ARTICLE

USING SECTION 24(1) *CHARTER* DAMAGES TO REMEDY RACIAL DISCRIMINATION IN THE CRIMINAL JUSTICE SYSTEM

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INTRODUCTION

Systemic racism is present in our criminal justice system and it has wide-reaching harmful impacts.[1] The consequences of racial discrimination are severe and can include physical and psychological harm, isolation, alienation, mistrust, behavioural adaptations, damage to family and social networks, and the over-incarceration of racial minorities.[2]

Many approaches are required to address and correct the issue of systemic racial discrimination.[3] Potential approaches to meaningful change include: cultural competency training relating to unconscious bias, implementing monitoring systems, providing more resourcing to *Gladue* workers, increasing funding for specialized courts, and appointing more racially- and culturally-diverse judges. Without detracting from the importance of these initiatives and others, this paper explores the use of damage awards pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*[4] as an avenue of relief for individuals harmed by racial discrimination who cannot access other remedies available in the criminal trial process or tort law.

The paper addresses this topic in five parts. Part I introduces the systemic and historical nature of racial discrimination. Part II discusses the nature of section 24(1) *Charter* damages and why they may provide an appropriate remedy for *Charter* violations caused by racial discrimination in the criminal justice system. While not a perfect or complete remedy, *Charter* damages can provide relief to individuals who face discrimination and can "clarify the law so as to prevent similar future breaches."[5] Part III canvasses the seminal decision on section 24(1) damages: *Vancouver (City) v Ward*.[6] Part IV covers the recent decision in *Henry v British Columbia (AG)*[7] and remarks on how it impacted the test for *Charter* damages, with comments on *Ernst v Alberta Energy Regulator*.[8] Part V considers how to approach a claim for *Charter* damages resulting from racial discrimination.

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1 David M. Tanovich, "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008) 40:2 Sup Ct Rev 656 at 661 [Tanovich, "Charter of Whiteness"].

2 *Ibid.*

3 Ranjan Agarwal & Joseph Marcus, "Where There is no Remedy, There is No Right: Using *Charter* Damages to Compensate Victims of Racial Profiling" (2015) 34:1 NJCL 75 at 79 [Agarwal & Marcus].

4 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11, section 24(1) [*Charter*].

5 *Ernst v Alberta Energy Regulator*, 2017 SCC 1 at para 30, Cromwell J [*Ernst*].

6 *Vancouver (City) v Ward*, 2010 SCC 27 [*Ward*].

7 *Henry v British Columbia (Attorney General)*, 2015 SCC 24 [*Henry*].

8 *Ernst, supra* note 5.

I. RACIAL DISCRIMINATION: A REAL ISSUE THAT NEEDS TO BE REMEDIED

A. The Nature of Racial Discrimination

There is a significant body of evidence illustrating the existence of racial discrimination and racial profiling in Canada.[9] The Ontario Court of Appeal (ONCA) in *R v Brown* accepted the definition of racial profiling as involving "the targeting of individual members of a particular racial group, on the basis of the supposed criminal propensity of the entire group…[where] race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group."[10] In *Brown*, Justice Morden for a unanimous Court of Appeal found that social science evidence clearly established racial profiling exists and went on to explain that "[t]he attitude underlying racial profiling is one that may be consciously or unconsciously held." For example, a police officer "need not be an overt racist" for his or her conduct to be "based on subconscious racial stereotyping."[11]

Justice Doherty of the ONCA stated in *Peart v Peel (Regional Municipality) Police Services Board* that racial discrimination is "offensive to fundamental concepts of equality and the human dignity of those who are subject to negative stereotyping."[12] The Court noted that both courts and the community at large have come to recognize that racial profiling is a daily reality for many minorities and that racism continues to operate in our criminal justice system.[13]

The Supreme Court of Canada (SCC) explicitly acknowledges the existence of systemic discrimination against Aboriginal peoples in Canada.[14] In *R v Gladue*, the SCC accepted findings in the Report of the Royal Commission on Aboriginal Peoples and the Aboriginal Justice Inquiry of Manitoba regarding widespread discrimination.[15] In *R v Williams*, the Court found there is "widespread bias against Aboriginal people" and "there is evidence that this widespread racism has translated into systemic discrimination in the criminal system."[16]

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9 Agarwal & Marcus, *supra* note 3 at 78; *R v Brown*, 2003 CanLII 52142 (ONCA) [*Brown*]. In his article on the Marshall Inquiry, Bruce Marshall discusses the definition of racism and distinguishes between individual, institutional, and structural racism. He also suggests that racism should be effect-oriented rather than entailing a certain intention or belief – I agree with this explanation. See generally Bruce H Wildsmith, "Getting at Racism: The Marshall Inquiry" (1991) 55 Sask L Rev 97 at 104-105 [Wildsmith].

10 *Brown, supra* note 9 at para 7; *Brown* was recently referenced in *R v Ohenhen*, 2016 ONSC 5782, a case that could be a strong basis for a *Charter* damages claim.

11 *Brown, supra* note 9 paras 7-8.

12 *Peart v Peel (Regional Municipality) Police Services Board,* 2006 CanLII 37566 (ONCA) at para 93 [*Peart*]; David M. Tanovich, "Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention" (2002) 40:2 Osgoode Hall LJ 146 at 147 [Tanovich, "Using the Charter"].

13 *Peart, supra* note 12 at para 94.

14 *R v Gladue* 1999 CanLII 679 (SCC) [*Gladue*]; *R v Ipeelee* 2012 SCC 13 [*Ipellee*]; *R v Kokopenace*, 2015 SCC 28 [*Kokopenace*].

15 *Kokopenace*, *supra* note 14 at para 283, McLachlin CJ, dissenting; Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: The Commission, 1996) [RCAP Report]; Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People,* vol 1, *The Deaths of Helen Betty Osborne and John Joseph Harper* vol 2, (The Aboriginal Justice Implementation Commission, 1991) online: <http://www.ajic.mb.ca/volume.html> archived at <https://perma.cc/2RBM-NF2R> [Justice Inquiry of Manitoba].

16 *Kokopenace*, *supra* note 14 at para 283, McLachlin CJC, dissenting; *R v Williams*, 1998 CanLII 782 (SCC).

B. The Extent of the Problem

Historical reports, Royal Commissions, and inquiries reflect on the nature of systemic racial discrimination and its impact on criminal investigations.[17] Although some of these documented cases occurred over thirty years ago, the principles and conclusions drawn from them remain relevant today. Recent statistical findings and case law further corroborate the conclusions of these reports. The case of Donald Marshall is an example of racial discrimination as a real and complex issue that demands remedial action in Canada.

i. The Royal Commission on the Donald Marshall Jr. Prosecution

R v Marshall presented explicit facts that raised issues of racism and discrimination: Mr. Marshall, an Aboriginal youth, was charged with murdering a black youth. He was investigated, tried and wrongly convicted by white criminal justice participants.[18] While the Commission stated the outcome was not the result of "any evil intention to discriminate by those in the criminal justice system,"[19] the unintended nature of discrimination does not make its impact any less insidious or devastating.[20]

The police, Crown prosecutors, defence counsel, courts and the Department of the Attorney General all contributed to the wrongful conviction of Donald Marshall in 1971.[21] The Royal Commission concluded "[t]he criminal justice system failed Donald Marshall, Jr. at virtually every turn."[22] The Commission also found that "[o]ne reason Donald Marshall, Jr. was convicted of and spent 11 years in jail for a murder he did not commit is because Marshall is an Indian."[23]

This Commission Report suggests racial discrimination causes increased public perceptions of unfairness and erosion of confidence in our justice system. Notions of unfairness can cause distrust to spread through the community "with debilitating and corrosive effects within…the system."[24] Loss of confidence can present on a spectrum, from simply questioning the system to complete loss of confidence in the system's integrity.[25] Restoring this confidence "can only be accomplished through the unwavering and visible application of the principles of absolute fairness and independence."[26]

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17 RCAP Report, *supra* note 15; Justice Inquiry of Manitoba *supra* note 15; Nova Scotia, *Findings and Recommendations of the Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: The Royal Commission, 1989) [Donald Marshall Commission]; Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto, 1995); Saskatchewan, *Report of the Commission of Inquiry into Matters Relating to the Death of Neil Stonechild* (Regina: 2004), Independent Review by the Honourable Frank Iacobucci, *First Nations Representation on Ontario Juries* (2013).

18 Donald Marshall Commission, *supra* note 17, vol 1 at 149; see also Wildsmith, *supra* note 9 at 16, where Bruce Wildsmith notes that more could have been done to "get at racism and access its role," including looking for structural racism in the justice system.

19 Donald Marshall Commission, *supra* note 17, vol 1 at 151.

20 *Ibid*.

21 Donald Marshall Commission *supra* note 17, vol 1 at 193.

22 *Ibid* at 15. See also Wildsmith, *supra* note 9 at 112-113 for a critique on the analysis presented in the report, and how it could have found more direct evidence of racism.

23 Donald Marshall Commission, *supra* note 17, vol 1 at 148.

24 *Ibid* at 228.

