

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

BETWEEN:

CITY OF VANCOUVER

APPELLANT
(RESPONDENT)

AND:

ALAN CAMERON WARD

RESPONDENT
(APPELLANT)

AND BETWEEN:

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

APPELLANT
(APPELLANT)

AND:

ALAN CAMERON WARD

RESPONDENT
(RESPONDENT)

**FACTUM OF THE APPELLANT,
CITY OF VANCOUVER**

City of Vancouver
Legal Services
453 West 12th Avenue
Vancouver, BC V5Y 1V4
Telephone: 604-873-7512
Fax: 604-873-7445
Email: tom.zworski@vancouver.ca
Tomasz M. Zworski

**Counsel for the Appellant, City of
Vancouver**

Gowling Lafleur Henderson LLP
Barristers & Solicitors
26th Floor, 160 Elgin Street
Ottawa, ON K1P 1C3
Telephone: 613-233-1781
Fax: 613-563-9869
Email: henry.brown@gowlings.com
Henry S. Brown, Q.C.

**Ottawa Agent for the Appellant, City of
Vancouver**

Ministry of the Attorney General
 Legal Services Branch
 6th Floor – 1001 Douglas Street
 Vancouver, BC V8W 9J7
 Telephone: 250-356-8447
 Fax: 250-356-5707
 Email: Bryant.Mackey@gov.bc
 Bryant A. Mackey

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

Samuels & Company
 #1400 - 1125 Howe Street
 Vancouver, BC V6Z 2K8
 Telephone: 604-602-9979
 Fax: 604 602-9978
 Email: brian@samuelslawcorp.com
 Brian M. Samuels

**Counsel for the Respondent, Alan
 Cameron Ward**

Gowling Lafleur Henderson LLP
 Barristers & Solicitors
 26th Floor, 160 Elgin Street
 Ottawa, ON K1P 1C3
 Telephone: 613-233-1781
 Fax: 613-563-9869
 Email: henry.brown@gowlings.com
 Henry S. Brown, Q.C.

**Ottawa Agent for the Appellant, Her
 Majesty the Queen in Right of the
 Province of British Columbia**

Burke-Robertson
 70 Gloucester Street
 Ottawa, Ontario K2P 0A2
 Telephone: 613-566-2058
 Fax: 613-235-4403
 Email: rhouston@burkerobertson.com
 Robert E. Houston, Q.C.

**Ottawa Agent for the Respondent, Alan
 Cameron Ward**

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PART I – STATEMENT OF FACTS

A. OVERVIEW

1. The issue in this appeal is the availability of damages for an infringement of a right under the *Canadian Charter of Rights and Freedoms* when the infringement was not accompanied by a tort or any loss to the plaintiff and was not a product of bad faith or abuse of power.

2. The Appellant, City of Vancouver, (the “City”) accepts the finding that the police breached the *Charter* rights of the Respondent. However, the City submits that, in light of a specific finding that the police officers acted in good faith and that the Respondent did not suffer any loss, damages should not have been awarded because:

- a. An award of damages was not necessary to vindicate the *Charter* rights of the Respondent;
- b. This Court refused to award damages for a breach of a *Charter* right in absence of bad faith in *Mackin v. New Brunswick*, [2002] 1 S.C.R. 405, 2002 SCC 13;
- c. An award of damages in the absence of bad faith is inconsistent with the principles of public law under which governments and public officials are afforded limited immunity for good faith exercise of their public law functions;

- d. Availability of damages for every breach of the *Charter* would create a new kind of liability, with *Charter* claims becoming a “fall back” position for claimants who cannot establish liability under existing tort law;
- e. An award of damages for good faith actions which are only subsequently found to breach the *Charter* will have a chilling effect on public officials, especially in the law enforcement context; and
- f. An award of damages in these circumstances does not serve any of the recognized purposes of damages and is unnecessary.

B. BACKGROUND FACTS

3. On August 1, 2002, the Respondent, Alan Cameron Ward, was detained by the Vancouver Police near a public ceremony attended by the then Prime Minister Jean Chrétien.

