**“It Shouldn’t be Small Potatoes: The Future of Civil Damage Awards under Canada’s Personal Information Protection Legislation**”

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 **Part Two: Inadequate *PIPEDA* Damages and the Way Forward**

*This is the second part of a two-part article. The first part can be found at 52 Adv Q 427 (2022)*.

*The Personal Information Protection and Electronic Document Act (PIPEDA) is well known as federal legislation governing the protection of personal information in the private sector. This article, published over two parts, focusses on a lesser explored but particularly concerning aspect of PIPEDA, namely the low damage awards (averaging between $3,000 to $5,000) granted by courts to applicants who establish a breach of the Act and the low number of actual applications (24 applications in 20 years). Chronically low monetary awards threaten PIPEDA’s legislative objective of recognizing the individual’s right of privacy in their personal information. As the low number of applications reflect, when it makes no economic sense to do so, otherwise deserving complainants will be discouraged from seeking damages or simply driven to pursue solutions such as class actions. PIPEDA’s damage provision thereby stands to wither away from disuse.*

*This article offers a three-fold solution to insufficient quantum and is inspired more generally by the functional approach to monetary damages presented by Justice Cromwell in an Isaac Pitblado lecture. First, damage quanta under PIPEDA must more rigorously reflect the status of personal information protection legislation, including its constitutional overlay and link to what have been termed “dignitary” torts such as the common law privacy torts and defamation. Second, courts should measure quantum based on insights from torts closely related to breach of privacy under PIPEDA which reflect a higher quantum. Third, courts must firmly reject the Federal Court’s 2010 decision in Randall v Nubody’s Fitness Centres which held that damages under PIPEDA are only recoverable in “the most egregious situations.” Egregiousness is not an ingredient required by the Act and wrongly reduces its scope.*

Part Two: Inadequate *PIPEDA* Damages and the Way Forward

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**Introduction to Part Two**

This is Part Two of a two-part article concerning *PIPEDA* damages. Part One, published in 52 Adv Q 427 (2022), set the stage by assessing the constitutional purposes and interests protected by *PIPEDA* in light of Justice Cromwell’s functional approach to the question of damages, as well as offering a brief account of relevant provincial legislation. It also considered the dignitary interests protected by privacy torts in Canada and linked them to the importance of informational privacy under *PIPEDA*. In this Part, such a context is brought into application over several sections. Section I assesses relevant *PIPEDA* case law, including the influential decisions of *Nammo* and *Randall.* It argues that the chronically low quanta awarded under *PIPEDA* are troubling because they compromise privacy values and interests by discouraging their enforcement. Section IIbriefly turns to the *Consumer Privacy Protection Act (CPPA),* the proposed successor legislation to PIPEDA and which recently died on the order paper. With an eye to future reform, we summarize *CPPA*’s major deficiencies in relation to damages. Section III offers the broad conclusion that damage claims under *PIPEDA* face an existential threat without more robust quanta going forward.

**Section I: *PIPEDA* Damages**

What follows is an assessment and critique of the case law in which *PIPEDA* damages were awarded. As a federal statute, *PIPEDA* – and presumably its legislative successor – is influenced by both common law and civil law principles. The focus of this section, however, is on the common law.

As noted, section 16(c) of *PIPEDA* gives the court jurisdiction to “award damages to the complainant, including damages for any humiliation that the complainant has suffered.” Appendix A (*infra)* contains a chart summarizing successful section 16 damage claims pursued in a commercial context while Appendix B summarizes unsuccessful claims. The charts show that in the twenty years that have passed since *PIPEDA* took effect in 2001, and up to May 2021, there have been 24 cases brought to court, with 10 resulting in a damage award. The average award in those 10 cases was approximately $5,000. If the outlier quantum in *Chitrakar* is removed, the average award falls to approximately $3,000.[[3]](#footnote-4) It seems reasonable to observe that both the number of *PIPEDA* cases and awarded quantum are low. Likely these matters are intertwined. Put another way, chronically low damage awards – at least in part – are dampening the pursuit of otherwise meritorious litigation.

This following analysis chooses several of the more influential cases from Appendix A for review. Based on this case law, this Section examines how courts could legitimately and appropriately increase damage awards to better fulfil the legislative objects of PIPEDA. They would better accord with a functional approach to monetary damages described in Part One of this article published in 52 Adv Q 427 (2022).[[4]](#footnote-5)

1. **The Damages Framework**

*Nammo*, a 2010 decision of the Federal Court of Canada[[5]](#footnote-6) referred to throughout Part One of this article, is significant for actively engaging the quasi-constitutional status of *PIPEDA* and offering a cogent framework for the award of damages. It has also been justifiably described by subsequent courts as “[o]ne of the most comprehensive reviews” of *PIPEDA* and one that provides “helpful guidelines” in damage assessment process.[[6]](#footnote-7) *Nammo* forms the centre-piece of privacy law under *PIPEDA*.

At issue in *Nammo* was the applicant’s failure to secure a business loan from the Royal Bank of Canada due to a negative and false credit report provided by the respondent, TransUnion of Canada Inc.[[7]](#footnote-8) This failure ended Mr. Nammo’s business opportunity to become a 50% partner in a proposed trucking business in “exchange for using his name, financial history, and expertise to secure the necessary business loan.”[[8]](#footnote-9) The court ruled that the respondent had breached *PIPEDA* by supplying false credit information,[[9]](#footnote-10) and for failing to correct the record appropriately.[[10]](#footnote-11) It also observed that TransUnion’s “was a serious breach involving financial information of high personal and professional importance.”[[11]](#footnote-12) Though Nammo could not prove any business loss, the court ruled that it had jurisdiction to award damages under section 16 of *PIPEDA* “even when no actual financial loss is proven.”[[12]](#footnote-13) As part of this conclusion, the court relied on *Ward,**[[13]](#footnote-14)* which identified the parameters for awarding damages in relation to *Charter* breaches under section 24 of the *Charter.* Since *Ward* involved a wrongful strip search and vehicle impoundment, one may wonder what it would have to do with *PIPEDA*. However, as Johannes Chan observes from a more general perspective, the Supreme Court of Canada in *Ward* has adopted “a composite approach that provides a comprehensive framework to bring together the public law and the private law dimensions in the award of damages for human rights violations.”[[14]](#footnote-15) Certainly, *PIPEDA* easily occupies that framework too, on the slightly different footing that it involves private law rights in the context of quasi-constitutional legislation.

Justice Zinn relied on *Ward* to describe *Charter* damages, a case which itself adopts a functional approach to damages[[15]](#footnote-16) Indeed, Zinn J quoted *Ward* as follows:

For damages to be awarded, they must further the general objects of the *Charter*. This reflects itself in three interrelated functions that damages may serve. The function of *compensation*, usually the most prominent function, recognizes that breach of an individual’s *Charter* rights may cause personal loss which should be remedied. The function of *vindication* recognizes that *Charter* rights must be maintained, and cannot be allowed to be whittled away by attrition. Finally, the function of *deterrence* recognizes that damages may serve to deter future breaches by state actors. [emphasis in original].

…

**However, the fact that the claimant has not suffered personal loss does not preclude damages where the objectives of vindication or deterrence clearly call for an award**…[emphasis added].[[16]](#footnote-17)

As Kent Roach aptly describes the damages model in *Ward* and its purposes, “[c]ompensation looks backwards and attempts to correct or repair the effects of a *Charter* violation on the particular person. Vindication and deterrence are more concerned with ensuring that the *Charter* is upheld and respected in the future.”[[17]](#footnote-18)

Justice Zinn’s overall assessment of *Ward* and its relationship to *PIPEDA* is succinctly made as follows:

The Supreme Court found that “to be ‘appropriate and just’ [under section 24], an award of damages must represent a meaningful response to the seriousness of the breach and the objectives of compensation, upholding *Charter* values, and deterring future breaches.” In my view, the same reasoning applies to a breach of *PIPEDA*, which is quasi-constitutional legislation.[[18]](#footnote-19)

In this way, Zinn J applies a *Charter* model of damages to a dispute over personal information with commercial consequences, because that dispute also occurs in a public law context represented by *PIPEDA*. Though the Supreme Court of Canada in *Ward* is clear that *Charter* damages cannot be awarded in a case between private parties,[[19]](#footnote-20) *Nammo* offers the possibility of *Charter*-like damages inspired by the *Ward* model. What follows is analysis of the three functions or interests protected by *Ward* and *Nammo* in a privacy context: compensation, vindication, and deterrence.

1. **The Compensation Function (pecuniary and non-pecuniary loss)**

Pecuniary loss, including out-of-pocket expenses for breach of *PIPEDA* is clearly compensable,[[20]](#footnote-21) though it is interesting to note that no such awards were granted in the cases collected under Appendix A. Non-pecuniary loss is also compensable, with quantum tied to its severity.[[21]](#footnote-22) However, the threshold for recovery of non-pecuniary loss under *Ward* appears to be lower than the law of negligence. As is well known, compensable mental distress must reach the level of personal injury[[22]](#footnote-23) in a negligence action though no longer having to amount to a “recognizable psychiatric illness”.[[23]](#footnote-24) As the Supreme Court of Canada in *Mustapha v Culligan of Canada Ltd* stated in 2008:

The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. The need to accept such upsets rather than seek redress in tort is what I take the Court of Appeal to be expressing in its quote from *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), 1999 CanLII 2863 (ON CA), 48 O.R. (3d) 228 (C.A.): “Life goes on” (para. 60). Quite simply, minor and transient upsets do not constitute personal *injury*, and hence do not amount to damage.[[24]](#footnote-25)

The Supreme Court of Canada recently affirmed this approach in the 2017 case of *Saadati*, stating: “[A]s *Mustapha* makes clear, mental *injury* is not proven by the existence of mere psychological *upset*. While, therefore, tort law protects persons from negligent interference with their mental health, there is no legally cognizable right to happiness [emphasis in original].”[[25]](#footnote-26) In short, *Mustapha* distinguishes between mental injury, on the one hand, and upset in the sense of “ordinary” and “routine” emotional discomfort, on the other. Only the former is compensable under the private law of negligence.

