

TABLE OF CONTENTS

PART I – OVERVIEW OF THE CCLA’S POSITION	2
PART II – CCLA’S POSITION ON THE QUESTION IN ISSUE.....	3
PART III – ARGUMENT	3
Section 24(1) Must be Construed Broadly In Accordance With Its Language And Purpose....	3
Damages May Be Necessary For Non-Compensatory Purposes	5
Section 24(1) Remedies Should Not Be Limited By Private Law Requirements	7
Making Awards of Damages Falls Within The Proper Role Of The Courts	9
Statutory Invalidity Cases Are Distinguishable And Do Not Apply Here	9
Conclusion	10
PART IV - COSTS.....	11
PART V - ORDER SOUGHT	11

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)**

B E T W E E N:

CITY OF VANCOUVER

Appellant

and

ALAN CAMERON WARD

Respondent

AND B E T W E E N:

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

Appellant

and

ALAN CAMERON WARD

Respondent

and

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO and
ATTORNEY GENERAL OF QUEBEC

Interveners

**FACTUM OF THE INTERVENER
CANADIAN CIVIL LIBERTIES ASSOCIATION**

PART I – OVERVIEW OF THE CCLA’S POSITION

1. The *Charter* does more than entrench fundamental rights and freedoms. It also institutes a remedial regime designed to ensure that those rights and freedoms are protected against encroachment. Section 24(1) is the cornerstone of that remedial regime.
2. Section 24(1) must be interpreted broadly, in accordance with its language and purpose. In its prior cases addressing s. 24(1), this Court has held that courts exercising remedial discretion under s. 24(1) must be free to craft innovative and flexible remedies that will meaningfully vindicate *Charter* rights that have been breached. This Court has also recognized that the imposition of rigid rules or general constraints on the remedial authority granted under s. 24(1) will impede courts’ ability to craft “appropriate and just” remedies in particular cases. The rule proposed by the Appellants in this case would have precisely this effect, and should be rejected.
3. Remedies under section 24(1) are not merely compensatory, nor are they limited to redressing past wrongs. On the contrary, an award of non-compensatory damages may be necessary to vindicate a *Charter* right in a given case. Damages may be required, for example, to deter similar breaches in the future or to express disapproval of unconstitutional conduct. Even in cases where individuals may not have suffered a compensable loss, courts should be free to craft a remedy that redresses the loss of dignity or moral harm associated with a *Charter* breach.
4. While the common law may provide useful points of reference to a court engaged in fashioning a constitutional remedy, private law requirements such as bad faith, abuse of power or tortious conduct do not and should not apply to remedies made under s. 24(1). The *Charter* is aimed at advancing societal purposes that go well beyond the more narrow considerations of private law. Constitutional breaches not only harm the individuals whose rights are infringed, they also threaten to undermine the rule of law and the rights and freedoms that have been guaranteed under the *Charter*. While proof of bad faith, abuse of power or tortious conduct may be a prerequisite to an award of damages against the government in the context of a common law claim, remedies under s. 24(1) must address public, as well as private harms, and therefore cannot be subject to such limitations.

5. A remedy under s. 24(1) must, of course, be consistent with the proper role of the courts within Canada's constitutional democracy. It is difficult to conceive of a remedy that is more firmly established in the judicial domain than an award of damages. Courts have expertise in the making of such awards. In doing so, courts do not intrude on legislative or executive functions.

6. In the *Mackin* line of cases this Court has articulated certain prerequisites for the making of damages awards in a case where an individual's rights have been infringed due to action taken under a statute subsequently held to be unconstitutional. Those prerequisites do not apply to cases such as this, where the *Charter* breach was the direct product of government action against an individual, and where there is no question of statutory invalidity.

PART II – CCLA'S POSITION ON THE QUESTION IN ISSUE

7. The CCLA submits that s. 24(1) of the *Charter* authorizes a court of competent jurisdiction to award damages, where appropriate based on the particular circumstances of a given case, to any person whose *Charter* rights have been infringed, even when the *Charter* breach does not result in loss to that person and was not the product of tortious conduct, bad faith or an abuse of power on the part of the infringer.

