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PART I – STATEMENT OF FACTS

A. Overview

1. Section 24(1) of the *Charter* does not confer a freestanding entitlement to damages simply because a *Charter* right has been infringed. In the absence of evidence of bad faith, an abuse of power or tortious conduct, damages are not necessary to vindicate *Charter* rights. Such a remedy is neither appropriate nor just. To the contrary, overreaching in this way disrupts the delicate balance between the protection of individual rights and the need for effective government which the *Charter* is intended to achieve. It also fails to effect a harmonious construction of s. 24(1) and s. 24(2) of the *Charter*, and of the *Charter* and the common law, by making actionable under s. 24(1) conduct that would not support a remedy under s. 24(2) or at common law.

2. This Court has consistently held that the unique position occupied by the Crown demands clearly-drawn lines placing identifiable limits on potential liability for discretionary decision-making by government officials. The public policy considerations underlying this qualified immunity for government decision-making apply equally to the availability of damages under s. 24(1) of the *Charter*. Imposing liability in damages for *Charter* infringements *per se* will not prevent future infringements. Rather, it will only serve to deter public officials from executing their duties with the decisiveness and judgment that the public interest requires, and impose an unnecessary strain on the allocation of scarce government financial resources.

3. As this Court recently held in *Miazga v. Kvello Estate*,[1] the public good is served by preserving a sphere of discretion which allows officials to discharge their public duties freely without fear of liability. An affirmative response to the constitutional question would render this sphere of discretion illusory. It would also have far-reaching implications: it would hold government decision-making to a standard of perfection, permit courts to second-guess the good-faith decisions of government officials, and create a cause of action under the *Charter* for mere errors in the exercise of discretion that are incapable of supporting a remedy in any other context.

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[1] 2009 SCC 51 at para. 47.

B. Facts

4. This case arises from a search of Mr. Ward's person conducted by corrections officers when Mr. Ward was admitted to the Vancouver Jail. Corrections officers asked Mr. Ward to remove his clothing and provide it for inspection. Mr. Ward disrobed, but objected to removing his underwear. The officers did not require him to disrobe further. The trial judge concluded that although the actions of the corrections officers were not malicious, high-handed or oppressive, the search was not reasonable in the circumstances and infringed s. 8 of the *Canadian Charter of Rights and Freedoms*. Mr. Ward was awarded damages of $5,000.00 for the infringement. A majority of the British Columbia Court of Appeal upheld this award on appeal.

5. The Attorney General of Canada accepts the facts as stated by the Appellants.

PART II – RESPONSE TO THE QUESTION IN ISSUE

6. The issue in this appeal is as stated by the Chief Justice in the Notice of Constitutional Question dated September 4, 2009:

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

7. The Attorney General of Canada submits that the answer to this question should be "no".

PART III – ARGUMENT

A. A Freestanding Entitlement to *Charter* Damages as a Remedy Under s. 24(1) is Neither Appropriate Nor Just

8. In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*,[2] this Court identified the following general principles to be applied in determining whether a remedy under s. 24(1) is "appropriate and just":

(a) the remedy should meaningfully vindicate the rights of the claimant;

(b) the remedy should employ means that are legitimate within the framework of our constitutional democracy;

(c) the remedy should be a judicial one;

(d) the remedy should be fair to the party against whom the order is made; and

(e) the remedy should remain flexible.[3]

9. The notion that there should be an entitlement to damages for *Charter* infringements *per se* is not supported by these general principles. Such a result is belied by the jurisprudence of this Court establishing a qualified immunity for government decision-making. This public law principle informs the analysis of the availability of damages as a remedy under s. 24(1) of the *Charter*. An appropriate and just remedy demands a balance between protecting constitutional rights and ensuring the effective operation of government within the Canadian legal system. An affirmative response to the constitutional question would negate this balancing exercise.

10. Such an outcome does not result in a remedy which can fairly be described as meaningfully vindicating the rights of the claimant. As Saunders J.A. noted in her dissent, the basis for an award of damages is less than apparent where there is no compensable loss and no conduct deserving of censure.[4] Where public officers have acted in good faith and no measurable loss has been sustained, damages serve no useful purpose. Damages are not required for compensation: there is nothing to compensate. Damages are not required for vindication: a declaration provides adequate vindication.