25 See generally *ibid* at 228-229.

26 *Ibid* at 194.

ii. Recent Manifestations and *Charter* Violations

The Office of the Correctional Investigator has compiled statistics and reports relating to the over-incarceration of Aboriginal people in Canada, indicating the issue of racial discrimination is getting worse over time.[27] In *R v Ipeelee,* the SCC found, "statistics indicate that the overrepresentation and alienation of Aboriginal peoples in the criminal justice system has only worsened." Indeed, "overrepresentation of Aboriginal people in the criminal justice system is worse than ever."[28] In January 2016, the office reported that 25% of federal inmates are Indigenous, and 35% of incarcerated women are Indigenous.[29]

> To put these numbers in perspective, between 2005 and 2015 the federal inmate population grew by 10%. Over this same period, the Aboriginal inmate population increased by more than 50% while the number of Aboriginal women inmates almost doubled. Given that 4.3% of Canada's population is comprised of Indigenous Peoples, the Office estimates that, as a group, they are incarcerated at a rate that is several times higher than their national representation.[30]

The racial profiling of Indigenous peoples and other racial minorities is an ever-growing problem in Canada. One survey found:

> Indigenous students will be stopped more frequently, the study indicates; whether or not they were engaged in or close to an illegal activity when stopped by police had little influence in explaining the results. This suggests staying out of trouble does not shield Indigenous student [sic] from unwanted police attention.[31]

There are many stories and documented incidents evidencing the high level of racial discrimination against racialized individuals in Ontario.[32] In October 2016, the Ottawa Police Service released a report summarizing data collected between 2013 and 2015 on the race of drivers stopped at traffic stops. The report indicates racial groups observed as "Middle Easterner" or "Black" are stopped in a disproportionately high number.[33] Further, racialized minority drivers experienced disproportionately high incidences of no action outcomes at the traffic stops.[34]

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27 Laura Stone, "Prison Watchdog encouraged by Ottawa's aboriginal pledge", *The Globe and Mail* (28 March 2016) online: <http://www.theglobeandmail.com/news/politics/prison-watchdog-encouraged-by-ottawas-aboriginal-pledge/article29412979/> archived at <https://perma.cc/46X3-6KAF>; Office of the Correctional Investigator, online: <http://www.oci-bec.gc.ca/index-eng.aspx>archived at <https://perma.cc/S6X8-L3HQ>.

28 *Ipeelee, supra* note 14 at para 62.

29 The Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2015-2016*, ch 4 (Ottawa: Correctional Investigator Howard Sapers, 2016) at 43.

30 *Ibid.*

31 Nancy MacDonald, "Canada's prisons are the 'new residential schools'" *Maclean's* (18 February 2016), online: <http://www.macleans.ca/news/canada/canadas-prisons-are-the-new-residential-schools/> archived at <https://perma.cc/R6LQ-GS7K>. McClean's surveyed more than 850 post-secondary students in Regina, Saskatoon and Winnipeg.

32 Leo Russomanno, "Carding, not just a Toronto Problem" (8 June 2015), online: <http://www.agpllp.ca/carding-not-just-a-toronto-problem> archived at <https://perma.cc/7EC4-RLTL>; Desmond Cole, "The Skin I'm In: I've been interrogated by police more than 50 times—all because I'm black" *Toronto Life* (21 April 2015), online: <http://torontolife.com/city/life/skin-im-ive-interrogated-police-50-times-im-black/> archived at <https://perma.cc/H4P6-FTBL>.

33 Ottawa Police Services Board & Ottawa Police Service, *Race Data and Traffic Stops in Ottawa, 2013-2015: A Report on Ottawa and the Police Districts*, executive summary (Ottawa, October 2016) at 3, online: <https://www.ottawapolice.ca/en/about-us/resources/.TSRDCP_York_Research_Report.pdf> archived at <https://perma.cc/F5WL-JXWC>.

34 *Ibid* at 5.

These examples of racial discrimination, among others, can and do offend the *Charter*. Police may make assumptions about the relationship between race and crime, creating suspicion about a person in their mind.[35] These assumptions may be motivated by conscious or unconscious bias, and can quickly escalate into an arrest and detention. Racial profiling often occurs under the guise of the police power to detain citizens for investigative purposes.[36] For example, evasive action may look suspicious, but in reality such action could stem from the suspect's numerous interactions with law enforcement and a desire to avoid all further contact with police.[37] Some officers may target individuals of a certain race because they believe it is a reliable investigative tool, even though racial profiling is neither an effective nor reliable way to investigate crime.[38]

If racial profiling motivates a detention or search, the detention is arbitrary and the search is unreasonable. These incidents violate sections 8 and 9 of the *Charter*.[39] In addition, if an individual becomes a suspect because of unconscious discrimination and tunnel vision, sections 7 and 11(d) violations could result. If left unremedied, these violations can lead to systemic distrust of the justice system,[40] and those who experience *Charter* violations may assume their rights are worth less than the rights of others.

II. "A RIGHT, NO MATTER HOW EXPANSIVE IN THEORY, IS ONLY AS MEANINGFUL AS THE REMEDY PROVIDED FOR ITS BREACH."[41]

A. *Charter* Damages: What Are They and Can They Remedy Harms?

Arguments on the exclusion of evidence under section 24(2) of the *Charter* are available during criminal trials where *Charter* violations resulted in the discovery of evidence. Additionally, a court may order a stay pursuant to section 24(1) when an individual is prosecuted solely on the basis of racial discrimination.[42] However, remedies are rarely granted where an individual is stopped on the street, searched, harassed, arrested, or tried on the basis of racial discrimination.[43] Factually innocent victims of racial discrimination rarely find relief through tort law and "alternative judicial and administrative remedies remain largely inadequate."[44] Often, those who experience *Charter* violations flowing from racial discrimination and who are factually innocent have "both the greatest grievance and the smallest chance of having that grievance remedied."[45]

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35 Tanovich, "Using the Charter", *supra* note 12 at 149-150.

36 For a further and more detailed discussion of investigative detention and its impacts on racial minorities, see Tanovich, "Using the Charter", *supra* note 12; Tanovich, "Charter of Whiteness", *supra* note 1; Agarwal & Marcus, *supra* note 3 at 89-90.

37 Tanovich, "Using the Charter", *supra* note 12 at 150.

38 *Ibid* at 158, 164.

39 Agarwal & Marcus, *supra* note 3 at 80, 88-89.

40 *Ward, supra* note 6 at para 28.

41 *R v 974649 Ontario Inc*, 2001 SCC 575 at para 20.

42 Kent Roach, "Remedies for Discriminatory Profiling" in Robert J Sharpe & Kent Roach eds, *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2010) at 403 [Roach, "Remedies for Discriminatory Profiling"]; *R v Regan*, [2002] 1 SCR 297; however, stays are an extreme remedy and are usually reserved for only the clearest of cases.

43 Roach, "Remedies for Discriminatory Profiling", *supra* note 42 at 403.

44 It will often be difficult to claim malicious prosecution or negligent investigation in cases of racial discrimination, and there is no distinct tort for racial profiling or discrimination in Canada. Further, human rights tribunals are generally subject to caps, legislative or otherwise, or result in inconsistent awards: Agarwal & Marcus, *supra* note 3 at 77, 81-84.

45 Agarwal & Marcus, *supra* note 3 at 80.

Chief Justice McLachlin and Justice Cromwell, dissenting in *R v Kokopenace*, indicated the state has a responsibility to make reasonable efforts to address systemic problems.[46] They noted that the phrase "systemic problems" was a euphemism for "among other things, racial discrimination and Aboriginal alienation from the justice system."[47] The dissent also found that while there are many "deeply seated causes" contributing to the under-representation of Aboriginal people on juries and the overrepresentation of Aboriginal people in the correctional system, "the *Charter* provides a basis for action, not an excuse for turning a blind eye."[48]

The *Charter* does provide a basis for action, in part through the award of damages pursuant to section 24(1). Rather than turning a blind eye, counsel and the judiciary can purposively use section 24(1) to remedy proven constitutional wrongs caused by deeply-entrenched racial discrimination in the criminal justice system.[49] The SCC has insisted "the large and purposive construction attaching to the conceptual definition of *Charter* rights must be mirrored by a large and generous approach to *Charter* remedies."[50] Courts have broad and largely unfettered discretion under section 24(1) to award damages for *Charter* breaches where "appropriate and just" to "provide a meaningful response to rights violations."[51] In *Ward*, the SCC confirmed the approach to awarding *Charter* damages should not be "cut down" by appellate courts so that all relevant considerations in any given case can be factored into the remedial analysis.[52]

Charter damages can provide financial relief to victims of racial discrimination, where the discrimination results in *Charter* violations. Litigation in this area can also provide an opportunity for the state to understand its responsibility to address the individualized consequences of systemic problems. Fully considering the breach at issue and its consequences also furthers the development of remedial and constitutional law.[53]

Although racial discrimination is an intersectional and complicated issue,[54] *Charter* damages are an appropriate remedy. They strike a balance between constitutional rights and effective government: "two important pillars of our democracy."[55] *Charter* damages can provide tangible monetary compensation to those who are thrust into the criminal

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46 *Kokopenace*, *supra* note 14 at para 281. Note that this was in the context of jury representation, but I think it is applicable to the context of racial discrimination as well.

47 *Ibid* at para 282, Cromwell J and McLachlin CJC, dissenting.

48 *Ibid* at para 285, Cromwell J and McLachlin CJC, dissenting.

49 See Generally Agarwal & Marcus, *supra* note 3. *Charter* litigation to date has not been very successful in remedying racial injustice in Canada, particularly in the criminal justice process. Professor Tanovich suggests that, "[n]arrow approaches to judicial review and a lack of judicial imagination have played a role in limiting the impact of Charter litigation" on this issue. Race is not often successfully raised in *Charter* cases, perhaps because some counsel do not see the issue, are uncomfortable engaging with it, or are unsure how to argue racial profiling in a *Charter* case. However, creative and evidence-based arguments by counsel, paired with the judiciary's willingness to hand down imaginative remedial judgments can expand the availability of section 24(1) damages to remedy victims of discrimination: Tanovich, "Charter of Whiteness" *supra* note 1 at 662, 674, 676.

50 Beverly McLachlin, "Rights and Remedies – Remarks" in Robert J Sharpe & Kent Roach eds, *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2010).

51 *Ward*, *supra* note 6 at para 16; *Henry, supra* note 7 at para 35; *R v Mills*, [1986] 1 SCR 28 at p 965 [*Mills*].

52 *Ward, supra* note 6 at para 18; *Henry, supra* note 7 at para 106, McLachlin CJC, dissenting.

53 For a further discussion on parliamentary sovereignty and damage awards, I can direct the reader to Raj Anand, "Damages for Unconstitutional Actions: A Rule in Search of a Rationale" (2010) 27 NJCL 159 at 167 [Anand] and Marilyn L Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984) 62 Can Bar Rev 517 at 540 [Pilkington].

