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CANADA UPDATE: PURSUING JUST DESSERTS: THE SUPREME COURT OF CANADA CLARIFIES DAMAGE AWARDS FOR CHARTER BREACHES

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I. INTRODUCTION

WHEN Alan Ward attended a speech by then-Prime Minister Jean Chrétrien, he had no indication that his actions and those of the Vancouver Police Department on that day would influence how Canada now determines monetary damages for breach of the Canadian Charter of Rights and Freedom ("Charter").[1] On July 23, 2010, the Supreme Court of Canada in *Vancouver (City) v. Ward* ruled that plaintiffs may obtain monetary awards in instances provincial courts had previously not recognized.[2] In its decision, the "full Court agreed with most of the findings made in the lower Courts and concluded that if 'appropriate and just', an award of Charter damages may be warranted without proof of bad faith" and laid out a four-part test to determine when and guide how much damages are available for Charter Breaches.[3]

II. BACKGROUND

While British laws have provided some judicial guidance in conferring

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1. *See* Rajan K. Agrawal & Carlo Di Carlo, *Canada: Ward v. Vancouver: Putting a Price on Charter Breaches*, MONDAQ, July 30, 2010, http://www.mondaq.com/canada/article.asp?articleid=106738; Jim Young, *Vancouver (City) v. Ward (2010)–Damages for Breach of Charter Rights*, CTR. CONSTITUTIONAL STUDIES, U. ALBERTA, July 28, 2010, http://www.law.ualberta.ca/centres/ccs/rulings/vancover(city)v.ward.php.
2. *See* Sara Law, *When Will Damages be a Just and Appropriate Remedy for Breach of Human Rights?*, HUMAN RIGHTS L. RES. CTR. (2010), http://www.hrlrc.org.au/court-tribunal/canadian-court-or-tribunal/city-of-vancouver-v-ward-2010-scc-27-23-july-2010 (last visited Nov. 14, 2010).
3. Tamar Agopian, *S.C.C. Awards Charter Damages in the Absence of Bad Faith*, BORDNER LADNER GERVAIS, 1-3 (Aug. 2010), http://www.martindale.com/members/Article_Atachment.aspx?od=1081999&id=1154612&filename=asr-1154614.SCC.pdf.

human rights,[4] Canada rejected a formal bill of rights at its founding.[5] The role of federal courts was simply to determine jurisdictional issues when constitutional freedoms were implicated.[6] As the need for a formal statement of individual rights became evident, Canada attempted to add a bill of rights through legislation since amending its constitution was difficult because "any changes. . .had to be passed by the British Parliament in London."[7] In 1960, the legislature enacted the Canadian Bill of Rights which suffered from its lack of fundamental authority, being subordinate to the constitution and only applying to federal laws.[8] Because of these limitations, the federal government, along with nine of the ten provinces, "called on the British Parliament to patriate the constitution to Canada."[9] Finally, Queen Elizabeth II signed the Canada Act containing the Constitution Act on April 17, 1982, bringing the Charter of Rights and Freedoms into force.[10]

The Charter provides individual protections that are in many ways similar to the U.S. Bill of Rights.[11] For example, Section 8 of the Charter corresponds with the Fourth Amendment of the U.S. Constitution (Article VI of the U.S. Bill of Rights) and provides Canadians with security from unreasonable searches and seizures.[12] But, unlike the U.S. Bill of Rights, which must rely on external statutes and common law such as 42 U.S.C. § 1983 or *Bivens* actions, to supply civil remedies, Section 24(1) of the Charter provides for enforcement of its "guaranteed rights and freedoms."[13] This section provides that "[a]nyone whose rights or freedoms, as guaranteed by [the] Charter [of Rights and Freedom], have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."[14]