*Reasons for Judgment, British Columbia Supreme Court
Joint Appellants’ Record, p. 10, paras. 5, 6*

4. The police were responding to information that someone intended to throw a pie at the Prime Minister. The Respondent partially matched the description of the suspect and was seen running away. He appeared to be evading the police when they attempted to stop him.

*Reasons for Judgment, British Columbia Supreme Court
Joint Appellants’ Record, p. 26, para. 55*

5. Once stopped and questioned, the Respondent attempted to cause a disturbance. He was arrested for breach of the peace and removed from the area. He was transported to the Vancouver Jail where he was held for approximately four hours.

Reasons for Judgment, British Columbia Supreme Court
Joint Appellants' Record, p. 27, para. 58

6. At the time, the Vancouver Jail was a shared facility operated by the City and the Province of British Columbia and was staffed by a police sergeant (the OIC) and employees of the Province of British Columbia. The Respondent was strip searched by Corrections Branch staff upon admission to the jail.

Reasons for Judgment, British Columbia Supreme Court
Joint Appellants' Record, pp. 15 - 17, paras. 24, 27, 28

7. Although the Respondent was not arrested for assault or attempted assault, the police continued their investigation into the alleged plan to assault the Prime Minister. As part of that investigation, the officers located the Respondent's vehicle, parked lawfully a few streets away from the ceremony.

8. Because the police officers suspected that the vehicle may contain evidence relevant to their investigation, they had the vehicle towed to a police garage to preserve potential evidence. The vehicle was never searched as the investigating officers concluded that there were insufficient grounds to obtain a search warrant.

Reasons for Judgment, British Columbia Supreme Court
Joint Appellants' Record, p. 38, para. 91

9. Upon his release from the jail, the Respondent was driven by the investigating officers to his vehicle. The Respondent did not suffer any loss or damage as a result of the towing of the vehicle.

Reasons for Judgment, British Columbia Supreme Court
Joint Appellants' Record, p. 49, para. 129

C. JUDICIAL HISTORY

10. The Respondent commenced an action alleging wrongful arrest, false imprisonment, negligence, assault, conversion and breach of his *Charter* rights against various individual police officers and the City¹, and negligence and breach of the *Charter* rights against the Province.²

11. Following a six day trial in the Supreme Court of British Columbia, Justice Tysoe (as he then was), found that the police were acting in good faith and were justified in detaining the Respondent and, as a result of his conduct, in arresting him for breach of the peace. He also found that the police were justified in transporting him to the jail but that they held him there longer than was necessary.

12. Tysoe J. specifically found that the police officers acted on a sincere belief that the Respondent was involved in a plot to assault the Prime Minister.

Reasons for Judgment, British Columbia Supreme Court
Joint Appellants' Record, p. 47, para. 124

¹ Although it does not employ police officers, the City is statutorily liable for torts committed by police officers – see s. 20 of the *Police Act*, R.S.B.C. 1996, c. 367

² The Respondent initially named other defendants as well, but the claims against them were discontinued prior to trial.

13. Tysoe J. dismissed the Respondent's claims for wrongful arrest, negligence, assault and conversion. While Tysoe J. allowed the claim of false imprisonment against the City, he dismissed all claims against individual police officers³.

14. In relation to the alleged breaches of the Respondent's *Charter* rights, Tysoe J. found that the false imprisonment constituted a breach of the Respondent's section 9 right to be secure from arbitrary imprisonment; that the search at the jail constituted a breach of his section 8 right to be secure from an unreasonable search; and that the towing of his vehicle constituted a breach of his section 8 right to be secure from unreasonable seizure.

15. The trial judge awarded the Respondent \$5,000 against the City for the tort of false imprisonment and breach of section 9 of the *Charter*. That part of the decision is not under appeal.

16. Tysoe J. dealt with the towing of the Respondent's vehicle as follows:

[91] Mr. Ward's car was towed from its parking place near the intersection of Taylor and Keefer Streets to the police compound for the purpose of securing it until it could be searched. It was never searched because Detectives Brydon and Petit decided that there were insufficient grounds to obtain a search warrant.