54 Peter Schuck, *Suing Government* (New Haven: Yale University Press, 1983) at 3 [*Schuck*]: conduct that violates the constitutional rights of individuals is not *one* problem but rather a web of issues.

55 *Ernst, supra* note 5 at para 25; *Mackin v New Brunswick,* 2002 SCC 13, para 79 [*Mackin*].

justice system on the basis of their race. These cases can also clarify the law relating to *Charter* breaches—assisting to prevent future *Charter* rights infringements.[56] *Charter* damages in this context have the potential to address the larger systemic issues of racial discrimination.

B. *Charter* Damages are not a Panacea

While *Charter* damages should be used to address *Charter* violations resulting from racial discrimination, it is important to be mindful of existing theoretical, procedural, and jurisdictional bars to claiming them.[57] Constitutional rights violations do not create "automatic or unlimited" remedies, particularly remedies such as *Charter* damages awards.[58] A claimant must "often traverse broad domains of official and governmental immunity"[59] before attaining damages grounded in compensation, vindication, or deterrence—the settled purposes for awarding *Charter* damages. Whether *Charter* damages can adequately address a systemic problem remains to be seen. Marilyn Pilkington (in the early days of the *Charter*) wrote, "if inadequate funding is at the root of the problem, diverting funds to pay damage awards may only exacerbate [the root of the problem]."[60] However, limiting the availability of *Charter* damage awards requires a principled and well-reasoned approach that appreciates the experience of the victim. The fact that a particular damage award does not fix the systemic issue, or does not provide deterrence on its own, is not a reason to deny a remedy to someone whose rights were infringed.[61]

Procedurally, section 24(1) invites individuals to apply to "a court of competent jurisdiction" to obtain a remedy. In *Ward*, the SCC confirmed that a court of competent jurisdiction must have the power to consider *Charter* questions and have inherent or statutory jurisdiction to award damages.[62] But while individuals must commence their *Charter* damages claims in a provincial superior court,[63] even superior courts have been reluctant to award damages in the midst of a criminal trial because of the fundamental differences between criminal and civil trials.[64]

An individual prosecuted in a superior court has recourse to damages within one proceeding, whereas an individual prosecuted in a provincial court does not. This is a serious limitation because most criminal cases are dealt with in provincial court. While it is possible for a provincial superior court to rely on its inherent jurisdiction to award

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56 *Ernst*, *supra* note 5 at paras 30, 36, Cromwell J.

57 Agarwal & Marcus, *supra* note 3 at 77.

58 *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 292.

59 *Ibid*.

60 Pilkington, *supra* note 53 at 562.

61 *Ibid*.

62 Kent Roach, *Constitutional Remedies in Canada*, loose-leaf (consulted last on 9 March 2016), (Aurora: Canada Law Book), ch 11 at 7 [Roach loose-leaf]; *Ward SCC*, *supra* note 6 at para 58; *R v Conway*, 2010 SCC 22.

63 *Tucker v* Canada, 201 FCT 157 (CanLII) at para 10; Whaling *v Canada (Attorney General)*, 2017 FC 121 [*Whaling*] is a recent example of a claim in the Federal Court; Roach loose-leaf, *supra* note 62, ch 11 at 7. However, there has been movement on the issue of provincial court jurisdiction. In 2011, the Saskatchewan Provincial Court found its enabling statute allowed it to award damages under section 24(1): *R v Wetzell* 2011 SKPC 9. On appeal, the Court of Appeal found the SKPC did not have jurisdiction to award *Charter* damages because this was a criminal proceeding, and because neither party had raised the damages issue: 2013 SKCA 143. It remains to be decided whether in the civil context, the SKPC has jurisdiction to award *Charter* damages.

64 *Mills*, *supra* note 51; *R v Pang*, (1994) 95 CCC (3d) 60; Roach loose-leaf, *supra* note 62, ch 11 at 8.

damages under 24(1), where appropriate,[65] the only recourse for those prosecuted in provincial court is a separate proceeding in superior court. This can be costly, time-consuming, and likely requires the expensive assistance of counsel. Legislative amendments could allow superior courts *or* provincial courts to award *Charter* damages during criminal proceedings when a stay is too extreme a remedy, and the exclusion of evidence is inapplicable.[66]

III. *WARD* AND THE TEST FOR *CHARTER* DAMAGES

A. Introduction: *Ward* through the Courts

Mr. Ward brought a claim against the City of Vancouver, the Province of British Columbia, and individual officers in tort and *Charter* damages for unlawful arrest, search, and detention.[67] All levels of court agreed the Defendants violated Mr. Ward's sections 7, 8, and 9 *Charter* rights through the wrongful imprisonment, strip-search, and seizure of his vehicle.[68] The British Columbia Supreme Court (BCSC) awarded $5000 in damages against British Columbia for the section 8 violation, $5000 against the City for the detention, and $100 against the City for the unreasonable car seizure.[69] All parties appealed to the British Columbia Court of Appeal (BCCA) and the City appealed to the SCC regarding the $5100.[70]

The SCC upheld the BCCA's decision in part. The Court upheld the contested $5000 against British Columbia for the strip search, but set aside the $100 award for the car seizure against Vancouver.[71] Ultimately, Mr. Ward received $10,000 in *Charter* damages and the decision clarified the legal test for damages pursuant to section 24(1) of the *Charter*. This case provided much needed structure to the confused jurisprudential history of *Charter* damages.

B. The *Ward* Test

In *Ward,* the SCC confirmed that competent courts are empowered to grant *Charter* damages pursuant to section 24(1) as a public law remedy against the state, through a functional approach. Broadly, the functional approach determines whether damages are "appropriate and just" in the circumstances.[72] More specifically, the claimant must first establish a *Charter* breach. Second, the claimant must establish that damages are appropriate, just, and fulfill with the purposes of *Charter* damages: compensation,

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65 Roach loose-leaf, *supra* note 62, ch 11 at 9-10. For example, in *R v McGillivary,* 1990 CanLII 2344 (NB CA), the New Brunswick Court of Appeal recognized the possibility of inherent jurisdiction to award damages but preferred that it be addressed in a separate proceeding.

66 Roach loose-leaf, *supra* note 62, ch 11 at 12.

67 On August 1, 2002, members of the Vancouver Police Department (VPD) mistakenly thought Mr. Cameron Ward intended to throw a pie at Jean Chrétien. VPD officers arrested and detained Mr. Ward, and impounded his car. At the police lock-up, corrections officers strip-searched him. The officers did not find any pies and determined they had no grounds to charge Mr. Ward with anything. Mr. Ward spent time in a cell before being released 4.5 hours later.

68 *Ward v City of Vancouver,* 2007 BCSC 3 at para 130 [*Ward BCSC*], however, Justice Tysoe found the Vancouver Police Department officers were justified in arresting Mr. Ward for breach of the peace, but *Charter* violations occurred when he was not released in a reasonable amount of time: para 123.

69 *Ibid,* at paras 128-129.

70 *Ward v British Columbia*, 2009 BCCA 23 [*Ward BCCA*].

71 *Ward, supra* note 6 at para 79. This is important to note because *Charter* damages remedy personal violations, and likely will never apply to property seizure, even where wrongful.

72 *Ward, supra* note 6 at para 24.

vindication, or deterrence. Third, the state can establish other considerations that render *Charter* damages "inappropriate or unjust."[73] The quantum of damages is determined at step four.

The lower courts in *Ward* addressed whether bad faith was required to award *Charter* damages for a *Charter* violation. The trial judge found the officers did not act maliciously or wrongfully enough to meet any tort standard,[74] but the lack of bad faith did not restrict the court from awarding *Charter* damages.[75] Throughout the trial and appeal process, British Columbia asserted that no damages could lie against government for a *Charter* breach "absent a concurrent tort, abuse of power, negligence or wilful blindness."[76] The government argued that *Mackin v New Brunswick* applied to immunize the government from *Charter* damages, absent negligence or bad faith.[77] The trial judge, and later the Court of Appeal, found the absence of bad faith, abuse of power, or tortious conduct is not a bar to awarding *Charter* damages in the context of discretionary decision-making or carrying out duties such as arrest and detention.[78] In the opinion of the BCCA, "[t]o require that the breach be accompanied by a tort or by bad faith to justify an award of damages in many cases will give to the victim of the breach only a pyrrhic victory, not a true remedy."[79] This finding was important to establishing *Charter* damages as a remedy available regardless of when other remedial avenues are closed.[80]

The Court in *Ward* carefully distinguished private law damages from constitutional damages. It clarified that section 24(1) damages lie against governments, rather than individuals, who exercise governmental functions or exceed legal authority.[81] Where constitutional damages are awarded, the state or society at large will compensate the claimant for breaches of that individual's constitutional rights.[82] However, policy considerations relevant to private law damages may play a role in awarding public law damages.[83]

The *Ward* test can afford those who experience racial discrimination an opportunity to get redress and participate in institutional change. The application of this *Charter* damages test, as modified in *Henry* and discussed in *Ernst,* to cases of racial discrimination is discussed in detail in the following section.[84]

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73 *Ward, supra* note 6 at para 33.

74 *Ward BCSC, supra* note 68 at paras 95, 103.

75 *Ward BCSC, supra* note 68 at para 111.

76 *Ward BCCA, supra* note 69 at para 34.

77 *Ibid* at para 57; *Mackin, supra* note 55.

78 *Ward BCCA, supra* note 69 at para 47; *Ward, supra* note 6 at para 12.

79 *Ward BCCA, supra* note 69 at para 63.

80 Note that Justice Saunders, in dissent at the BCCA expressed concern that awarding section 24(1) damages for non-pecuniary loss would become a "fall-back" where negligence or another tort cannot be established: para 89. However, an understanding of *Charter* remedies flows from this logic would leave large gaps in the availability of remedies, thus undermining the inherent importance of *Charter* rights.

81 Roach loose-leaf, *supra* note 62, ch 11 at 24.

82 *Ward, supra* note 6 at para 22.

