damages are best avoided. The purpose of the award, whether it is made to redress the contravention or as relief, is to vindicate the right, not to punish the executive. Vindication involves an assertion that the right is a valuable one, as to whose enforcement the complainant herself has an interest.
>
> [emphasis added]

***Durity v. Attorney-General of Trinidad & Tobago*, [2008] UKPC 59 at para. 34**

86. The awarding of damages in order to deter future breaches of constitutional rights was approved of by the Judicial Committee in *Inniss v. Attorney General of Saint Christopher and Nevis*. The action was based on the removal of the plaintiff from her office of Registrar of the High Court in a manner contrary to s. 83(3) of the Constitution. The case was one of constitutional procedures and allocation of powers rather than one of constitutional human rights such as security of the person. Despite this, citing *Ramanoop* and *Taunoa*, the Board held that declaratory relief would not be sufficient to vindicate the important constitutional right at stake and to deter the executive from similar breaches in the future.

***Inniss v. Attorney General of Saint Christopher and Nevis*, [2008] UKPC 42 at para. 21-28**

87. Deterrence of future breaches was also cited by the New Zealand Supreme Court as a reason for awarding damages for breach of constitutional rights in *Taunoa*.

***Taunoa, supra*, (NZSC) at para. 109 per Elias C.J., para. 253, 255 per Blanchard J., para. 368 per McGrath J.**

88. These cases illustrate why *Charter* infringements *per se* are deserving of availability of damages, and why having to prove a tort as a pre-condition is inappropriate:

> The law would be in a strange state if relatively innocuous common law breaches were compensated as of right whereas breaches of a statutorily affirmed human right of an important kind were deemed less worthy of compensatory redress.
>
> ***Taunoa, supra,* (NZSC) at para. 318 per Tipping J.**

B WHY THE PROPOSED TEST (TORTIOUS CONDUCT) IS NOT APPROPRIATE

89. As stated, the Respondent's position is that proof of a *Charter* breach, *simpliciter*, should be sufficient to allow a court to award damages where it is just and appropriate to do so. A victim should not be required to surmount a further hurdle. There is no justifiable reason why the victim of a tort should have greater remedies available than a person whose fundamental rights have been violated, where those violations do not fall within the categories of torts that are currently recognized by the courts.

Bad Faith and Abuse of Power by a Government Actor is Tortious Conduct

90. The constitutional question before this Court is whether "bad faith, abuse of power, or tortious conduct" must be proven before damages are available in a non-s. 52 case.

91. This test would be similar, but not identical, to the *Mackin* limitation, which applies only in s. 52 cases, which holds that damages may be awarded for conduct that "is clearly wrong, in bad faith or an abuse of power…" The wording is slightly different than the constitutional question in this case, but the gist is the same.

92. In this section, the Respondent addresses:

(a) why the proposed test should not be used; and

(b) an alternative test of "reasonable conduct".

93. On its face, the proposed test contains three branches: bad faith, abuse of power, and tortious conduct. In fact, all three of these branches constitute tortious conduct, as discussed below.

94. When a government actor breaches the *Charter* rights of a citizen, and does so in bad faith, the "bad faith" element denotes an improper motive or purpose. Bad faith is an intentional act, as is malice.

95. Abuse of power has been defined as "...acting for a reason and purpose knowingly foreign to the administration...":

> The trial judge noted the seminal Canadian case on abuse of (or misfeasance in) public office, ***Roncarelli v. Duplessis,*** [1959] S.C.R. 122, where Rand J. noted at 141 that "Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration . . . ." As well, she noted the decisions of the Court of Queen's Bench and the Court of Appeal in what was until recently the leading English case, ***Bourgoin SA and Others v. Ministry of Agriculture, Fisheries and Food*** [1985] 3 All E.R. 585 (C.A.), and the decisions of the Federal Court of Canada in ***Chhabra v. The Queen*** (1989), 43 D.T.C. 5310 (F.T.D.), and ***Francoeur v. Canada*** (1994), 78 F.T.R. 109 (F.T.D.). In the latter case, the Court described the elements of abuse of public office:
>
> > Underlying both categories of cases giving rise to the tort of abuse of power or misfeasance in public office is the element of intent. ... Therefore, the tort of abuse of authority must be described as intentional and it is incumbent upon the plaintiff to establish this element either in the form of malice or action knowingly taken without authority.
>
> ***First National Properties Ltd. v. McMinn*** **2001 BCCA 305 at para. 32; leave to the SCC refused, [2001] S.C.C.A. No. 365**

96. As stated in the above case extract, abuse of power is actionable as a tort, described as the tort of abuse of authority. The exercise of power done in bad faith by a government agent constitutes the same tort, *i.e.* abuse of authority, or misfeasance of public office:

> What, then, are the essential ingredients of the tort, at least insofar as it is necessary to determine the issues that arise on the pleadings in this case? In *Three Rivers*, the House of Lords held that the tort of misfeasance in a public office can arise in one of two ways, what I shall call Category A and Category B. Category A involves conduct that is specifically intended to injure a person or class or persons. Category B

> involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff.
>
> ***Odhavji Estate v. Woodhouse* [2003] 3 S.C.R. 263, 2003 SCC 69, at para. 22**

97. While not all torts contain an element of bad faith or malice, bad faith or malicious exercise of statutory power by government actors is actionable in tort.

98. Therefore, the constitutional question before this Court is simply whether, in a non-s. 52 case, a court should be able to award damages for a *Charter* breach, absent tortious conduct. It is not necessary to identify bad faith and abuse of power separately in the constitutional question, as they are subsumed within the heading of tortious conduct.