[92] If Mr. Ward had been lawfully arrested for assault or attempted assault on Taylor Street, it may be arguable that it was reasonable for the police to seize his vehicle in order to secure it so that evidence in the vehicle would not go missing. 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

³ Under s. 21 of the *Police Act, supra*, police officers are not personally liable for torts committed in the course of their duties in the absence of gross negligence or intentional or willful misconduct.

cannot be justified on the basis that Mr. Ward was under arrest for breach of peace.

[93] I conclude that Mr. Ward's right under s. 8 of the *Charter* to be secure against unreasonable seizure of his belongings was infringed.

[underlining added]

17. The trial judge specifically found that the police and corrections officers acted in good faith. Furthermore, in relation to the section 8 breaches, the trial judge found no bad faith, no abuse of power, nor any tortious conduct. Nonetheless, Tysoe J. rejected the City's and Province's arguments that damages should not be awarded for the infringement of the *Charter* in the absence of bad faith, abuse of power or tortious conduct. He awarded \$5,000 against the Province for the strip search and \$100 against the City for the towing of the car.

18. The Province appealed the award of damages for the *Charter* breach and the Respondent cross-appealed the amount of damages awarded. In a separate appeal, the Respondent appealed the dismissal of the wrongful arrest claim and the amount of damages awarded against the City. The City cross-appealed the award of damages for the *Charter* breach. The two appeals were heard together.

19. The British Columbia Court of Appeal unanimously upheld the finding that the Respondent's detention and arrest were lawful and dismissed his appeal and cross-appeal in relation to the amount of damages awarded. The Court of Appeal was divided, however, on the issue of *Charter* damages.

20. The majority (Finch C.J.B.C. and Low J.A.) upheld the award of damages for the *Charter* breach notwithstanding the absence of bad faith, abuse of power or loss to the Respondent. They did so on the basis that, in their view, the government immunity from liability for acts which are subsequently declared unconstitutional, as set out in this Court's decision in *Mackin supra.*, applies only to actions taken under legislation subsequently declared unconstitutional and did not apply to the facts of this case.

21. Dissenting on the issue of *Charter* damages, Saunders J.A., concluded that, in the absence of a finding of malice or bad faith, an award of damages was not an "appropriate and just" remedy for infringement of a *Charter* right. In her view, the rationale for government immunity as discussed in *Mackin, supra.* applied to good faith discretionary decisions of the police and corrections officers. In addition, having considered the objectives that damages serve, Saunders J.A., did not consider any of them to apply to a *Charter* breach in the absence of a loss or bad faith:

[84] The general objective of damages at common law is compensation for loss. Where, as here, the wrong did not cause pecuniary loss, (unlike, for example, *Auton v. British Columbia (Attorney General)*, 2002 BCCA 538, 6 B.C.L.R. (4th) 201, rev'd on the issue of liability 2004 SCC 78, [2004] 3 S.C.R. 657, and *Wynberg v. Ontario* (2006), 82 O.R. (3d) 561, 269 D.L.R. (4th) 435 (Ont. C.A.), leave to appeal ref'd [2006] S.C.C.A. No. 441) the basis for the award is less than apparent.

[85] For damages under s. 24 of the *Charter*, one basis may be, as with other *Charter* remedies, to "correct" behaviour of the persons who have caused the *Charter* infringement, or to provide rebuke. On this theory, damages are not so much intended to compensate the wronged individual as to censure the persons who have breached his or her rights. Where, as here, neither malice nor bad faith is found, and where, as the trial judge seems to hold, the individuals conducting the search thought they were acting in accordance with a policy, there seems to me to be little accomplished by an award of damages that is not already accomplished by a trial process calling attention to their error. In other words, on the findings of the trial judge as to the state of mind of the corrections officers, I do not consider "correction" a sound basis on which to award damages. Nor

would an objective of punishment or sanction be appropriate absent a finding of a faulty state of mind.

[86] An alternative basis for an award of damages under s. 24 of the *Charter* may be as compensation for loss from injury, much as in the law of negligence. But here, I would suggest, the incremental development of the law of negligence, particularly with respect to persons fulfilling public responsibilities, is instructive. 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.