It turns out that Vancouver police violated Alan Ward's Charter free-

4. *See* Lloyd Duhaime, *Charter of Rights and Freedoms (1981)*, DUHAIME BLOG (Mar. 22, 2010), http://www.duhaime.org/LawMuseum/CanadianLegalHistory/LawArticle-583/1981-Charter-of-Rights-and-Freedoms.aspx.
5. *See Charter of Rights and Freedoms*, CANADA'S RIGHTS MOVEMENT: A HISTORY, http://www.historyofrights.com/events/charter.html (last visited Dec. 21, 2010).
6. *Id.*
7. *Id.*
8. *See The History of the Charter*, FUNDAMENTAL FREEDOMS: THE CHARTER OF RIGHTS AND FREEDOMS, http://www.charterofrights.ca/en/26_00_01 (last visited Nov. 19, 2010).
9. *Charter of Rights and Freedoms*, *supra* note 5.
10. Along with amending the Constitution to include the Charter, the 1982 Canada Act also allowed Canada to more easily amend its Constitution in the future. *See The History of the Charter*, *supra* note 8.
11. *See* Larry Glasser, *The American Exclusionary Rule Debate: Looking to England and Canada for Guidance*, 35 GEO. WASH. INT'L L. REV. 159, 168 (2003).
12. *Compare* Canadian Charter of Rights and Freedoms, Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.), Part I § 8, *with* U.S. CONST. amend. IV.
13. *See* Canadian Charter of Rights and Freedoms, Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.), § 24.
14. *Id.* § 24 (1).

doms when they arrested him in August 2002.[15] As a result of the arrest, Ward "brought an action in tort and for the breach of his human rights" as protected by Charter § 24(1).[16] While the Supreme Court of British Columbia found that Ward failed to prove any tortious violations, the Court did find a breach of his Charter rights, albeit in "the absence of a commission of a tort, bad faith, abuse of power, negligence, or wilful blindness on the part of the corrections officers."[17] This ruling was controversial because prior case law held that when discretionary terms in a statute are applied to find a violation of Charter rights, the plaintiff is required to prove *mala fides* for compensation.[18] The British Columbia Court of Appeals upheld the trial judge's ruling, resulting in conflict across the provinces as to whether a bad faith action is required for monetary damages.[19] The Supreme Court of Canada found that bad faith is not a requirement for awarding monetary damages for Charter breaches; Section 24(1) of the Charter allows the trial judge sufficient discretion to determine the proper remedy.[20] The court also expounded on a four-step process to determine the proper context and appropriate amount of monetary damages under Section 24(1).[21]

III. THE PIE, THE ARREST, AND THE STRIP SEARCH

On August 1, 2002, Ward attended an outdoor ceremony at which then Prime Minister Chrétrien "was present to mark the opening of a gate to the entrance of Vancouver's Chinatown."[22] During the ceremony, the local police received a report that someone was intent on throwing a pie at the Prime Minister, an event that had happened in the recent past.[23] The description of the would-be culprit matched those of Ward in some respects—a white male wearing a t-shirt with red writing. But, the main reason he aroused suspicion was that he appeared to be running away from a police officer in approximately the same location where the culprit was reported.[24] Ward, a lawyer with a reputation for defending political protesters, claimed he was running towards the Prime Minister's location

15. *See generally* Renn A. Holness, *Vancouver Police Forced to Pay for Unreasonable Strip Search*, BRITISH COLOMBIA PERSONAL INJURY L. BLOG (July 26, 2010; 9:43 AM), http://www.holnesslawgroup.com/blog/2010/07/26/vancouver-police-forced-to-pay-for-unreasonable-strip-search.
16. Law, *supra* note 2.
17. Christine Kellowan, *One Order of Just Desserts, Hold the Mala Fides Requirement*, THE COURT, Sept. 30, 2009, http://www.thecourt.ca/2009/09/30/one-order-of-just-desserts-hold-the-mala-fides-requirement (quoting the trial judge in the British Columbia Supreme Court decision).
18. *Id.*
19. *See id.*
20. *See* Mike Novakowski, *Charter Breaches Net Arrestee Cash*, BLUE LINE MAG. (Oct. 2010), *available at* http://blueline.ca/articles/charter_breaches_net_arrestee_cash.
21. *Id.*
22. Law, *supra* note 2.
23. *See Ward v. Vancouver (City)*, 2007 BCSC 3, [2007] 63 B.C.L.R. (4th) 399 para. 2 (Can. B.C.).
24. *See id.* para. 7.

because he wanted to get a better view of a demonstrator being accosted by "men in suits."[25]