In the public law arena of *Charter* breaches, however, something less than mental injury might also do. According to the court in *Ward:*

Compensation focuses on the claimant’s personal loss: physical, psychological and pecuniary. To these types of loss must be added harm to the claimant’s intangible interests. **In the public law damages context**, courts have variously recognized this harm as distress, humiliation, embarrassment, and anxiety: *Dunlea*; *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Taunoa v. Attorney-General*, [2007] NZSC 70, [2008] 1 N.Z.L.R. 429. Often the harm to intangible interests effected by a breach of rights will merge with psychological harm. But **a resilient claimant whose intangible interests are harmed should not be precluded from recovering damages simply because she cannot prove a substantial psychological injury** [emphasis added].[[26]](#footnote-27)

In this quotation, *Ward* establishes two categories of loss. The first is personal loss and this category expressly includes psychological loss. Ward’s second category is harm to intangible interests which it expressly defined in the context of public law as a harm going to distress, humiliation, embarrassment and anxiety. This distinction gives one pause since, in the private law sphere, harm to intangible interests would already be included in the psychological category of loss provided it met the threshold set in *Mustapha*, namely having been “serious and prolonged.” Therefore, one very sustainable interpretation of *Ward* is that, in the public sphere only, harm to intangible interests is compensable even without meeting the strict test set in *Mustapha*. Indeed, if *Mustapha* ruled the day on all fronts, including in the public sphere, the court could easily have said so and there would be no need to make further distinctions. Yet, and on the contrary, there is no mention of *Mustapha* at all in *Ward*, presumably because the court wanted to treat *Charter* breaches as distinct from the law of negligence at this juncture.[[27]](#footnote-28) This is certainly the interpretation which WH Charles gives to the matter. In a 2016 publication, Charles states that recovery in *Ward* for intangible loss is indeed, “unique to public law in that it covers personal emotional reactions such as humiliation, embarrassment, and anxiety, none of which would be considered legally recognized injuries in private or civil law.”[[28]](#footnote-29) This reading of *Ward* is entirely sustainable though, interestingly, not one that has been widely explored.[[29]](#footnote-30)

It can be difficult to know exactly what courts are doing when they award damages under *PIPEDA* because analysis is typically kept at a more general level. This is perfectly acceptable under *Nammo* because, further to this precedent, plaintiffs are not required to quantify the harm suffered; rather, such claims can be absorbed under the vindicatory and deterrence aspects of a damage award.[[30]](#footnote-31) *Biron,* however, is a clear example of courts addressing intangible loss head on and making a damage award accordingly. The facts are these: Biron complained that RBC had wrongfully disclosed her credit card statements in relation to divorce proceedings between her current spouse and his now former wife. This disclosure was made by the bank to counsel for the former wife. The disclosure came to pass because Biron held a credit card jointly with her current spouse and her information was revealed along with his.[[31]](#footnote-32) Of note is that Biron asked RBC on two occasions to stop disclosing her personal financial information.[[32]](#footnote-33) The court ruled that RBC had breached *PIPEDA* and in relation to the damages claim stated as follows:

The only evidence submitted by Ms. Biron in support of her total claim for $15,000 in damages, that is, $5,000 for distress and inconvenience and $10,000 for moral damages, is limited to the representations she had to make to the Privacy Commissioner, the letters sent to RBC and the time spent in helping her spouse in defending himself against his ex-wife’s allegations resulting from the review of the money spent using the joint credit card.

The Court therefore concludes that, given that Ms. Biron, as a third party in a divorce proceeding, objected twice to her personal information being disclosed, that **she suffered humiliation** under [paragraph 16](https://www.canlii.org/en/ca/laws/stat/sc-2000-c-5/latest/sc-2000-c-5.html#sec16_smooth)(*c*) of the [Act](https://www.canlii.org/en/ca/laws/stat/sc-2000-c-5/latest/sc-2000-c-5.html) and that the damages sought by Ms. Biron are directly related to RBC’s fault, the Court awards $2,500 plus interest and costs, to be paid to Ms. Biron by RBC [emphasis added].[[33]](#footnote-34)

The global amount of $2,500 included compensation for humiliation (as *PIPEDA* expressly permits) but seemingly not for humiliation at the level required by *Mustapha*, namely as being serious and prolonged. This is in line with understanding *PIPEDA*’s right of application for damages as based on a distinct functional approach pursuant to statute rather than on the tort of negligence.

Similarly, the court in *Landry*[[34]](#footnote-35) awarded damages under *PIPEDA* for wrongful disclosure of the applicant’s financial information to her then husband from whom she was divorcing. In the global quantum awarded, the court compensated for humiliation with no reference to the *Mustapha* test:

Taking into account the contributory fault of the applicant, who was partially responsible for her own problems, and the serious breach committed by the respondent’s employee and its subsequent cover-up, the Court finds that the applicant **suffered humiliation** under paragraph 16(*c*) of the Act and that the respondent’s negligence warrants the applicant being compensated but does not give rise to exemplary damages as requested. Consequently, we fix an amount of $4,500 with interest and costs to be paid to the applicant by the respondent [emphasis added].[[35]](#footnote-36)

Cases like *Montalbo v Royal Bank of Canada*[[36]](#footnote-37) (*Montalbo*) take a different approach to recognizing distress that does not meet the test in *Mustapha*. In *Montalbo*, the applicant alleged that the Royal Bank failed to safeguard her personal information disclosed in relation to her residential property mortgage application.[[37]](#footnote-38) The court agreed that the Royal Bank’s safeguards were inadequate and the information itself was highly sensitive. However, the court criticized the self-represented applicant for not properly proving her damage claim. For example, the court stated as follows: “The Applicant states in her affidavit that this situation has caused her some sleepless nights, physical and mental distress, depression, loss of concentration at work resulting in a three (3) day suspension without pay. She also claims to have had an accident at work. However, the Applicant has failed to articulate these allegations.”[[38]](#footnote-39) In response to the applicant’s failure to fully explain herself, the court went on to simply award “nominal damages”[[39]](#footnote-40) of $2000 for “some anxiety and stress.”[[40]](#footnote-41) Nominal damages is a term of art referring to a “sum awarded where the plaintiff's legal right has been invaded, but no damage has been proved.”[[41]](#footnote-42) Given that nominal damages are largely regarded as vindicatory damages,[[42]](#footnote-43) there was no apparent need for the court to proceed under that banner. It could have simply awarded damages according to the express framework established in *Nammo*.

Whether judicial flexibility or expansiveness regarding emotional distress under *PIPEDA* would change under future legislation is an open question. It would be preferable, though, both from a theory and practice perspective for the law to continue with the court’s expansive understanding under *PIPEDA*. From the perspective of public law theory, it is important for privacy legislation to recognize or mark the violation of a quasi-constitutional interest even when the court determines that the result is not large. From the perspective of practice, it is important that individual litigants – who are generally self represented – receive something for their efforts in pursuing a privacy breach all the way from the Privacy Commissioner’s Office through the judicial system. In short, loss to intangible interest as understood in *Ward* and, by extension, *PIPEDA* should be (or continue to be) regarded as a compensable loss.

 In *Nammo*, Zinn J ultimately quantified Nammo’s loss at $5,000 “inclusive of humiliation he suffered as a result of the breaches of *PIPEDA* by TransUnion.”[[43]](#footnote-44) Beyond compensation for humiliation, the award in *Nammo* also presumably factored in the objectives of vindication and deterrence (discussed below) since the monetary award was “inclusive” of humiliation and not limited to humiliation alone. In short, though Nammo suffered no demonstrated pecuniary loss, this was not an impediment to damages. Rather, the court in *Nammo* concluded that the various goals for awarding damages for a *Charter* breach include “compensation, for which loss is relevant, but also vindication and deterrence, for which loss is not a determinative factor.” It stands to reason, though, that in face of personal loss, there is more to vindicate and there is more to deter, hence increasing quanta.

1. **The Vindication Function**

*Nammo* does not explain exactly what it meant by “vindication” but it seems directed at awarding damages to vindicate the victim who has suffered a privacy breach as well as “upholding the objects and values of *PIPEDA*.”[[44]](#footnote-45) This is appropriate given the goals and values informing *PIPEDA* and is not open to criticism. Indeed, the second notion of vindication builds on *Ward* wherein vindication relates to society at large in the form of reduced “public confidence” and “public faith”[[45]](#footnote-46) as a result of the violation. As the court in *Ward* observes, while “one may speak of vindication as underlining the seriousness of the harm done to the claimant, vindication as an object of constitutional damages focuses on the harm the *Charter* breach causes to the state and to society.”[[46]](#footnote-47)

It is fair to conclude that vindication under *PIPEDA* involves all these aspects – vindication of the applicant who has suffered the breach of privacy, vindication as an advancement of *PIPEDA*’s legislative objects, and vindication in relation to societal harm.[[47]](#footnote-48) A stronger judicial valuing of vindication on these fronts is also an important avenue through which quantum could reasonably be increased.

1. **The Deterrence Function**

Deterrence under *Ward* relates to the importance of deterring or preventing future *Charter* breaches[[48]](#footnote-49) and, under *Nammo*, that same importance exists in relation to *PIPEDA*. In *Cote v Day & Ross Inc***,** for example, the employer possessed some of the applicant’s personal medical information and, on three occasions refused to disclose that information to her, in violation of *PIPEDA*. In response, the court awarded $5,000 in damages, noting that such an award may make the respondent “more alert and sensitive to its obligations in the future.”[[49]](#footnote-50) The deterrence component of *Ward* damages acts to castigate and incentivize the particular respondent to do better in the future. But additionally, as WH Charles correctly observes, deterrence overlaps with the vindication function and addresses “public faith in the efficacy of constitutional protection.”[[50]](#footnote-51) As noted in *Emond v Google LLC*, (when discussing deterrence in the context of Ontario’s *Class Proceeding Act,[[51]](#footnote-52)*), “if the award has no ‘sting’ for the defendant then behaviour modification is unlikely to be achieved.”[[52]](#footnote-53)

A stronger judicial enforcement of the deterrence function going forward is another way in which *PIPEDA* quantum could see an appropriate increase.

Though the applicant was successful in *Nammo,* the court did not technically award *Charter* damages because there was no state actor against which to award them. As noted and more accurately speaking, *Nammo* awarded *Charter*-like damages based on *PIPEDA*’s quasi-constitutional status. Personal loss (whether pecuniary or non-pecuniary) is compensable under section 16 of *PIPEDA* and likely present in the ordinary case but it is not a precondition to recovery. Damages to advance the other objects of *PIPEDA*, namely deterrence and vindication, are also possible, either alone or in relation to an expressly compensatory award.

1. **Breach of the *Charter* and Breach of *PIPEDA* as Actionable *per se*?**

As this section will discuss, breach of the *Charter* and breach of *PIPEDA* appear to be actionable *per se.* This tends to demonstrate the important of the privacy interest and, by extension, the importance of recognizing breach with a robust quantum.