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[2] [2003] 3 S.C.R. 3, 2003 SCC 62.
[3] Ibid. at paras. 55-59.
[4] Joint Appellants' Record ("JAR"), Vol. 1 at p. 97, Reasons for Judgment of the British Columbia Court of Appeal dated January 27, 2009 at paras. 84-85 (Saunders J.A. dissenting).

Damages are not required for denunciation or deterrence: officials who act in good faith should be encouraged to do so and can be expected to comply in the future with the court's determination.

11. The prospect of a freestanding award of *Charter* damages as a s. 24(1) remedy can only have the effect of deterring public officers from exercising their discretion in conformity with what they genuinely believe to be their public duty. In this way, awarding damages for constitutional violations *per se* unjustifiably intrudes upon government decision-making. Such a remedy is not fair to public officials who are routinely required to make discretionary decisions in the discharge of their public duties.

12. A freestanding entitlement to damages as a *Charter* remedy is not judicious. As this Court has recognized in a trilogy of cases, in the absence of bad faith, malice or abuse of authority, damages are not an appropriate and just remedy under s. 24(1) where public officials have acted under legislative authority which is subsequently found to be invalid.[5] There is no principled reason to distinguish between actions taken in good faith pursuant to legislative authority held to be unconstitutional and *bona fide* discretionary actions found to be unconstitutional. In both cases, officials will have held the honest but mistaken belief that they were acting lawfully within the scope of their authority in furtherance of the public interest.

13. Finally, a remedy of damages for stand-alone *Charter* violations is hardly a flexible remedy capable of evolving to adapt to different circumstances. If anything, as Saunders J.A. appreciated, it is an uncertain, amorphous concept which lacks an adequate analytical framework for both liability and quantum.[6]

14. That the remedy arising from an affirmative answer to the constitutional question would be neither appropriate nor just within the meaning of s. 24(1) of the *Charter* is amply demonstrated by considering this question in light of three principles:

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[5] *Guimond v. Québec (Attorney General)*, [1996] 3 S.C.R. 347; *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13; and *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429, 2007 SCC 10.

[6] JAR, Vol. 1 at p. 96, Reasons for Judgment of the British Columbia Court of Appeal dated January 27, 2009 at para. 83 (Saunders J.A. dissenting).

(a) First, a contextual approach to *Charter* interpretation which takes into account both individual interests and societal interests in the fashioning of *Charter* remedies under s. 24(1);

(b) Second, the public law principle recognizing a qualified immunity for government decision-making which informs the crafting of appropriate and just remedies for the purposes of s. 24(1) of the *Charter*;

and

(c) Third, the notion that s. 24(1) of the *Charter* should be interpreted in a manner which promotes a harmonious relationship between s. 24(1) and s. 24(2) and s. 24(1) and the common law.

B. The Need for a Balanced Approach to *Charter* Remedies Which Takes into Account Both Individual and Societal Interests

15. The case at bar exemplifies the tension that can arise between the need to give the *Charter* a broad and purposive reading and the need to ensure that *Charter* interpretation does not venture beyond the purposes of the *Charter* to the detriment of other legitimate considerations. In *R. v. Grant*,[7] the Court put it this way: "[w]hile a narrow approach risks impoverishing a *Charter* right, an overly generous approach risks expanding its protection beyond its intended purposes."[8]

16. Similarly, as Iacobucci and Arbour JJ., writing for the majority, stated in *Doucet-Boudreau* in considering the remedial ambit of s. 24(1):

> While courts must be careful not to overshoot the actual purposes of the *Charter*'s guarantees, they must avoid a narrow, technical approach to *Charter* interpretation which could subvert the goal of ensuring that right holders enjoy the full benefit and protection of the *Charter*.[9]

17. As the foregoing passages illustrate, the accepted approach to *Charter* interpretation, including the fashioning of *Charter* remedies, involves balancing diverse interests. On the one hand, courts should be vigilant to remedy *Charter* breaches. Otherwise, the *Charter* will cease to be an effective instrument for preserving individual rights.[10] As this Court has repeatedly observed, a *Charter* right without a remedy is