Charter Rights Add Nothing if Tortious Conduct Must be Proven

99. It is trite law that if a victim of a tort can prove his or her case, he or she is entitled to damages. What, then, would be gained by seeking concurrent damages for a *Charter* breach? Arguably, nothing. The *Charter*, being the supreme law of Canada, becomes a meaningless document to the victim. If this Court accepts the Appellants' position, then a victim who can prove a tort will be entitled to damages with or without the *Charter* breach; if the victim cannot prove a tort, the victim cannot claim damages, notwithstanding the *Charter* breach. As stated by the Nova Scotia Court of Appeal in *Bevis*:

> Because our *Charter* rights are so significant, so fundamental to every Canadian, any breach warrants special consideration when it comes to assessing an appropriate remedy. It is not enough to simply add them to the mix with other common law torts without further elaboration. I acknowledge that double recovery is to be avoided and a global award might have been appropriate. However, in this case, a specific instruction was required to highlight the importance of *Charter* rights to all Canadians and the corresponding significance of the breaches.
>
> ***Bevis v. Burns*, 2006 NSCA 56 at para. 3**

100. The Appellants' position is, at its root, that the existence of a concurrent tort is the only reason a victim of a *Charter* breach should have damages available as a remedy. On the Appellants' approach, relief under s. 24(1) of the *Charter*, other than declarations, would be

subsumed and in effect displaced by the common law of tort and damages. The Respondent submits that this is inconsistent with both the broad discretionary power to craft appropriate remedies granted by s. 24(1), and with the *Charter*'s role as the "supreme law of Canada."

101. This point has been made by one learned author:

> If liability for violation of Charter rights extends no further than the existing basis in the ordinary law of malicious prosecution, abuse of power and the first branch of the tort of conspiracy, then quite simply, the Charter adds very little to the position of individuals with respect to their human rights – merely extending marginally the scope of the rights protected by law.
>
> **Cooper-Stephenson: *Charter Damages Claims* (1990), p. 320**

102. There are at least two reasons for not requiring proof of a concurrent tort. First, some *Charter* breaches do not involve a contemporaneous tort. Second, while tort damages are primarily intended to provide compensation, constitutional damages are primarily intended to vindicate the constitutional right that was breached, and to deter further breaches, although compensation is also relevant. In summary, if the Court accepts that the purposes of awarding damages for breach of constitutional rights include vindication of the breached right and deterrence of further breaches, the occurrence of a tort should not be a *sine qua non* regarding the availability of damages.

> ***Taunoa, supra,* (NZSC) at para. 108-109 per Elias C.J., para. 253, 255 per Blanchard J., para. 366 per McGrath J.**

103. There are examples of actual or potential *Charter* violations that do not fall within any current definition of a common law tort. For example, excessive surveillance, failure to issue a passport, discrimination, cruel and unusual punishment (*e.g.* in a prison setting, absent any physical contact, such as excessive solitary confinement) and wrongful conviction (absent malicious prosecution) are not recognized common law torts. There are areas where the *Charter* applies, but no tort has been committed, and areas where a tort has been committed, but no *Charter* breach has occurred.

***Merson, supra* at para. 10**
***Taunoa, supra,* (NZSC) at para. 108**

104. The categories of recognized torts are evolving. In 1930, negligence was not a recognized tort in Canada. There are likely to be new torts recognized by this Court in the future. To adopt the Appellants' argument would mean that a person whose *Charter* rights are violated today would not be entitled to damages if those rights are not currently protected by tort law, but if the right becomes protected by tort law in the future, that same *Charter* breach would entitle a future victim to damages. The argument ignores the simple fact that the rights deserving of protection in the *Charter* are already recognized as the supreme law of Canada, and the citizenry should not have to wait until tort law catches up.

Bad Faith and Malice

105. Bad faith or malice is not, however, a wholly irrelevant factor. It should not be a pre-condition to the availability of damages, but is relevant in determining the quantum of damages:

> Malice or gross negligence could perhaps justify awarding extra damages, but a fault requirement, independent of the violation of the right, sits uneasily with fundamental principles of Charter interpretation which stress the effects as opposed to the purposes of state action.

Roach, Kent, *Constitutional Remedies in Canada* (looseleaf), at para. 11.560

106. Reliance on a legal opinion stating that *Golden* did not apply to the Jail should be irrelevant to availability of damages. If such an opinion existed, there is no evidence as to whether it contained any uncertainty or qualification. It is submitted that there is no justifiable reason why a victim of such conduct should not be entitled to damages, simply because the government has acted pursuant to an erroneous legal opinion. If reliance on a legal opinion were to create immunity, that would transfer the risk that the legal opinion was wrong from the lawyer and/or the lawyer's client to the victim. To bar such a claim is to effectively transfer the consequences from the wrongdoer to the victim.

107. The House of Lords has recognized the danger in allowing "good faith" to immunize the wrongdoer. The statement was made in the context of a civil tort, but the logic is equally applicable to a *Charter* breach:

> First, in the context of a claim in tort, the law often has to strike a balance between two conflicting interests or rights. Like Lord Scott of Foscote, I consider that it would be wholly unfair on the victim of violence, and unduly favourable to the inflictor, if the victim had no right to any redress, and the inflictor had no civil liability, simply because the inflictor had an honest belief that he was under the threat of imminent attack, irrespective of the reasonableness of that belief.
>
> ***Ashley v. Chief Constable of Sussex Police*, [2008] UKHL 25, at para. 86 per Lord Neuberger**

108. To illustrate further, bad faith contains a subjective element of intent. In the case at bar, Mr. Ward was a high-profile civil rights lawyer who had represented claimants against the police in many cases. The police knew his identity as soon as he was arrested. Despite these facts, it was not possible to prove bad faith in this case, as each of the police officers involved denied having heard of him. If bad faith is a requirement for damages, it will be extremely difficult for most plaintiffs to succeed.

109. Similarly, proving common law negligence in such cases would likely be problematic. If, for example, the case involves police conduct, it would be necessary to find a police officer willing to testify that the standard of his or her colleagues fell below an acceptable standard of care. The requirement to prove tortious conduct would present an insurmountable bar to some deserving claimants. It is submitted that this Court should not impose such a high threshold.