83 *Ibid*.

84 *Henry, supra* note 7; *Ernst*, *supra* note 5.

C. Post- *Ward: Henry*

In 2010, the BCCA quashed Ivan Henry's convictions and released him from prison after almost 27 years behind bars. The BCCA found there were serious errors in the conduct of Mr. Henry's trial and that the sexual assault verdicts were unreasonable.[85] Mr. Henry filed a civil claim against the City of Vancouver, the Attorney General of British Columbia, and the Attorney General of Canada for *Charter* damages resulting from his wrongful conviction. The Crown submitted a motion to strike the claim for *Charter* damages absent malice.[86] As a result, the issue of the fault requirement in the Crown's failure to disclose went up to the SCC in order to ground an award of section 24(1) damages.[87] British Columbia argued, as it had argued in *Ward*, that fault was required. Specifically, British Columbia and the other Attorneys General argued that proof of malice is required in order for a claimant to receive *Charter* damages in the context of the Crown's failure to disclose.

At the SCC, Justice Moldaver for the majority held that where the Crown's failure to disclose violates the claimant's *Charter* rights, the claimant need not prove Crown counsel acted with malice. Rather, the claimant must prove that,

> Where the Crown, in breach of its constitutional obligations, causes harm to the accused by intentionally withholding information when it knows, or would reasonably be expected to know, that the information is material to the defence and that the failure to disclose will likely impinge on the accused's ability to make full answer and defence.[88]

The majority held a claimant must prove the wrongful non-disclosure caused the claimant harm—a "but for" causation requirement,[89]—a move away from the broad remedial approach to *Charter* damages established in *Ward*. Although the SCC in *Ward* cautioned against cutting down the test,[90] *Henry* narrowed the test for *Charter* damages in the context of the failure to disclose.

Chief Justice McLachlin and Justice Karakatsanis dissented, finding the majority's fault-based standard was inconsistent with the purpose of section 24(1) and the principled framework developed in *Ward*.[91] Where *Ward* requires the claimant to establish a *Charter* breach, the majority's modified *Ward* test requires the claimant to prove the *Charter* breach, that the actor had intent to withhold, and that the withholding caused harm. While the *Henry* modifications are specific to the context of the failure to disclose, future cases will have to resolve whether the *Henry* modifications apply to *Charter* damages claims in other contexts, particularly those involving Crown prosecutors.[92]

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85 *Henry, supra* note 7. The court could not determine whether Mr. Henry was factually innocent of the crimes, as the forensic evidence collected at the time of the trial was destroyed before the BCCA reheard his case and quashed the convictions.

86 *Ibid*, at para 21.

87 *Ibid* at para 2. This case continued to trial in the Fall of 2015. Chief Justice Hinkson released his decision in June, 2016: 2016 BCSC 1038 [*Henry* trial decision]; See Emma Cunliffe, "*Henry v British Columbia*: Still Seeking a Just Approach to Damages for Wrongful Conviction" (2016) 76 SCLR 144 at 154, for more in depth coverage of this case, its facts and its implications for wrongful convictions.

88 *Henry*, *supra* note 7 at para 31.

89 *Ibid* at para 95.

90 *Ward*, *supra* note 6 at para 18.

91 *Ibid* at para 104.

92 WH Charles, *Understanding Charter Damages* (Toronto: Irwin Law, 2016) at 118 [*Understanding Charter Damages*].

In *Ernst,* the SCC had another opportunity to apply the *Ward* test, although in a context with a less tangible connection to racial discrimination. In *Ernst*, the SCC grappled with the availability of *Charter* damages in the face of an administrative tribunal protected by an immunity clause.[93] That case, like *Henry*, resulted from a motion to strike the claim for *Charter* damages. The SCC's split decision on whether it was "plain and obvious" that *Charter* damages were available indicates the question of whether *Charter* damages are available in specific contexts is not, in fact, obvious. These issues are explored in more detail in Part V. As a result, *Henry* (and arguably aspects of *Ernst*) "will likely dampen Charter damage claims against the state for non-disclosure even though a failure to disclose is one of the main causes of wrongful convictions."[94]

IV. THE CURRENT *WARD* TEST, APPLIED TO RACIAL DISCRIMINATION

The *Ward* framework is well-formulated to remedy *Charter* violations involving racial discrimination because it recognizes the inherent harm in *Charter* breaches. It can respond with both individualized compensation and the potential for systemic change. The absence of a clear intent or causation requirement in the test addresses the nature of racial discrimination as commonly unconscious and capable of covertly imbuing a series of transactions within the criminal justice system with bad faith. However, the *Henry* decision raises a substantive obstacle to claiming damages arising out of Crown conduct, particularly regarding the failure to disclose as constitutionally required since *R v Stinchcombe*.[95] Part IV of this paper details the test for awarding damages under section 24(1) in light of *Ward*, *Henry,* and the SCC's recent commentary in *Ernst*. It also applies the test in the context of racial discrimination, providing arguments and commentary on its potential future success.

A. Step One: Establishing a Charter Breach

The first stage of the *Ward* test requires the claimant to establish the *Charter* violation.[96] In the context of racial discrimination, a claimant must prove on the basis of circumstantial and expert evidence that discrimination or racial profiling led to a *Charter* violation.

i. Which Rights Ground *Charter* Damages?

As noted in Part I(B)(ii) of this paper, racial discrimination can easily lead to violations of *Charter* sections 7, 8, 9, and 11(d). But racial discrimination can also be addressed as a section 15 equality violation.[97] That said, I suggest the section 15 jurisprudence to date is not sufficiently clear to predictably underpin a section 24(1) *Charter* damages claim in the criminal law context. The test under section 15 is rather unwieldy,[98] and generally used in the context of discriminatory *laws* as opposed to discriminatory *acts*. Further, the definition of equality shifts over time, and may better be described as "a process of constant and flexible examination, of vigilant introspection, and of aggressive

93 *Ernst*, *supra* note 5. This case also had issues relating to constitutional notice and an incomplete record on the constitutionality or justification of the immunity clause.

94 Roach loose-leaf, *supra* note 62, ch 11 at 32.

95 *R v Stinchcombe*, 1991 CanLII 45 (SCC) [*Stinchcombe*].

96 *Henry*, *supra* note 7 at para 37.

97 Agarwal & Marcus, *supra* note 3 at 89.

98 Although it was condensed somewhat by Justice Abella, this time with a unanimous court, in *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30.

open-mindedness."[99] Framing the issue as a section 15 violation may allow courts to sidestep granting a remedy, because judges may be unfamiliar with the section 15 argument in the context of racial discrimination by government actors, and the breach is harder to prove.

As *Charter* violations flowing from racial discrimination rarely lead to a meaningful remedy, it is wise to argue the most predictable path first. Discrimination often results in many discrete violations such as unlawful searches, arbitrary detentions, unwarranted charges, and the failure to disclose relevant documents.[100] A discriminatory investigation or prosecution will usually involve sections 8 and 9 *Charter* breaches, or a section 7 violation if the individual is denied a fair trial or is wrongfully convicted. Kent Roach notes:

> One tension for lawyers is between asking for what you think you can get versus asking for a more ambitious remedy that the decision maker may be unwilling to give. There is a constant tension between the understandable desire to win and the desire to attempt to tackle the full extent of systemic and deeply entrenched problems.[101]

While the ultimate endgame and perhaps "secondary goal"[102] is for an individual to be investigated in a manner that is free from racial discrimination and prosecuted only where evidence warrants it, basing a constitutional damages claim only on section 15 is to argue for redress where the right is unclear and not strongly linked to a remedy.

While this paper does not focus on section 24(1) damages flowing from a section 15 *Charter* breach, this area nonetheless deserves close attention in the future. In a case currently before the Ontario Superior Court (ONSC), the plaintiff, Ms. Anoquot, claims section 24(1) damages for sections 7, 8 and 15 *Charter* violations flowing from police interactions.[103] The statement of claim survived an application to strike two statements that alleged discrimination on a personal and a systemic level.[104] The ONSC found "[w]ith respect, the Defendants seem oblivious to the nature of the claim that Ms. Anoquot is making, which is that the Defendants employ a stereotypical approach and systemically strip search Aboriginals rather than engaging in a case-by-case analysis."[105] The ONSC acknowledged that a discrimination claim would be complicated, because discrimination claims are "inherently complicated."[106] The complexity of a claim, however, is not a bar to pleading it. Pleading it successfully in the future will simply require extensive documentation and discovery processes.[107]

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99 Rosalie S. Abella, "Limitations on the Right to Equality before the Law" in Armand de Mestral et al eds, *The Limitation of Human Rights in Comparative Constitutional Law* (Montreal: Editions Yvon Blais, 1986) at 226.

100 Agarwal & Marcus, *supra* note 3 at 88-89. These authors carefully distinguish between discrete *Charter* violations and why our courts should not recognize a broad right to an adequate investigation.

101 Roach, "Remedies for Discriminatory Profiling", *supra* note 42 at 396.

102 See generally: Stephen Coughlan & Laura Peach, "Keeping Primary Goals Primary: Why There is No Right to an Adequate Investigation" (2012) 16 Can. Crim L Rev 248 at 254.

103 *Anoquot v Toronto Police Services Board*, 2015 ONSC 553 [*Anoquot*].

104 *Ibid* at para 18.

105 *Ibid* at para 28.

106 *Ibid* at para 34.

107 *Ibid*.

ii. What Proof is Required?