It is well known that there is a pivotal distinction in law between “torts of damage” and torts that are “actionable *per se*”, that is, actionable without proof of damage.[[53]](#footnote-54) Put another way, and as Jane Stapleton notes, when torts are actionable *per se* the “’gist of the action’ is the commission of the wrong and not the damage.”[[54]](#footnote-55) As an example, Fridman observes that “[t]respass in all its forms is actionable per se, i.e., without the need for the plaintiff to prove he has sustained actual damage… [and] is an important hallmark of trespass as contrasted with other torts.”[[55]](#footnote-56) Trespass, of course, includes trespass to land and significantly trespass to the person, which in turn includes battery, assault, and false imprisonment.[[56]](#footnote-57) All are actionable *per se.*

Furthermore, there is a link between actionability *per se* and damages at large as the Alberta Court of Appeal has observed, by quoting AI Ogus in *The Law of Damages* as follows: “Damages for torts actionable *per se are* said to be "at large", that is to say the Court, taking all the relevant circumstances into account, will reach an intuitive assessment of the loss which it considers the plaintiff has sustained.”[[57]](#footnote-58) Providing more detail, the Newfoundland Court of Appeal quoted *Cassell v Broome* as follows: “The expression ‘at large’ should be used in general to cover all cases where awards of damages may include elements for loss of reputation, injured feelings, bad or good conduct by either party, or punishment, and where in consequence no precise limit can be set.”[[58]](#footnote-59) For example, and in the context of defamation discussed in Section II(B)(3) of Part One of this article, published in 52 Adv Q 427 (2022), the court in *Holden v Hanlon* confirmed that “damages are at large and there is no requirement for the plaintiff to prove actual loss or injury.”[[59]](#footnote-60)

In sum, all the privacy torts referenced in this part stand as dignitary torts and are actionable *per se.[[60]](#footnote-61)* They arise given the nature of the wrong.[[61]](#footnote-62) Likewise, in a law review article preceding *Ward*, Marilyn Pilkington argued that damages under the *Charter* as actionable *per se* would be possible.*[[62]](#footnote-63)* This outcome would also be appropriate, in her view, because: “[w]hen a person’s constitutional rights or freedom have been infringed or denied, he should be entitled to a remedy which vindicates his rights – not solely on the basis that he has suffered some consequential injury, but for the violation of the right itself.”[[63]](#footnote-64) According to Katherine Fisher, this became known as the ‘*per se*’ theory of *Charter* damages[[64]](#footnote-65) and focusses on the wrong itself. In the following quotation, *Ward* indeed appears to permit damages *per se* when it states as follows: “the fact that the claimant has not suffered **personal loss** does not preclude damages where the objectives of vindication or deterrence clearly call for an award [emphasis added].[[65]](#footnote-66) Personal loss in turn, involves the claimant’s “physical, psychological, pecuniary and harm to intangible interests.”[[66]](#footnote-67) Putting this all together, a *Charter* breach is actionable *per se*, that is, without proof of personal loss, but with the important caveat from Ward that a damage award be “appropriate and just.”[[67]](#footnote-68) This qualifier on actionability *per se* is virtually automatic given the nature of *Charter* damages.[[68]](#footnote-69)

In *Ward*, the plaintiff received *Charter* damages for the wrongful strip search based on the compensatory interest. That is, the humiliating quality of being strip searched caused “significant injury” to the individual’s “intangible interest”.[[69]](#footnote-70) Additionally, the plaintiff received damages under the objects of deterrence and vindication given that the conduct of the corrections officer “was serious and reflected a lack of sensitivity to *Charter* concerns.”[[70]](#footnote-71) However, the court denied recovery for the wrongful impoundment of the plaintiff’s vehicle on the basis that none of the objects of *Charter* damages – compensation, vindication or deterrence – were engaged. In short, there was no financial loss and the seizure was “not of a serious nature.”[[71]](#footnote-72) According to Kent Roach, such a rejection of damages must also be understood as a rejection of a “theory of *per se* nominal damages for all *Charter* violations.”[[72]](#footnote-73) While Roach is technically correct, it must be emphasized that *Ward* does not create a large inroad on the principle of *per se* damages. As previously noted, the *Ward* framework requires that an award of section 24 damages be “appropriate and just,”[[73]](#footnote-74) given the over all constitutional context. *Per se* damages are available for *Charter* breaches but subject to this axiomatic caveat.

The quasi-constitutional nature of *PIPEDA*, its close relation to the privacy torts and defamation (previously discussed in Section II(B) of Part One of this article, published in 52 Adv Q 427 (2022)), and the language of section 16, explain why courts have seemed to understand the breach of *PIPEDA* as being actionable *per se*, with damages at large awarded as necessary. For example, in *Girao*,[[74]](#footnote-75) the applicant sought damages under *PIPEDA* “arising from the disclosure of her personal information contained in a letter and Report of Findings issued by the Privacy Commissioner of Canada which the respondent law firm posted on the firm’s website.”[[75]](#footnote-76) As noted by the court, there was no evidence of economic loss or expenses incurred in relation to the privacy breach.[[76]](#footnote-77) Likewise, “the record does not establish that the applicant suffered humiliation as a result of the breach.”[[77]](#footnote-78) In this sense, there was no demonstrated personal loss but the court nonetheless ordered damages on the following basis: “The law firm was negligent in not taking steps to ensure that any personal information about an identifiable complainant was removed before it posted the report.”[[78]](#footnote-79) The court went on to award $1500.00.[[79]](#footnote-80) Another example is the *Cote* case.[[80]](#footnote-81) Notably, the court made no express finding of actual loss (whether pecuniary or non-pecuniary) in relation to the respondent’s breach of *PIPEDA* but went on to award $5,000[[81]](#footnote-82) on this basis: “[A]n award of damages will drive home its failure to meet its obligations under *PIPEDA* and, hopefully, cause it to be more attentive to these matters in the future.”[[82]](#footnote-83) Note, too, that while damages at large are often nominal, they can be more substantial as proven.[[83]](#footnote-84)

While damages *per se* appear to be recoverable under *PIPEDA*, it remains to be seen whether this will continue under future legislation. Given the importance of privacy, its constitutional overlay, and its role in the context of dignitary torts, we argue below that *per se* damages should continue to be available. Note that statutory privacy torts are explicitly actionable without proof of damages and that in *Douez,* the Supreme Court of Canada justifiably lauded this approach to privacy for reflecting the “legislature’s intention to encourage access to justice for such claims.”[[84]](#footnote-85) One would hope for similar encouragement in any future legislation.[[85]](#footnote-86)

1. ***PIPEDA* Damages as Symbolic Damages**

The type of damages awarded in *Ward, Nammo,* and *Tsige* (the latter case receiving detailed discussion in Part One, Section II(B) has been described in various ways. Waddams categorizes the awards in *Ward* and *Nammo* as “symbolic and vindicatory damages”[[86]](#footnote-87) These are awards which “vindicate rights’ or act as “symbolic recognition of their infringement.”[[87]](#footnote-88) In Klar’s *Remedies in Tort*, the damage awards in *Ward* and *Tsige* are called “[s]ymbolic, moral or vindicatory damages” [[88]](#footnote-89) and it adopts the Waddams definition quoted immediately above.[[89]](#footnote-90) And finally, see the court in *Sharp v Royal Mutual Funds Inc* who observes as follows:

Symbolic damages are most commonly awarded for violations of the [*Canadian Charter of Rights and Freedoms*](https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html)*.* The courts have also awarded symbolic damages in circumstances such as those that arose in *Jones* [i.e., *Tsige*]*,* in which the tort of intrusion upon seclusion is proven but no measurable loss is identified. Symbolic damages awards outside these two situations are highly exceptional….[[90]](#footnote-91)

Further, though *Ward, Nammo*, and *Tsige* all awarded symbolic damages in some form, only *Tsige* refers to them as such. *Ward*, for example, references “*Charter* damages” instead of “symbolic damages” perhaps given uncertainty as to what the term precisely meant in the case-law[[91]](#footnote-92) and perhaps because a reference to *Charter* damages is inherently more descriptive. Beyond this, and as WH Charles argues, the “issue of language and in particular the meaning of specific terms like ‘symbolic’ or ‘moral damages’ was not directly addressed in the *Ward* decision because it was subsumed in the new discussion of the functions or purposes of *Charter* damages, particularly the purpose of vindication.”[[92]](#footnote-93) Most importantly, the implicit wisdom of the Supreme Court of Canada in abandoning the use of the word ‘symbolic’ shines through. ‘Symbolic’ is not the ideal moniker not just because it is a possibly unclear term. The adjective may also suggest that the damages suffered are of insufficient substance or are implicitly somehow “damages-lite”. Reference to “*Charter* damages” (under *Ward*) and *PIPEDA* damages (under *Nammo*) is more robust and less possibly diminishing. It is hoped that courts in the future will follow *Ward* and *Nammo*’s lead by also dropping reference to “symbolic” damages.

While breach of privacy will often bring to the fore compensatory, non-pecuniary damages such as distress or humiliation, symbolic damages cover different terrain. They serve public policy goals including recognizing the value of dignity. These damages – which are awarded under *Ward* and *Nammo*’s vindicatory function – should not necessarily be modest when the functional approach to quantification requires to the contrary.

1. **Critique of *Nammo v TransUnion of Canada Inc*, 2010 FC 1284**

While *Nammo* is a compelling application of *Ward* to private sector disputes and an enormous contribution to Canadian privacy law, it does have a notable deficiency, namely its low, $5,000 quantum. This is particularly so considering the court’s finding that the circumstances of Mr. Nammo’s humiliation (in face of a false and negative credit report) were pronounced and given the court’s finding that TransUnion had committed a serious breach of *PIPEDA* “involving financial information of high personal and professional importance.”[[93]](#footnote-94) As observed by the court, Nammo

had partnered with a friend to undertake a business; his role was to secure financing because he was creditworthy while his friend was not, and the loan was approved subject to the credit check, which came back indicating that Mr. Nammo had poor credit. Mr. Nammo then had to inform his partner of this result. Although he said to his partner that the information was wrong, the credit reporting service said that it would take up to 30 days to investigate, during which time the opportunity and partnership were lost. In addition, RBC officials were provided with information that led them to conclude that the applicant was not a good credit risk. The reasonable person, knowing that the assessment made of his creditworthiness must be incorrect, would be humiliated at having to face and to protest to both his prospective partner and to bank officials. The reasonable person would suffer additional humiliation when the error was not clearly corrected by informing RBC and the credit applicant that an error was made, that there was no debt owed by the applicant, and that the error had been corrected.[[94]](#footnote-95)

What also makes the compensation in *Nammo* too low is this: the respondent’s misconduct amounted to both a breach of *PIPEDA* and the tort of defamation though that latter action was never apparently pursued. In short, it was not just that Nammo’s personal information was wrongfully shared; *erroneous* personal information that put him in a bad light that was wrongfully shared, with considerable non-pecuniary loss as a result.

On a related front, one could easily conclude that the circumstances in *Nammo* were, in fact, worse than what transpired in *Tsige*, a case we have already critiqued above as itself awarding too low a quantum. As discussed in Part One, the plaintiff in *Tsige* was awarded $10,000 in damages (double the quantum in *Nammo*) because the defendant wrongfully and repeatedly accessed the plaintiff’s private financial information for reasons related to the relationship both had with the plaintiff’s ex-husband. Significantly, however, there was no finding that the defendant republished or otherwise distributed that information in any way.[[95]](#footnote-96) Conversely, in *Nammo,* the credit report containing inaccurate financial information became known to two third parties: the Bank and Nammo’s erstwhile business partner. This republication destroyed Nammo’s otherwise promising business relationship, led to a loan denial, and left the applicant feeling disgraced and discredited.