[87] A conclusion that non-pecuniary damages may be awarded absent negligence or another tort in these circumstances, I suggest, would create two classes of wrongs, with a s. 24 action for damages available as a "fall-back" to an action in tort in the event a tort cannot be established. In this, I agree with Mr. Justice Spencer in *Stenner v. British Columbia (Securities Commission)* (1993), 23 Admin. L.R. (2d) 247 at para. 78 (B.C.S.C.), aff'd 141 D.L.R. (4th) 122 (B.C.C.A.), leave to appeal ref'd [1996] S.C.C.A. No. 595. See also *McGillivray v. New Brunswick* (1994), 149 N.B.R. (2d) 311, 116 D.L.R. (4th) 104 (C.A.), leave to appeal ref'd [1994] S.C.C.A. No. 408.

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

22. In this appeal, the City does not challenge the finding that the Respondent's *Charter* right to be secure from unreasonable seizure was infringed when his vehicle was towed by the police. However, the City submits that, in view of the specific finding that the officers acted in good faith, an award of damages for this *Charter* breach was not an appropriate and just remedy.

PART II – STATEMENT OF ISSUES

23. The Constitutional Question in this appeal was stated by the Chief Justice 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 bad faith, an abuse of power or tortious conduct committed by the infringer?

PART III – ARGUMENT

24. The City submits that, notwithstanding the very broad remedial power conferred on the courts by section 24(1) of the *Charter*, damages should not be awarded for a breach of the *Charter*, in the absence of bad faith, an abuse of power or tortious conduct, for two reasons.

25. First, in the absence of bad faith, an abuse of power or tortious conduct, damages are not an appropriate and just remedy for a breach of a *Charter* right.

26. Second, an award of damages in the absence of bad faith, an abuse of power or tortious conduct does not serve any of the recognized purposes of damages and is unnecessary.

A. IN THE ABSENCE OF BAD FAITH, AN ABUSE OF POWER OR TORTIOUS CONDUCT, DAMAGES ARE NOT AN APPROPRIATE AND JUST REMEDY FOR A BREACH OF A *CHARTER* RIGHT.

27. The meaning of the words “appropriate and just” in section 24(1) of the *Charter*, was considered by this Court in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 SCC 62. Writing for the majority⁴, Iacobucci and Arbour JJ. confirmed the broad discretion that s. 24(1) of the *Charter* conferred on the court ordering the remedy but also set out the general principles which should govern evaluation of the appropriateness and justice of a potential remedy:

[54] While it would be unwise at this point to attempt to define, in detail, the words “appropriate and just” or to draw a rigid distinction between the two

⁴ The dissenting justices did not disagree with the “appropriate and just” analysis.

terms, there are some broad considerations that judges should bear in mind when evaluating the appropriateness and justice of a potential remedy. These general principles may be informed by jurisprudence relating to remedies outside the *Charter* context, such as cases discussing the doctrine of *functus* and overly vague remedies, although, as we have said, that jurisprudence does not apply strictly to orders made under s. 24(1).

[55] First, an appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant. A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied. An ineffective remedy, or one which was "smothered in procedural delays and difficulties", is not a meaningful vindication of the right and therefore not appropriate and just (see *Dunedin, supra*, at para. 20, McLachlin C.J. citing *Mills, supra*, at p. 882, *per* Lamer J. (as he then was)).

[56] Second, an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. As discussed above, a court ordering a *Charter* remedy must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary. This is not to say that there is a bright line separating these functions in all cases. A remedy may be appropriate and just notwithstanding that it might touch on functions that are principally assigned to the executive. The essential point is that the courts must not, in making orders under s. 24(1), depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes.

[57] Third, an appropriate and just remedy is a judicial one which vindicates the right while invoking the function and powers of a court. It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited. The capacities and competence of courts can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent.

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

[59] Finally, it must be remembered that s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*. As such, s. 24, because of its broad language and the myriad of roles it may play in cases, should be allowed to evolve to meet the challenges and circumstances of those cases. That evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions

of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.

[underlining added]

28. The City submits that, on an application of these principles, in the absence of bad faith, an abuse of power, or tortious conduct by the infringer, damages are not an appropriate and just remedy for an infringement of a *Charter* right because:

- 1) Damages are not necessary to meaningfully vindicate *Charter* rights in the absence of an actual loss;
- 2) An award of damages would not be fair to an innocent infringer.