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[7] 2009 SCC 32.
[8] Ibid. at para. 17.
[9] *Doucet-Boudreau, supra,* at para. 23.
[10] *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81 at para. 1 ("*Dunedin Construction*").

antithetical to one of the key purposes of the *Charter*: enabling courts to craft effective remedies that are responsive to *Charter* violations.[11]

18. At the same time, however, courts cannot lose sight of the fact that *Charter* remedies do not exist in a vacuum, nor are they without their own internal limits. As La Forest J. stated in *Mills v. The Queen,*[12] s. 24 of the *Charter* does not invite "the wholesale invention of a parallel system for the administration of *Charter* rights."[13] To the contrary, s. 24, like the rest of the *Charter*, forms part of the Canadian legal system, and, accordingly, must fit harmoniously into that system.[14] The caution expressed by this Court in discussing remedies under s. 52 is apposite to the s. 24 context, namely, that "Courts should certainly go as far as possible to protect rights, but no further."[15]

19. Moreover, where government decision-making affects *Charter* rights, there is a need to ensure that *Charter* remedies strike an appropriate and just balance between the protection of constitutional rights and the need for effective government.[16] This challenge was described by this Court in *R. v. Laba*:[17] "the court must apply the measures which will best vindicate the values expressed in the *Charter* while refraining from intrusion into the legislative sphere beyond what is necessary."[18]

20. This approach, which recognizes that our understanding of the *Charter* should be informed by both individual and societal interests, is a defining characteristic of the contextual approach to *Charter* interpretation consistently adopted by this Court. In *R. v. O'Connor,*[19] L'Heureux-Dubé J. summarized this approach:

> ...a contextually sensitive approach to *Charter* rights requires that the private interests reflected therein also be evaluated from the standpoint of the public interests that underlie those private rights. Given that many, if not most, of the individual rights protected in the *Charter* also have a broader, societal dimension,

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[11] See for example *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at p. 196.
[12] [1986] 1 S.C.R. 863.
[13] Ibid. at p. 971.
[14] Ibid. at pp. 956-957.
[15] *Schachter v. Canada*, [1992] 2 S.C.R. 679 at p. 700; and *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 149.
[16] *Guimond, supra*, at para. 15; *Mackin, supra,* at para. 79; and *Hislop, supra,* at para. 117.
[17] [1994] 3 S.C.R. 965.
[18] Ibid. at p. 1012.
[19] [1995] 4 S.C.R. 411.

> it is therefore consistent with both the purpose and the spirit of the *Charter* to look, in certain cases, beyond the possibility of prejudice to the particular accused, to clear cases of prejudice to the integrity of the judicial system.[20]

21. This balancing of individual and societal interests is not confined to defining the content of *Charter* rights. It similarly informs the crafting of remedies under s. 24 of the *Charter*. As L'Heureux-Dubé J. stated in *O'Connor* in describing the parameters of s. 24(1):

> It is important to recognize that the *Charter* has now put into judges' hands a scalpel instead of an axe – a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system.[21]

22. This Court has emphasized that remedies under s. 24(1) of the *Charter* must be flexible and contextual.[22] As Rothstein J. stated for the majority in *R. v. Bjelland*[23] in affirming this principle, "[d]ifferent considerations may come into play in the search for a proper balance between competing interests"[24] in deciding the question of remedy under s. 24(1).

23. Even advocates for damages as a *Charter* remedy have recognized that "[i]n granting a remedy, a court must seek to balance competing interests, by enforcing rights and freedoms guaranteed by the *Charter*, without imposing an excessive burden on government conduct."[25]

24. As one American academic has recently observed in commenting on the availability of damages for violations of the *Charter*, the "appropriate and just" requirement contained in s. 24(1) demands a balancing of private *and* public interests:

> This mandate affords the courts the unique opportunity and sober responsibility to find the optimal balance between the interest in compensating the citizen whose

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[20] Ibid. at para. 64.
[21] Ibid. at para. 69.
[22] *Doucet-Boudreau, supra*, at paras. 52 and 54-56.
[23] 2009 SCC 38.
[24] Ibid. at para. 18.
[25] Pilkington, Marilyn, L. "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984), 62 *Can. Bar Rev.* 517 at p. 535.