Courts and tribunals have become more willing to take racial discrimination seriously in the context of *Charter* violations.[108] When provided with adequate evidence, courts acknowledge that racial discrimination is not just the acts of a few bad apples, but rather a systemic problem.[109] In addition to the systemic root causes of discrimination, state misconduct can be racially motivated even when the individual does not consciously appreciate the discriminatory nature of his or her action.[110] Professor Tanovich notes, "[s]ince most profiling is unconscious, is there really any point in putting the suggestion to the officer? What can he or she reasonably be expected to say in response to the question?"[111] It is therefore important that a claim of racial profiling or discrimination leading to a *Charter* violation can be successfully grounded in circumstantial evidence.[112]

In *Brown,* the ONCA found that a "racial profiling claim could rarely be proven by direct evidence…if racial profiling is to be proven it must be done by inference drawn from circumstantial evidence."[113] To find an officer engaged in racial profiling in the context of a traffic stop for example, it must be more probable than not that the real reason for the stop was the person of interest's race.[114] The ONCJ discussed *Brown* in *North Bay (City) v Singh*, noting it "would be extremely rare to have such [overt] evidence [of racial discrimination] as the social science evidence supports the fact that there is much subconscious racial stereotyping and profiling and most people would seek to hide overt racist views if they had them."[115]

Circumstantial evidence of discrimination can be adduced through indicia of racial profiling, such as factors that courts have recognized through the assistance of studies,[116] academic writing, and expert evidence.[117] These indicia can aid a court in drawing inferences of racial discrimination where warranted.[118] In *Peart,* the ONCA referred to these indicia as "social facts" flowing from the trier of fact's assessment of the evidence in any given case.[119] The indicia of racial profiling in a traffic stop case include: continuing surveillance even after police determine a car is not stolen, officers assuming targeted individuals have drugs or guns, engaging in an unwarranted high risk take down (because this indicates the officers assumed the individuals were dangerous) and

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108 See R v Bharath, 2016 ONCJ 382 [*Bharath*], for an application of *Brown* and Professor Tanovich's academic commentary on this issue; Human Rights Tribunals are also considering social science evidence in this context. See *Nassiah v Peel (Regional Municipality) Police Services Board*, 2007 HRTO 14 at para 115 [*Nassiah*] and *Aiken v Ottawa Police Services Board*, 2013 HRTO 901, where the Ontario Human Rights Tribunal used expert testimony by Professor Scot Wortley to understand the factors that indicate racial profiling. Professor Wortley has generated empirical research on racial profiling, particularly in Ontario.

109 Agarwal & Marcus *supra* note 3 at 89; *Nassiah, supra* note 108 at para 212.

110 *Peart, supra* note 12 at para 42.

111 Tanovich, "Charter of Whiteness", *supra* note 1 at 678.

112 *Brown*, *supra* note 9.

113 *Brown, supra* note 9 at para 45. This appeal dealt with the issue of whether or not the trial judge had a reasonable apprehension of bias when he refused to properly consider the issue of racial profiling. The ONCA found there was a reasonable apprehension of bias, and in the decision made authoritative comments on the standard of proof required to prove racial profiling.

114 *Brown, supra* note 9 at para 11; *R v Thompson*, 2014 ONSC 4749 at para 41.

115 *North Bay (City) v Singh,* 2015 ONCJ 500 at para 9 [*Singh*].

116 In *Aiken v Ottawa Police Services Board*, 2013 HRTO 901, the settlement agreement included the Ottawa Police Service agreeing to collect race-based data on traffic stops for future study, see *supra* note 33 for the report. This is an example of a study that could be used as evidence of racial profiling.

117 *Peart, supra* note 12 at paras 95, 98.

118 Agarwal & Marcus, *supra* note 3 at 80.

119 *Peart, supra* note 12 at para 96.

evidence of police violence even where there is no evidence of illegal activity.[120] Other issues of evidence, such as the credibility of witnesses and corroborating evidence may also build an argument that racial discrimination occurred.[121]

Expert evidence will play a key role in proving that racial discrimination or profiling occurred and lead to a *Charter* breach. While Doherty JA noted in *Peart* that,"[t]he reality of racial profiling cannot be denied," he was not prepared to accept that racial profiling was "the rule rather than the exception."[122] He was not ready to take the leap without being sure: "I do not mean to suggest that I am satisfied that it is indeed the exception, but only that I do not know."[123] It is unlikely that courts will make ground-breaking decisions in this area of the law without strong evidence before them.[124] Expert evidence can ground particular circumstantial evidence in the greater systemic picture or help courts understand the indicia of racial discrimination.[125] Counsel should endeavour to use *Brown,* along with expert evidence, to prove *Charter* violations and claim damages pursuant to section 24(1) of the *Charter* where racial discrimination is at issue.

iii. A Shifting Burden in the Future?

The African Canadian Legal Clinic (ACLC) intervened at the ONCA in both *Brown* and *Peart*. They argued that an allegation of racial profiling should justify shifting the burden of proof.[126] The argument flowed from the proposition that because racial profiling is so common, when it is alleged, placing the burden on police rather than the claimant is more likely to achieve an accurate result.[127] Specifically, the ACLC argued that where racial profiling is alleged against police, the onus should shift to the police to demonstrate that improper racial considerations were *not* a factor contributing to the state action.[128] The ACLC suggested fairness considerations favour placing the burden on police, because they have access to more information than the claimant.[129] Although that argument was unsuccessful in *Brown* and *Peart*, it may be more fruitful after more cases have proven *Charter* violations on the basis of discrimination.

In dismissing the ACLC's argument, the Court of Appeal found that while the burden of proof shifts to the Crown in some contexts, as in a claim alleging unreasonable search and seizure, "[s]tate interference with individual liberty whether by way of detention or arrest has never been seen as requiring prior judicial authorization,"[130] and therefore the

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120 *Peart v Peel (Regional Municipality) Police Services Board*, 2003 CanLII 42339 (ONSC) at para 20.

121 *Brown, supra* note 9 at para 45; *Peart, supra* note 11 at para 114; *Bharath, supra* note 108 at para 419; See also *Brown v Durham Regional Police Force*, 1998 CanLII 7198 (ONCA) where Doherty JA stated that if only people of colour were stopped at a checkpoint, then this allows the inference that the stop was discriminatory.

122 *Peart*, *supra* note 12 at para 146.

123 *Ibid*.

124 Consider *St. Anicet (Parish of) v Gordon*, 2014 QCCM 290 at paras 55-58, where the Court found on a balance of probabilities that one of the reasons the police stopped the accused was racial profiling. The judge found that the stop breached the accused's sections 9 and 15 *Charter* rights, and the court ordered a stay of proceedings pursuant to section 24(1) of the *Charter.* Also consider *R v Huang*, 2010 BCPC 336 at para 5, where the British Columbia Provincial Court held the facts before the Court indicated on a balance of probabilities that the officer involved stopped the accused on the basis of his race and thus violated the accused's section 9 *Charter* rights. The Court found the officer was not truthful because there were "simply too many circumstances" that made his explanation improbable.

125 *Brown, supra* note 9 at paras 44-46; *Peart*, *supra* note 12 at paras 95-96.

126 *Brown, supra* note 9; *Peart, supra* note 12.

127 *Peart, supra* note 12 at para 145.

128 *Ibid* at paras 136, 144.

129 *Ibid* at para 148.

130 *Ibid* at paras 140-143.

shift is not justified. Further, demonstrating that the other party is in a better position to disprove an issue does not justify a reverse onus.[131] Only where the party expected to bear the onus "has no reasonable prospect of being able to discharge that burden, and the opposing party is in a position to prove or disprove the relevant facts" does fairness mandate a reverse onus.[132]

The ONCA held that a "properly informed consideration of the relevant circumstantial evidence—indicators of racial profiling—combined with maintaining the traditional burden of proof on the party alleging racial profiling" and "a sensitive appreciation of the relevant social context" strikes the proper balance of the parties' interests.[133] As the Court noted, the traditional rule has resulted in successful claims in the past.[134] Importantly, the Court emphasized that there may frequently be a tactical burden on the police to introduce evidence that negates a racial profiling inference in any case.[135] As the above reasons indicate, it would be a large step in reasoning even for a non-Ontario court to come to opposite conclusions on this point.

iv. Other Challenges in Proving a *Charter* Breach Through Discrimination

One aspect of the *Peart* judgement is troubling. The ONCA found that when the initial contact with police is tainted by racial discrimination, it does not mean all further actions or contact are equally tainted.[136] I argue that it will be a very rare case where the initial discrimination and consequent violation does not flow through most, if not all, subsequent police and Crown conduct if left unchecked. Without the initial discrimination that brought the individual into contact with the criminal justice system, the individual may not have encountered the system at all. At a minimum, courts should presume that discrimination flows to subsequent actions (from investigative detention to arrest and incarceration, for example) unless proven otherwise. This argument can be bolstered through appropriate expert evidence on the nature of discrimination and precise argument on this point.[137]

B. Step Two: The Functional Justification of Damages

Once a *Charter* breach is established, damages must be functionally justified as appropriate and just. To be appropriate and just, they must satisfy one or more of the confirmed purposes of *Charter* damages: compensation, vindication, or deterrence.[138] While there was some confusion pre-*Ward* as to whether bad faith was also required to justify *Charter* damages, it is clear post-*Ward* that only one of the above purposes is required to functionally justify a damage award.[139] Any countervailing factors are addressed at a later stage.

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131 *Ibid* at para 149.

132 *Ibid*.

133 *Ibid* at para 147.

134 *Ibid* at para 150.

135 *Ibid* at para 151.

136 *Ibid* at para 92.

137 Another challenge these claims may encounter is an application to strike claims that reference racial profiling and discrimination. The claim may be struck for lack of particularity where pleadings do not properly tie together "both the historical and the ongoing improper police conduct to the racial discrimination claim." Counsel should be prepared to address this argument if it arises: *Sidhu v Canada (The Attorney General)*, 2015 YKSC 53 at para 17; *Anoquot, supra* note 103 (the statements in this case survived an application to strike paragraphs from the notice of claim).

138 *Ward, supra* note 6 at paras 24, 25, 31.