One possible damper on the quantum front in *Nammo* relates to traditional judicial hesitation in face of intangible loss,[[96]](#footnote-97) including apprehension about “[d]ifficulties of proof, the risk of frivolous claims, and floodgate concerns.”[[97]](#footnote-98) The Supreme Court of Canada in *Ward* seemed attentive to at least some of these matters when observing that while non-pecuniary damages are harder to measure, “[y]et they are not by that reason to be rejected.”[[98]](#footnote-99)

In addition, it is possible that a more significant damper in *Nammo* is the Supreme Court of Canada’s damage assessment in *Ward*. As already noted, *Ward* involved a wrongful strip search though one which the court described as “relatively brief and not extremely disrespectful, as strip searches go.”[[99]](#footnote-100) *Ward*’s damages were quantified at $5,000 taking into account the need to compensate for breach of his section 8 rights but also to engage “the objects of vindication of the right and deterrence of future breaches.”[[100]](#footnote-101) In working with the *Ward* case, Zinn J reached for analogies when he stated: “Although the dissemination of false credit information is not a strip search, it does lay bare to those receiving the information the creditworthiness of the person. In my assessment, it can be as equally intrusive, embarrassing and humiliating as a brief and respectful strip search.”[[101]](#footnote-102) There can be little doubt that the court felt confined to what was ordered in *Ward* as a ceiling.

The problem indeed is that the quantum in *Ward* was also too low, particularly given the circumstances of that case. Mr. Ward, an innocent bystander, was wrongly identified as an individual who was going to throw a pie at then Prime Minister Jean Chretien.[[102]](#footnote-103) Police chased Ward down, handcuffed him, then arrested him while Ward protested loudly.[[103]](#footnote-104) Upon arrival at the police lockup he was strip searched and his car impounded. Several hours later, police released him without charge.[[104]](#footnote-105) As the Supreme Court of Canada concluded, Mr. Ward’s treatment in the hands of the police was “without cause,”[[105]](#footnote-106) though not in bad faith.

But probably the most significant factor unduly suppressing quantum in *Nammo* is its status as the first decision under *PIPEDA* to ever award damages.[[106]](#footnote-107) This prominence may have made the judge understandably cautious and, being first out of the gate, also gave the case an outsized influence in relation to quantum going forward. It is of further note that the court in *Nammo* did not have the benefit of submissions by a lawyer in setting quantum; Mr. Nammo was self-represented. Though the court complimented Nammo for doing “an admirable job for one unskilled in the law,”[[107]](#footnote-108) a lawyer might well have been able to make more of the applicant’s humiliation, for example, and secure a higher damage award. As Jeffrey Berryman astutely observes in a slightly different context (though it applies equally to *Nammo*), the “first litigant to court” can have “an undue impact on setting the range.”[[108]](#footnote-109) Opportunities to moderate such an impact are further reduced when **all** of the successful cases that followed *Nammo* to-date involved self-represented litigants as well. As the details of these cases (listed in Appendix A) demonstrate, many of the damage claims made by such litigants are rejected or reduced because the litigants provided little or no evidence in support. Second, self-represented litigants do not have the background to produce novel principled arguments in support of their claims. In short, case law that has developed on PIPEDA’s right to seek damages has had little to no input from applicant’s counsel.

1. **Critique of *Randall v Nubody’s Fitness Centres,* 2010 FC 681**

*Randall* is a particularly influential case which has had the unfortunate result of drastically limiting when applicants can recover damages under *PIPEDA*. *Randall* – and its successor case, *Girao*[[109]](#footnote-110) – have been cited with approval in six of the 10 cases summarized in Appendix A (concerning successful *PIPEDA* applications) in the context of requiring egregious circumstances. *Randall* and *Girao* were cited with approval in three of the 14 cases summarized in Appendix B (concerning unsuccessful *PIPEDA* applications) on this same front. As will be discussed below, it would be very much preferable if future courts declined to follow these two cases.

In *Randall*, the applicant enrolled at the respondent’s fitness gym because the membership fees for which were partially subsidized by the applicant’s employer[[110]](#footnote-111) as part of its employee benefits program. In response to employer queries as to how many times the applicant frequented the gym, the respondent released that information.[[111]](#footnote-112) As summarized by the judge, the applicant claimed that “the disclosure of information on his fitness centre usage caused him embarrassment and created an atmosphere of competition amongst co-workers that he was unwillingly forced into. The applicant also stated that he believes that he was reprimanded by his superiors for his communications with the respondent.”[[112]](#footnote-113)

The court found a breach of *PIPEDA* given that Nubody’s disclosed personal information concerning usage of the facility,[[113]](#footnote-114) but declined to award damages. This is, in part, because Nubody’s had adopted the Privacy Commissioner’s recommendations to improve its systems,[[114]](#footnote-115) but more significantly because “an award of damages is not be made lightly.”[[115]](#footnote-116) According to the court, “such an award should only be made **in the most egregious situations[[116]](#footnote-117)** and **“where the breach has been one of a very serious and violatingnature”**[[117]](#footnote-118) [emphasis added]. The court determined that the circumstances in *Randall* did not meet this standard”[[118]](#footnote-119) – unlike, for example, cases involving video-taping and phone-line tapping.[[119]](#footnote-120) Rather, “the impugned disclosure of personal information was minimal” and there was “no injury to the applicant justifying an award of damages.”[[120]](#footnote-121)

While the court was almost certainly correct that the release of such innocuous information caused no loss, it was certainly wrong to read into *PIPEDA* that a damage award should only be made in the most egregious situations. As noted in the Introduction, in requiring egregious circumstances, the court inappropriately adds criteria to what the legislation requires, setting such a spectacularly high bar for recovery, it trenches on the test for punitive damages.[[121]](#footnote-122) Recall that *PIPEDA* already protects the “reasonable” conduct of organizations in section 3, and that section 14 already limits the scope of the Federal Court’s review. Though not mentioning *Randall* by name, the court in *Chitrakar* is critical, observing that “there is no reason to require that the violation be egregious before damages will be awarded. To do so would undermine the legislative intent of paragraph 16(c) which provides that damages be awarded for privacy violations including but not limited to damages for humiliation.”[[122]](#footnote-123)

The cause of the court’s misstep in *Randall* is unclear. Partially it may be because the court relied on the privacy analysis of *Poirier*[[123]](#footnote-124) and apparently took it out of context. *Poirier* concerned misappropriation of the Plaintiff’s personality and image pursuant to British Columbia’s statutorily created privacy tort,[[124]](#footnote-125) discussed earlier. In *Poirier* the court found that the relevant factors for quantum for breach of privacy were “whether embarrassment, humiliation and distress was caused to the person whose privacy was violated, whether the actions of the responsible party were **flagrant and callous**, and the extent to which the responsible party gained a commercial advantage”[[125]](#footnote-126) [emphasis added]. As the court in *Poirier* noted, these factors go to quantum, not to the determination of whether the tort occurred, [[126]](#footnote-127) since as noted above British Columbia’s statutory tort is dignitary, and allows for damages *per se*.

Similarly, the court in *Randall* may have additionally misapplied *Ward*’s assessment that quantum for a *Charter* breach is tied to the seriousness of the breach itself and that “[g]enerally speaking, the more **egregious** the conduct and the more serious the repercussions on the claimant, the higher the award for vindication or deterrence will be” [emphasis added].[[127]](#footnote-128) In this way, Ward identifies egregiousness as relevant but it goes to quantum, not recoverability.

For all these reasons, future courts should decline to follow *Randall*’s requirement for egregious circumstances. Rejecting *Randall* may also have the salutary result of increasing damage quanta by resetting the judicial tone.

 **Section** **II: Summary of *CPPA* Deficiencies in Relation to Damages**

Given the time and effort already put into the process, reform of federal privacy law will likely proceed in some manner though no longer under the auspices of *CPPA.* This is because, as previously noted, *CPPA* has recently died on the order article and must start the journey to enactment anew. The current lacuna, however, provides an opportunity to briefly assess *CPPA* with an eye to improvement, particularly in relation damages for breach of privacy.

Currently, *PIPEDA* states in s 16:

The Court may, in addition to any other remedies it may give…

(c) award damages to the complainant, including damages for any humiliation that the complainant has suffered.

In contrast, s 106(1), the damages provision under *CPPA* provides as follows:

An individual who is affected by an act or omission by an organization that constitutes a contravention of this Act has a cause of action against the organization for damages **for loss or injury** that the individual has suffered as a result of the contravention….[emphasis added.][[128]](#footnote-129)

It can be seen that *CPPA* breaks with the wording of *PIPEDA* by dropping reference to the word “humiliation” on the one hand, and adding in the words “for loss or injury” on the other. Elimination of the word “humiliation” is not inherently problematic if it simply reflects the conclusion that non-pecuniary damages are naturally recoverable and need no special mention. Nor is elimination of the word “humiliation” problematic provided the bench continues to follow *PIPEDA*’s path and permit recovery for non-pecuniary loss below the standard set by *Mustapha,* discussed earlier.[[129]](#footnote-130) But both these conclusions are less than foregone given *CPPA’s* inherent ambiguity.[[130]](#footnote-131) Indeed, another interpretation is that deletion of the word ‘humiliation’ limits the plaintiff’s recovery to pecuniary loss alone. If so, the effort is clumsy since that is not what the defunct legislation says. But beyond this, the effort is unwelcome. Though the intent of the deletion may be to save institutions such as banks or credit offices from the possibly devastating impact of large class action damages for non-pecuniary loss, the provision denies justice to individual claimants who are caught in the very same net. However unappealing it is for a personal applicant to pursue damages under *PIPEDA*, it would be even less so if this reading of *CPPA* were to prevail in future legislation.[[131]](#footnote-132)

On a related front, the new *CPPA* requirement that the plaintiff prove damages “for loss or injury”[[132]](#footnote-133) is concerning as it could mean the elimination of symbolic damages and actionability *per se*. On this reading, *CPPA* reflects a legislative intention to further dampen what little litigation there is under *PIPEDA* – including potential class action lawsuits. If these understandings are correct, then *CPPA* represents a momentous and regrettable change in the direction in federal privacy protection, particularly for the personal claimant since, as argued previously, *PIPEDA* appears to regard breach of privacy as actionable *per se*.[[133]](#footnote-134)

 Non-pecuniary loss and actionability *per se* must be expressly preserved in successor legislation for all the reasons given in this paper, including the importance of: upholding privacy as a quasi-constitutional value with strong links to defamation; providing access to justice;[[134]](#footnote-135) and actively respecting the foundational *Nammo* principles not just of compensation but also deterrence and vindication. Successor legislation should not be organized around the singular goal of staving off class actions. Such an orientation denies access to justice for the individual and will further stunt the protection of privacy in Canada as a result. Instead, issues relating to class actions should be treated separately and, of course, fairly.

**Section III: Brief Conclusion**

 As has been seen, Justice Cromwell in his 2010 Pitblado lecture described the functional approach to damages in compelling terms, including that the monetary remedy address “the purposes of the underlying substantive law”[[135]](#footnote-136) and, as relevant, include non-economic damages[[136]](#footnote-137) so as to demonstrate that a given right (such as privacy) is “deeply valued by the community.”[[137]](#footnote-138) The engine driving protection of the privacy interest is its constitutional status, one which goes to individual dignity[[138]](#footnote-139) and with close links to dignitary torts, both traditional and more recently emerging.