What likely began as a misunderstanding escalated as Ward vociferously protested his detainment.[26] The local media, alerted by the commotion, filmed part of his arrest.[27] Ward was taken to the jail where a constable filled out the arrest report indicating that the arrest was for breach of peace and that Ward was also being held pending an investigation into assault on the Prime Minister.[28] Following a brief stay in the holding cell, Ward was stripped all the way to his underwear and searched, at which point he protested; the sergeant in charge authorized a deviation from the strip search policy and "the balance of the strip was not conducted."[29] The police released Ward roughly four and a half hours after his initial arrest and several hours after the Prime Minister left the area.[30] Upon his release, Ward was taken by police detectives to the police compound where they had stored his seized car.[31]

IV. AT THE TRIAL COURT

Ward brought claims for violation of Sections 7-9 of his Charter rights as well as in tort for assault, battery, and false imprisonment against the police officers, the City of Vancouver, and the British Columbia Provincial Government, which was in charge of the jail.[32] He also brought negligence claims against the City of Vancouver and the Provincial Government.[33] The trial court found that because his *initial* detention was not arbitrary, but rather for investigative purposes, his Charter rights were not violated by the initial detention.[34] The court also found that the officers who arrested and handcuffed Ward did not commit assault or battery because they had "reasonable grounds to believe that Mr. Ward may attempt to escape" and were entitled to take him into custody.[35] But, the trial court found that Ward was unlawfully imprisoned for three and a half to four hours after the Prime Minister left the ceremony, thus violating his right to be free from arbitrary detainment and imprisonment under Section 9 of the Charter.[36] The Court relied on *R. v. Mann*,[37] which found that an investigative detention must be reasonably brief; otherwise, it can become a de facto arrest.[38] The Court also found that be-

25. *Id.* paras. 4, 7. Upon conducting a search, the authorities failed to find any desserts on Mr. Ward. *Id.* para. 63.
26. *See id.* paras. 20, 22.
27. *See id.* para. 33.
28. *See id.*
29. *Id.* para. 28.
30. *Id.* para. 32.
31. *Id.*
32. *See id.* para. 35.
33. *Id.*
34. *See id.* para. 52.
35. *See id.* para. 56, 65.
36. *Id.* para. 71.
37. *See id.* para. 52.
38. *See R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, para. 35 (Can.).

cause the officers did not commit willful misconduct in holding Mr. Ward for the extra time, they were protected under § 20 of the Police Act from personal liability.[39] Finally, because of a lack of duty and a lack of evidence on the standard of care, the Court found no negligence.[40]

With regards to the strip search, the Court relied on *R. v. Golden*,[41] where the Supreme Court of Canada ruled that strip searches must be conducted to limit the interference of privacy of the person and the need for a strip search must be determined on a "case-by-case basis and cannot justify routine strip searches of all arrestees."[42] In this case, as in *R. v. Douglas*, a reasonable strip search policy does not subject all detainees to an examination, regardless of whether they are charged with an offense or not.[43] The trial court determined that because Ward did not display any "threat to the safety and security of the Jail," was being detained for only a short period of time, and the strip search was conducted contrary to the correction Branch's *stated* policy, it resulted in a breach of his § 8 rights under the Charter.[44] Further, because he was not arrested for assault or attempted assault, the seizure of Mr. Ward's vehicle constituted unreasonable seizure, which also was a breach of his § 8 Charter rights.[45] In summary, while the Court did find that Mr. Ward's rights under the Charter were breached, they also found that the violation was without any malice, bad faith, or accompanying tort.[46]

In arguing against an award of damages for Charter breaches absent a tort, the Provincial Government relied fundamentally upon *Mackin v. New Brunswick*, which held that "absent conduct that is clearly wrong, in bad faith, or an abuse of power," damages should not be granted for claims against actions that are valid under a statute that is later declared unconstitutional.[47] The Provincial Government also relied on *Wynberg v. Ontario*, where the Ontario Appellate Court declared a government policy decision, in which only autistic children between the ages of two to five had access to behavior intervention programs, an unconstitutional breach of older autistic children's Charter rights.[48] In *Wynberg*, the Ontario Appeals Court had relied on *Mackin* to limit the availability of monetary damages.[49]

But, the Ward Trial Court found that unlike *Wynberg*, which resulted in a declaration of unconstitutionality of the policy as the remedy, in this case, the strip search policy was sound; rather, it was the *application* of the policy resulting from poor discretion of the officers that violated

39. *Ward*, 2007 BSC 3, para. 97, 103-04.
40. *See id.* para. 96.
41. *See id.* para. 73.
42. *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, para. 97 (Can.).
43. *See Ward*, 2007 BCSC 3, para. 80.
44. *Id.* para. 86.
45. *See id.* para. 92.
46. *Id.* para. 105.
47. *Mackin v. New Brunswick*, 2002 SCC 13, [2002] 1 S.C.R. 405, para. 78 (Can.).
48. *See Wynberg v. Ontario*, [2006] 269 D.L.R. (4th) 435, para. 1 (Can. Ont. C.A.).
49. *See id.* paras. 192-193.