> rights have been invaded, the goal of preserving the willingness of persons to seek and execute the duties of public office, and the allocation of finite public funds.[26]

25. A freestanding award of damages for *Charter* infringements *per se* would constitute a complete failure to engage in the balancing required by s. 24(1). For this reason alone such an outcome would be neither appropriate nor just. In not taking into account societal considerations, it would nullify the limited immunity which this Court has carefully constructed for officials who are charged with making decisions in the public interest, and would impose unacceptable constraints on the allocation of public funds.

C. Liability for Government Action and the Need to Preserve a Limited Immunity for Government Decision-Making

(i) The Mackin Limitation Should Apply to All Government Decision-Making

26. The rationale in support of a limited immunity for government decision-making was succinctly articulated by this Court in *Hislop*. There, LeBel and Rothstein JJ. stated:

> Imposing…liability on the government, absent bad faith, unreasonable reliance or conduct that is clearly wrong, would undermine the important balance between the protection of constitutional rights and the need for effective government that is struck by the general rule of qualified immunity.[27]

27. In essence, the answer to the constitutional question in the case at bar turns on whether this rationale should extend to all discretionary decision-making by public officials, as suggested by Saunders J.A. in her dissent,[28] or whether the general rule of qualified immunity should be confined to the facts of *Mackin* and limited to actions taken under legislation which is subsequently declared unconstitutional, as the majority of the Court of Appeal concluded[29] and as the Respondent contends.[30]

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[26] Gildin, Gary S. "Allocating Damages Caused by Violations of the Charter: The Relevance of American Constitutional Remedies" (2009), 24 *Nat'l J. Const. L.* 121 at p. 168.
[27] *Hislop, supra*, at para. 117.
[28] JAR, Vol. 1 at pp. 97-98, Reasons for Judgment of the British Columbia Court of Appeal dated January 27, 2009 at para. 86 (Saunders J.A. dissenting).
[29] JAR, Vol. 1 at pp. 83-89, Reasons for Judgment of the British Columbia Court of Appeal dated January 27, 2009 at paras. 58-63 (Low J.A.).
[30] Respondent's Factum at paras. 54-62.

28. There is no sound basis for narrowing the doctrine of qualified immunity so as to limit its application in the *Charter* context. Indeed, this Court made clear in *Mackin* that the rationale for qualified immunity informs the determination of whether a particular remedy is appropriate and just for the purposes of s. 24(1). As Gonthier J., writing for the majority, explained:

> The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a *Charter* context. [Emphasis added.][31]

29. It is therefore clear that public law principles are to be considered in the fashioning of appropriate and just remedies under s. 24(1) of the *Charter*. A review of this Court's jurisprudence in the area of public law confirms that these considerations, which support a qualified-immunity approach to government decision-making in the public law context, are also relevant when considering the availability of damages as a remedy under s. 24(1) of the *Charter*. As Saunders J.A. stated in her dissent:

> The caution applied by courts where compensation comes from the public purse and where the official's actions are committed in the exercise of discretion on behalf of the public, without malice or bad faith, soundly establishes that not every loss arising from a mistake made by a public official is compensable.[32]

(ii) Liability of Public Authorities and the Doctrine of Qualified Immunity

30. The approaches adopted by this Court in defining the scope of government liability in areas ranging from civil negligence claims to the award of costs against the Crown in criminal cases evince a common recognition of the need to place identifiable limits on exposure to liability for the exercise of public authority. A recurring consideration informing these analyses is the appreciation that a limited immunity is necessary for the effective operation of government.

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[31] *Mackin, supra,* at para. 79.

[32] JAR, Vol. 1 at pp. 97-98, Reasons for Judgment of the British Columbia Court of Appeal dated January 27, 2009 at para. 86 (Saunders J.A. dissenting).