Reasonable Conduct as an Alternative Test

110. As stated, it is the Respondents' position that in a non-s. 52 case, damages should be available in the discretion of the judge, which should not be fettered.

111. In the alternative, if any threshold test is to be established, it should not be one that makes it all but impossible for a plaintiff to succeed. The alternative test suggested is "unreasonable conduct". Such a test would be appropriate because it is consistent with the language in the

Charter. Some sections explicitly create such a test, including s. 8. Further, such a test sets a threshold that will not bar deserving plaintiffs.

112. There are many sections of the Charter, particularly in the Fundamental Freedoms and Equality Rights provisions, that do not refer to "reasonableness". For example, sections 2, 3, 7, 9, 10, 11(c), (d), (f), (g), (h) and (i), 12, 13, 14, 15, and others. In other words, applying a test of reasonableness would not equate to strict liability for damages for *Charter* breaches.

113. It was the intent of the drafters of the *Charter*, as expressed in the *Charter*, that reasonable conduct be the test for finding a breach of s. 8. No further test for damages for breach of s. 8 is set out anywhere else in the *Charter*, and s. 24(1) is drafted using the broadest possible language.

114. In the case at bar, although the learned trial judge did not find bad faith, he did find that the prison guards acted "unreasonably" with respect to the strip-search. The *Charter* infringement resulted from the unreasonable exercise of discretion, and even if this Court adopts the "reasonableness" standard as a threshold test, the appeal should be dismissed.

***RFJ, BCSC*, JAR, Volume I, p. 35 para. 82**

115. In summary, there is no need for the Court to impose any test, other than exists in the *Charter* itself, before damages are available. To require proof of tortious conduct would disentitle deserving victims of any meaningful remedy. A tort victim can sue for damages without invoking the Charter. In the alternative, if this Court imposes a threshold test, it should be based on reasonable conduct.

C THE *MACKIN* LIMITATION, AND WHY IT DOES NOT APPLY

116. The general rule is that Section 24(1) provides a broad mechanism by which *Charter* rights are enforced. As Lamer J. (as he then was) stated in *Mills*, "section 24(1) establishes the right to a remedy as the foundation stone for the effective enforcement of *Charter* rights." Such remedies may include damages:

> [S]ince the adoption of the *Charter*, a plaintiff is no longer restricted to an action in civil damages. In theory, a plaintiff could seek compensatory and punitive damages by way of "appropriate and just" remedy under section 24(1) of the *Charter*.
>
> ***Mackin, supra*, at para. 79.**
> ***Mills, supra*, at p. 881**

117. There is one relevant limitation to this general rule. A well-established principle enunciated in *Welbridge*, which pre-dates the *Charter*, is that a legislative body cannot be liable in damages for enacting a law that is held to be invalid. Government actors whose impugned actions were performed according to legislation or regulations later held to be invalid will in most cases be immune to claims for damages.

> ***Welbridge, supra*, at pp. 969 - 970**

118. Since the enactment of the *Charter*, the *Welbridge* principle has been applied to similar circumstances, where the legislation or regulation is struck down as contrary to the *Charter*. The result is that in s. 52 cases, damages will not be available in most circumstances. As explained in *Schacter v. Canada,* "where a provision is declared unconstitutional and immediately struck down pursuant to section 52, that will be the end of the matter" and no further remedy will be awarded.

> ***Schacter v. Canada*, [1992] 2 S.C.R. 679 at p. 720**

119. However, where a *Charter* breach has occurred in a non-s. 52 case, the general rule applies and a section 24(1) remedy will be available, including damages in appropriate cases:

> Where s. 52 of the *Constitution Act, 1982* is not engaged, a remedy under s. 24(1) of the *Charter* may nonetheless be available. This will be the case where the statute or provision in question is not in and of itself unconstitutional, but some action taken under it infringes a person's *Charter* rights. Section 24(1) would there provide for an individual remedy for the person whose rights have been so infringed.
>
> ***Schacter, supra,* at p. 719**

The *Mackin* Principle

120. In *Mackin,* a law was declared invalid as contrary to the *Charter*. In addition, the claimants sought damages under section 24(1) of the *Charter*. This claim for damages was dismissed based upon the Court's earlier decisions in *Welbridge*, *Schacter* and *Guimond*.

> ***Mackin, supra,* at para. 70 and 81**
> ***Schacter, supra,* at p. 720**
> ***Guimond v. Quebec (Attorney-General),* [1996] 3 S.C.R. 347 at para. 19**

121. However, the Court in *Mackin* noted an exception to the *Welbridge* principle, that a government official's clearly wrong, bad faith or abusive conduct has the effect of maintaining the court's power to award damages under section 24(1), despite there being a law impugned under section 52:

> [T]he 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. Otherwise the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded.
> ...
> In short, although it cannot be asserted that damages may never be obtained following a declaration of unconstitutionality, it is true that, as a rule, an action for damages brought under section 24(1) of the *Charter* cannot be combined with an action for a declaration of invalidity based on section 52 of the *Constitution Act, 1982.*
>
> ***Mackin, supra,* at para. 79 and 81**

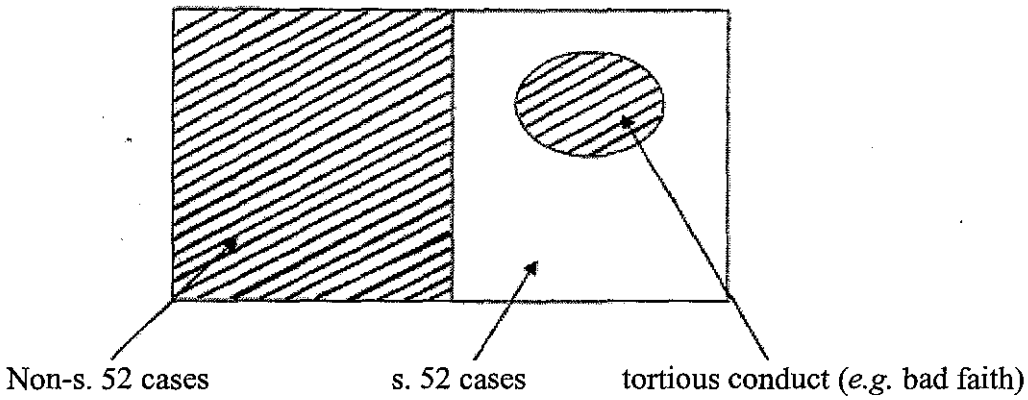
122. In summary, the law is as follows:

