

COURT OF APPEAL NOs. CA034766 and CA034785
VANCOUVER REGISTRY

COURT OF APPEAL

On Appeal from the Supreme Court of British Columbia Judgment of the Honourable Mr.
Justice Tysoe, pronounced the 2nd day of January, 2007

BETWEEN:

ALAN CAMERON WARD

RESPONDENT
(PLAINTIFF)

AND:

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

APPELLANT
(DEFENDANT)

and

BETWEEN:

ALAN CAMERON WARD

APPELLANT
(PLAINTIFF)

AND:

CITY OF VANCOUVER

RESPONDENT
(DEFENDANT)

**FACTUM OF THE INTERVENOR,
THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION**

**THE BRITISH COLUMBIA CIVIL
LIBERTIES ASSOCIATION**
Suite 500 – 1188 West Georgia Street
Vancouver, BC V6E 4A2

SAMUELS & COMPANY
1400 – 1125 Howe Street
Vancouver, BC V6Z 2K8

**CITY OF VANCOUVER LAW
DEPARTMENT**
453 West 12th Avenue
Vancouver, BC V5Y 1V4

**MINISTRY OF THE ATTORNEY
GENERAL, Legal Services Branch**
6th Floor, 1001 Douglas Street
Victoria, BC V8 1X4

Grace M. Pastine
Counsel for the Intervenor, the British Columbia
Civil Liberties Association

Brian Samuels,
Counsel for A. Cameron Ward

Tom Zworski
Counsel for the City of Vancouver

J.E. Gouge and B.A. Mackey,
Counsel for the HMTQ in Right of the Province
of British Columbia

INDEX

Opening Statement.....	i
Part 1 - Statement of Facts	1
Part 2 - Issue on Appeal	1
Part 3 – Argument.....	1
Introduction.....	1
The Importance of Charter Remedies	3
Damages as a Charter Remedy	6
The Qualified Immunity in <i>Mackin</i> Should Not Apply to the Instant Appeals	7
Cases Applying <i>Mackin</i> Beyond the Context of Legislation that Has Been Found to Be Unconstitutional Should Not Be Followed	9
The Proper Approach to Damages as a Charter Remedy	12
The Alleged Chilling Effects of Damage Awards	14
Conclusion	16
Part 4 - Nature of the Order Sought	17
LIST OF AUTHORITIES.....	18

OPENING STATEMENT

These appeals concern a matter that rarely is litigated, namely, whether compensatory damages may be awarded for a violation of rights guaranteed in the *Charter of Rights and Freedoms* (“Charter”) when no charges have been laid and the applicant cannot, therefore, seek remedies related to the prosecution process, such as the exclusion of evidence under s.24(2) or other non-remuneratory remedies under s.24(1) of the Charter. The British Columbia Civil Liberties Association (the “BCCLA”) respectfully submits that the learned trial judge did not err in awarding damages to Mr. Ward for compensation for the government action that infringed his Charter rights. The award was a legitimate exercise of the learned trial judge’s broad remedial discretion under s.24(1) of the Charter, and was necessary to ensure that the remedy Mr. Ward received was meaningful, full and effective.

Damages may properly be awarded in the absence of a finding of government fault. The jurisprudence from the Supreme Court of Canada only requires proof of fault in the form of bad faith, malice or negligence in cases unlike the present; that is, where the activity alleged to violate the Charter is specifically authorized by legislation and an applicant is therefore able to claim relief both under s.24(1) of the Charter and s.52(1) of the *Constitution Act, 1982*. Such an approach to damages is consistent with the basic principles of Charter adjudication and the traditional judicial role in providing damage remedies to give individuals the tangible benefit of their rights. Any more restrictive approach would allow the state to violate legal rights with impunity in cases such as that bar where the victim is not charged with a criminal offence.

PART 1 - STATEMENT OF FACTS

1. The BCCLA takes no position with respect to the facts presented by the parties of the underlying appeals. The BCCLA relies on the facts as found by the learned trial judge.

PART 2 - ISSUE ON APPEAL

2. The BCCLA will confine itself to addressing the following issue on appeal:
Did the learned trial judge err in awarding Mr. Ward damages for compensation for government action that infringed his Charter rights?