31. One of the earliest pronouncements of this principle is found in *Welbridge Holdings Ltd. v. Greater Winnipeg*,[33] where the Court accepted that where the exercise of statutory authority is involved, "invalidity is not the test of fault and it should not be the test of liability."[34] Laskin J., as he then was, stated:

> Accepting that *Hedley Byrne* has expanded the concept of duty of care, whether in amplification or extension of *Donoghue v. Stevenson,* it does not, nor, in my view, would any underlying principle which animates it, reach the case of a legislative body, or other statutory tribunal with quasi-judicial functions, which in the good faith exercise of its powers promulgates an enactment or makes a decision which turns out to be invalid because of anterior procedural defects. [Emphasis added.][35]

32. In *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*,[36] Deschamps J. applied this principle in determining that a municipality is immune from liability under the *Civil Code of Québec* for regulatory decisions made in good faith, noting that what Laskin J. said in *Welbridge* "transcends the common law."[37]

33. In *Just v. British Columbia*,[38] this Court grounded its recognition of an immunity from tort liability for government policy decisions in the need to balance government accountability for tortious conduct with the need to ensure the proper functioning of government. Cory J. explained these competing objectives:

> The increasing complexities of life involve agencies of government in almost every aspect of daily living. Over the passage of time the increased government activities gave rise to incidents that would have led to tortious liability if they had occurred between private citizens. The early governmental immunity from tortious liability became intolerable. This led to the enactment of legislation which in general imposed liability on the Crown for its acts as though it were a person. However, the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions. On the other hand, complete Crown immunity should not be restored by having every government decision designated as one of "policy". [Emphasis added.][39]

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[33] [1971] S.C.R. 957.
[34] Ibid. at p. 969.
[35] Ibid. at p. 967.
[36] [2005] 3 S.C.R. 304, 2004 SCC 61.
[37] Ibid. at para. 24.
[38] [1989] 2 S.C.R. 1228.
[39] Ibid. at p. 1239.

34. In distinguishing between policy and operational decisions, Cory J. drew on the American experience and the observation that this distinction is essential to "preventing tort actions from becoming a vehicle for judicial interference with decision-making…and of protecting "the Government from liability that would seriously handicap efficient government operations.""[40]

35. In *Brown v. British Columbia (Minister of Transportation and Highways)*,[41] this Court recognized that governments are nevertheless not immune from liability for policy decisions arrived at in bad faith. The Court adopted the approach articulated in *City of Kamloops v. Nielsen*[42] where Wilson J. stated:

> In my view, inaction for no reason or inaction for an improper reason cannot be a policy decision taken in the *bona fide* exercise of discretion. Where the question whether the requisite action should be taken has not even been considered by the public authority, or at least has not been considered in good faith, it seems clear that for that very reason the authority has not acted with reasonable care.[43]

36. Similarly, in an action for misfeasance in public office, a plaintiff must prove that the public officer deliberately engaged in conduct that he or she knew to be inconsistent with the obligations of the office. This requirement of "bad faith" or "dishonesty" was explained by this Court in *Odhavji Estate v. Woodhouse*[44] as a consequence of the principle that "[i]n a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens."[45]

37. This Court in *Nelles* observed that a qualified-immunity approach is not concerned with "second-guessing a Crown Attorney's judgment in the prosecution of a case but rather with the deliberate and malicious use of the office."[46] Lamer J., as he then was, emphasized that to support a claim for malicious prosecution a "demonstration of

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[40] Ibid. at p. 1240.
[41] [1994] 1 S.C.R. 420.
[42] [1984] 2 S.C.R. 2.
[43] Ibid. at p. 24, cited with approval in *Brown, supra*, at pp. 435-436.
[44] [2003] 3 S.C.R. 263, 2003 SCC 69.
[45] Ibid. at para. 28.
[46] *Nelles, supra*, at pp. 196-197.

improper motive or purpose" is required and that "errors in the exercise of discretion and judgment are not actionable."[47]

38. Most recently, this Court in *Miazga* explained that the stringent standard that must be met to impose liability for the exercise of prosecutorial discretion is essential to "advancing the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations."[48] Charron J. explained that the "public good is clearly served by the maintenance of a sphere of unfettered discretion within which Crown attorneys can properly pursue their professional goals."[49]

39. Similarly, in defining when it is appropriate to order the Crown to pay costs in criminal proceedings, this Court has consistently emphasized that the limits of Crown liability must be clearly delineated in order to avoid the risk of disrupting the proper working of the system of justice.