1) Damages are not necessary to meaningfully vindicate *Charter* rights

29. Damages are not necessary to vindicate a *Charter* right in the absence of an actual loss arising out of a *Charter* breach. A declaration that a right had been breached represents a meaningful and effective remedy both for an individual claimant and for the public at large.

30. A declaration, combined with costs where appropriate, vindicates the individual claimant and affirms the existence of a freedom or a right. It also serves as a direction to the police and other public officials as to the appropriate future conduct.

31. There is no evidence that either nominal damages, such as awarded in this case, or more substantive damages would be more effective than a declaration. To the

contrary, the City submits that it is the declaration of the infringement that is the only truly effective and meaningful means of vindicating a *Charter* right.

32. As was observed by this Court in *Doucet-Boudreau, supra.*, Canada has a remarkable history of compliance with court decisions by all institutions of government. A fact which, while we must never take for granted, must be respected and protected.

Doucet-Boudreau, supra., para. 32

33. A suggestion that a declaration alone is not an effective and meaningful remedy ignores this fundamental reality and misunderstands the role that the courts play in the Canadian democracy.

2) **An award of damages for an infringement of a *Charter* right, in absence of bad faith, abuse of power or tortious conduct, is not fair to an innocent infringer.**

34. The *Charter* is fundamental to the Canadian society and its enforcement is of critical importance. It represents Canadian commitment to individual rights, subject only to such limits as can be demonstrably justified in a free and democratic society.

35. Yet there can be no free and democratic society without efficient and effective government. While the government actions are, and must be, limited by the individual rights enshrined in the *Charter*, the government actors, whether federal, provincial, or municipal, cannot be held to a standard of perfection through an imposition of strict liability for every *Charter* breach.

36. Thus, although damages are, without a doubt, available as a remedy under s. 24(1) of the *Charter*, the City submits that it would not be appropriate or just to award damages for breaches of the *Charter* which are not accompanied by bad faith, abuse of power, or tortious conduct.

- i. An award of damages in the absence of bad faith is inconsistent with this Court's decision in *Mackin* and the limited immunity provided to governments and public officials under established public law principles.

37. Government officials, in the performance of their public duties, are regularly called on to make discretionary decisions. In doing so, they must balance multitude of competing interests. Despite best efforts, government officials, acting in the public interest and in good faith, will occasionally infringe *Charter* rights of individuals.

38. Public law principles provide the governments and public officials with limited immunity for good faith performance of public duties - *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957, *Central Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42. This immunity has been extended by this Court to breaches of the *Charter* in *Guimond v. Quebec (Attorney General)*, [1996] 3. S.C.R. 347 and *Mackin, supra*.

39. By extending this limited immunity to *Charter* cases, this Court recognized the importance of balancing the protection of constitutional rights and the

need for effective government. In *Mackin, supra.*, Gonthier J. speaking for the majority of this Court stated:

[79] However, as I stated in *Guimond v. Quebec (Attorney General), supra.*, since the adoption of the *Charter*, a plaintiff is no longer restricted to an action in damages based on the general law of civil liability. In theory, a plaintiff could seek compensatory and punitive damages by way of “appropriate and just” remedy under s. 24(1) of the *Charter*. The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a *Charter* context. Thus, the government and its representatives are required to exercise their powers in good faith and 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 (*Crown Trust Co. v. The Queen in Right of Ontario (1986)*, 26 D.L.R.(4th) 41 (Ont. Div. Ct.)).

[underlining added]

40. 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. The same immunity should apply to all actions carried out in the absence of bad faith, abuse of power or tortious conduct in the performance of public duty which are only subsequently found to infringe a *Charter* right.

- ii. Availability of damages for every breach of the *Charter* would create a new kind of liability and would have a chilling effect on public officials.

41. The many common law torts corresponding to various *Charter* rights (false imprisonment, malicious prosecution, abuse of public office, negligence, etc.) developed gradually together with various defences to balance the conflicting interests of individuals and society.

42. The City submits that the *Charter*, and specifically section 24(1), was never intended to replace centuries of common law jurisprudence that regulates compensation for wrongs committed by public officials in the performance of their duties. To hold otherwise would create two classes of wrongs, with a *Charter* action for damages available as a “fall-back” to an action in tort in the event a tort cannot be established.