PART 3 – ARGUMENT

Introduction

3. It is in the public interest that meritorious Charter litigation be encouraged by the availability of full and effective remedies, including damages. Individuals who are not charged with an offence are extremely unlikely to commence Charter litigation if the only remedy that they can realistically obtain is a declaration that their Charter rights have been violated. A more tangible remedy is required in order to ensure that the Charter is meaningful both for those whose rights are violated and for state actors, such as police and correctional officials, who are bound by its restraints.

4. If full and effective remedies are not available, there is a danger that the state can avoid the restraints of the Charter simply by not prosecuting people whose rights are violated. Such an approach would harm victims whose Charter rights have been violated

and present undesirable incentives for the state to avoid accountability through the exercise of charging and prosecutorial discretion. By holding state actors accountable for Charter violations, damage awards against government actors may be an effective way to induce governments to change their behaviour to prevent violations in the future.

5. The BCCLA's argument on these appeals is twofold. First, we canvass the important role that section 24(1) of the Charter serves in providing full and effective remedies, and examine the limited jurisprudence from the Supreme Court of Canada on damages under s.24(1). We submit that the Supreme Court of Canada's decisions in *Guimond v. Quebec (Attorney General)* [1996] 3 S.C.R. 347 and *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick* [2002] 1 S.C.R. 405 ("*Mackin*") and *Canada v. Hislop* [2007] 1 S.C.R. 429 ("*Hislop*") only require proof of fault in the form of bad faith, malice or negligence in cases unlike the present; that is, where the activity alleged to violate the Charter is specifically authorized by legislation and an applicant is therefore able to claim relief both under s.24(1) of the Charter and s.52(1) of the *Constitution Act, 1982*.

6. Second, we submit that the proper approach to Charter damage claims under s.24(1), where, as in this case, the activity that violates the Charter is not specifically authorized in legislation, is to allow the trial judge to decide what, if any, damages would be an appropriate and just remedy in the circumstances of the particular Charter violation. Such an approach to damages is consistent with the basic principles of Charter

adjudication and the traditional judicial role in providing damage remedies to give individuals the tangible benefit of their rights.

The Importance of Charter Remedies

7. Her Majesty the Queen in Right of the Province of British Columbia (the “Provincial Government”) submits at paragraphs 26-27 of its factum (file no. CA034766) that there is no “persuasive” or “juridical” rationale for distinguishing a breach of the Charter from a breach of another statute. The BCCLA submits, to the contrary, that the Charter is not an ordinary statute but rather a constitutional document that has been designed to provide for the enduring protection of rights and freedoms.

8. Section 24(1) of the Charter has special significance; the *Canadian Bill of Rights* contained no equivalent clause providing for the provision of appropriate and just remedies. The proper approach to Charter remedies is a purposive one that recognizes the need for full and effective remedies:

A purposive approach should, in my view, 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, para. 73

To create a right without a remedy is antithetical to one of the purposes of the *Charter* which surely is to allow courts to fashion remedies when constitutional infringements occur.

Nelles v. The Queen [1989] 2 S.C.R. 170, para. 50

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.

Osborne v. Canada [1991] 2 S.C.R. 69, para. 65

9. 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 object. 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 *R. v. Mills* [1986] 1 S.C.R. 863, McIntyre J. observed at para. 23 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 "[n]arrow and technical" reading of the provision (see *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, para. 11).

10. Section 24(1) must be interpreted in a way that achieves its purpose of upholding Charter rights by providing effective remedies for their breach. If the Court's past decisions concerning s. 24(1) can be reduced to a single theme, it is that s. 24(1) must be interpreted in a manner that provides a full, effective and meaningful remedy for Charter violations: *Mills*, *supra*, para. 57 – 69 (*per* Lamer J.), para. 6-8 (*per* McIntyre J.); *Mooring v. Canada (National Parole Board)* [1996] 1 S.C.R. 75, paras. 50-52 (*per* Major J.). As Lamer J. observed in *Mills*, s. 24(1) "establishes the right to a remedy as the foundation stone for the effective enforcement of *Charter* rights" (para. 59). Through the

provision of an enforcement mechanism, s. 24(1) “above all else ensures that the *Charter* will be a vibrant and vigorous instrument for the protection of the rights and freedoms of Canadians” (*Ibid.*, para. 58).