A central, underlying purpose of *PIPEDA* – namely, the protection of consumer privacy – has been well documented by the courts. Judges are to set damages as a “meaningful response,”[[139]](#footnote-140) to a given *PIPEDA* breach, with reference to the important functions of compensation, vindication, and deterrence. This article concludes that the case law has, regrettably, fallen short of serving *PIPEDA*’s underlying purpose due to chronically low damage awards. As noted, *PIPEDA* damage claims range between an average of $3,000 and $5,000 and, in just over 20 years, only 24 applications for *PIPEDA* damages have been brought forward.

The court in *Miglialo* is correct that “not every breach of *PIPEDA*”, however nominal, should be transformed into an “opportunity for vindication in the form of the imposition of an award of damages.”[[140]](#footnote-141) At the same time, and to reiterate the Supreme Court of Canada’s observation in *Ward*, an important purpose of *Charter* damages in relation to vindication is that constitutional rights “must be maintained and cannot be allowed to be whittled away by attrition.”[[141]](#footnote-142)

In relation to the protection of privacy via damage claims, attrition is the risk faced by *PIPEDA* and, unless carefully formulated, any successor legislation.

[see next page for Appendices]

**Appendix A: Successful Applications for Damages under *PIPEDA* in a Commercial Context \*\***

**(\*\*as at May 2, 2021)**

| **Case** | **Facts** | **Judicial Analysis** | **Quantum** |
| --- | --- | --- | --- |
| ***1.Montalbo v Royal Bank of Canada*, 2018 FC 1155**[cites Randall at para 60] | Applicant alleged that the Royal Bank failed to safeguard her personal information disclosed in relation to her residential property mortgage application.  | Court agreed that the Royal Bank’s safeguards were inadequate, at para 47 and that the financial information was “highly sensitive” at para 45 | **$2,000** in “nominal” damages for “some anxiety and stress” at para 62 plus $800 costs to the self-represented litigant, at para 63. |
| ***2. AT v Globe24H.com*,2017 FC 114** | The respondent was a Romanian website that published Canadian court and tribunal decisions. The website, unlike similar Canadian counterparts, allowed the decisions to be located via search engines like Google, at para 10. Further, the respondent indexed decisions such that “Googling” an individual’s name would show decisions concerning them, including those involving highly personal information like HIV status, divorce proceedings and personal bankruptcy, at para 13. The respondent would then demand payment to remove the information from its website, at para 15. The Applicant claimed his privacy rights were violated when the Respondent published a labour board decision in which the complainant was a party.  | Respondent's breach was egregious because its business was to exploit the privacy of individuals for profit. Damages were appropriate remedy because: “the respondent has commercially benefited from the breach through targeted advertising and by requiring a fee for removing the personal information of individuals contained in the decisions. The respondent has also acted in bad faith in failing to take responsibility and rectify the problem” at para 103.  | **$5,000** in damages, at para 103, plus $300 in costs to self-represented litigant, at para 104.  |
| ***3. Cote v Day & Ross Inc.*, 2015 FC 1283** | Applicant’s employer was in possession of correspondence related to the applicant’s personal medical information and refused to properly disclose such correspondence to her on three occasions, at para 21. | Court awarded damages, noting such an award may make the respondent “more alert and sensitive to its obligations in the future” at para 21.  | **$5,000** in damages, at para 25, plus $1,000 in costs to self-represented litigant, at para 25. |
| ***4. Blum v Mortgage Architects Inc.*, 2015 FC 323**[*cites Girao/Randall with approval, at para 15*] | Applicant engaged in several transactions with the Mortgage Architects Inc (the respondent mortgage broker) but later defaulted under certain mortgages. Without the Applicant’s consent, Mortgage Architects Inc sent emails to third parties mentioning applicant’s default and anticipated legal action against him, at paras 41 and 55. Applicant complained that the purpose in releasing the personal information was “to foment trouble” and “encourage” the foreclosures, at para 57. | While *PIPEDA* was violated, the applicant suffered no losses as a result. The mortgages would have been foreclosed upon in any event, at para 56.  | **$1,000** in “nominal” damages, at para 64.No costs awarded to the respondent nor to the self-represented applicant, at para 65. |
| ***5. H******enry v Bell Mobility*, 2014 FC 555** | Bell Mobility revealed certain information about Henry’s mobile telephone account to an imposter who called a Bell Mobility representative, claiming to be the account holder, at paras 7 and 16. | Court agreed that Bell had breached *PIPEDA* but that it caused no loss, at para 17. Court awarded damages, however, to “further the general objects of *PIPEDA*” at para 19.  | **$2,500** in damages, at para 27 plus$1,000 costs for the self-represented litigant, at para 27. |
| ***6. Chitrakar v Bell* *TV*, 2013 FC 1103**[Appears to implicitly criticize *Randall* at para 24, without naming the case.] | The applicant ordered satellite television services from Bell TV and provided his signature on a “proof of delivery” device when the service was installed at para 5. Without Chitrakar’s permission, Bell went on to wrongfully embed the plaintiff’s signature from that device onto a TV rental agreement, which, in turn, permitted Bell to conduct credit checks, at paras 6-7. Applicant found out that Bell had ordered a credit check on him without his permission, at para 8. Bell did not appear in proceedings before the privacy commissioner, though served, at para 15, nor respond to Chitrakar’s concerns nor even appear at the court hearing, at para 18. | Court described Bell TV’s behaviour as “reprehensible” in relation to the applicant’s privacy rights, at para 18, including in its failure to appear in the subject proceedings or follow the Privacy Commissioners recommendations in this matter, at para 18. It acknowledged that Bell’s “hard check” on the applicant’s credit rating had an adverse effect on that rating, at para 20. Court emphasized the importance of a damage award that would provide, at para 26, “meaningful compensation, deterrence and vindication”, particularly in relation to a large company like Bell, at para 27. Without expressly mentioning the decision of *Randall v Nubodys Fitness Centres*, 2010 FC 681 (summarized in Appendix B of this article), the court indirectly criticized it, stating at para 24:“there is no reason to require that the violation be egregious before damages will be awarded. To do so would undermine the legislative intent of paragraph 16(c) which provides that damages be awarded for privacy violations including but not limited to damages for humiliation.”In addition to damages, court awarded exemplary damages, at para 28 “for Bell's conduct at the time of the breach of the privacy rights and thereafter. I take account of Bell's dealings with Chitrakar as well as its reactions to the Privacy Commissioner and her recommendations and its failure to take these proceedings seriously.” | **$10,000** in damages, at para 28, plus**$10,000** in exemplary damages plus, $1,000 in costs for self-represented litigant, at para 29. |
| ***7. Biron v RBC Royal Bank,***[**2012 FC 1095**](http://www.canlii.org/en/ca/fct/doc/2012/2012fc1095/2012fc1095.html) [Cites *Randall* with approval, at para 37] | RBC disclosed Biron’s credit card statements, on a card she held jointly with her husband, to counsel for her husband’s ex-wife, at para 4 and following.  | RBC violated *PIPEDA* in this disclosure, at para 34. Of note in determining quantum of damages was that Biron had asked RBC on two occasions to stop disclosing her information, at para 40.  | **$2,500** in damages, plus unquantified“costs” to self-represented litigant at para 43. |
| ***8. Girao v Zarek Taylor Grossman Hanrahan LLP*, 2011 FC 1070**Cites *Randall* with approval, at para 42 (same judge in both cases) | Respondent law firm posted a report by the Privacy Commissioner on its website under “recent decisions” category which contained the personal medical information of the Applicant, at paras 1 and 29. Applicant claimed a breach of privacy under *PIPEDA* even though this information was already made public via other proceedings, at para 30-31. | Court rejected respondent’s argument that the Privacy Commissioner of Canada (PCC) reports should be publicly available in an unredacted way, ruling that the law firm should have taken steps to ensure that applicant was not identifiable in the posting, at para 38. Even though no evidence of pecuniary harm nor of humiliation, at para 55, damages are appropriate because:“Parliament has ensured that Canadians have the right to file complaints with the PCC for investigation without fear of having their personal information disclosed other than in certain constrained circumstances…. To that end, an award of damages would further the general objects of PIPEDA and uphold the values it embodies. A damage award would also send the message to lawyers and individuals with increased public responsibility that they must proceed prudently when dealing with private information” at para 50.Court awarded damages in the factual context that the respondent “was careless in posting but did not act in bad faith” and took the posting down promptly, at para 61. | **$1,500** in damages, at para 61, plus$500 in costs to the self-represented litigant, at para 63. |
| ***9. Landry v Royal Bank of Canada,* 2011 FC 687***[Cites* *Randall* with approval, at para 28] | Bank improperly disclosed bank records to the applicant’s ex-husband during a separate divorce trial, at para 4. This led to her being humiliated including on the stand when her denial of having a personal bank account was refuted by these records, at para 19 | The court observed that *PIPEDA* was violated because the Bank’s employee made a “major error” and even tried to “cover up her wrongful conduct” at para 28. It also recognized that the applicant “contributed to her own misfortune by attempting to conceal under oath the existence of her personal accounts even though she was obliged to disclose their existence” at para 29. Court assessed damages in the context of the applicant’s “contributory fault” at para 32.  | **$4500** in damages, at para 32, plus costs to the self-represented applicant. |
| ***10. Nammo v TransUnion of Canada Inc.,* 2010 FC 1284***[Cites Randall with approval, at para 71]* | Nammo pursued a business opportunity to become a 50% partner in a proposed trucking business in “exchange for using his name, financial history, and expertise to secure the necessary business loan” at para 5. When the applicant applied for a loan from RBC, it was denied on the basis of a negative and false credit report provided by TransUnion of Canada Inc, at para 7. This ended the business opportunity. Beyond this, TransUnion did not take steps to clearly correct the record with RBC, at para 50. Nammo claimed damages including for humiliation and lost profits.  | Court ruled that the respondent had breached *PIPEDA* by supplying false credit information, at para 43, and for failing to correct the record appropriately, at para 50. The applicant could not prove any business loss, at para 65, but the court ruled that it had jurisdiction to award damages under section 16 of *PIPEDA* “even when no actual financial loss is proven” at para 71. This was particularly the case because TransUnion’s “was a serious breach involving financial information of high personal and professional importance” at para 71.Court relied on Ward where the SCC, in the context of a *Charter* breach, awarded damages absent financial loss. This was because it identified several goals in awarding damages: “these include compensation, for which loss is relevant, but also vindication and deterrence, for which loss is not a for which loss is not a determinative factor,” at para 72.Following *Ward*, the court awarded damages for the humiliation of the dissemination of false credit information, at para 79. | **$5,000** in damages, at para 79, plus$1,000 in costs for the self-represented litigant, at para 81.  |