(a) Damages are generally available as a remedy under section 24(1);

(b) Damages will not generally be available under section 24(1) where a declaration of invalidity is made under section 52; and

(c) Damages may nevertheless be available under section 24(1) in conjunction with a declaration of invalidity under section 52 where the government actor has acted in a manner that was "clearly wrong, in bad faith, or an abuse of power".

Following is a diagram that illustrates the circumstances under which damages are available for a *Charter* breach. The shaded areas represent availability of damages:



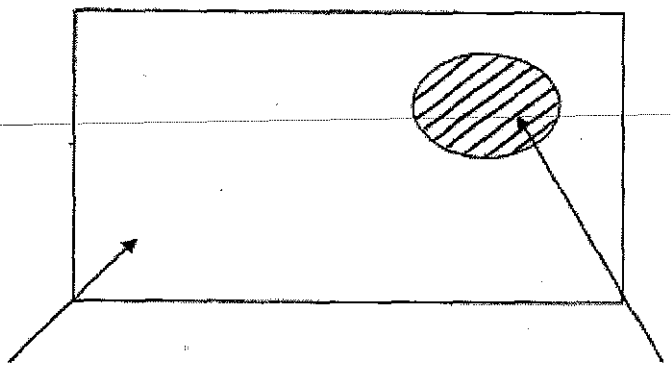
123. The Appellants seek to turn this Court's logic in *Mackin* on its head. In their arguments, they isolate the requirement for conduct that is "clearly wrong, in bad faith or an abuse of power" in a s. 52 case, and argue that such conduct should *always* be necessary for an award of damages against government actors under s. 24(1). In doing so, the Appellants ignore the basic context and principles under which *Mackin* was decided. The City argues:

> While *Mackin*, *supra*, involved unconstitutional legislation, the City submits that there is no reason, either in terms of policy or the decisions of this Court, to limit this principle to legislative acts only.
>
> ***City factum*, para. 40.**

124. HMTQ argues:

> 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.
>
> ***HMTQ factum*, para. 84**

Following is a diagram that illustrates the circumstances under which damages would be available for a *Charter* breach, if the Appeal were successful. The shaded areas represent availability of damages:



All cases (both s. 52 and non- s. 52) tortious conduct (e.g. bad faith)

125. With respect, the Appellants have failed to recognize the policy reasons that explain why damages should not be available when a government actor acts pursuant to an unconstitutional law, but why damages should be available where the government actor simply acts unconstitutionally on his or her own accord. There are good reasons why a s. 52 case should be treated differently than a non-s. 52 case.

a) Deterrence: a government actor should not be deterred from following democratically enacted legislation until such time as it is declared invalid. In a non-s. 52 case, government actors should be deterred from violating people's rights.

b) Deference to Legislatures: While courts must find a balance between the protection of constitutional rights, on the one hand, and the need for effective government, on the other hand (*Mackin*, para. 79), the deference shown to legislatures in a s. 52 case has no application in a non-s. 52 case.

c) To limit a victim to a purely prospective remedy (*i.e.* a declaration) in a non-s. 52 case would be contrary to the rule in *Hislop*, as explained below.

Deterrence

126. As explained in *Mackin*, "laws must be given their full force and effect as long as they are not declared invalid" (Gonthier J. in *Mackin*, para. 79). That is, in respecting the legislative role and power of the government, courts must necessarily extend a degree of protection to those government actors through which the legislature's will is given its "full force and effect". To the extent that a government official is simply carrying out the will of the legislature, that official's actions should not give rise to liability.

127. Applying the above principle to a situation where a government official is acting pursuant to a subsequently impugned law, it becomes clear why policy reasons dictate why liability should not arise. First, where an official is simply carrying out the will of the legislature and giving effect to a subsequently invalid law, the *Charter* breach was necessarily caused by the legislature's actions in enacting a violative law in the first instance and no fault is attributable to the official's actions alone. His or her role in the *Charter* breach was simply based on an obligation to carry out a law that was later found invalid. Absent the culpability of conduct that is (in the words of the Court in *Mackin*) clearly wrong, in bad faith or an abuse of power, the official has done no more than carry out the legislature's commands.

128. In a non-s. 52 case, the *Charter* infringement stems not from an act of the legislature, but rather, from an exercise of power or discretion exercised by a government actor. In such cases, the *Charter* infringement occurred because the actor opted to give effect to his or her responsibilities in a violative way, rather than in the constitutionally acceptable way. Section

24(1) of the *Charter* was designed to provide an individual remedy in such situations. As explained by Lamer C.J. in *Schacter*:

> Where section 52 of the *Constitution Act, 1982* is not engaged, a remedy under section 24(1) may nonetheless be available. This will be the case where the statute or provision in question is not in and of itself unconstitutional, but some action taken under it infringes a person's *Charter* rights. Section 24(1) would there provide for an individual remedy for the person whose rights have been so infringed.
>
> This course of action has been described as "reading down as an interpretive technique", but it is not reading down in any real sense and ought not to be confused with the practice of reading down as referred to above. It is, rather, founded upon a presumption of constitutionality. In comes into play when the text of the provision in question supports a constitutional interpretation and the violative action taken under it thereby falls outside the jurisdiction conferred by the provision. I held that this was the case in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, when I determined that a provision which provided a labour adjudicator with discretion to make a range of orders could not have been intended to provide him with the discretion to make unconstitutional orders. The legislation itself was not unconstitutional and section 52 was not engaged, but the aggrieved party was clearly entitled to an individual remedy under section 24(1).
>
> ***Schacter, supra* at p. 719**