PART III – ARGUMENT

Section 24(1) Must be Construed Broadly In Accordance With Its Language And Purpose

8. Section 24(1) of the *Charter* is drafted in the broadest possible terms. Its language is both expansive and permissive. Section 24(1) imposes no limits on the type of remedy that a court may provide to a person whose *Charter* rights are infringed. Rather, it allows a court to award any remedy that "the court considers appropriate and just in the circumstances". As this Court has observed, "[i]t is difficult to imagine language which could give the court a wider and less fettered discretion."¹

¹ *Canadian Charter of Rights and Freedoms*, s. 24(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11; *Mills v. The Queen* ("Mills"), [1986] 1 S.C.R. 863 at paras. 261, 276-278, 297, 298; *R. v. 974649 Ontario Inc. c.o.b. as Dunedin Construction* ("Dunedin"), [2001] 3 S.C.R. 575 at para. 18.

9. Like the sections of the *Charter* that provide for underlying rights and freedoms, s. 24(1) must be interpreted generously and liberally, rather than in a narrow, technical or legalistic manner. Section 24(1) must also be interpreted in a manner that advances its purpose, which is to vindicate fundamental rights and freedoms by providing “a full, effective and meaningful remedy for *Charter* violations”. As Lamer J. (as he then was) wrote in his dissent in *Mills*, “[s]ection 24(1) establishes the right to a remedy as the foundation stone for the effective enforcement of *Charter* rights”. In order to ensure that the enforcement of *Charter* rights is effective and responsive, courts must be free to exercise their remedial power under s. 24(1) in a manner that is flexible, creative, and tailored to the needs of the particular case before them.²

10. Section 24(1) applies to all *Charter* rights and freedoms, not just to the rights at issue in this appeal. Moreover, infringements of particular provisions of the *Charter* occur in widely disparate factual circumstances. Accordingly, it is important that courts have the latitude to choose from among the full range of potential remedies when adjudicating a case involving a constitutional breach. Ultimately, whether a particular remedy is appropriate and just in the circumstances is a determination that can only be made in the context of a given case, based on careful consideration of the nature of the right or freedom that has been infringed, the nature of the infringement, and the facts of the case.³

11. This Court has repeatedly rejected the imposition of any blanket rule that would constrain a court’s ability to fashion an appropriate and just remedy in a particular case. In *Mills*, the Court held that “[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”. In *R. v. Gamble*, the Court “agree[d] with the general proposition...that *Charter* relief should not be denied or ‘displaced by overly rigid rules’”. In *Osborne*, the Court noted that “[b]y reason of the diverse and novel problems which it will be called upon to redress, the court must maintain at its disposition a variety of remedies as part of its arsenal”. In *Doucet-*

² *Mills*, [1986] 1 S.C.R. at paras. 26-27, 265, 278, 303; *Doucet-Boudreau v. Nova Scotia (Department of Education)* (“*Doucet-Boudreau*”), [2003] 3 S.C.R. 3 at paras. 23-25, 54-59; *Osborne v. Canada* (“*Osborne*”), [1991] 2 S.C.R. 69 at para. 65; *R. v. Rahey* (“*Rahey*”), [1987] 1 S.C.R. 588 at paras. 102, 125; *R. v. Gamble* (“*Gamble*”), [1988] 2 S.C.R. 595 at paras. 66, 68; *Dunedin*, [2001] 3 S.C.R. at paras. 18-20, 74; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, [2004] 1 S.C.R. 789 at para. 26

³ *Dunedin*, [2001] 3 S.C.R. at para. 20, 74; *Doucet-Boudreau*, [2003] 3 S.C.R. at paras. 52, 59.