Ward's Charter § 8 rights.[50] The Court then relied on several lower court decisions providing damages for Charter violations.[51]

In determining the amount of damages for the strip search, the court considered awards from cases in similar situations–those without egregious conduct.[52] Because the strip search was relatively benign—his underwear remained on—and because of the lack of physical or psychological damage, the court awarded a relatively low amount of $5,000.[53] For the unreasonable seizure of his vehicle, the court awarded Mr. Ward $100.[54]

The British Columbia Appellate Court dismissed all appeals by Mr. Ward, the City of Vancouver, and the Provincial Government.[55] The City of Vancouver appealed the $100 award for unreasonable seizure of Mr. Ward's car while the Provincial Government appealed the $5,000 award for the unreasonable strip search.[56] The appellate court found that contrary to the Province's argument, *Mackin* was not directly on point; rather, there were no appellate cases that discuss damage awards for a good-faith breach of Charter rights.[57] The appellate court relied on *Doucet-Bourdreau v. Nova Scotia (Minister of Education)* where the Supreme Court of Canada promoted an expansive reading of the remedies available under § 24(1) for Charter breaches.[58] The court concluded that a Charter breach resulting in striking down a statute is fundamentally different from one that results when a government actor improperly applies a valid law.[59] In the former case, the declaration of a law as invalid provides immediate relief for a person previously subject to that law; but, in the latter case, a mere declaration of application as invalid, though offering vindication, provides no substantial compensation to the injured party.[60]

The dissent argued that because the officers did not properly apply the policy, through "an honest but mistaken belief. . .as to the correct search procedure," there should be no damages.[61] The dissent contended that damages would not accomplish any corrective result greater than that of a mere declaration; that damages should not result from public officials' actions without malice or bad faith, especially when considering the effect

50. *See Ward*, 2007 BCSC 3, para. 109.
51. *Id.* para. 111.
52. *Id.* paras. 125-127.
53. *Id.*
54. *Id.* para. 129.
55. *Ward v. Vancouver* (City), 2009 BCCA 23, [2009] 89 B.C.L.R. (4th) 217, para. 71 (Can. B.C. C.A.)
56. *Id.* paras. 29 & 34.
57. *Id.* para. 49.
58. In Doucet-Boudreau v. Nova Scotia (Minister of Education), the violation was improper application of language rights under § 23 of the Charter. *See id.* para. 60 (citing Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCC 62, [2003] 3 S.C.R. 3, para. 52 (Can.)).
59. *Id.* para. 62.
60. *Id.* paras. 62-63.
61. *Id.* para. 82.

on the public's purse; and that without bad faith, the resultant award would create the unnecessary aura of strict liability.[62]

V. AT THE SUPREME COURT OF CANADA

The Supreme Court of Canada in hearing *Ward v. Vancouver (City)* has taken a substantial step in developing the law regarding the availability of monetary damages under § 24(1) of the Charter.[63] In its unanimous decision, the Court detailed a four-step process to determine conditions for providing damages and "emphasized the overriding principle of the phrase 'appropriate and just' contained in [§ 24(1)]."[64] The Court stressed that § 24(1) allows many remedies of which damages is but one, and that a court must exercise its discretion as per the facts of the case to determine the appropriate remedy.[65] The Court characterized an appropriate and just remedy for Charter breaches as being one that:

> (1) meaningfully vindicate[s] the rights and freedoms of the claimants; (2) employ[s] means that are legitimate within the framework of. . .[Canada's] constitutional democracy; (3). . .[is] a judicial remedy which vindicates the right while invoking the function and powers of a court; and (4). . .[is] fair to the party against whom the order is made.[66]

It is under this rubric that the Court expounded its "four-part test [or four-step test] for assessing when it would be appropriate and just to award damages."[67]