129. As stated, deterrence is not a consideration the government actor is following a law currently in force. However, where the government actor cannot justify his or her actions on the basis of "I was just following the law", awarding damages for Charter breaches acts as a deterrent to future exercise of discretionary powers in a manner that infringes the Charter:

> There are further reasons why damages should be available to redress the infringement of a guaranteed right *per se*. First, it may assist in deterring future unconstitutional conduct. If officials are held liable only for collateral consequences, there is little incentive for them to respect rights in those circumstances where actual injury is unlikely to result. "
>
> **Pilkington, Marilyn "Monetary Redress for Charter Infringement," in R.J. Sharpe, ed., *Charter Litigation* (1987), 307 at 315**

Deference to Legislatures

130. At para. 41 of HMTQ's factum, it states that Charter remedies "... should intrude as little as possible on the exercise of authority by the legislative and executive branches of government." [emphasis added]. For this proposition, HMTQ relies on *Osborne*.

131. The Appellant's argument overstates the law, and *Osborne* does not support that statement. *Osborne* supports the principle that courts should defer to the law-making role of legislatures, and should not strike down laws "...beyond what is necessary to give full effect to the provisions of the *Charter*." It does not support the Appellant's argument that in crafting remedies for *Charter* breaches, courts "...should intrude as little as possible on the exercise of authority by ... executive branches of government." [emphasis added]. The executive branches of government include the police and Corrections Branch. In fact, the paragraph quoted by the Appellant from *Osborne* (which is in fact paragraph 65) is reproduced in its entirety:

> The policy of restraint reflected in the presumption of constitutionality arose out of the traditional respect by the judicial branch for the supremacy of the legislative branch. Interpreting a statute by reading it in accordance with the presumed intention of the legislators was regarded as less of an invasion of their domain by the court. 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. This flows from the court's role as guardian of the rights and freedoms which are entrenched as part of the supreme law of Canada. The court is given an express mandate to declare invalid a law which, by virtue of s. 52 of the *Constitution Act, 1982*, is of no force or effect to the extent of its inconsistency with the *Charter*. There is no reason for the court to disguise the exercise of this power in the traditional garb of interpretation. 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*. In exercising its broad discretion to fashion the appropriate remedy that will achieve these objectives in a *Charter* case, it is unnecessary to resolve the question as to whether there is a presumption of constitutionality. By reason of the diverse and novel problems which it will be called upon to redress, the court must maintain at its disposition a variety of remedies as part of its arsenal. Reading down may in some cases be the remedy that achieves the objectives to which I have alluded, while at the same time constituting the lesser intrusion into the role of the legislature. The same result may on occasion be obtained by resort to the constitutional exemption. This remedy was adopted by the Ontario Court of Appeal in *R. v. S. (S.)* (1987), 58 C.R. (3d) 289, 61 O.R. (2d) 290, 37 C.C.C. (3d) 53, 35 C.R.R. 300, 20 O.A.C. 345, a case which is pending in this court [affirmed (1991), 7 C.R. (4th) 117, 128 N.R. 81, (sub nom. *R. v. S.)* 66 C.C.C. (3d) 321, 83 D.L.R. (4th) 193, 48 O.A.C. 81, 6 C.R.R. (2d) 35 (S.C.C.)]. In such circumstances, I see no particular virtue in resorting to the language of presumptions in order to disguise what is to all intents and purposes a remedy. When the values of the *Charter* are not sacrificed thereby, it is preferable to express deference to the legislature as a factor in fashioning the remedy rather than engaging in a fictitious analysis that attributes to the

legislature an intention that it did not have.

[emphasis added]

***Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 at para. 65**

132. None of this has any application to determining the appropriate remedy where jailers strip-search an innocent citizen in breach of the *Charter*, and no legislation is impugned.

133. HMTQ argues, in para. 41, that, "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." This statement does not support the Appellants' position for two reasons:

a) Awarding damages does not affect the elected branches of governments' freedom to act. That statement would apply if this were a s. 52 case. However, in this case the government actors should be prevented and deterred from infringing the constitutional rights of citizens, something they have no "freedom" to do; and

b) In any event, history and case law clearly demonstrate that admonishments and statements of the law by this Court are not always effective in deterring on-going violations of people's rights.

134. Where a *Charter* infringement occurs in a non-s. 52 case, it may not be excessively constraining to expect government officials to seriously contemplate the constitutionality of their actions in advance. This balancing of interests is lost in the Appellants' proposed test for entitlement to damages. Instead of finding a balance between constitutional rights and effective government, the Appellants ask this Court to instead shift the risk of loss from *Charter* infringements almost entirely away from the government, who can better prevent and bear such risks, and place it entirely onto the individuals whose rights have, or will be infringed.

135. The present case offers an example of where the application of certain principles from *Mackin* are not applicable to *Charter* infringements that were not caused by a constitutionally invalid law. The strip-search of Mr. Ward was not caused by the application of an invalid law, and section 52 was not engaged. The violation of the Respondent's *Charter* rights occurred because the guards opted to carry out their responsibilities in a constitutionally violative way, despite the availability of a constitutionally acceptable alternative.