**Appendix B: Unsuccessful Applications for Damages under *PIPEDA* in a Commercial Context\*\***

**(\*\*as at May 2, 2021)**

| **Case** | **Facts** | **Judicial Analysis** |
| --- | --- | --- |
| ***1.Kwan v Amex Bank of Canada,* 2019 FC 968** | Applicant applied for a credit card from Amex, later alleging that Amex wrongfully used her information beyond its intended purposes, failed to keep accurate records, and fabricated records of her phone conversations with its representatives, at para 1. | No damages awarded because applicant failed to prove her case, at para 20. Court found that Amex lawfully collected information for a valid purpose and kept accurate records, at paras 13, 15, and 18.   |
| ***2.Miglialo v Royal Bank of Canada*, 2018 FC 525***[cites Randall with approval, at para 41]* | An RBC employee accessed the applicant’s financial information without authorization, at para 2. Applicant alleged that the employee further disclosed this information to family members, causing “irreconcilable damage” to applicant’s relationships with family members and causing her “a great deal of humiliation and embarrassment” at para 32.  | While the *PIPEDA* violation (wrongful access) was acknowledged, the applicant was not awarded damages, at para 52. This is because the applicant failed to prove that the financial information was disclosed to others to begin with, at paras 27 and 43. Instead, the court emphasized that “[v]indication is to be found in the respondent’s acknowledgement of the breach, which resulted in appropriate disciplinary measures [of its employee], as well as the finding of the Privacy Commissioner that a violation of Principle 4.5 occurred” at para 52. |
| ***3. Fahmy v Bank of Montreal, 2016 FC 479*** | Bank terminated relationship with applicant who sought disclosure of documents signed by applicant. Applicant challenged produced documents as an incomplete list. Privacy Commissioner concluded that BMO had responded to applicant’s access request, albeit late, at para 21. Applicant sought judicial review and damages under *PIPEDA*. | Application dismissed. "The applicant has failed to demonstrate that he is entitled to a remedy under section 16 of the Act. In this, I agree with the OPC that BMO responded to the access requests" at para 70.  |
| ***4. Bertucci v Royal Bank of Canada,* 2016 FC 332** | The Royal Bank closed the applicants’ bank accounts, orally explaining that it was no longer comfortable doing business with them, at para 6. The applicants requested the Royal Bank to produce the personal information it held on them, pursuant to *PIPEDA*, including why their accounts were to be closed. The bank refused the request for various reasons, including that the information was confidential commercial information, at para 7. The applicants eventually brought this matter to the federal court, seeking disclosure of that personal information and damages under *PIPEDA*.  | The court ordered production of the requested documents but declined to award damages. This is because there was little evidence that the applicants “suffered hardship or difficulties in having to make alternative banking arrangements, other than a feeling of humiliation” at para 47.*Author’s Note*: The basis for the damages claim and the court’s analysis of same would appear to be problematic since *PIPEDA* does not contain rules as to when a bank can terminate its relationship with a customer. It would seem that damages under *PIPEDA* in this case would be recoverable only if related to the bank’s wrongful failure to produce the applicant’s personal information.  |
| ***5. Townsend v Sun Life Financial*, 2012 FC 550***[cites Randall with approval at para 23]* | Applicant had been dealing with Sun Life in a long-term care insurance matter, at para 4. Sun Life mishandled some of the complainant’s medical information by sending it to the wrong address, at para 17.  | No damages awarded because Sun Life’s wrongful disclosure was minimal and caused the applicant no injury, at para 38. Organizations are not held “to a standard of perfection” at para 34, particularly in the context of Sun Life already have “a detailed protocol before the occurrence of what can only be considered as a human error” at para 34. |
| ***6. Stevens v SNF Maritime Metal Inc,* 2010 FC 1137** | Stevens was an employee of Alscott, a company that sold metal to SNF Maritime Metal Inc (SNF). Part of Stevens’ job was to deliver metal to SNF and remit cash proceeds to his foreman, at para 4. Stevens opened a personal account with SNF, delivered metal, and had proceeds deposited to his account, at para 5. Stevens knew that some of the money that was deposited to his account belonged to Alscott but took no steps to correct that error, at para 24. Responding to decreased metal sales to SNF, Alscott made inquiries of SNF who disclosed the fact of Steven’s personal account, at para 6. Stevens was dismissed from his employment at para 8. Stevens saught damages under *PIPEDA* for losses related to termination.  | Court found a breach of *PIPEDA* because SNF’s disclosure of the personal account was wrongful, at para 18. However, Stevens also misconducted himself by taking not steps to correct SNF records, at para 24. As well, Stevens’s loss was caused by his termination for cause, at para 28. In declining to award damages, court observed: “To the extent (if any) that privacy is involved, it is minimal and the Applicant has put forward no other evidence of impact on his standing or community perception or similar features of a breach of privacy claim” at para 31.  |
| **7. Banuelos v TD Bank Financial Group, 2010 FC 934** | Applicant claimed that TD disclosed his information to his mother, who was in divorce proceedings with his father, at para 7. The Privacy Commissioner found there was no breach of *PIPEDA.* | No damages awarded because no breach of *PIPEDA*, at para 42. |
| ***8. Randall v Nubody’s Fitness Centres*, 2010 FC 681** | Applicant enrolled at the respondent’s fitness gym. The membership was partially subsidized by the applicant’s employer. The respondent released information to employer disclosing how many times the applicant frequented the gym, at para 36.Applicant claimed that “the disclosure of information on his fitness centre usage caused him embarrassment and created an atmosphere of competition amongst co-workers that he was unwillingly forced into. The applicant also stated that he believes that he was reprimanded by his superiors for his communications with the respondent” at para 18.  | Court found a breach of *PIPEDA* because Nubody’s disclosed personal information concerning usage of the facility, at para 36 but would not award damages. This is, in part, because Nubody’s had adopted the Privacy Commissioner’s to improve its systems, at para 46-47. Furthermore, “an award of damages is not be made lightly. Such an award should only be made in the most egregious situations. I do not find the instant case to be an egregious situation” at para 55, such as video-taping and phone-line tapping, at para 56. Here, the information released was of low sensitivity, at para 42, and caused no loss, at para 49.*Author’s Note:* Court’s requirement that damages are only available in the most egregious situation is problematic as this requirement is not found in *PIPEDA*. No costs awarded to either side, at para 59. |
| **9. Privacy Commissioner of Canada v Air Canada, 2010 FC 429** | Mr. Dankwort complained to Air Canada about the conduct of one of its employees, at para 7, and demanded to see the file that Air Canada had on him. When Air Canada refused, Dankwort complained to the Privacy Commissioner which instituted these proceedings for disclosure and damages.  | The Court found that Air Canada was not required to disclose its file, at para 61 and so no damages were awarded to Dankwort, at para 62.  |
| **10. Waxer v JJ Barnicke Limited, 2009 FC 169** | Applicant complained that the Respondent collected his information. | No damages awarded because no information had been collected, at para 38. *PIPEDA* does not apply to unsuccessful attempts to collect personal information, at para 46. |
| **11. Johnson v. Bell Canada, 2008 FC 1086**  | Applicant alleged, inter alia, that Bell failed to comply with *PIPEDA* in relation to his access request, at para 5.  | No damages awarded because Bell Canada had complied with *PIPEDA*, at para 54. |
| **12. Wansink v Telus Communications Inc, 2007 FCA 21** | Several employees of Telus objected to its institution of “speaker verification technology” for identity verification purposes as impinging on privacy, contrary to *PIPEDA,* at paras 6 and 7. | No damages awarded because Telus had complied with *PIPEDA*, at para 32. |
| **13. Morgan v Alta Flights (*Charter*s) Inc., 2005 FC 421, affirmed Morgan v. Alta Flights (*Charter*s) Inc., 2006 FCA 121** | The applicant complained that her employed attempted to collect her personal information by hiding a voice recorder underneath a coffee table in the break room, at para 4. Her manager “admitted she personally hid the recorder in the smoke room on the night in question with the intention of recording the conversations in that room of Ms. Morgan…” at para 5. | No damages awarded because no information had been collected, at para 22. *PIPEDA* does not apply to unsuccessful attempts to collect personal information, at para 20. |
| ***14. Englander v Telus Communications Inc*, 2004 FCA 387** | Applicant alleged that Telus failed to obtained valid consent to publish customers’ personal information in its directories and objected, *inter alia*, to a fee charged by Telus to customers to keep their phone number confidential, at para 2.  | Telus violated then section 5 of *PIPEDA* because it failed to advise first time customers “of the primary and secondary purposes for which the information was collected and of the availability of non-published number service” at para 89. The court would not award damages remedy however, because complainant had not “been personally aggrieved” at para 90 and had not personally incurred any charges. Applicant, who was self-represented, was awarded reasonable costs for being successful in part, at para 87. |

*Arcand v Abiwyn Co-Operative Inc*, 2010 FC 529 is not included in the Chart above because the *PIPEDA* damage claim was denied not on the merits but including on the basis that Applicant had signed a release, at para 63.