43. There is no need for doing so. The City submits that the existing common law torts are adequate to properly compensate plaintiffs for government wrongdoings including when such wrongdoing also constitutes a *Charter* breach.

44. There are, on the other hand, good reasons for not doing so. To treat every breach of a *Charter* right as a *de facto* tort actionable without proof of damages, as the trial judge appears to have done in the present case, creates a form of strict liability that deprives public officials of the defences that would be available to them at common law for the very same conduct. In particular, it would deprive them of the good faith defence which is available in response to many of the possible claims against public officials: for

example, misfeasance in public office (*Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69). That, in turn, would have an undesirable “chilling effect” on the ability of public officials to perform their common law and statutory duties.

45. This is particularly true in the law enforcement context. Police officers are routinely required to make discretionary decisions, often in exigent circumstances. As long as they do so in good faith, they should be free from the threat that, should their action be subsequently held to infringe a *Charter* right, they will be liable for damages. The alternative would threaten the entire criminal justice system, as noted by the New Brunswick Court of Appeal in *McGillivray v. New Brunswick* (1994), 149 N.B.R. (2d) 311, 116 D.L.R. (4th) 104 (C.A.) leave to appeal ref'd [1994] S.C.C.A. No. 408 (at para. 10):

... The enforcement of the criminal law is one of the most important aspects of the maintenance of law and order in a free society. So long as the carrying out of duties in relation to the investigation and prosecution of persons in pursuit of the aims of the justice system is done within jurisdiction and with an absence of mala fides, there can be no recovery. A breach, in order to be actionable must be carried out in disregard of fundamental justice resulting in, for example, a loss of liberty. In order for the criminal justice system to function effectively, there has to be something more than an allegation of an error in reaching a conclusion or in the making of a decision by law enforcement officers, or the experts upon which they rely for professional advice.

[underlining added]

46. The case at bar illustrates that very well. The police were dealing with an alleged plot to assault the Prime Minister. As part of their investigation, they did not search the Respondent's car but chose to secure it to preserve potential evidence until a

search warrant could be obtained. It was a good faith effort to balance their public duty to prevent and investigate crime with the Respondent's privacy rights.

47. The trial judge found that, had the Respondent been arrested for assault or attempted assault rather than just for breach of peace, the towing of the vehicle to preserve evidence could have been justified. Thus, it cannot be said that the police decision to tow the Respondent's car was contrary to established and indisputable laws such that it was clearly wrong. Without detracting from the importance of the right in question, in the absence of any evidence that their conduct fell below an applicable standard of care or that it was a product of bad faith, the error of the police officers in towing the Respondent's vehicle can only be seen for what it was – an innocent mistake. It should not have exposed them, or the City, to liability for damages.

48. An award of damages in these circumstances cannot be considered to be "fair to the party against whom the order is made." Nor was it necessary for the Respondent's right to be fully vindicated. Thus, the award of damages in the present case, because of the absence of bad faith, abuse of power, or tortious conduct, does not satisfy the fourth principle articulated by this Court in *Doucet-Boudreau, supra*. for evaluating the appropriateness and justice of a remedy and should not be allowed to stand.

B. AN AWARD OF DAMAGES FOR A *CHARTER* BREACH, IN THE ABSENCE OF BAD FAITH, ABUSE OF POWER OR TORTIOUS CONDUCT, IS NOT CONSISTENT WITH THE RECOGNIZED PURPOSES OF DAMAGES.

49. As was correctly noted by Saunders J.A., in the court below, an award of damages in a case such as this, does not serve any of the recognized purposes of damages: compensation, deterrence, or punishment.

50. The wrong in question, the towing of the Respondent's vehicle, did not result in any loss or damage to the Respondent. There is no need for compensation – the primary objective of damages at common law.

51. The police officers acted in good faith and, although they erred, they did not do so intentionally. The award of damages cannot, therefore, be justified as a rebuke or punishment. Indeed, in light of the trial judge's finding that they acted in good faith, it would be inappropriate as such.