D PROSPECTIVE VERSUS RETROSPECTIVE

136. HMTQ, in its factum at para. 42, argues that *Charter* remedies "are primarily aimed at prospective deterrence not retrospective correction and compensation" (citing *Hislop)*. With respect, that is an incorrect statement of both the law and the *Hislop* case. This Court in *Hislop* made the following statements:

> 81 The Constitution empowers courts to issue constitutional remedies with *both* retroactive and prospective effects: see, e.g., *Schachter v. Canada*, [1992] 2 S.C.R. 679 (S.C.C.), at p. 719. Section 24(1) of the *Charter* enables individuals who have had their *Charter* rights violated to seek redress for those past wrongs and "obtain such remedy as the court considers appropriate and just". Section 24(1) may also, in some situations, enable the claimant to recover damages, which are necessarily retroactive: *Schachter*, at pp. 725-26.
>
> 82 Section 52(1) instructs courts to declare unconstitutional legislation of no force or effect. When a court issues a declaration of invalidity, it declares that, henceforth, the unconstitutional law cannot be enforced. The nullification of a law is thus prospective. However, s. 52(1) may also operate retroactively so far as the parties are concerned, reaching into the past to annul the effects of the unconstitutional law: see, e.g., *Miron v. Trudel*, [1995] 2 S.C.R. 418 (S.C.C.)...
>
> 86 ... Because courts are adjudicative bodies that, in the usual course of things, are called upon to decide the legal consequences of past happenings, they generally grant remedies that are retroactive to the extent necessary to ensure that successful litigants will have the benefit of the ruling: see S. Choudhry and K. Roach, "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies" (2003), 21 *S.C.L.R.* (2d) 205, at pp. 211 and 218. There is, however, an important difference between saying that judicial decisions are *generally* retroactive and that they are *necessarily* retroactive. When the law changes through judicial intervention, courts operate outside of the Blackstonian paradigm. In those situations, it may be appropriate for the court to issue a prospective rather than retroactive remedy...

> 99 Change in the law occurs in many ways. "Clear break with the past" catches some of its diversity. It can be best identified with those situations where, in Canadian law, the Supreme Court departs from its own jurisprudence by expressly overruling or implicitly repudiating a prior decision. Such clear situations would justify recourse to prospective remedies in a proper context. But other forms of substantial change may be as relevant, especially in constitutional adjudication, where courts must give content to broad, but previously undefined, rights, principles or norms. The definition of a yet undetermined standard or the recognition that a situation is now covered by a constitutional guarantee also often expresses a substantial change in the law. The right may have been there, but it finds an expression in a new or newly recognized technological or social environment. Such a legal response to these developments properly grounds the use of prospective remedies, when the appropriate circumstances are met. A substantial change in the law is necessary, not sufficient, to justify purely prospective remedies. Hence, we must now turn to what else must be considered once legal change has been established.
>
> [emphasis added]
>
> 103 ...where a judicial ruling changes the existing law or creates new law, it may, under certain conditions, be inappropriate to hold the government retroactively liable.
>
> ***Hislop, supra,* at para. 81, 82, 86, 99, and 103**

137. *Hislop* was a s. 52 case, and all of the discussion regarding retrospective versus prospective remedies was in that context. The case at bar is not a s. 52 case.

138. Most importantly, in *Hislop*, this Court stated,

> A substantial change in the law is necessary, not sufficient, to justify purely prospective remedies.
>
> ***Hislop, supra,* at para. 99**

139. The case at bar does not involve any change in the law. It has always been the law in Canada that individuals who have had their Charter rights violated are entitled to damages under s. 24(1), except in a s. 52 case (and absent tortious conduct).

E FLOODGATES

140. In HMTQ's factum, at paragraphs 22 and 50, HMTQ indirectly alludes to the spectre of increased litigation and the high cost of same, should the appeal be unsuccessful. If the spectre of widespread and large monetary liability for breaches of the Charter was realistic, one could reasonably have expected it to have already arisen in the nearly 28 years since the *Charter* was enacted. Instead, the courts have shown, if anything, even more restraint in awarding damages for breaches of *Charter* rights than they apply every day in civil cases.

141. Damages awards for breaches of constitutional rights in Canada have been remarkably modest, both in frequency and amount. In those few cases where damages have been awarded for *Charter* breaches, judges have been careful and cautious in the exercise of their discretion in awarding damages, and the quantum awarded to Mr. Ward in this case illustrates that point. The "floodgates" spectre that is hinted at by the Appellants has not materialized despite the availability of damages for 28 years.

Roach, Kent, *Constitutional Remedies in Canada* (looseleaf), at para. 11.10

142. Commonwealth cases also demonstrate restraint in damages awards. There are express statements in such cases that damages for breaches of constitutional rights, while they should be realistic and vindicate those rights, should be neither extravagant nor duplicative of common law damages.

***Taunoa, supra,* (NZSC) at para. 109 per Elias C.J., para. 265 per Blanchard J., para. 324 per Tipping J.**
***Baigent's Case, supra*, at p. 678 per Cooke P.**
***Dunlea, supra*, at para. 82 per Thomas J. (dissenting)**
***Ramanoop, supra*, at para. 16**

143. This Court may take judicial notice of the fact that litigating claims such as Mr. Ward's claims in this case, which included two interlocutory applications, several days of examinations for discovery, a one-week trial and a two-day appeal, would typically cost many tens of

thousands of dollars. Most victims of such *Charter* breaches (*e.g.* strip-search by the police, unlawful detention) could not afford to litigate a case of this nature. An award of costs, if the Plaintiff is successful, is only a partial indemnity, representing substantially less than one half of the actual legal costs incurred. Given the prohibitively high cost (to most people) of litigating a *Charter* breach, it is not surprising that there have been so few cases.