As the first step of the test, the Court necessitated that the plaintiff must "establish a Charter breach."[68] With this threshold requirement met, the second step is to determine the basis on which damages provide the appropriate remedy for this breach of his Charter rights.[69] The Court maintained that the awarding of damages must be useful either in the function of: (1) "compensation" to attempt to make the victim whole; (2) "vindication" to promote and uphold the importance of Charter rights; or (3) "deterrence" to prevent the future breach of Charter rights.[70] For compensation, the Court allowed consideration of both physical and psychological harm to the victim.[71] Because Charter rights implicate concerns involving not only the immediate victim for whom compensation is

62. *See id.* paras. 84-90. Moreover, the dissent argued that the damages remedy under § 24(1) for Charter breaches was underdeveloped. *Id.* para. 83.
63. *See generally* Ward v. Vancouver (City), 2010 SCC 27, [2010] 321 D.L.R. (4th) 1 (Can.).
64. Agopian, *supra* note 3, at 2.
65. *See id.*
66. Holness, *supra* note 15.
67. Agrawal & Di Carlo, *supra* note 1.
68. *Ward*, 2010 SCC 27, para. 23.
69. *See* Arnold Ceballos, *Top Court Upholds Novel Charter Remedy for Lawyer's Strip Search*, LAW. WKLY, Aug. 6, 2010, *available at* http://www.lawyersweekly.ca/index.php?section=article&articleid=1217.
70. *Ward*, 2010 SCC 27, paras. 24-25.
71. *Id.* para. 27.

the primary focus, the court also considers vindication in order to prevent harm to "the state and to society" from the erosion of Charter rights.[72] Thus, the first and second tests focus on to the "need for compensation" and "the appropriateness of an award of damages."[73]

The third test determines whether the State presents sufficient justification of the breach through "countervailing factors" such that it overwhelms the results of the second test.[74] The Court acknowledged that countervailing factors is a developing area of law, but listed two primary considerations that could result in justifying the breach: "the existence of alternative remedies and [the] concern for good governance."[75] The Court proposed, for example, that if the function of the damage was only compensation and if a tort remedy was available, then it may be appropriate to forgo damages under § 24(1).[76] A court can also consider that good governance may dictate that the breach must be of a "minimum threshold of gravity" before damages are allowed.[77] For example, in *Mackin*, properly complying with existing statutes in good faith was a reason to provide some immunity for the government, such that a declaration without monetary damages was the appropriate remedy.[78] Finally, the Court suggested that principles from private tort law can serve as a guide to develop this area of the law.[79]

The fourth step, if the basis for a damage award outweighs the countervailing factors, is in assessing the damage amount in a method that is "appropriate and just."[80] "The objects of compensation, vindication, and deterrence will determine the amount of damages awarded" with compensation playing the primary role.[81] Tort law should again serve to guide a court in determining the compensatory damages.[82] But, the Court declared that fairness to the State must also be considered because large awards that divert public funds may be inappropriate.[83] In general, the lower courts, thus far, have been reluctant to award large damages and with this holding, this practice is expected to continue.[84]

The existence of a Charter breach was not appealed to the Supreme Court, so Ward satisfied the first step of the four part test.[85] In applying the second step, the Court found that the strip search was a serious infringement of his Charter rights, while the seizure of his car did not cause

72. *Id.* paras. 28-29.
73. *Id.* para. 30.
74. Novakowski, *supra* note 20.
75. *Id.*
76. *Ward*, 2010 SCC 27, para. 34.
77. Novakowski, *supra* note 20.
78. *See generally Ward*, 2010 SCC 27, paras. 39-40.
79. *See* Ceballos, *supra* note 69 (quoting *Ward*, 2010 SCC 27, para. 22).
80. *See* Novakowski, *supra* note 20 (quoting *Ward*, 2010 SCC 27, para. 46).
81. *Id.* (quoting *Ward*, 2010 SCC 27, para. 47).
82. *See Ward*, 2010 SCC 27, paras. 49-51.
83. *See id.* para. 53.
84. *See* Agopian, *supra* note 3.
85. *Ward*, 2010 SCC 27, para. 62.

him compensable damages.[86] Because the tort action did not stand—the state could not show alternative remedies—and because the state could not show that an award would be contrary to good governance, a damage award was in order.[87] Finally, in the fourth step, the Supreme Court agreed with the trial judge's finding that the monetary damage should be modest because of the limited violation of his privacy and because vindication and deterrence do not require a large award.[88]