Boudreau, the Court concluded that “the judicial approach to remedies must remain flexible and responsive to the needs of a given case” and that “[a] superior court may craft any remedy that it considers appropriate and just in the circumstances” (emphasis added).⁴

12. Adopting the legal rule proposed by the Appellants in this case would impose exactly the type of restriction on remedial power under s. 24(1) that this Court has disapproved in the cases cited above. A general prohibition on damage awards in cases that do not involve bad faith, an abuse of power or tortious conduct – regardless of the right or freedom that has been infringed, the nature of the infringement, or the particular circumstances at issue in a given case – would rob the courts of an alternative that might be required to provide an appropriate and just remedy in a particular case. Such a rule would be inconsistent with the broad and permissive language of s. 24(1) and contrary to this Court’s prior decisions interpreting that provision.

Damages May Be Necessary For Non-Compensatory Purposes

13. In some cases, an award of damages may be necessary to provide an appropriate and just remedy for a *Charter* breach even where the person whose rights were breached did not suffer a compensable loss. Damages may be appropriate, for example, to deter other *Charter* breaches from occurring in the future. They may also provide a mechanism for registering disapproval of a particular breach or emphasizing the importance of the right that has been breached. Further, damages may be awarded in recognition of the loss of dignity inherent in a *Charter* breach, even where no pecuniary or traditional loss has been established.

14. Decisions rendered in other Commonwealth jurisdictions have recognized that in certain circumstances an award of non-compensatory damages may be required to vindicate a breach of fundamental rights. In *Attorney-General of Trinidad and Tobago v. Ramanoop*, also a case of police misconduct, the Privy Council concluded that it was “unable to accept the Attorney General’s basic submission that a monetary award under section 14 [of the Constitution of the Republic of Trinidad and Tobago] is confined to an award of compensatory damages in the traditional sense”. The Privy Council reasoned as follows:

⁴ *Mills*, [1986] 1 S.C.R. at paras. 276-278, 309; *Gamble*, [1988] 2 S.C.R. at paras. 66, 67; *Osborne*, [1991] 2 S.C.R. at para. 65; *Doucet-Boudreau*, [2003] 3 S.C.R. at paras. 59, 87.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches. All of these elements have a place in the additional award.⁵

15. In *Merson v. Cartwright*, a police misconduct case from the Bahamas, the Privy Council made clear that “vindicatory” damages may need to go further than what is necessary to compensate a plaintiff for his or her loss:

If the case is one for an award of damages by way of constitutional redress ... the nature of the damages award may be compensatory but should always be vindicatory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount.⁶ (Emphasis added.)

16. In *Simpson v. Attorney-General (Baigent’s case)*, which involved an allegedly unreasonable police search, the New Zealand Court of Appeal noted that deterrence and other non-compensatory objectives are relevant when considering the quantum of damages to be awarded for a breach of fundamental rights:

As to the level of compensation, on which again there is much international case law, I think that it would be premature at this stage to say more than that, in addition to any physical damage, intangible harm such as distress and injured feelings may be compensated for; the gravity of the breach and the need to emphasize the importance of the affirmed rights and to deter breaches are also proper considerations; but extravagant awards are to be avoided.⁷ (Emphasis added.)

17. The non-compensatory considerations described above all flow directly from the meaning of the term “vindicate”. Vindicating a *Charter* right involves more than simply compensating the individual victim of the breach – it includes redressing the broader societal harm caused by

⁵ *Attorney-General of Trinidad and Tobago v. Ramanoop*, [2006] 1 A.C. 328 at paras. 19, 20 (Privy Council).

⁶ *Merson v. Cartwright*, [2005] UKPC 38 at para. 18 (Privy Council).

⁷ *Simpson v. Attorney-General (Baigent’s case)*, [1994] 3 NZLR 667 at p. 678 (N.Z. Court of Appeal).

the breach. In *Taunoa v. Attorney-General*, the Supreme Court of New Zealand offered the following observations on the public law element of vindication:

One of the ordinary meanings which “to vindicate” bears ... is “to defend against encroachment or interference”. [*The Oxford English Dictionary* 2d ed vol XIX at 642.] Society has an interest in the defence that is required here. Violations of constitutionally protected rights harm not only their particular victims, but it as a whole too. That is so because, unless they are adequately remedied, they will impair public confidence and diminish public faith in the efficacy of the protection, and for a good reason too since one invasion discounted may well lead to another.