139 For a brief discussion of the pre-*Ward* case law on this issue of bad faith, see Agarwal & Marcus, *supra* note 3 at 90-91.

i. Compensation

Compensation demands that a claimant is compensated for personal loss. The SCC in *Ward* stated that compensation will often be the "most prominent function" of damages.[140] The purpose of compensation is analogous to damages in the private law context, where it is the primary (if not the only) justification for a damage award. In *Ward,* the SCC defined compensation broadly. *Charter* damages can compensate physical, psychological, or pecuniary harm, but also harm to intangible interests through distress, humiliation, embarrassment, or anxiety.[141] The Court's description of compensation in the *Charter* context is consistent with a purposive analysis of *Charter* rights, because the *Charter* protects non-pecuniary values "including fairness, privacy, security of the person, liberty and equality."[142]

In the context of discrimination, compensation can take various forms. A flexible approach is required to remedy harms that may be more "subtle" than in other contexts.[143] The amount of compensation required will likely depend on which *Charter* right is violated and what harm, if any, flowed from the violation. Further, even if an individual did not suffer compensable "personal loss," damages are still available where the other purposes of vindication and deterrence "clearly call for an award."[144] These other purposes ensure the remedy adequately addresses the inherent societal harm of *Charter* violations.

ii. Vindication

Vindication recognizes that constitutional violations not only harm the claimant involved, but also society as a whole. *Charter* damages serve to compensate the individual who experienced a *Charter* breach, but they also affirm constitutional values and the rule of law on the basis of vindication. While compensation focuses on the individual, vindication "focuses on the harm the Charter breach causes to the state and to society."[145] Even if a violation does not result in compensable harm to the individual, public confidence in the court's ability to give meaning to *Charter* rights can be impaired by violations. This impairment can justify a damage award.[146]

Charter damages functionally justified by vindication are crucial to affirming the importance of *Charter* rights. The purpose of vindication is particularly important for a *Charter* damages claim involving racial discrimination. Systemic discrimination breeds distrust of the justice system. If courts fail to remedy these violations, they may appear to specifically condone violations flowing from discrimination. This can have a disproportionate effect of breeding distrust in racialized groups.[147] Awarding damages on the basis of vindication can demonstrate commitment to remedying the issue and perhaps help rebuild public confidence in the rule of law. Where discrimination leads to the 'worst case scenario' of a wrongful conviction, an award on this basis "would recognize the state's responsibility for the miscarriage of justice that occurred."[148]

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140 *Ward, supra* note 6 at para 25.

141 *Ibid* at paras 27, 50.

142 Roach loose-leaf, *supra* note 62, ch 11 at 26.

143 Agarwal & Marcus, *supra* note 3 at 91.

144 *Ward, supra* note 6 at para 30; *Ernst*, *supra* note 5 at para 160, Abella J, concurring.

145 *Ward, supra* note 6 at para 28.

146 Roach loose-leaf, *supra* note 62, ch 11 at 27.

147 Tanovich, "Charter of Whiteness", *supra* note 1 at 679. The disproportionate impact can also be considered in the deterrence category, or under the seriousness of the breach, which affects the quantum of damages.

148 *Henry*, *supra* note 7 at para 115.

As Peter Schuck argues in the American context, "[n]o social or moral order can sustain itself, much less flourish, unless it can affirm, reinforce, and reify the fundamental values that define it."[149] A remedial system that fails to compensate victims of a certain kind of official wrongdoing is neither effective nor just.[150]

iii. Deterrence

Charter damages can also serve the purpose of deterrence. This purpose is forward-looking.[151] Awarding damages on the basis of deterrence can regulate government behaviour to achieve *Charter* compliance in the future.[152] The Court in *Ward* emphasized that deterrence in this context is general deterrence aimed at influencing government as a whole rather than "deterring the specific wrong-doer."[153]

Prior to the *Ward* decision, deterrence was rarely recognized "as a legitimate goal for constitutional remedies."[154] Kent Roach states that recognizing deterrence as a valid purpose for awarding damages has the potential to reshape remedies jurisprudence.[155] While it is unlikely that deterrence alone would justify a *Charter* damage award,[156] *Ward* makes it clear that deterrence can at least complement a compensatory purpose, strengthening a damage award's impact on systemic change.

Fostering a legal regime that allows for legal challenges can also act as deterrence.[157] Raising obstacles in the form of unprincipled fault or intent requirements can blunt the value of deterrence because it shifts the risk of litigation to the claimant and permits unremedied *Charter* violations.[158] If the reasoning of the majority in *Henry* extends to other contexts, it could stifle the potential of deterrence-based awards. It raises an obstacle for future *Charter* damages claimants.

In the context of discrimination, deterrence is extremely important. Because of the unconscious nature of racial discrimination, general deterrence can encourage governments to implement better training or policies to counteract the effects of discriminatory acts throughout the criminal justice system. As Chief Justice McLachlin noted in dissent in *Henry*, awarding damages for the purpose of deterrence, even where government actors carry out duties in good faith, is important for pushing the state to "remain vigilant in meeting its constitutional obligations."[159]

C. Step Three: Countervailing Factors

At this stage of the test the burden shifts to the Crown. The Court in *Ward* recognized that damages may not be warranted if the state substantiates compelling countervailing factors, even if damages would serve the purposes of compensation, vindication, or deterrence.[160] These countervailing factors include the availability of alternative remedies

149 *Ibid*.
150 Schuck, *supra* note 54 at 23.
151 *Ward, supra* note 7 at para 29, *Henry*, *supra* note 7 at para 112, McLachlin CJC dissenting.
152 *Ward, supra* note 7 at para 29.
153 *Ibid*.
154 Kent Roach "A Promising Late Spring for Charter Damages: *Ward v Vancouver*" (2011), 29 NJCL 135 at 156.
155 *Ibid*.
156 Roach loose-leaf, *supra* note 62, ch 11 at 28.
157 Schuck, *supra* note 54 at 17.
158 *Ibid*.
159 *Henry*, *supra* note 7 at para 116.
160 *Ward, supra* note 6 at para 33.

and effective governance concerns.[161] Effectively, these factors have the same result as the imposition of a bad faith requirement, qualified immunity, or good faith immunity because they restrict the availability of damages.[162]

The Court in *Ward* suggests countervailing factors should be contextualized in each case.[163] While the case-by-case approach risks unpredictability for both parties, it "also requires the government to bear the burden of justifying restrictions on Charter remedies" in all cases.[164] The *Ward* contextual approach is consistent with other *Charter* jurisprudence; it provides rights and remedies to individuals, but allows government to justify reasonable restrictions when required.[165] An approach that blocks access to remedies without a contextual analysis or sufficient evidence, such as the one put forward in *Henry*, is inconsistent with *Charter* jurisprudence.[166]

i. Alternative Remedies

If an alternative remedy fulfills the purposes of *Charter* damages, then no further award is required.[167] For example, someone who receives tort damages or a Human Rights Tribunal award would likely receive a nominal award or simply a declaration under section 24(1) to address the other purposes of vindication and deterrence.[168]

Under this countervailing factor, the claimant need not exhaust all other remedies first and can run concurrent claims in tort and *Charter* damages as long as the result is not double compensation.[169] As mentioned above in Part II(A), individuals who experience racial discrimination rarely find recourse in tort law, so alternative remedies may rarely be engaged. However, it may be engaged more in the future as Human Rights Tribunal awards increase.[170]

In *Henry*, the SCC did not engage with available alternative remedies.[171] However in *Ernst*, Cromwell J's judgment considered judicial review of the Alberta Energy Regulator's decision to be an alternate remedy, because it could "substantially" address the alleged *Charter* breach.[172] The Chief Justice's judgment instead considered that judicial review might not vindicate *Charter* rights or deter future breaches and that it was premature to find this an alternate remedy.[173] While this paper focuses on racial discrimination in the criminal justice context, expanding the analysis to decisions of quasi-judicial bodies would require consideration of this potential bar to *Charter* damages.

161 *Ibid*.
162 Roach loose-leaf, *supra* note 62, ch 11 at 29.
163 *Ibid; Henry*, *supra* note 7 at paras 106-107, McLachlin CJC, dissenting.
164 *Ibid*.
165 *Ibid*.
166 *Ibid*.
167 *Ward, supra* note 6 at para 34.
168 Roach loose-leaf, *supra* note 62, ch 11 at 29.
169 *Ward, supra* note 6 at paras 35-36.
170 Agarwal & Marcus, *supra* note 3 at 93.
171 *Henry*, *supra* note 7 at para 38: the Court referenced alternative remedies as a countervailing factor but did not engage in an analysis of any alternative remedies available.
172 *Ernst*, *supra* note 5 at paras 30, 32-33, Cromwell J.
173 *Ibid*, at para 167, McLachlin CJ, dissenting.

ii. Good Governance Concerns in *Ward*

In *Ward*, the state failed to establish a good governance concern that could negate a damage award.[174] The state argued *Charter* damages will always chill government conduct and that a no-fault regime in the context of individual government actions would result in a flood of damage claims.[175] The Court rejected this argument because the logical conclusion of it means *Charter* damages would *never* be appropriate.[176] Kent Roach notes:

> If concerns about chilling law enforcement discretion and draining the public purse in *Ward* are not sufficient to negate the award of damages, it is difficult to see that any violations of the Charter rights of a single Charter applicant should be defeated on effective governance grounds.[177]

The floodgates concern in *Ward* regarding the no-fault requirement was not supported by evidence, and the same argument can be made in a *Charter* damages claim today. There are 'naturally occurring' and significant barriers limiting *Charter* damages claims that will likely continue to prevent floods of claims in the future. As noted in Mr. Ward's factum, "[i]f the spectre of widespread and large monetary liability for breaches of the *Charter* was realistic, one could reasonably have expected it to have already arisen in the nearly 28 years since the *Charter* was enacted."[178] Perhaps many courts' conservative approach to awarding damages during this time was due to unclear precedent on the issue. Or, perhaps there are naturally occurring checks against a flood of *Charter* damage claims. There are many examples of natural restraints in this area of the law: our court system already weeds out unmeritorious or vexatious claims, launching a *Charter* damages claim can be prohibitively expensive, and the threat of the loser-pays-costs rule in civil litigation looms large.[179] Most importantly, damage awards since *Ward* have generally been minimal and launching a claim for *Charter* damages is often not "economically rational."[180]

iii. Good Governance Concerns since *Ward*: Chilling Effects and Tort Comparisons

The *Ward* test allows for argument on the limitation of *Charter* damages if they would adversely impact effective government. However, this limiting potential can shift the cost of a *Charter* violation to the individual.[181] In *Henry*, the majority increased the gap within which an individual must bear the costs of a *Charter* violation; good governance

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174 *Ward, supra* note 6 at para 68.