11. Section 24(1) necessarily resonates across *all* Charter rights, since a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach. From the outset, the Supreme Court of Canada has characterized the purpose of s. 24(1) as the provision of a “direct remedy” (*Mills, supra*, para. 7, *per* McIntyre J.). As Lamer J. stated in *Mills*, “[a] remedy must be easily available and constitutional rights should not be ‘smothered in procedural delays and difficulties’” (para. 63). Anything less would undermine the role of s. 24(1) as a cornerstone upon which the rights and freedoms guaranteed by the *Charter* are founded, and a critical means by which they are realized and preserved (*R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, paras. 18-20)

12. 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” (*Mills, supra*, 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 v. Nova Scotia [2003] 3 S.C.R. 3, para. 25 (emphasis in original)

Damages as a Charter Remedy

13. Despite the importance that the Charter attaches to remedies, the status of damages as a remedy under s.24(1) of the Charter remains surprisingly unclear. In 1994, the Supreme Court of Canada recognized that damages could be awarded under the Charter, while noting: “However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the *Charter*.” *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, para. 66. In 2007, the Supreme Court noted that s.24(1) damages “are necessarily retroactive” (para. 81). The Court stated:

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.

Hislop, para. 86

14. The Supreme Court has addressed the issue of Charter damages but only in the context of whether and when damages are available in conjunction with a declaration that legislation is invalid under s. 52(1). These cases raise distinct issues of reliance on explicit statutory authorization for conduct that has subsequently been found to violate the Charter. They also typically involve claims that could result in wide-spread or indeterminate liability, in contrast to the individual claim brought by Mr. Ward.

Schachter v. Canada [1992] 2 S.C.R. 679, 720
Guimond v. Quebec, supra

Mackin, supra
Hislop, supra

The Qualified Immunity in *Mackin* Should Not Apply to the Instant Appeals

15. The origins of the qualified immunity for governmental actors that requires proof of misconduct in the form of negligence, bad faith or abuse of power stems from concerns of imposing liability on governments for actions specifically authorized by legislation that is presumed valid but is subsequently found to be unconstitutional:

Although it cannot be said that damages can never be obtained following declaration of constitutional invalidity, it is true, as a general rule, that an action for damages under s. 24(1) of the *Charter* cannot be coupled with a declaratory action for invalidity under s. 52 of the *Constitution Act, 1982*. The respondent based his claim for damages under s. 24(1) on a bare allegation of unconstitutionality.

Guimond v. Quebec (Attorney General), supra, para. 19

16. In the leading case of *Mackin, supra*, the Supreme Court made clear that it was dealing with a claim for damages accompanied by a request to strike down a law under s. 52(1) and reliance by officials on a validly enacted law (paras. 78-81). Similarly, in *Hislop, supra*, the Supreme Court was considering a case where the Charter violation was specifically authorized by legislation (paras. 109-117). These cases raise institutional issues of good faith and reasonable reliance on legislation, fairness to other litigants, respect for Parliament's role, and substantial changes to the law which do not apply to the case at bar. This case is an ordinary arrest, detention and search scenario that only resulted in litigation because of the atypical fact that the detainee happened to be a lawyer with the knowledge and resources required to commence a damage action.

17. We submit that in this case, there was no combination of a remedy under s. 52 of the *Constitution Act, 1982* and s. 24(1) of the Charter.

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

Trial Judgement, para. 109

18. Section 19 of the *Correctional Centre Rules and Regulations* mandated searches prior to admission to correctional facilities but not strip searches. There was no legislative authorization for the unlawful searches and periods of detention suffered by Mr. Ward.

19. The rationale for the limited immunity contemplated in *Guimond v. Quebec, supra*, and *Mackin, supra*, and for the limits on retroactive Charter relief in *Hislop*, is that governmental officials should be entitled to assume that actions specifically authorized by legislation are constitutional. It is our submission that this rationale does not apply when government officials take actions that are not specifically authorized in legislation but that violate Charter rights. Section 52(1) cases typically involve the conflicting rights of many whereas this case involves the state acting as the singular antagonist of an individual that it unconstitutionally detained and searched. Indeed, it has long been recognized that governmental officials who undertake improper and *ultra vires* acts without statutory authorization can be found to be civilly liable. Indeed, the imposition of damages for such actions and the provision of retroactive remedies designed to give the aggrieved individual the benefit of his or her rights are fundamental tenets of the rule of law.