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3. *Chitrakar v Bell TV*, 2013 FC 1103 [*Chitrakar*]. See Appendix A for a recitation of the facts. According to the court, “Bell’s conduct in this matter is reprehensible in respect to Chitrakar’s privacy rights. Not only did Bell violate those rights, it has shown no interest in compensation or apparently any interest in addressing the CSR [customer service representative]’s actions nor in following the Privacy Commissioner’s remedial recommendations. Its failure to appear in this Court is consistent with its disregard of Chitrakar’s privacy rights” at para 18. That a corporation particularly of Bell’s size and resources would fail to even appear in court is hard to fathom. [↑](#footnote-ref-4)
4. It is beyond the scope of this article to discuss an alternative approach altogether, namely a statutory damages regime. Such regimes do exist, such as with respect to copyright, and although they assist the plaintiff since they do not require proof of damage, they rely on a regulatory mechanism which does not exist with respect to personal information. See *Copyright Act*, RSC, 1985, c C-42, s 38.1. [↑](#footnote-ref-5)
5. *Nammo v TransUnion of Canada Inc*, 2010 FC 1284 [*Nammo*]. [↑](#footnote-ref-6)
6. *Townsend v Sun Life Financial,* [2012 FC 550](https://www.canlii.org/en/ca/fct/doc/2012/2012fc550/2012fc550.html) at para 31 [*Townsend*], cited with approval in *Blum v Mortgage Architects Inc*, 2015 FC 323 at para 20 [*Blum*]. [↑](#footnote-ref-7)
7. *Nammo, supra* note 3, at paras 7 and 41. [↑](#footnote-ref-8)
8. *Ibid* at para 5. [↑](#footnote-ref-9)
9. *Ibid* at para 41. [↑](#footnote-ref-10)
10. *Ibid* at para 50. [↑](#footnote-ref-11)
11. *Ibid at para 71.* [↑](#footnote-ref-12)
12. *Ibid* at para 71. [↑](#footnote-ref-13)
13. *Vancouver (City) v Ward*, 2010 SCC 27 [*Ward*]. [↑](#footnote-ref-14)
14. Johannes Chan, "Vindicatory Damages for Violation of Constitutional Rights: A Comparative Approach" in Mark Elliott, Jason NE Varuhas & Shona Wilson Stark, eds, *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Oxford: Hart Publishing, 2018) 327 at 330. [↑](#footnote-ref-15)
15. For discussion of *Ward* as applying the functional approach to damages, see Justice Thomas Cromwell, “Money Remedies: Towards a Functional Approach” in *Remedies: From Dollars to Sense* (2010 Isaac Pitblado Lectures) (Winnipeg: Law Society of Manitoba, 2010) at I-21, discussed in Section II(A) of Part One of this article, published in 52 Adv Q 427 (2022), as well as WH Charles, *Understanding Charter Damages –the Evolution of a Charter Remedy* (Toronto: Irwin Law, 2016) at 84. [↑](#footnote-ref-16)
16. *Nammo, supra* note 3, at para 72. [↑](#footnote-ref-17)
17. Kent Roach, “A Promising Late Spring for *Charter* Damages: *Ward* v *Vancouver*” (2011) 29 NJCL 136 at 144. See also Chris Hunt, "Constitutional Damages in the Supreme Court of Canada" (2011) 7 Cambridge Student L Rev 115. [↑](#footnote-ref-18)
18. *Nammo, supra* note 3, at para 74. [↑](#footnote-ref-19)
19. As the SCC notes in *Ward*, *supra* note 11 at para 22: “An action for public law damages — including constitutional damages — lies against the state and not against individual actors.” [↑](#footnote-ref-20)
20. *Nammo, supra* note 3, at para 78, citing *Ward, supra* note 11, at para 27. [↑](#footnote-ref-21)
21. *Ward, ibid* at para 50. [↑](#footnote-ref-22)
22. *Mustapha v Culligan of Canada Ltd,* 2008 SCC 27 at para 8 [*Mustapha*]. [↑](#footnote-ref-23)
23. *Saadati v Moorhead*, 2017 SCC 28 at para 36 [*Saadati*]. [↑](#footnote-ref-24)
24. *Mustapha, supra* note 20, at para 9. See too *Saadati*, *ibid* at para 37:

None of this is to suggest that mental injury is always as readily demonstrable as physical injury. While allegations of injury to muscular tissue may sometimes pose challenges to triers of fact, many physical conditions such as lacerations and broken bones are objectively verifiable. Mental injury, however, will often not be as readily apparent. Further, and as *Mustapha* makes clear, mental *injury* is not proven by the existence of mere psychological *upset*. While, therefore, tort law protects persons from negligent interference with their mental health, there is no legally cognizable right to happiness. Claimants must, therefore, show much more — that the disturbance suffered by the claimant is “serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears” that come with living in civil society (*Mustapha*, at para. 9). To be clear, this does not denote distinct legal treatment of mental injury relative to physical injury; rather, it goes to the prior legal question of what constitutes “mental injury”. Ultimately, the claimant’s task in establishing a mental injury is to show the requisite degree of disturbance (although not, as the respondents say, to show its classification as a recognized psychiatric illness). [↑](#footnote-ref-25)
25. *Saadati, ibid* at para 37. [↑](#footnote-ref-26)
26. *Ward, supra* note 11, at para 27. [↑](#footnote-ref-27)
27. In other contexts, however, the Supreme Court of Canada in *Ward, ibid*, recognizes tort law as à propos in understanding *Charter* breaches. For example, in relation to concerns over the quantification of intangible loss, the court opined that “tort law is useful,” going on to state: “Pain and suffering are compensable. Absent exceptional circumstances, compensation is fixed at a fairly modest conventional rate, subject to variation for the degree of suffering in the particular case. In extreme cases of catastrophic injury, a higher but still conventionally determined award is given on the basis that it serves the functional purpose of providing substitute comforts and pleasures” at para 50. [↑](#footnote-ref-28)
28. Charles, *supra* note 13 at 84. For his part, Kent Roach observes that under *Ward*, the Supreme Court of Canada:

“defined the compensatory purposes of *Charter* damages very broadly to include ‘physical, psychological and pecuniary’ loss as well as harm to ‘intangible interests’ including ‘distress, humiliation, embarrassment and anxiety’ as well as ‘pain and suffering’. The court has explicitly ruled that it is an error to restrict damages to pecuniary losses and this holding effectively reverses many early *Charter* cases that implicitly or explicitly limited *Charter* damages in such a manner. The court’s approach is appropriate because the *Charter* is designed to protect many important non-pecuniary values including fairness, privacy, security of the person, liberty and equality.”

See Kent Roach, *Constitutional Remedies in Canada* 2nd ed (Toronto: Carswell, 2013) (binder/loose-leaf/electronic) at para 11.500. Roach goes on to observe how the Supreme Court in *Ward* called for non-pecuniary loss to see compensation even though difficult to measure and that compensation follow, in the court’s words, a ‘fairly modest conventional rate, subject to variation for the degree of suffering in the particular case.’ *Ibid.*  [↑](#footnote-ref-29)
29. See, however, discussion in Peter Krikor Adourian, “*Charter* Damages: Private Law in the Unique Public Law Remedy”, LLM Thesis, Osgoode Hall Law School of York University, Osgoode Digital Commons (2018) at 38, online: <<https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1031&context=llm>>. [↑](#footnote-ref-30)
30. *Nammo, supra* note 3, at para 72. [↑](#footnote-ref-31)
31. *Biron v RBC Royal Bank,* 2012 FC 1095 at para 3-6 [*Biron*]. [↑](#footnote-ref-32)
32. *Ibid* at para 40. [↑](#footnote-ref-33)
33. *Ibid* at para 43. [↑](#footnote-ref-34)
34. *Landry v Royal Bank of Canada,* 2011 FC 687. [↑](#footnote-ref-35)
35. *Ibid* at para 32. [↑](#footnote-ref-36)
36. 2018 FC 1155. [↑](#footnote-ref-37)
37. *Montalbo v Royal Bank of Canada*, 2018 FC 1155 at para 1-4 [*Montalbo*]. [↑](#footnote-ref-38)
38. *Ibid* at para 61. [↑](#footnote-ref-39)
39. *Ibid.* [↑](#footnote-ref-40)
40. *Ibid* at para 62. The court also helpfully summarized relevant case-law, including *Nammo,* as providing the following factors in assessing an award of damage and its quantum, stating, at para 60:

the Court may consider a number of non-exhaustive factors, including: (1) the seriousness of the breach; (2) the nature of the information at stake; (3) the impact of the breach on the Applicant; (4) the nature of the relationship between the parties; (5) the conduct of the Respondent before and after the breach; (6) whether the Applicant attempted to mitigate his or her loss; (7) whether the Respondent benefited from the breach; (8) whether the award of damages would further the objectives of the Act in ensuring that organizations are diligent in retaining as secure, personal information; and (9) whether the award of damages may be justified to deter future breaches.” [↑](#footnote-ref-41)
41. Stephen Waddams, Law of Damages (np: Carswell, 2020 e-loose-leaf service) at 10.10. [↑](#footnote-ref-42)
42. As the New Brunswick Court of Appeal observed in the context of defamation case: “Nominal damages serve to vindicate the plaintiff's rights even when no compensation is necessary.” See