RESPONSES TO OTHER PARAGRAPHS IN THE APPELLANTS' FACTA

144. In para. 16 of HMTQ's factum, reference is made to para. 96 of the *Golden* decision. That extract is relied upon later in that factum to argue that the prison staff had a "good faith" defence in believing that *Golden* did not apply to strip searches at the jail. However, it is obvious upon reading the latter part of para. 96 that it certainly does apply:

> ... 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: [page732] R. v. Toulouse, [1994] O.J. No. 2746 (QL) (Prov. Div.).
>
> ***Golden, supra*, at para. 96**

145. In its factum at para. 88, HMTQ cites *Holland v. Saskatchewan* for the proposition that "...a failure by government to comply with declaratory orders is actionable in negligence." That is, with respect, an overstatement of the law. The statement may apply where a declaratory order is made in favour of an individual, and that same individual sues in negligence with respect to enforcement of the order. It has no application to general statements of the law made by a court, when the Plaintiff was not a party to the original decision.

***Holland v. Saskatchewan*, [2008] 2 S.C.R. 551, 2008 SCC 42**

146. In *Holland*, which involved a federal programme aimed at preventing chronic wasting disease in cattle, a lower court declared that the government's lowering of the classification of the plaintiff's herd was invalid. Despite this ruling, the government took no steps to cancel the certification level. Certainly that plaintiff would have a right to enforce that declaration. However, the Respondent is unaware of any case where a plaintiff has successfully sued a

government in negligence for failure to apply, in favour of that plaintiff, a declaratory court order obtained by someone else in another action. There would be many hurdles in attempting to do so, including lack of privity.

147. In the present case, on HMTQ's argument, HMTQ would be liable in negligence for its failure to comply with *Golden*. Obviously, that is not the effect of *Holland*.

148. The City, at paragraphs 41 – 48 of its factum, and in particular paragraphs 44 and 45, raise the spectre of a "chilling effect". The City does not explain what the supposed chilling effect would be or how it would manifest itself, but in paragraphs 44 and 45 the City discusses that police officers should not be afraid to make discretionary decision. There are several answers to this argument:

a) the 28 year history of availability of *Charter* damages has not led to any discernable "chill";

b) it has been held in other Commonwealth countries that claims for constitutional damages will not lie against individual government actors; the action lies against the government itself. "It is a liability of the state itself."

***Maharaj v. Attorney-General of Trinidad and Tobago (No. 2),* [1979] A.C. 385 at p. 399 F**
***Baigent's Case*, supra, at p. 677 per Cooke P.**

c) Moreover, if affirmation by this Court that damages continue to form part of an "appropriate and just" remedy in some cases where a *Charter* right has been breached leads to increased vigilance by government actors to ensure they do not continue to breach human rights under the *Charter*, then so much the better.

149. In para. 3 of HMTQ's factum, it is argued that there must be a balancing of constitutional rights as between segments of society or individuals. That balancing takes place in determining whether a *Charter* right has been breached. It is irrelevant to determination of the appropriate

remedy. In the present case, such balancing took place when it was determined that the strip-search of Mr. Ward was "unreasonable" under s. 8 of the *Charter*. Now, in determining the appropriate remedy, the balance to be considered is whether the victim or the state should bear the loss.

150. HMTQ, at para. 43 and 51 of its factum, argues that it is up to the plaintiff to demonstrate that declaratory relief would be ineffective. This approach would create a presumption that declaratory relief is a sufficient remedy, and would place the onus on the victim to overcome that presumption. This is an illogical and unprincipled approach, and does not follow from the authorities cited by HMTQ.

CONVERSION

151. The City's appeal is based on the incorrect premise that there was no finding of conversion in the trial judgment. This is found in the City's factum, at para. 13, in which the City says, "Tysoe J. dismissed the Respondent's claim for wrongful arrest, negligence, assault and conversion."

152. The fact that the learned trial judge omitted to address the issue of conversion was recognized by the Court of Appeal:

> Mr. Ward argues that the impounding of his car by the police, in addition to being a breach of his *Charter* right, also amounted to the tort of unlawful conversion for which, like the tort of wrongful imprisonment, the awarding of damages was an appropriate remedy. He pleaded the tort of unlawful conversion in his statement of claim but the trial judge did not discuss that aspect of the claim in his reasons. It will be necessary to consider this alternative argument only if the appeal of the Province is successful.
>
> ***RFJ, BCCA*, JAR Volume 1, p. 73, para. 33**

153. In the final analysis, the Court did not find it necessary to address the issue of conversion, because it dismissed the appeal of HMTQ.

154. The tort of conversion "involves a wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession."

> ***373409 Alberta Ltd. (Receiver of) v. Bank of Montreal*, [2002] 4 S.C.R. 312, 2002 SCC 81, at para. 8**

155. It is a finding of fact that the City (the police) took possession of Mr. Ward's car, without lawful justification: "However, Mr. Ward was not lawfully arrested for assault or attempted assault, and the seizure of his car was not reasonable. The seizure of the car cannot be justified on the basis that Mr. Ward was under arrest for breach of peace."

> ***RFJ, BCSC*, JAR, Volume I, p. 38 para. 92**

156. The Court of Appeal refused to interfere with the trial judge's exercise of discretion in awarding $100 for the unlawful and unreasonable seizure of Mr. ward's car:

> I also would not interfere with the discretionary decision to award nominal damages for the seizure of Mr. Ward's car. Likewise I would not have interfered had the trial judge decided to simply acknowledge the unreasonable seizure and award no damages for it.
>
> ***RFJ, BCCA*, JAR Volume 1, p. 90, para. 65**

157. The Respondent's position is, as stated, that tortious conduct is not a prerequisite to entitlement to damages under s. 24(1). However, in the alternative, all of the elements of the tort of conversion have been proven, and therefore even if this Court were to find that tortious conduct is a prerequisite, the City's appeal should be dismissed in any event.

CONCLUSION

158. In *Doucet-Boudreau*, this Court identified five factors to be used to determine an appropriate and just remedy:

a) It must be one that meaningfully vindicates the rights and freedoms of the claimants;

b) The remedy must employ means that are legitimate within the framework of our constitutional democracy, that strives to respect the relationships with and separation of functions among the legislature, the executive and the judiciary;

c) The remedy must be a judicial one which vindicates the right while invoking the function and powers of a court;

d) The remedy must be one that, after ensuring that the right of the claimant is fully vindicated, is also fair to the party against whom the order is made. The remedy should not impose substantial hardships that are unrelated to securing the right; and

e) The remedy must be one that evolves to meet the challenges and circumstances of a given case, and which is flexible and responsive.