...

The dual purpose of Bill of Rights remedies is reflected in the fact that when there is a breach of human rights there are two victims. First there is an immediate victim. The interests of that victim require the court to consider what, if any, compensation is due. But, because the breach also tends to undermine the rule of law and societal norms, society as a whole becomes a victim too. Hence, the court must also consider what is necessary by way of vindication in order to protect society’s interests in the observance of fundamental rights and freedoms.⁸

18. In some cases, vindication may be attained by declaratory relief or by an award of purely compensatory damages. In other cases, an award of non-compensatory damages – whether in a modest amount (as was done in this case) or in a more substantial amount – will be required to vindicate the right that has been breached.

Section 24(1) Remedies Should Not Be Limited By Private Law Requirements

19. While certain common law claims against government actors may require a plaintiff to establish bad faith, abuse of power or compensable loss, those requirements do not and should not restrict the remedies available under s. 24(1).

20. Private law is primarily aimed at compensating individuals for harm suffered. As argued above, *Charter* remedies are concerned not only with redressing harm done to an individual but also with the larger societal ramifications of a breach of fundamental rights and freedoms,

⁸ *Taunoa v. Attorney-General*, [2007] 1 NZLR 429 at paras. 253, 317, 366-367 (SCNZ).

including the need to maintain strong protections for those rights and freedoms and to preserve the integrity of the judicial system. Because the *Charter* protects both individual rights and broader public interests, in fashioning remedies under s. 24(1) courts should not be constrained by common law principles focused solely on private interests.⁹

21. This Court has repeatedly held that remedies under s. 24(1) are distinct from traditional common law remedies. In *Rahey*, La Forest J. described s. 24(1) as “an entirely novel procedural mechanism” and stated that “[c]ourts, therefore, can no longer treat existing remedies as defining the scope of the right”.¹⁰ In *Gamble*, which addressed the relationship between the traditional writ of *habeas corpus* and the relief accorded under s. 24(1), the Court adopted the following view:

[A] right of application conferred by s. 24(1) of the Charter is not to be cut down by limitations placed on the exercise of discretionary powers or prerogative remedies in non-Charter situations ... nor will the vindication of Charter rights be subjected to limitations not developed with Charter rights in mind.¹¹

22. The *Charter*'s remedial regime was intended to be flexible, as well as expansive. In *O'Connor*, this Court advised that “[i]t is important to recognize that the *Charter* has now put into judge's 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”.¹²

23. While common law rules may provide useful guidance to a court fashioning a remedy under s. 24(1), they cannot be used to limit the remedies available for a constitutional breach. In *Doucet-Boudreau*, the Court held that:

The power of the superior courts under s. 24(1) to make appropriate and just orders to remedy infringements or denials of *Charter* rights is part of the supreme law of Canada. It follows that

⁹ *R. v. O'Connor* (“*O'Connor*”), [1995] 4 S.C.R. 411 at paras. 61-65.

¹⁰ *Rahey*, [1987] 1 S.C.R. at para. 102.

¹¹ *Gamble*, [1988] 2 S.C.R. at para. 64.

¹² *O'Connor*, [1995] 4 S.C.R. at para. 69.

this remedial power cannot be strictly limited by statutes or rules of the common law.¹³

24. The enactment of the *Charter* gave rise to “a new regime of constitutional rights and remedies”. Section 24(1) was designed to provide courts with the power to fashion new – and if necessary novel – remedies to protect fundamental rights. If constitutional remedies were to be restricted by the imposition of private law requirements such as bad faith, abuse of power or compensable loss, s. 24(1) would be rendered an empty vessel. The result would be that courts would be left without the means to address the broader societal aspects of *Charter* breaches.¹⁴

Making Awards of Damages Falls Within The Proper Role Of The Courts

25. Courts fashioning remedies under s. 24(1) must act within the framework of Canada’s constitutional democracy and refrain from straying into roles reserved to other branches of government.¹⁵

26. Damages are clearly an appropriate remedy for a court to award under s. 24(1). Determining whether to award damages, and setting the quantum of damages where such an award is made, falls squarely within the institutional competence and proper role of the courts and does not in any way intrude upon the legislative or executive functions.