*Langille v McGrath*, 2001 NBCA 106 at para 18, citing J Cassels, Remedies: The Law of Damages (Toronto: Irwin Law, 2000) at 281. [↑](#footnote-ref-43)
43. *Nammo, supra* note 3 at para 79. [↑](#footnote-ref-44)
44. See Barbara von Tigerstrom, *Information & Privacy Law in Canada* (Toronto: Irwin Law, 2020) at 391, citing *AT v Globe24H.com*,2017 FC 114*,* which, at para 99 cites *Nammo*, *supra* note 3. See too *Townsend* and *Chitrakar*. [↑](#footnote-ref-45)
45. *Ward, supra* note 11, at para 28. [↑](#footnote-ref-46)
46. *Ibid* at para 28. [↑](#footnote-ref-47)
47. Note that the court in *Miglialo v Royal Bank of Canada*, 2018 FC 525 [*Miglialo*]offers a further aspect to the idea of vindication in the context of an employee wrongfully accessing the applicant’s financial information. It does not lie in damages but in “the respondent’s acknowledgement of the breach, which resulted in appropriate disciplinary measures [of its employee] as well as the finding of the Privacy Commissioner that a violate of Principle 4.5 occurred” at para 52. See also David Rolph, “Vindicating Reputation and Privacy” in A Kenyon, (ed.) *Comparative Defamation and Privacy Law* (Cambridge: Cambridge University Press, 2016) 291 at 302: “Vindication involves ‘attesting to, affirming and reinforcing’ the importance and value of legal rights protected by tort law’.” [↑](#footnote-ref-48)
48. *Ward, supra* note 11 at para 54. [↑](#footnote-ref-49)
49. *Cote v Day & Ross Inc.*, 2015 FC 1283 at para 21 [*Cote*]. [↑](#footnote-ref-50)
50. Charles, *supra* note 13 at 85. [↑](#footnote-ref-51)
51. [SO 1992, c 6](https://www.canlii.org/en/on/laws/stat/so-1992-c-6/latest/so-1992-c-6.html). [↑](#footnote-ref-52)
52. *Emond v Google LLC*, 2021 ONSC 302 at para 33, citing *Whiten v Pilot Insurance Co*., [2002 SCC 18](https://www.canlii.org/en/ca/scc/doc/2002/2002scc18/2002scc18.html) at para [32](https://www.canlii.org/en/ca/scc/doc/2002/2002scc18/2002scc18.html#par32). [↑](#footnote-ref-53)
53. Jenny Steele, “‘Breach of Duty Causing Harm?’ Recent Encounters between Negligence and Risk”, (2007) 60 Curr Legal Probs 296 at 297. [↑](#footnote-ref-54)
54. Jane Stapleton, "Gist of Negligence *"* (1988) 104 LQR 213. [↑](#footnote-ref-55)
55. GHL Fridman, The Law of Torts in Canada, Vol 1 at 7 (Toronto: Carswell, 1989), quoted with approval in *Corlis v Blue Grass Sod Farms Ltd*, 2016 ABPC 55, at para 61. [↑](#footnote-ref-56)
56. Kirsty Horsey and Erica Rackley, *Tort Law* 6th ed (Oxford: Oxford University Press, 2019). [↑](#footnote-ref-57)
57. *Bank of Nova Scotia v Dunphy Leasing Enterprises Ltd*, 1991 ABCA 351 at para 60. [↑](#footnote-ref-58)
58. *Farrell v Canadian Broadcasting Corporation (1987)*, 1987 CanLII 3929 (NL CA) at para 52, quoting *St. Marylebone in Cassell v. Broome* [1972] AC 1027] at 1073. [↑](#footnote-ref-59)
59. *Holden v Hanlon*, 2019 BCSC 622 at para 289, citing *John v Kim,* 2007 BCSC 1224, at para 94. [↑](#footnote-ref-60)
60. Rolph, *supra* note 45 at 300-301, 306. [↑](#footnote-ref-61)
61. Marilyn Pilkington, “Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms”, (1984) 62 Can Bar Rev 517 at 569. We add that since actual damages are immaterial to such torts, compensation must follow regardless of whether actual damages have been sustained or whether they were difficult to quantify. [↑](#footnote-ref-62)
62. *Ibid* at 569: “it would be open to a Canadian court exercising its jurisdiction … to award a remedy for violation of a constitutional right *per se.*” For very helpful analysis of Pilkington’s work and the *Ward* case, see Katharine June Fisher, “Using *Charter* Damages to Provide Meaningful Redress and Promote State Accountability: A Re-examination of the Omar Khadr Case”, Osgoode Hall Law School of York University, Digital Commons Osgoode, Theses and Dissertations (2020), online: <<https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1041&context=llm>>. [↑](#footnote-ref-63)
63. Pilkington, *supra* note 59, at 570. [↑](#footnote-ref-64)
64. Fisher, *supra* note 60, at 18. [↑](#footnote-ref-65)
65. *Ward, supra* note 11, at para 30. [↑](#footnote-ref-66)
66. *Ibid* at para 71. [↑](#footnote-ref-67)
67. *Ibid* at para 4. [↑](#footnote-ref-68)
68. It further aligns with the doctrine that breaches of regular statutes are not actionable *per se*, in that they must result in actual damages. See *AI Enterprises Ltd v Bram Enterprises Ltd*, 2014 SCC 12 at para 74 as well as *Low v Pfizer Canada Inc*, 2015 BCCA 506 at para 87. [↑](#footnote-ref-69)
69. *Ward*, *supra* note 11, at para 64. [↑](#footnote-ref-70)
70. *Ibid* at para 72. [↑](#footnote-ref-71)
71. *Ibid* at para 77. [↑](#footnote-ref-72)
72. Roach, *supra* note 15 at 137. [↑](#footnote-ref-73)
73. *Ward*, *supra* note 11, at para 4. [↑](#footnote-ref-74)
74. *Girao v Zarek Taylor Grossman Hanrahan* LLP, 2011 FC 1070 [*Girao*]. [↑](#footnote-ref-75)
75. *Ibid* at para 1. [↑](#footnote-ref-76)
76. *Ibid* at para 55. [↑](#footnote-ref-77)
77. *Ibid.*  [↑](#footnote-ref-78)
78. *Ibid at* para 61. [↑](#footnote-ref-79)
79. *Ibid.* [↑](#footnote-ref-80)
80. *Cote, supra* note 47 [↑](#footnote-ref-81)
81. *Ibid* at para 25. [↑](#footnote-ref-82)
82. *Ibid* at para 21. [↑](#footnote-ref-83)
83. Pilkington, *supra* note 59, at 569. [↑](#footnote-ref-84)
84. *Douez v Facebook Inc*, 2017 SCC 33 at para 61 [*Douez*]. [↑](#footnote-ref-85)
85. Note also our discussion in Section I(C) of Part One, published in 52 Adv Q 427 (2022), of *Kugler v Newman*, 2017 ABQB 536 [*Kugler*], which case indicates, albeit in *obiter* and with no analysis, that *per se* damages are available under the provincial *PIPAs* as well. [↑](#footnote-ref-86)
86. Waddams, *supra* note 39 at para 10.50 [↑](#footnote-ref-87)
87. *Ibid.* [↑](#footnote-ref-88)
88. Klar et al, *Remedies in Tort*, (Toronto: Carswell, 1987 online) at para 30.3. [↑](#footnote-ref-89)
89. *Ibid at para 30:3.* [↑](#footnote-ref-90)
90. 2020 BCSC 1781, at para 179. [↑](#footnote-ref-91)
91. Charles, *supra* note 13 at 30 and 32. [↑](#footnote-ref-92)
92. *Ibid* at 94. See too the discussion in Adourian, *supra* note 27 at 38. [↑](#footnote-ref-93)
93. *Nammo*, *supra* note 3, at para 71. [↑](#footnote-ref-94)
94. *Ibid* at para 68. [↑](#footnote-ref-95)
95. *Jones v Tsige*, 2012 ONCA 32 at para 4 [*Tsige*]. [↑](#footnote-ref-96)
96. Nancy Levit, “Ethereal Torts” (1992) 61 Geo Wash L Rev 136. Citing SFC Milsom, *Historical Foundations of the Common Law* (2nd ed 1981), she observes that, historically, tort law “compensated only direct and tangible injuries to persons or property” at 140. [↑](#footnote-ref-97)
97. Omri Ben-Shahar and Ariel Porat, "The Restoration Remedy in Private Law" (2018) 118:6 Colum L Rev 1901 at 1913. [↑](#footnote-ref-98)
98. *Ward, supra* note 11, at para 50. [↑](#footnote-ref-99)
99. *Ibid* at para 71. [↑](#footnote-ref-100)
100. *Ibid* at para 77. [↑](#footnote-ref-101)
101. *Nammo,* supra note 3, at para 79. [↑](#footnote-ref-102)
102. *Ward, supra* note 11, at para 7. [↑](#footnote-ref-103)
103. *Ibid* at para 7-8. [↑](#footnote-ref-104)
104. *Ibid* at para 9. [↑](#footnote-ref-105)
105. *Ibid* at para 2. [↑](#footnote-ref-106)
106. *Nammo, supra* note 3, at para 71. [↑](#footnote-ref-107)
107. *Ibid* at para 81. [↑](#footnote-ref-108)
108. J Berryman, “Breach of Privacy in Canada” in Jason N E Varuhas and N A Moreham, eds, *Remedies for Breach of Privacy* (London: Hart, 2018), 323 at 327. [↑](#footnote-ref-109)
109. *Supra* note 72. [↑](#footnote-ref-110)
110. *Randall v Nubody’s Fitness Centres*, 2010 FC 681 at para 6 [*Randall*]. [↑](#footnote-ref-111)
111. *Ibid* at para 36. [↑](#footnote-ref-112)
112. *Ibid* at para 18. [↑](#footnote-ref-113)
113. *Ibid* at para 36. [↑](#footnote-ref-114)
114. *Ibid* at para 46-47. Note that *PIPEDA’s* s 16 (a) and (b) first provide the remedies of the court ordering organizations to correct their practices and to publicize such corrections. The remedy of damages appears only in s 16 (c), suggesting an (unintended?) hierarchy of remedies that *Randall* and cases that followed it adopted as yet another reason to lower or limit damages. [↑](#footnote-ref-115)
115. *Ibid a*t para 55. [↑](#footnote-ref-116)
116. *Ibid* at para 55. [↑](#footnote-ref-117)
117. *Ibid* at para 56. [↑](#footnote-ref-118)
118. *Ibid* at para 55. [↑](#footnote-ref-119)
119. *Ibid* at para 56. [↑](#footnote-ref-120)
120. *Ibid* at para 49. [↑](#footnote-ref-121)
121. Cory J in *Hill v Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 SCR 1130 at para 196 [*Hill*], states that punitive damages are “the means by which the jury or judge expresses its outrage at the **egregious** conduct” [emphasis added]. [↑](#footnote-ref-122)
122. *Chitrakar*, *supra* note 1, at para 24. [↑](#footnote-ref-123)
123. *Poirier v Wal-Mart Canada,* 2006 BCSC 1138 [*Poirier*]. [↑](#footnote-ref-124)
124. *Ibid* at para 11. [↑](#footnote-ref-125)
125. *Ibid* at para 104. [↑](#footnote-ref-126)
126. *Ibid* at para 95. [↑](#footnote-ref-127)
127. *Ward, supra* note 11, at para 52. [↑](#footnote-ref-128)
128. Though it is beyond the scope of this article to discuss, note that s 106(2) also provides a personal cause of action as follows:

If an organization has been convicted of an offence under section 125, an individual affected by the act or omission that gave rise to the offence has a cause of action against the organization for damages for loss or injury that the individual has suffered as a result of the act or omission. [↑](#footnote-ref-129)
129. See *supra* Section I(A)(1). [↑](#footnote-ref-130)
130. As Kirsten Thompson et al observe, *CPPA* provided no guidance “on the type or quantum of damages that an individual may seek from an organization for a breach of the CPPA…” See *Dentons Data CPPA In-Depth Guide*, 2021 at 41, online: [https://www.dentons.com/en/insights/guides-reports-and-whitepapers/2021/january/28/dentons-*CPPA*-in-depth-guide-a-detailed-review-of-key-provisions-in-canadas-proposed-new-privacy-law?utm\_source=email&utm\_medium=email&utm\_campaign=vuture](https://www.dentons.com/en/insights/guides-reports-and-whitepapers/2021/january/28/dentons-cppa-in-depth-guide-a-detailed-review-of-key-provisions-in-canadas-proposed-new-privacy-law?utm_source=email&utm_medium=email&utm_campaign=vuture) [↑](#footnote-ref-131)
131. Although we did not discuss Quebec’s legislation in this article, we should note that in 2021 Quebec passed *An Act to modernize legislative provisions as regards the protection of personal information.* The Act amended Quebec’s existing legislation, and in particular, created a new right of action. A new s. 93.1 was created to provide as follows: “Where the unlawful infringement of a right conferred by this Act or by articles 35 to 40 of the Civil Code causes an injury and the infringement is intentional or results from a gross fault, the court shall award punitive damages of not less than $1,000." While the Act does not define ‘injury’ it would seem that nonpecuniary losses would be covered, especially since both the Act and the relevant articles of the Civil Code refer to privacy and reputation together. Note that the damages are punitive. See Bill 64, An Act to modernize legislative provisions as regards the protection of personal information, 1st Sess., 42nd Leg., 2020. Online: <http://m.assnat.qc.ca/en/travauxparlementaires/projets-loi/projet-loi-64-42-1.html>. [↑](#footnote-ref-132)
132. See Thomson et al, *supra* note 128 at 41, who observe that the meaning of ‘loss or injury’ under CPPA “[was] a topic of much debate.” But note too our discussion, in Part One, Section I(C), published in 52 Adv Q 427 (2022), regarding the meaning of 'loss or injury' according to the case law. [↑](#footnote-ref-133)
133. See discussion, *supra*, Section I(B). [↑](#footnote-ref-134)
134. *Supra* note 82. [↑](#footnote-ref-135)
135. Cromwell, *supra* note 13 at I-26. [↑](#footnote-ref-136)
136. *Ibid* I-17. [↑](#footnote-ref-137)
137. *Ibid* at I-20. [↑](#footnote-ref-138)
138. *Somwar v McDonald’s Restaurants of Canada Ltd*, 2006 CanLII 202 (ON SC); 2006 79 OR (3d) 172 at para 27. [↑](#footnote-ref-139)
139. *Nammo,* supra note 3,at para 74 [↑](#footnote-ref-140)
140. *Miglialo, supra note* 45, at para 48. [↑](#footnote-ref-141)
141. *Ward, supra* note 11, at para 25. [↑](#footnote-ref-142)