Roncarelli v. Duplessis, [1959] S.C.R. 121
Irwin Toy v. Quebec [1989] 1 S.C.R. 927

Cases Applying *Mackin* Beyond the Context of Legislation that Has Been Found to Be Unconstitutional Should Not Be Followed

20. A number of courts, most notably the Ontario Court of Appeal, have extended *Mackin, supra*, to require proof of fault for all Charter damage claims under s.24(1) even when, as in this case, the state actions have not been authorized by statute and the applicant does not need to request a declaration of invalidity under s.52(1) of the *Constitution Act, 1982*. The BCCLA submits that these cases have been wrongly decided because they extend *Mackin, supra*, beyond its legitimate borders; and, because they are wrong in principle because they fetter the discretion of trial judges under s.24(1) of the Charter to award appropriate and just remedies.

21. The leading Ontario Court of Appeal decision requiring fault for all damage remedies under s.24(1) of the Charter is *Mammoliti v. Niagara Regional Police Service*, 2007 ONCA 79. The reasoning on this critical issue was brief. Laforme J.A. (Gillese J.A. concurring) stated:

Liability for a constitutional tort, such as under ss. 6 and 7 of the *Charter* as claimed here by Ferri and Mammoliti, requires wilfulness or *mala fides* in the creation of a risk or course of conduct that leads to damages. Proof of simple negligence is not sufficient for an award of damages in an action under the *Charter*: *McGillivray v. New Brunswick* (1994), 116 D.L.R. (4th) 104 at 108 (N.B.C.A.), leave to appeal refused, [1994] S.C.C.A. No. 408.

Ibid., para. 108

Jurianz J.A agreed and stated:

As LaForme J.A. sets out, liability for a constitutional tort under ss. 6 and 7 of the *Charter* requires wilfulness or *mala fides* in the creation of a risk or course of conduct that leads to damages. Mere negligence is not sufficient to succeed on this ground: see *McGillivray, supra*, at 108. Malice, on the other hand, may be sufficient to satisfy the bad faith requirement. As I have concluded, there is no genuine issue for trial on the issue of malice and in this case there is no other basis for establishing bad faith. I would conclude that the appellants' claim for *Charter* damages was properly dismissed.

Ibid., para. 167

See also *Hawley v. Bapoo*, 2007 ONCA 503

22. In the above cases, the Ontario Court of Appeal relied heavily on *McGillivray v. New Brunswick* (1994), 116 D.L.R. (4th) 104 at 108 (N.B.C.A.) ("*McGillivray*"). The *McGillivray* decision fails to address the rationale for requiring fault. It is best seen as a case in which a civil action was dismissed for failing to allege any Charter breach rather than for one holding that damages can only be ordered under s. 24(1) of the Charter if the plaintiff demonstrates some form of fault.

23. The BCCLA submits that the Ontario Court of Appeal in *Mammoliti v. Niagara Regional Police Service* is at odds with the Supreme Court's decision in *Mackin*. *Mammoliti v. Niagara Regional Police Service* fails to recognize that in the context of combining remedies under s.24(1) of the Charter and s.52(1) of the *Constitution Act, 1982*, negligence as well as subjective fault in the form of wilfulness or *mala fides* is a sufficient form of fault to ground liability.

Mackin, supra, paras. 79-82

24. The trial judge correctly distinguished the Ontario Court of Appeal's judgment in *Wynberg v. Ontario* (2006), 82 O.R. (3d) 561 ("Wynberg") as one arising from a deliberate policy choice to limit funding to certain categories of autistic children. In *Wynberg*, the Court of Appeal indicated at para. 199:

This is not a case in which extending a remedy, for example damages, under s. 24(1) to the respondent would be appropriate. The classic doctrine of damages is that the plaintiff is to be put in the position he or she would have occupied had there been no wrong. In the present case, there are two possible positions the plaintiff could have been in had there been no wrong. The plaintiff could have received the benefit equally with the original beneficiaries, or there could have been no benefit at all, for the plaintiff or the original beneficiaries. The remedial choice under s. 24 thus rests on an assumption about which position the plaintiff would have been in. However, I have already determined which assumption should be made in the analysis under s. 52, and have determined that it cannot be assumed that the legislature would have enacted the benefit to include the plaintiff. Therefore, the plaintiff is in no worse position now than had there been no wrong.