VI. 42 U.S.C. § 1893 AND *BIVENS* ACTIONS IN THE UNITED STATES

In its determination of the proper functions of damage awards, the Supreme Court of Canada considered the United States' judicially available remedies for constitutional violations presented in *Bivens v. Six Unknown Named Agents*.[89] In *Bivens*, the U.S. Supreme Court allowed monetary damage awards as a remedy against federal agents who violated a private citizen's constitutional rights.[90] In this first consideration of a federal cause of action, the Court determined that the plaintiff's Fourth Amendment protection from unreasonable searches and seizure was violated by federal agents who entered his apartment without a warrant, conducted a search, and then arrested him for drug offenses.[91] Similar to the Canadian Supreme Court, the *Bivens* Court recognized the primarily compensatory nature of damage awards, but also emphasized the vindication effect of substantiating constitutional rights.[92] Because of the more developed case law and analogous rights available in the United States, the Canadian Supreme Court considered U.S. court decisions regarding monetary remedies for constitutional breach.[93]

Because Mr. Ward's claims were primarily against provincial and local agents, the Court could also have considered 42 U.S.C. § 1983, the U.S. federal law which allows plaintiffs to bring a cause of action against state and local officials and local governments who, under color of state or local law, cause "the deprivation of any rights, privileges, or immunities secured by the Constitution."[94] "In *Monroe v. Pape*, the [Supreme] Court ruled that a plaintiff could state a claim for damages under § 1983 against

86. *See id.* para. 77; Novakowski, *supra* note 20.
87. *Ward*, 2010 SCC 27, para. 68.
88. *See id.* para. 72.
89. *See id.* para. 27 (citing *Bivens v. Six Unknown Fed. Narcotics Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)).
90. *See* Heather J. Hanna & Alan G. Harding, *Ubi Jus Ibi Jus Ibi Remedium—For the Violation of Every Right, There Must Be a Remedy: The Supreme Court's Refusal to Use the Bivens Remedy in Wilkie v. Robbins*, 8 WYO. L. REV. 193, 199 (2008).
91. *Id.* at 199-200.
92. *Id.* at 201.
93. *See Ward*, 2010 SCC 27, para. 33, 72.
94. *See* Donald L. Nevins III, *Municipal Liability Under 42 U.S.C. § 1983 for Failing to Equip Police with Tasers*, 28 QUINNIPIAC L. REV. 225, 247 (2009) (quoting 42 U.S.C. § 1983 (2006)).

local officials" for an illegal search.[95]

While local governments and local officials may be sued for damages under § 1983, only injunctive relief is available from state governments and state officers acting in their official capacity.[96] Moreover, in the United States damages may be unavailable from state or local officials without first overcoming the safe harbor of good faith belief and reasonable conduct through the qualified immunity doctrine for government officials acting in their individual capacities.[97] Thus, without bad faith or malice, damage awards are only available from local officers.[98]

As a result, if Mr. Ward's situation were presented to a federal court in the United States, the damages available from a Canadian provincial government might not be available from the analogous state government, although declaratory relief likely would.[99] At the local level, barring bad faith, the officers themselves would be protected by qualified immunity, similar to the result in Canada.[100] Further, in order for a city to be liable, under § 1983, the plaintiff would have to "show a causal link between execution of the [challenged] policy" and the injury from the strip search.[101] Thus, upon showing that the strip search or seizure is a custom or practice "that results in a deprivation of federal rights," a damage remedy would be available at the local level.[102]

The Canadian Supreme Court's willingness to consider foreign case law in setting the framework for remedies for Charter breaches[103] not only provides some validation of foreign legal standards and their application, but may encourage Canadian lower courts to do the same when developing the particularities of Canada's law in the varied cases in which these claims will be asserted. Indeed, where human rights are concerned, modern courts have turned "to other nations for guidance."[104] In those situations where countries face similar problems and where they have

95. John Stanfield Buford, *When the Heck Does This Claim Accrue? Heck v. Humphrey's Footnote Seven and § 1983 Damages Suits for Illegal Search and Seizure*, 58 WASH. & LEE L. REV. 1493, 1496-97 (2001) (citing Monroe v. Pape, 385 U.S. 167, 187 (1961)).