***Doucet-Boudreau*, supra, at para. 55 – 59**

159. For the reasons set out above, the Respondent submits that maintaining the courts' discretion to award damages in *Charter* breach cases allows judges to meet the criteria described in the above paragraph. Fettering that discretion would prevent courts in some cases, from crafting appropriate and just remedies.

PART IV: COSTS

160. The Respondent, Mr. Ward, seeks costs against the City of Vancouver, in any event of the cause.

161. The amount in issue in the City's appeal is only $100. Yet Mr. Ward has already been ordered to pay costs in the City's leave application to this Court, and those costs are in the thousands of dollars. Mr. Ward did not oppose the City's leave application.

162. It is unnecessary for the City to be pursuing this appeal. HMTQ filed its own leave application within a few days of the City's leave application. Therefore, the important constitutional question before this Court was bound to be decided in HMTQ's appeal, and the City should have abandoned its appeal as soon as HMTQ commenced its appeal process.

163. Mr. Ward's is a prominent civil rights lawyer. He sued the City and obtained a judgment against the City for wrongful imprisonment, and that judgment is not under appeal. It is an injustice that he should be put to the expense of dealing with the City's appeal, including the costs already awarded against him by this Court in the leave application, where the City's proceeding is superfluous, and there are only nominal damages ($100) at stake.

164. In his Statement of Claim, Mr. Ward alleged that the seizing of his car constituted conversion. As stated, the trial judge made no express finding on this point, neither accepting nor denying the claim for conversion, presumably, because damages were awarded for the *Charter* breach, in the amount of $100. It is submitted, in the alternative, that if this Court finds that damages are not available for a pure *Charter* breach, the City's appeal should be denied in any event because the underlying elements of conversion have been proven.

165. An agreement has been reached as between HMTQ and the Respondent with respect to costs, and as a consequence no order should be made as to costs as between the Respondent and HMTQ.

PART V: ORDER SOUGHT

166. The Respondent seeks an order dismissing both of the appeals, with costs as against the City.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

Dated December 11, 2009

Brian Samuels and **Kieran Bridge**
Counsel for the Respondent

PART VI: TABLE OF AUTHORITIES

14	*Little Sisters Book & Art Emporium v. Canada (Minister of Justice)* [2000] 2 S.C.R. 1120, 2000 SCC 69, at para. 180 and 258	60, 61
15	*Lower Nicola Indian Band v. Trans-Canada Displays Ltd.*, 2001 BCSC 1461 at para. 30-31	69
HMTQ Tab 9	*Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick (Minister of Finance),* [2002] 1 S.C.R. 405, 2002 SCC 13 para. 79 - 81	39, 44, 117, 121, 122
16	*Maharaj v. Attorney-General of Trinidad and Tobago (No. 2),* [1979] A.C. 385 at p. 399 F	149
17	*Merson v. Cartwright*, [2005] UKPC 38 at para. 3, 10, 14, 18, 20 and 22	70, 80, 82, 83, 104
18	*Mills v. The Queen*, [1986] 1 S.C.R. 863 at p. 881 and 965	2, 117
City Tab 6	*Odhavji Estate v. Woodhouse* [2003] 3 S.C.R. 263, 2003 SCC 69, at para. 22	97
HMTQ Tab 12	*Osborne v. Canada (Treasury Board),* [1991] 2 S.C.R. 69 at para. 65	132
19	Pilkington, Marilyn: "Monetary Redress for Charter Infringement," in R.J. Sharpe, ed., *Charter Litigation* (1987), 307 at 315	130
20	*R v. Gamble*, [1988] 2 S.C.R. 595, at p. 641	37
21	*R. v. Douglas,* 2003 BCPC 392 at para. 94	28, 62
22	*R. v. Drury*, 2004 BCPC 0188 at para. 76	59
23	*R. v. Feeney*, [1997] 2 S.C.R. 13 at p. 47, para 45	54
24	*R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83 at para. 96 and 99	6, 145
25	*R. v. Samuels*, 2008 ONCJ 85 at para. 80 – 81	58
26	Roach, Kent: *Constitutional Remedies in Canada* (looseleaf), at para. 11.10 and 11.560	106, 142
27	*Schacter v. Canada,* [1992] 2 S.C.R. 679 at p. 719 - 720	119, 120, 121, 129
28	*Shewish v. MacMillan Bloedel Ltd.* (1990), 48 B.C.L.R. (2d) 290 (C.A.) at pp. 294-5 and 297	69,
29	*Simpson v. Attorney-General (Baigent's Case),* [1994] 3 N.Z.L.R. 667 (C.A.), at pp. 677 and 678, per: Cooke P.	78, 143, 149
30	*Subiah v. Attorney General of Trinidad and Tobago*, [2008] UKPC 47, at para. 11	81
31	*Taunoa v. The Attorney General*, [2007] NZSC 70, at para. 100, 108 – 109, 253, 255, 265, 318, 322, 324, 366, 368 and 371	56, 85, 88, 89, 103, 104, 143

32	*Taunoa v. The Attorney General,* [2005] NZCA 312, [2006] 2 N.Z.L.R. 457 at para. 150	85
33	*Vorvis v. ICBC*, [1989] 1 S.C.R. 1085 at p. 1099 at pp. 1098j - 1099j	70, 73
34	Waddams, S.M.: *The Law of Damages* (loose-leaf) at para. 4.180, 11.10 and 11.160	68, 70
City Tab 7	*Welbridge Holdings Ltd. v. Greater Winnipeg* [1971] S.C.R. 957 at pp. 969 - 970	39, 118
35	*Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18, at para. 111	73