175 But see: *Ward, supra* note 6 at para 39; Roach loose-leaf, *supra* note 62, ch 11 at 30; *Mackin, supra* note 55 at paras 81-82.

176 *Ward, supra* note 6 at para 38.

177 Roach loose-leaf, *supra* note 62, ch 11 at 31.

178 *Vancouver (City) v Ward*, 2010 SCC 27 (Factum of the Respondent at para 140).

179 Roach loose-leaf, *supra* note 62, ch 11 at 6. Roach notes there are some methods to get around this, for example the government can enter into an agreement that they will not seek costs no matter the outcome, litigants can seek a protective costs order or a court may simply not award costs to the government if they win.

180 *Ibid,* ch 11 at 2; *Understanding Charter Damages supra* note 92 at 102-103; See also note 226 below for a discussion of class action suits, where the damages award can be higher. Notably, the award of over 8 million dollars in the recent *Henry Charter* damages decision was astronomical compared to other cases.

181 Roach loose-leaf, *supra* note 62, ch 11 at 27: This is contrary to Justice Wilson's true compensatory approach in her dissenting judgments in *McKinney v University of Guelph*, [1990] 3 SCR 229 and *Air Canada v British Columbia* [1989] 1 SCR 1161. In these cases, Wilson J advocated that if the choice is between the individual and those who violated the right, the violator should bear the costs in order to restore the victim to the position he or she occupied before the breach.

concerns now circumscribe the award of damages for the Crown's failure to disclose.[182] It seems the involvement of Crown counsel in the *Charter* violation attracts a more protectionist approach, raising issues regarding the immunization of prosecutorial discretion. Consequently, it is likely that no *Charter* damages will flow where the Crown's failure to disclose was unintentional or caused by unconscious racial discrimination.

In *Ernst*, one judgment of the split Court held that immunity clauses provide a justified good governance concern in the case of quasi-judicial decision makers,[183] imposing a "sweeping" immunity for *Charter* damages.[184] While this may be the case, some of the reasoning in Justice Cromwell's judgment also has the potential to restrict future *Charter* damages claims where they might otherwise be justified.[185] Although the Court's "division in thinking" on the availability of *Charter* damages "in the face of common law and statutory immunities protecting state actors appears to be quite profound,"[186] good governance concerns since *Ward* appear to be evolving in a manner that circumscribes the test for *Charter* damages.

The majority in *Henry* held that not limiting the availability of *Charter* damages in the disclosure context would cause a flood of claims. They found it would expose prosecutors to an unprecedented scope of liability that would negatively impact the exercise of their vital public function."[187] It seems the risk of a no-fault (or more precisely, a no-intent) standard in *Henry* loomed large as a good governance concern, even in the context of a constitutional obligation such as the duty to disclose. While courts are loathe to wade into a review of core prosecutorial discretion, such as the discretion to lay charges, the duty to disclose all relevant information to the defence does not involve any significant degree of prosecutorial discretion.[188] As the Chief Justice found in dissent, "[i]t is not an action for abuse of discretion, but an action for breach of a legal duty imposed by the *Charter*. Where this *Charter* duty is breached, it is the state and not the individual prosecutor who faces liability."[189]

Nevertheless, the majority drew from the line of malicious prosecution tort cases dealing with prosecutorial discretion where the actions of the individual are at play.[190] The majority's concern regarding the chilling effect on Crown counsel resulted in the imposition of an intent standard.[191] The fear of liability in a no-fault regime, leading to "defensive lawyering" and the addition of an extraneous consideration to "the Crown's role as a quasi-judicial officer," justified the increased standard for the Crown in their

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182 *Henry, supra* note 7 at paras 39-42.

183 *Ernst*, *supra* note 5 at paras 51-55, Cromwell J. The decision was split 4-1-4, with a 5-4 majority striking the claim for *Charter* damages. There is a large distinction between quasi-judicial decision-makers in a tribunal and police officers or prosecutors, as noted by Justice Abella in concurrence at paragraph 121. However, the Court's statements on the state of the *Ward* test contribute to the analysis in this paper.

184 *Ernst*, *supra* note 5 at para 177, McLachlin CJC, dissenting.

185 Although many issues mentioned here relating to *Ernst* are not the outcome of a majority decision, the Court's differing comments on *Charter* damages indicate future arguments and concerns on the issue.

186 *Whaling supra* note 63 at para 23.

187 *Henry, supra* note 7 at paras 73, 77.

188 *Ibid* at paras 49, 128. The prosecutor need only disclose "relevant" evidence. However, the assessment of relevance includes discretion to some extent.

189 *Ibid* at para 129.

190 *Ibid* at paras 55-59. While he distinguished these cases, the standard he ended up with is very close to the malice requirement in the malicious prosecution cases.

191 *Ibid* at paras 40, 45. The malice standard was established in *Nelles v Ontario* [1989] 2 SCR 170, *Proulx v Quebec (Attorney General)* 2001 SCC 66, and *Miazga v Kvello Estate*, 2009 SCC 51.

duties of disclosure.[192] While this may occur in limited circumstances, knowing that disclosure decisions could violate the *Charter* would most often promote better decision-making. As the Chief Justice noted in *Ward*, "[g]ood governance is strengthened, not undermined, by holding the state to account where it fails to meet its *Charter* obligations."[193] The *Constitution* by nature is a restraint on state action. To broaden immunity on the basis of a chilling effect would counter the idea that the *Charter* should stand to encourage constitutional compliance. The Chief Justice for the dissent in *Henry* echoed these concerns again by stating that holding the state to account feeds back into the general deterrence value of *Charter* damages.[194]

Justice Cromwell's judgment in *Ernst* also referenced the protection of quasi-judicial decision-makers. He cited *Ward*, stating that we must afford immunity to certain state functions to avoid a chilling effect in decision-making.[195] However, the citation from *Ward* must be read in context. It applies to the "[l]egislative and policy-making functions" of the state and to those who carry out constitutionally invalid duties under legislation.[196] As noted in the Chief Justice's judgment, it was unclear whether the decision-maker in this case was even acting in an adjudicative capacity.[197] Justice Cromwell also relies on policy defences in the private law context, noting that the majority in *Henry* also heavily relied on tort law.[198] Although there is no clear majority judgment in *Ernst*, one can see the extension of the chilling effect concerns in *Henry*, a shift on the principles in *Ward*, and the Court's continued reliance on tort law concepts.

While the policy considerations engaged in tort actions may be relevant to limiting *Charter* damages under good governance, these damages are against the state, not against individual 'bad' actors. Therefore, the chilling effect often argued in regards to common law civil actions would be "considerably less and different" than if individuals were personally liable.

Although there is a stated distinction between tort and *Charter* remedies, the intent standard in this modified *Ward* test falls very close to malice in the tort context. It will require the same type of proof to successfully claim *Charter* damages where the violation flows from the failure to disclose. An individual must establish a *Charter* breach and establish that the prosecutor intended to withhold disclosure knowing, or reasonably being expected to know, that the failure to disclose was material and impinged the accused's right to full answer and defence. While the majority found intent could be inferred, "a claimant need only prove that prosecutors were actually in possession of the information and failed to disclose it"[199] or that "prosecutors were put on notice of the existence of the information and failed to obtain possession of it."[200] This inference is available to the trier of fact but is not mandatory.[201] The standard could leave a harmed party without a remedy for the lack of disclosure where it was unintentional, merely careless, or even negligent.

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192 *Henry, supra* note 7 at para 73.

193 *Ibid* at para 129, McLachlin CJC, dissenting.

194 *Ibid* at para 129, McLachlin CJC, dissenting.

195 *Ernst, supra* note 5 at para 42, citing *Ward*, *supra* note 6 at para 40.

196 *Ward, supra* note 6 at para 41.

197 *Ernst, supra* note 5 at para 172, McLachlin CJC dissenting.

198 *Ernst, supra* note 5 at para 43, Cromwell J. Chief Justice McLachlin's judgment is also critical on this issue. She argues "immunity in negligence law does not necessarily translate into immunity under the *Charter*" at para 173.

199 *Henry, supra* note 7 at para 86.

200 *Ibid* at para 86; *R v McNeil*, 2009 SCC 3 at para 49.

201 *Henry, supra* note 7 at para 86. Notably, this description of inferred intent is comparable to how carelessness or "wilful blindness" can substitute for an intentional *mens rea* requirement in the *Criminal Code*.

To avoid defensive lawyering and chilling effects, the majority essentially imposed a qualified immunity rule for the failure to disclose. This works to reduce the remedial value of *Charter* damages by negating compensation, deterrence, and vindication where *Charter* violations flow from the unintentional failure to disclose. It also shifts the cost of the violations to the victim and complicates the trial process by requiring evidence of individual intent. This seems contrary to the spirit of the *Ward* test that lays damages against the state, not individuals. In *Ernst*, Justice Cromwell's decision also imposed immunity (not even qualified)[202] without proof of chilling effects. He also expressed concerns about the Board's potential liability to damage claims,[203] without comment on the state's responsibility for *Charter* compliance. This judgment may indicate a trend towards immunity and away from remedial recognition of *Charter* violations.

Deliberately laying *Charter* damages against the state as a whole, rather than implicating the intentions of individual government actors, will also reduce chilling effects. This too will take the spotlight off the Crown's actions or intentions. It allows courts to focus on the accused's resulting harm in the criminal process. Removing the intent standard means there is less risk that the modified *Ward* test will be used in other types of *Charter* damages cases. While future cases may argue *Charter* damages could extend to violations resulting from core prosecutorial discretion in some contexts, surely reducing the scope of available remedies short of prosecutorial discretion is unwarranted.