96. *See* Michael S. Gilmore, *An Introduction to Liability and Immunities Under 42 U.S.C. § 1983*, 51 ADVOC. (IDAHO) 17 (Oct. 2008).

97. *See* Jeffrey A. Parness, *Pleading Civil Rights Claims*, 97 ILL. B.J. 156, 158 (2009). *See also* Nicole B. Lieberman, *Post-Johnson v. Jones Confusion: The Granting of Back-Door Qualified Immunity*, 6 B.U. PUB. INT. L.J. 567, 568-69 (1997).

98. *See* Gilmore, *supra* note 96.

99. *See id.*

100. *See Ward*, 2010 SCC 27, para. 97-113.

101. *Ellis v. Philadelphia Police Dept.*, 1996 WL 683868, at *2 (E.D. Pa.) (citing *Losch v. Borough of Parksburg*, 736 F.2d 903, 910 (3d Cir. 1984)).

102. Nevins, *supra* note 94, at 249.

103. *See Ward*, 2010 SCC 27, para. 27.

104. While there are differing opinions on the subject and the United States seems to overwhelmingly reject foreign analysis, Justice Ginsburg of the U.S. Supreme Court believes that "the Supreme Court can learn from other. . .[international bodies and foreign jurisdictions], particularly in human rights matters." Jean M. Callighan, *"A Decent Respect to the Opinions of Mankind. . . ": Selected Speeches by Justices of the U.S. Supreme Court on Foreign and International Law*, 36 INT'L J. LEGAL INFO. 181, 182-3 (2008) (book review).

espoused similar values, as in this case,[105] "transnational judicial exchanges" may serve as an efficient method to provide direction.[106] Because there has been considerable legal analysis regarding U.S. decisions concerning damages for both § 1983 and *Bivens* actions and regarding affirmative defenses for constitutional violations and because of Canada's willingness to consider U.S. law, it is likely that Canadian lower courts could turn to American decisions for guidance.[107] In the end, it is not only the Canadian legal system that benefits from adopting this transnational approach but also the countries whose laws are being analyzed as they will profit from external scrutiny.[108]

VII. CONCLUSION

The Canadian Supreme Court has unanimously held that damages are an available remedy for Charter breaches to compensate the plaintiff, vindicate the applicable Charter right, and deter future violations, barring countervailing factors.[109] The Court presented a methodology to follow in assessing violations to determine the applicability of monetary damages and the amount of damages.[110] Because the Court considered foreign remedies to similar breaches of constitutional rights, the ruling is predominantly consistent with the damages remedy for similar violations in the United States. This decision by the Court seems to resolve contradictory provisional laws regarding the requirement of bad faith for damage awards for Charter breaches.[111] But *Ward v. Vancouver* only sets the stage for future case law that will further clarify the test. Until this happens, because of the broad discretion allowed to courts, as is needed in such fact intensive cases, "uncertainty [in administering the new methodology] will be amplified for the next few years as courts grapple with having to apply what is a new legal analysis."[112]

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105. *See Ward*, 2010 SCC 27, paras. 26-29.
106. *See* Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 679 (2010) (addressing the international nature of heinous human rights threats and violations and promoting an international jurisprudence).
107. *See* Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 414-16 (2003). *See, e.g.*, Sheldon Nahmod, *Constitutional Torts, Overdeterrence and Supervisory Liability After Iqbal*, 14 LEWIS & CLARK L. REV. 279, 280-290 (2010) (discussing affirmative defenses for § 1983 and Bivens actions). *See generally* Karen M. Blum, *Local Government Liability Under § 1983*, 806 PLI/LIT 195 (2009) (discussing recent U.S. cases of § 1983 actions, compensation, deterrence, and vindication); Alexander A. Reinert, *Measuring the Success of Bivens Litigation and its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809 (2010) (recent analysis of Bivens litigation including its compensating and deterring effects for constitutional breaches).
108. *See* Harding, *supra* note 107.
109. Novakowski, *supra* note 20.
110. Ceballos, *supra* note 69.
111. Agopian, *supra* note 3.
112. Anthony Price, *Ward v. Vancouver (City): The Birth of Charter Damages*, MURDY & MCALLISTER, Aug. 5, 2010, http://www.murdymcallister.com/newsnpublications/Ward.htm.