40. Thus, in *Dunedin Construction,* McLachlin C.J.C stated that "Crown counsel is not to be held to a standard of perfection", noting that "the developing jurisprudence uniformly restricts such awards, at minimum, to circumstances of a marked and unacceptable departure from the reasonable standards expected of the prosecution."[50] The Manitoba Court of Appeal has held that the "marked and unacceptable departure" standard is the standard to be applied in determining the availability of damages as a remedy against the Crown under s. 24(1) of the *Charter*.[51]

41. In the criminal context, the rationale for limiting the liability of the Crown is inextricably tied to the notion that Crown officers carry out public duties and make decisions in the public interest. As a result, the Crown "should be treated more

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[47] Ibid. at p. 197.
[48] *Miazga, supra*, at para. 47.
[49] Ibid.
[50] *Dunedin Construction, supra*, at para. 87.
[51] *R. v. Sweeney* (2003), 179 C.C.C. (3d) 225 (Man. C.A.) at paras. 47-48.

tenderly,"[52] and should not be obliged to pay compensation in the absence of misconduct.[53]

42. This Court in *Miazga* noted that courts should be circumspect in defining the liability of public officials as distinct from private parties. Charron J. instructed in this regard that "courts must take care not to simply transpose the principles established in suits between private parties to cases involving Crown defendants without necessary modification."[54] This caveat applies to considering the availability of damages against government actors as a s. 24(1) remedy for *Charter* infringements.

(iii) The Discretionary Nature of Government Decision-Making

43. A posture of restraint is appropriate because, besides being in furtherance of public rather than private interests, much government decision-making is necessarily left to the discretionary judgments of public officials. As this Court has noted, the concept of discretionary decision-making invariably involves "decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries."[55]

44. This Court has long recognized that the exercise of discretion is a cornerstone of the Crown function. As the Court recently stated in the public law context, "[t]he exercise of discretion is an important part of administrative decision making."[56] It is especially important in the criminal law context. As La Forest J. noted In *R. v. Beare*,[57] "[t]he day to day operation of law enforcement and the criminal justice system...depends upon the exercise of that discretion."[58] In *R. v. Beaudry*,[59] Charron J. similarly explained that "[t]he ability – indeed the duty – to use one's judgment to adapt the process of law

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[52] *Berry v. British Transport Commission* [1961] 3 All E.R. 65 (C.A.) at p. 75.
[53] *R. v. Robinson* (1999), 142 C.C.C. (3d) 303 (Alta. C.A.) at para. 29.
[54] *Miazga, supra*, at para. 44.
[55] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 52.
[56] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 at para. 155.
[57] [1988] 2 S.C.R. 387.
[58] Ibid. at p. 411.
[59] [2007] 1 S.C.R. 190, 2007 SCC 5.

enforcement to individual circumstances and to the real-life demands of justice is...the basis of police discretion."[60]

45. This Court has held that measures which would unnecessarily fetter the discretion of public officials are to be avoided. The Court made this point in *Beare* as follows:

> Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on.[61]

46. In *Hill v. Hamilton-Wentworth Regional Police Services Board*,[62] this Court, in recognizing the tort of negligent investigation, was careful to point out that the duty of care expected of the reasonable police officer in the investigation of crime must take into account the discretionary nature of law enforcement decisions so as not to impose liability for mere errors of judgment. McLachlin C.J.C., writing for the majority, stated:

> This standard should be applied in a manner that gives due recognition to the discretion inherent in police investigation....A number of choices may be open to a police officer investigating a crime, all of which may fall within the range of reasonableness. So long as discretion is exercised within this range, the standard of care is not breached. The standard is not perfection, or even the optimum, judged from the vantage of hindsight....The law of negligence does not require perfection of professionals; nor does it guarantee desired results. Rather, it accepts that police officers, like other professionals, may make minor errors or errors in judgment which cause unfortunate results, without breaching the standard of care. The law distinguishes between unreasonable mistakes breaching the standard of care and mere "errors in judgment" which any reasonable professional might have made and therefore, which do not breach the standard of care. [Citations omitted.][63]

47. Significantly, the majority of the Court in *Hill* also concluded that the tort of negligent investigation should only allow recovery in damages for compensable losses,

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[60] Ibid. at para. 37.
[61] Ibid. at p. 410.
[62] [2007] 3 S.C.R. 129, 2007 SCC 41.
[63] Ibid. at para. 73.