52. Nor is an award of damages necessary to deter or correct police conduct in the future. There is no evidence to suggest that an award of damages is necessary or helpful in discouraging the police, or other public officials, from breaching *Charter* rights of the citizens. To the contrary, the City submits that a declaration is sufficient to instruct public officials as to the appropriate conduct and to prevent repetition of the offending actions.

Doucet-Boudreau, supra., para. 32

53. Finally, the City submits that it is neither necessary nor appropriate to use damages as a “marker” to recognize a *Charter* breach.

54. It is not necessary because, as was discussed above, a declaration is a more flexible and appropriate means of doing so than an award of nominal damages.

55. It is not appropriate because it would either create a form of strict liability under which every infringement of the *Charter* would entitle one to damages or would result in arbitrariness where some breaches would be compensated with damages and some would not. Indeed, the comment of Low J.A., in the court below, is illustrative of the inherent risk of this approach:

[65] 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.

56. An award of damages for a breach of a *Charter* right, in the absence of bad faith, abuse of power, or tortious conduct, does not meet any of the recognized purposes of damages. It is, therefore, unnecessary and inappropriate.

C. CONCLUSION

57. An award of damages is not necessary to vindicate the rights of the claimant. In the absence of actual loss to the claimant, a declaration of an infringement of

a *Charter* right is an effective and meaningful remedy that fully vindicates his or her rights.

58. An award of damages, in the absence of bad faith, an abuse of power, or tortious conduct is not an appropriate or just remedy for an infringement of a *Charter* right because it is not fair to an innocent infringer. It would deprive public officials of defences otherwise available to them and would go beyond what is necessary to vindicate the claimant's rights.

59. Finally, an award of damages for a breach of a *Charter* right, in the absence of bad faith, an abuse of power, or tortious conduct, is not consistent with any of the recognized purposes of damages and is unnecessary and inappropriate.

60. Therefore, the City submits that the constitutional question should be answered in the negative – section 24(1) of the *Charter* does not authorize an award of 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. The City's appeal should be allowed and the award of damages for the breach of the Respondent's section 8 of the *Charter* right should be set aside.

PART IV – COSTS

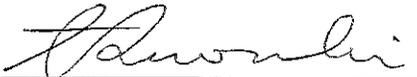
61. The City seeks costs in this Court as well as its costs in its cross-appeal in the British Columbia Court of Appeal.

PART V – ORDER SOUGHT

62. The City seeks an order allowing this appeal and:
- a. varying the judgment of the British Columbia Court of Appeal in appeal no. CA034785 to allow the City's cross-appeal and to set aside the award of costs of the cross-appeal in favour of the Respondent;
 - b. varying the judgment of the British Columbia Supreme Court in action no. S030038 by striking out the award of damages for breach of the *Charter*; and
 - c. awarding the City costs in this Court and costs of its cross-appeal in the British Columbia Court of Appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: October 16, 2009


Tomasz M. Zworski, Counsel for
the Appellant, City of Vancouver

PART VI – TABLE OF AUTHORITIES

Cases:	At para.:
<i>Central Potash Co. v. Government of Saskatchewan</i> , [1979] 1 S.C.R. 42	38
<i>Doucet-Boudreau v. Nova Scotia (Minister of Education)</i> , [2003] 3 S.C.R. 3, 2003 SCC 62	27, 32, 48, 52
<i>Guimond v. Quebec (Attorney General)</i> , [1996] 3. S.C.R. 347	38
<i>Mackin v. New Brunswick</i> , [2002] 1 S.C.R. 405, 2002 SCC 13	2, 20, 21, 38, 39, 40
<i>McGillivray v. New Brunswick (1994)</i> , 149 N.B.R. (2d) 311, 116 D.L.R. (4th) 104 (C.A.) leave to appeal ref'd [1994] S.C.C.A. No. 408	45
<i>Odhavji Estate v. Woodhouse</i> , [2003] 3 S.C.R. 263, 2003 SCC 69	44
<i>Welbridge Holdings Ltd. v. Greater Winnipeg</i> , [1971] S.C.R. 957	38

PART VII – STATUTES AND RULES

Statute:

At para.:

Police Act, R.S.B.C. 1996, c. 367, ss. 20, 21

10, 13