Statutory Invalidity Cases Are Distinguishable And Do Not Apply Here

27. Contrary to the Appellants’ submissions, this Court’s decision in *Mackin v. New Brunswick* does not govern the outcome of this appeal. *Mackin* addressed the issue of whether damages are available when *Charter* rights are breached by government action taken pursuant to a valid statute only later held to be unconstitutional. In *Mackin*, this Court held that in such cases damages are generally not available absent bad faith or abuse of power and that the proper remedy is a declaration of invalidity under s. 52 of the *Constitution Act, 1982*.¹⁶

¹³ *Doucet-Boudreau*, [2003] 3 S.C.R. at para. 51.

¹⁴ *Dunedin*, [2001] 3 S.C.R. at para. 39; *Doucet-Boudreau*, [2003] 3 S.C.R. at paras. 59, 87.

¹⁵ *Osborne*, [1991] 2 S.C.R. at para. 65; *Dunedin*, [2001] 3 S.C.R. at paras. 33-36, 56, 87, 106-110.

¹⁶ *Mackin v. New Brunswick (Minister of Finance) (“Mackin”)*, [2002] 1 S.C.R. 405 paras. 78-84.

28. This Court has been careful to limit the principle set out in *Mackin* to cases involving the enactment or application of an unconstitutional statute. The *Mackin* principle is grounded in the notion of qualified immunity, under which government actors acting in good faith are entitled to follow the prescriptions of a statute valid at the time of their action, even if that statute is subsequently found to be unconstitutional, without exposure to damages. Moreover, in cases claiming statutory invalidity, an alternative remedy – the striking out of the offending statute – is available to vindicate the right.¹⁷

29. Unlike *Mackin* and similar cases, this case involves direct government action in breach of an individual's *Charter* rights. The police officers in question here were not acting pursuant to a statute later found to be unconstitutional. Rather, their actions constituted a breach of the Respondent's *Charter* rights at the time that those actions were taken. There is accordingly no possibility of relief under s. 52 of the *Constitution Act, 1982* in this case, nor is there any question of qualified immunity. The remedies available under 24(1) are not – or should not be – subject to the same limitations raised in a case involving government action pursuant to a statute only later determined to be unconstitutional.

Conclusion

30. The remedial authority created under s. 24(1) is framed in the broadest of terms. Those terms allow courts to fashion imaginative remedies that vindicate *Charter* rights breached in a wide variety of circumstances. In some cases, an award of non-compensatory damages may be required to deter future breaches, to underline the importance of the right at issue, or to voice disapproval of unconstitutional conduct. While courts can and should look to common law principles for guidance in fashioning constitutional remedies, they cannot be constrained by these principles. Remedies under s. 24(1) are not only concerned with redressing individual harm, but also with addressing the broader public harm caused by a *Charter* breach. Without the ability to grant remedies not available as a matter of private law, courts would not be able to give meaning to the rights and freedoms guaranteed under the *Charter*.

¹⁷ *Mackin*, [2002] 1 S.C.R. at paras. 78-82; *Schachter v. Canada*, [1992] S.C.R. 679 at p. 720; *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347 at paras. 13, 14 and 19.

PART IV - COSTS

31. The CCLA does not seek costs and asks that no costs award be made against it.

PART V - ORDER SOUGHT

32. The CCLA requests permission to present oral argument for 10 minutes at the hearing of the appeal.

33. The CCLA asks that the constitutional question framed by the Chief Justice be answered in the affirmative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Stuart Svonkin

Jana Stettner

Counsel for the Canadian Civil Liberties Association