The majority in *Henry* asserts the purpose of the intent and knowledge requirement is to set a threshold high enough to address good governance and let only serious instances of non-disclosure form the basis of a section 24(1) remedy.[204] However, as addressed below, this standard may not be nuanced enough to provide a remedy in cases of racial discrimination. Serious instances of non-disclosure and *Charter* violations can result from the unintentional failure to disclose or the failure to provide a check on investigatory tunnel vision. Many of these instances will occur where racial discrimination makes its way into a criminal investigation. The *Henry* decision may therefore have a disproportionate impact on these kinds of claims.

iv. The Impact on Racial Discrimination Claims

The imposition of an intent standard may be problematic for *Charter* damages claims flowing from racial discrimination that extend into the trial process and beyond. This standard was imposed without much more than speculative evidence.[205] Many historical inquiries into wrongful convictions have noted that the interacting nature of unconscious systemic discrimination and the failure to disclose are often to blame for miscarriages of justice. It would be unfortunate if *Charter* damages become categorically unavailable to victims of racial discrimination where the Crown does not intend to discriminate.

Racial discrimination, where it exists, will rarely dissipate when a file comes into contact with Crown counsel. It seeps through the criminal justice process in many cases, and the intent requirement in *Henry* will be a substantial obstacle for future *Charter* damages claims where the individual's *Charter* violations extend into the Crown's office. Invoking the intent requirement is as useful as asking a police officer if they racially profiled someone at a traffic stop. To go further, asking individual Crown counsel to defend their decision to not disclose information when allegations of racism are on the table invites

202 *Ernst*, *supra* note 5 at para 55, Cromwell J.
203 *Ibid* at para 47, Cromwell J.
204 *Henry, supra* note 7 at para 89.
205 *Henry, supra* note 7 at para 133.

a difficult exchange. When the damages lie against the state as a whole, the deterrence value remains at a general level and nudges the state towards implementing policies that will better avoid discrimination in the future.

The Manitoba Justice Inquiry and the Donald Marshall Report both speak to the unconscious nature of racial discrimination. In his article on the leading causes of wrongful convictions, Bruce MacFarlane explores the nature of tunnel vision in criminal investigations.[206] Tunnel vision involves an overly narrow focus that can colour the evaluation of information received and the unconscious response to that information in a criminal investigation or prosecution.[207] In other words, the case against an individual will be built from this filtered information, and other information that points away from guilt is invisible or ignored.[208] The notion of tunnel vision is consistent with the unconsciousness of racial discrimination. Many government actors are susceptible to unconscious bias, particularly confirmation bias. As with racial profiling where a police officer may infer criminality on the basis of race,[209] Crown counsel may unconsciously make decisions on what is relevant or material to the case based on confirmation bias, linked to racial discrimination.[210]

This is not to say that all Crown counsel are fostering racial discrimination, only that the *Henry* intent standard could deny a damage award under section 24(1) without a principled consideration of the impact of narrowing the availability of damages where the failure to disclose arises from unconscious racial bias. If the line of reasoning in *Henry* and *Ernst* is followed into future cases, the test could be narrowed in other circumstances without much justification. When government is immunized from liability for violations without principled justification, leaving victims without a remedy, the integrity and universality of the state's underlying fundamental values are questioned.[211]

D. Step Four: Quantum of Damages

The "presence and force of" the purposes underlying a *Charter* damage award will determine the quantum of those damages.[212] Compensation will usually be the most significant purpose, followed by vindication and deterrence.[213] Compensation engages the goal of restoring the claimant to her pre-breach condition where loss is proven, as it does in tort law.[214] But the Court in *Ward* noted that "cases may arise where vindication or deterrence play a major and even exclusive role"[215] in determining quantum. Tort law is less applicable in these cases as the damage award assumes a more punitive aspect.[216] Courts should determine what is rational and proportionate in the circumstances, guided

206 Bruce A MacFarlane, *Wrongful Convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System: The Goudge Commission of Inquiry into Pediatric Forensic Pathology in Ontario* (2008) [MacFarlane]; David Gill, "Full Disclosure: *Charter* Damages after *Henry v British Columbia*" (2015) [unpublished].

207 MacFarlane, *supra* note 206 at 34.

208 *Ibid*.

209 *Brown*, *supra* note 9 at para 7.

210 MacFarlane, *supra* note 206 at 36.

211 Schuck, *supra* note 54 at 23.

212 *Ward, supra* note 6 at para 47.

213 *Ibid*.

214 *Ibid* at paras 48, 50.

215 *Ibid* at para 47.

216 *Ibid* at paras 51,56.

by precedent.[217] What is rational and proportionate will depend on the seriousness of the breach (the impact on the claimant and the seriousness of the state misconduct).[218] The more serious the breach, the higher the quantum will be.[219]

Ultimately, the damage award must be fair to both the claimant and the state.[220] The Court warned that the diversion of public funds to pay large awards "may serve little functional purpose in terms of the claimant's needs and may be inappropriate or unjust from the public perspective."[221] Despite this, the award must be meaningful and compensate *Charter* breaches as independent wrongs "worthy of compensation in … [their] own right."[222] In the *Henry* trial decision, Chief Justice Hinkson of the BCSC noted he had no evidence before him to "assess the amount beyond which an award in this case could begin to threaten public funding"[223] and so awarded a large damage award against British Columbia.

Racial discrimination is a large, systemic issue, and when *Charter* violations stem from discrimination, the seriousness of collective misconduct is high.[224] Because *Charter* damages lie against the state as a whole rather than against individual actors, courts should focus on the breaches as independent wrongs in their own right. They should also consider the systemic impacts of the independent wrongs. Where there is evidence of individual misconduct, the quantum of damages should increase.[225] Where *Charter* damages are justified on the basis of compensation, vindication, or deterrence in the context of racial discrimination, the quantum could be large enough to make a claim financially viable.[226]

CONCLUSION

Charter damages are an important remedy that should be more widely available to victims of racial discrimination in the criminal justice system. Their availability relies on counsel advancing creative arguments and courts accepting the issue of racial discrimination as a serious one that requires adequate remedies. There are legal and financial obstacles to obtaining *Charter* damages. These obstacles could be addressed through legislative amendments, policy directions, and legal aid funding. As mentioned in Part II, a claimant generally cannot pursue *Charter* damages in provincial courts and *Charter* damages cannot be awarded within the confines of a criminal trial. Parts III and IV indicate that *Charter* damage claims can be prohibitively expensive and individuals in high profile

217 *Ibid* at para 51.

218 *Ibid* at para 52.

219 *Ibid*. Notably, when considering *Charter* damages in *Henry*, 2016 BCSC 1038, the BCSC awarded 7.5 million dollars to Mr. Henry for vindication and deterrence. This sets the bar high for future cases where rights are violated in a serious manner.

220 *Ward, supra* note 6 at para 53.

221 *Ibid*.

222 *Ibid* at para 54.

223 *Henry* trial decision, *supra* note 87 at para 463.

224 *R v Harris*, 2007 ONCA 574; Tanovich, "Charter of Whiteness", *supra* note 1 at 679. The disproportionate impact of discriminatory policing is a consideration when assessing the seriousness of a *Charter* violation.

225 Although, if there is specific misconduct that can be addressed through existing torts, a claimant might run into the issue of adequate alternative remedies.

226 For a more detailed discussion on this issue, see generally: Agarwal & Marcus, *supra* note 3 at 96. Class action *Charter* damages claims are also an option to pursue, and several were filed in 2013 against Ontario police services boards. The success of these claims is mixed; see *Thorburn v British Columbia*, 2013 BCCA 480 where the BCCA found that whether the strip searches were reasonable had to be decided through individual trials. On the other hand, in *Good v Toronto (Police Services Board)*, 2016 ONCA 250, the ONCA upheld a class action certification relating to detentions during the G20 in Toronto.

cases will likely find themselves in a legal struggle that must endure the appeal process. The test for *Charter* damages is also in flux. The *Ward* test is likely, but not certainly, on a narrowing trajectory. A final obstacle lies in the reality that many cases for damages against the state may settle. Settlements are subject to non-disclosure clauses. These clauses mean that state behaviour is not publically highlighted or deterred, as it would be in a *Charter* damages claim. However, *Charter* damages are still a powerful tool driven by "compelling societal interest in vindicating individual *Charter* rights," compensating victims, and deterring violations in a sea of inadequate alternative remedies.[227]

Ultimately, the value we place on decreasing the prevalence of racial discrimination should "find expression not only in safeguards…but also in the form of meaningful redress when those safeguards fail"[228] as they are bound to do in a system run by human beings. But meaningful redress is not always available to those who experience identifiable *Charter* violations, particularly in the context of racial discrimination. The individual and systemic costs of discrimination therefore require more attention and may be partially redressed through the principled application of remedial provisions like section 24(1) of the *Charter*.

While *Charter* damages do not provide a perfect or complete response to systemic racism, they provide relief to victims while clarifying the state's obligations to protect *Charter* rights, potentially leading to systemic responses. Section 24(1) of the *Charter* provides a broad basis for action. Rather than widening gaps to refuse remedies without a principled basis, section 24(1) should be broadly interpreted to provide remedial relief to victims of racial discrimination. In 1986, the SCC stated that section 24(1) damages ensure "the *Charter* will be a vibrant and vigorous instrument for the protection of the rights and freedoms of Canadians."[229] Let us hope section 24(1) will be used as an instrument for ensuring the *Charter* rights of all Canadians.

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227 Agarwal & Marcus, *supra* note 3 at 77.

228 *Henry v British Columbia (Attorney General),* 2015 SCC 24 (Factum of the Intervener, Association in Defence of the Wrongly Convicted at para 7), although this quote specifically referenced the immense value we place on preventing the state from punishing the innocent, rather than avoiding racial discrimination, it applies to both contexts.

229 *Mills*, *supra* note 51 at 881.