noting that any other approach would impede the investigation and apprehension of criminals.[64]

48. Just as this Court in *Krieger v. Law Society of Alberta*[65] held that "[c]learly drawn constitutional lines are necessary"[66] with respect to potential liability for prosecutorial decision-making, so too are clear lines necessary with respect to the liability of other public officials. The public interest clearly benefits from preserving a zone of discretionary decision-making so that public officials are immune from liability for decisions made in good faith: "[I]f public officials can be made subject to damage claims under the *Charter*...after they have made a decision in good faith, it would...have a chilling effect upon the exercise of their duties."[67]

(iv) The Need to Ensure that Charter Remedies Do Not Represent Unwarranted Intrusions into the Workings of Government

49. This Court's jurisprudence on the proper scope of remedial jurisdiction in s. 52 cases also illustrates restraint in imposing remedies which could unduly impinge upon the government's ability to effectively discharge its responsibilities.

50. For example, in *Mahe v. Alberta,*[68] in awarding a remedy for legislation which was found to infringe upon minority language rights, the Court stated that the remedy of a declaration ensured the realization of s. 23 *Charter* rights while still leaving the government with the flexibility necessary to fashion a suitable response.[69] Similarly, in *Schachter*, in discussing the remedies of severance and reading in, the Court stressed the importance of avoiding unwarranted intrusions into the legislative sphere.[70] More recently, in *R. v. Ferguson,*[71] the Court rejected constitutional exemptions as an

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[64] Ibid. at paras. 90-92.
[65] [2002] 3 S.C.R. 372, 2002 SCC 65.
[66] Ibid. at para. 32.
[67] *Stenner v. British Columbia (Securities Commission)* (1993), 23 Admin. L.R. (2d) 247 (B.C.S.C.) at para. 85, affirmed (1996), 82 B.C.A.C. 124, application for leave to appeal dismissed, [1996] S.C.C.A. No. 595.
[68] [1990] 1 S.C.R. 342.
[69] Ibid. at pp. 392-393.
[70] *Schachter, supra,* at pp. 707-710.
[71] [2008] 1 S.C.R. 96, 2008 SCC 6.

appropriate remedy for unconstitutional mandatory minimum sentences on the basis that this would undermine the legislative intent of Parliament.[72]

51. These examples underscore this Court's earlier observation in *Mills* that "the *Charter* was not intended to turn the Canadian legal system upside down. What is required rather is that it be fitted into the existing scheme of Canadian legal procedure."[73]

(v) The Risk of Deterring Good Faith Decision-Making by Public Officials

52. An affirmative answer to the constitutional question would represent a direct affront to the established jurisprudence. Such an outcome would render actionable *any* state action which is found to infringe a *Charter* right, irrespective of the *bona fides* of the conduct in issue and regardless of whether any measurable loss resulted. It would create a cause of action for damages based on a *Charter* violation attributable to nothing more than an error in the exercise of discretion by a public official. It would also render actionable conduct that would not support a civil claim in tort.

53. The potential "chilling effect" is very real. If every state action resulting in a *Charter* infringement is made actionable in damages this could not but impinge upon the discretionary decision-making ability of government officials. This very observation was made in *Guimond,* where this Court cited with approval the view of Professor Pilkington:

> A qualified immunity for government officials is a means of balancing the protection of constitutional rights against the needs of effective government, or, in other words, determining whether a remedy is appropriate and just in the circumstances. A government official is obliged to exercise power in good faith and to comply with "settled, indisputable" law defining constitutional rights. However, if the official acts reasonably in the light of the current state of the law and it is only subsequently determined that the action was unconstitutional, there will be no liability. To hold the official liable in this latter situation might "deter his willingness to execute his office with the decisiveness and judgment required by the public good." [Emphasis in original.][74]

54. There is no justifiable basis for restricting this holding to the facts of *Guimond.* If a government official, acting in good faith, makes a discretionary decision which the official believes at the time to be *Charter*-compliant but which is subsequently

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[72] Ibid. at paras. 50-56.
[73] *Mills, supra,* at p. 953.
[74] *Guimond, supra,* at para. 15.