Wynberg, citing *Schachter v. Canada*, *supra*, pp. 725-26

25. In this case, as opposed to *Wynberg*, it is possible to attempt to use damages to return Mr. Ward to the position that he would have occupied in the absence of the Charter violation that he suffered. The *status quo ante* that should be restored is that which protected Mr. Ward from arbitrary detention and unreasonable searches.

26. It is submitted that the Ontario Court of Appeal decision in *Wynberg* correctly restricted the *Mackin* qualified immunity to cases where the applicant challenged legislation under s.52(1) of the *Constitution Act, 1982* when the Court of Appeal stated:

Absent bad faith, abuse of power, negligence or willful blindness in respect of its constitutional obligations, damages are not available as a

remedy in conjunction with a declaration of unconstitutionality. As the trial judge made no such findings on the part of Ontario, it was an error in principle to award damages in conjunction with declaratory relief. It was a further error to grant damages on the basis that the Minister of Education had breached his statutory duty under s. 8(3) of the *Education Act*. The appropriate remedy for such a breach would be to direct the Minister to fulfill his duty.

Wynberg, supra, para. 202 (emphasis added)

27. It is submitted that the inconsistency between *Wynberg* and *Mammoliti v. Niagara Regional Police Service*, as well as the sparse reasoning used in *Mammoliti v. Niagara Regional Police Service*, are reasons for this Honourable Court not to follow the Ontario line of cases that have extended *Mackin* to all s.24(1) damage claims.

The Proper Approach to Damages as a Charter Remedy

28. The BCCLA submits that the proper approach to the award of Charter damages under s.24(1) in a case where an applicant does not challenge legislation under s. 52(1) of the *Constitution Act, 1982* and where the activity that violates the Charter is not specifically authorized in legislation, is to allow the trial judge to decide what, if any, damages would be an appropriate and just remedy in the circumstances of the particular Charter violation. Although the presence of fault, including negligence, is a relevant consideration, particularly with respect to quantum of damages, there should be no rigid requirement that fault be established. Such a requirement would unduly fetter the trial judge's remedial discretion and would undermine the purpose of s.24(1) in providing for full and effective remedies.

Doucet-Boudreau v. Nova Scotia, supra

29. Although the case law is obviously divided on the issue of whether proof of governmental fault is required for a s.24(1) damage claim, there is support in the case law for not requiring proof of fault as a prerequisite for a damage award.

30. Although a majority of the Supreme Court has never dealt with this issue, a strong dissent by Justice Wilson reasoned that fault should not be required as a prerequisite for a damage award:

I believe it is appropriate and just in these circumstances to award compensatory damages for the loss of income and benefits sustained by the appellants through the breach of their s. 15 rights. Compensation for losses which flow as a direct result of the infringement of constitutional rights should generally be awarded unless compelling reasons dictate otherwise.

Mackinney v. University of Guelph, [1990] 3 S.C.R. 229, para. 346

31. In *Dulude v. Canada* (2000), 192 D.L.R. (4th) 714 (Fed C.A.) the court dealt with an illegal arrest and detention of a member of the armed forces by military police. Létourneau J.A. stated:

However, the appellant's constitutional rights were infringed and, under section 24 of the Charter, he is entitled to a just and appropriate remedy in the circumstances. As the harm results from illegal acts (unlawful imprisonment and assault), the existence of damages is not a prerequisite for obtaining compensation: ... Though unintentional and not from malice, the infringement is nonetheless serious and unjustified. . . . It is quite apparent that the establishment and legal vindication of his constitutional rights was a source of anxiety, anguish and frustration for himself and his family. . . . I do not feel that he should be awarded punitive and exemplary damages, but I believe that financial compensation for the moral injury sustained is the proper remedy in the circumstances. It only remains to determine the nature and extent of this.

[Emphasis added]

Ibid., para. 18

32. At least one lower court judgment has quoted *Dulude v. Canada* with approval and rejected a fault requirement for Charter damages in a context similar to the case at bar. In *Morin v. Reg. Admin. Unit #3 (PEI)*, (2004) 233 Nfld. & P.E.I.R. 271, the court cited the passage excerpted above from *Dulude v. Canada* with approval (para. 18). The court further stated:

Professor Kent Roach in his text *Constitutional Remedies in Canada*, Canada Law Book Inc., 2002, considers the issue to state of mind and makes the following comments at p. 11 - 30:

...

(1) Liability based on violation of a Charter right

There is much to be said for the proposition that the defendant's state of mind should only be relevant to the extent, if any, required to find a violation of a Charter right. 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. The structure of the Charter suggests that once there had been a violation that is not justified under s. 1, the next issue should be whether damages would be an appropriate and just remedy.

This is the approach I choose to adopt in this case. On the one hand the plaintiff's Charter right to freedom of expression was infringed. On the other hand, I am satisfied there was no bad faith or malice on the part of the defendant or any of the authorities acting on its behalf.

Morin v. Reg. Admin. Unit #3 (PEI), (2004) 233 Nfld. & P.E.I.R. 271 (paras. 71, 76-77)

The Alleged Chilling Effects of Damage Awards

33. The City of Vancouver and Attorney General of British Columbia rely on the notion that damage awards may have a chilling effect on police officers and other

governmental actors. In our submission, such concerns are speculative, especially given the likelihood that any damages awarded against individual officers would be paid by governments capable of raising taxes to pay for the awards.

34. Courts have not allowed speculative concerns about the possible effects of damages to trump the need for constitutional remedies in other contexts. The Supreme Court has recently rejected the idea that governments would be protected from having to pay back money taken from unconstitutional taxes on the basis that:

[P]rivileging policy considerations in the case of *ultra vires* taxes threatens to undermine the rule of law...Turning to La Forest J.'s concern about potential fiscal inefficiency, I agree with Wilson J. in *Air Canada*, where she queries:

Why should the individual taxpayer, as opposed to taxpayers as a whole, bear the burden of government's mistake? I would respectfully suggest that it is grossly unfair that X, who may not be (as in this case) a large corporate enterprise, should absorb the cost of government's unconstitutional act. If it is appropriate for the courts to adopt some kind of policy in order to protect government against itself (and I cannot say that the idea particularly appeals to me) it should be one which distributes the loss fairly across the public. The loss should not fall on the totally innocent taxpayer whose only fault is that it paid what the legislature improperly said was due.

Kingstreet Investments Ltd. v. New Brunswick (Finance), [2007] 1 S.C.R. 3, paras. 21, 27-29.

35. It is submitted that the above reasoning applies with even greater force in the present case given the trial judge's findings that Mr. Ward was unconstitutionally detained and subject to a strip search. Furthermore, this case does not raise issues of fairness to other litigants or respect for Parliament's role as discussed in *Hislop, supra*.

Conclusion

36. The BCCLA submits that the award of damages under s.24(1) of the Charter in the absence of governmental fault can be an appropriate and just remedy. Damages can be a meaningful remedy that are consistent with the judicial function in a constitutional democracy and can be awarded in a manner that is fair to all parties concerned. Damages awarded only under s.24(1) of the Charter appropriately focus on the effects of Charter violations on individuals and not the purpose with which a government acts. This is consistent with basic principles of Charter adjudication and the traditional judicial role in providing retroactive damage remedies to give individuals the tangible benefit of their rights.

Doucet-Boudreau v. Nova Scotia, supra, paras. 55-59

Roncarelli v. Duplessis, supra

Hunter v. Southam [1984] 2 S.C.R. 145

Hislop, supra, paras. 81, 86

37. The remedial role of the Charter is particularly important in cases like the present, which involve the unconstitutional detention and search of a person who was not charged with an offence. People in such circumstances by definition cannot seek the remedy of exclusion of unconstitutionally obtained evidence under s.24(2) of the Charter. The only meaningful remedy that such factually innocent people can seek is damages under s.24(1). To place greater barriers to litigation under s.24(1) of the Charter, such as a requirement that the applicant establish that the government acted with malice or fault, would mean that the state could escape accountability for violating Charter rights simply by not charging individuals and precluding them from seeking defensive Charter remedies such as exclusion of evidence.

38. Courts have repeatedly stressed the broad discretion of trial judges to determine the appropriate and just remedy in the circumstances. It is submitted that the learned trial judge made no error of law in ordering the damages that he did. A requirement that subjective fault be established as a prerequisite to Charter damage claims would fetter the remedial discretion of trial judges and make it extremely difficult for an individual in a position similar to Mr. Ward's to receive a meaningful remedy for the violation of his or her Charter rights. It would mean that s.24(1) of the Charter did not add anything to the common law tort remedies that have long applied to police action despite s.24(1)'s important remedial purpose. As the Supreme Court of Canada emphasized in *Mills*, *supra*, s.24(1) must be interpreted in a manner that provides meaningful remedies:

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, and it is not for appellate courts to pre-empt or cut down this wide discretion.

Mills, supra, para. 23

PART 4 - NATURE OF THE ORDER SOUGHT

The Association takes no position on the appropriate order to be made in this case; it asks only that the case be resolved on the basis of the principles advanced herein.

Dated: _____

Grace M. Pastine
Counsel for the Intervenor,
B.C. Civil Liberties Association

LIST OF AUTHORITIES

<u>Statutes</u>	<u>Page Nos.</u>
<i>Canadian Charter of Rights and Freedoms</i> , Part I of the <i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982 (U.K.) 1982</i> , c. 11	i, 1 – 13, 16, 17
<i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982 (U.K.) 1982</i> , c. 11	i, 2, 6, 8, 9, 10, 11, 12
<i>Correction Act; Prisons and Reformatories Act (Canada) Correction Centre Rules and Regulations</i> , B.C. Reg. 284/78	8
<i>Canadian Bill of Rights (1960, c. 44)</i>	3
Cases	
<i>Canada v. Hislop</i> , [2007] 1 S.C.R. 429	2, 6 - 8, 15, 16
<i>Doucet-Boudreau v. Nova Scotia</i> , [2003] 3 S.C.R. 3	5, 12, 16
<i>Dulude v. Canada</i> , (2000),192 D.L.R. 714 (Fed C.A.), 1 F.C. 545	13, 14
<i>Guimond v. Quebec (Attorney General)</i> , [1996] 3 S.C.R. 347	2, 6 - 8
<i>Hawley v. Bapoo</i> , 2007 ONCA 503	10
<i>Hunter v. Southam</i> [1984] 2 S.C.R. 145	16
<i>Irwin Toy v. Quebec</i> , [1989] 1 S.C.R. 927	8 - 9
<i>Kingstreet Investments Ltd., v. New Brunswick (Finance)</i> , [2007] 1 S.C.R. 3	15
<i>Law Society v. Skapinker</i> , [1984] 1 S.C.R. 357	4,
<i>Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick</i> , [2002] 1 S.C.R. 405	2, 6 - 12
<i>Mackinney v. University of Guelph</i> , [1990] 3 S.C.R. 229	13
<i>Mammoliti v. Niagara Regional Police Service</i> , 2007 ONCA 97	9, 10, 12
<i>McGillivray v. New Brunswick</i> (1994), 116 D.L.R. (4 th) 104, 92 C.C.C. (3d) 187	10

<i>Mooring v. Canada (National Parole Board)</i> , [1996] 1 S.C.R. 75	4
<i>Morin v. Reg. Admin. Unit #3 (PEI)</i> , (2004) 233 Nfld. & P.E.I.R. 271, 2004 PESCTD 1	14
<i>Nelles v. The Queen</i> , [1989] 2 S.C.R. 170	3
<i>Osborne v. Canada</i> , [1991] 2 S.C.R. 69	3 - 4
<i>R v. 974649 Ontario Inc.</i> , [2001] 3 S.C.R. 575	5
<i>R v. Gamble</i> , [1988] 2 S.C.R. 595	3
<i>R v. Mills</i> , [1986] 1 S.C.R. 863	4, 5, 17
<i>RJR MacDonald Inc. v. Canada, (Attorney General)</i> [1994] 1 S.C.R. 311	6
<i>Roncarelli v. Duplessis</i> , [1959] S.C.R. 121	8 – 9, 16
<i>Schachter v. Canada</i> , [1992] 2 S.C.R. 679	6, 11
<i>Wynberg v. Ontario</i> (2006) 82 O.R. (3d) 561, 269 D.L.R. (4th) 435	11, 12