“Using s.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 impacts of racial discrimination are severe: physical and psychological harm, isolation, alienation, mistrust, behavioural adaptations, damage to family and social networks, and over-incarceration of racial minorities.[2] Many approaches are required to address and correct the issue of systemic racial discrimination, and I do not attempt to highlight them all here. For example, training relating to unconscious bias, implementing monitoring systems, providing more resourcing to *Gladue* workers, providing funding for specialized courts and appointing more Indigenous and racialized judges will create meaningful change. Without detracting from the importance of implementing these kinds of initiatives, among others, this paper explores the use of damage awards pursuant to s.24(1) of the *Charter*[3] as an avenue of relief for individuals harmed by racial discrimination. However, in order to be more effective, courts must remove obstacles that currently exist in the *Charter* damages jurisprudence in order to nudge government into implementing some of the approaches just listed above.

This paper addresses this topic in five parts. In part I, I introduce the systemic and historical nature of racial discrimination. In part II, I discuss the nature of s.24(1) *Charter* damages, and why they may provide an appropriate remedy for racial discrimination that results in *Charter* violations in the criminal justice system. While not a perfect or complete remedy, *Charter* damages can provide relief to individuals who face discrimination and prompt government towards implementing systemic change. In part III, I canvass the Supreme Court of Canada's (SCC) seminal decision on s.24(1) in *Vancouver (City) v Ward* (*Ward).* Part IV covers the SCC's recent decision in *Henry v British Columbia (AG) (Henry)* and comments on how it impacted the *Ward* test. Part V considers how a claim for racial discrimination could be approached in a claim for damages under a s.24(1).

[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.
[2] 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.
[3] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11, s 24(1) [*Charter*].

I. DISCRIMINATION AND RACIAL PROFILING: 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.[4] While racial profiling refers to the specific act of targeting individuals on the basis of race, and racial discrimination can be interpreted more broadly, I use them interchangeably in this paper. 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.[5]

Justice Morden of the ONCA went on to explain,

> [t]he attitude underlying racial profiling is one that may be consciously or unconsciously held. That is, the police officer need not be an overt racist. His or her conduct may be based on subconscious racial stereotyping."[6]

This unconscious nature of racial discrimination was later confirmed by the ONCA in *North Bay (City) v Singh*;

> In fact it would be extremely rare to have such evidence 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.[7]

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[4] 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 76 at 78; *R v Brown*, 2003 CanLII 52142 (ONCA).
[5] *R v Brown*, 2003 CanLII 52142 (ONCA) at para 7.
[6] *R v Brown*, 2003 CanLII 52142 (ONCA) at para 8.
[7] *North Bay (City) v Singh,* 2015 ONCJ 500 at para 9.

Justice Doherty of the ONCA then elaborated on the seriousness of racial discrimination in *Peart v Peel (Regional Municipality) Police Services Board*, noting; "[i]t is offensive to fundamental concepts of equality and the human dignity of those who are subject to negative stereotyping."[8] The Court also noted that both the community at large and courts have come to recognize that racial stereotyping operates in our criminal justice system – it is a daily reality for those minorities affected by it.[9]

Generally courts show deference to legislative authority and fail to remedy systemic problems related to racial discrimination, and few courts have responded remedially to findings of racial discrimination.[10] I argue the individual and systemic costs of discrimination require more attention, through the principled application of remedial provisions like s.24(1) of the *Charter*. Discrimination in the criminal justice system results in identifiable *Charter* breaches and this needs to be addressed, and remedied where possible.

The SCC has recognized systemic discrimination against Aboriginal people in Canada in cases such as *R v Gladue, R v Ipeelee,* and recently in *R v Kokopenace*.[11] Chief Justice McLachlin, in dissent in *Kokopenace*, stated that in the context of jury representation, the state has a responsibility to make reasonable efforts to address systemic problems.[12] She noted that "systemic problems" was a euphemism for "among other things, racial discrimination and Aboriginal alienation from the justice system."[13] In *Gladue*, the SCC accepted the findings in the Report of the Royal Commission on Aboriginal Peoples, the Aboriginal Justice Inquiry of Manitoba, and the Court's findings in *R v Williams*: there is "widespread bias against Aboriginal

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[8] *Peart v Peel (Regional Municipality) Police Services Board,* 2006 CanLII 37566 (ONCA) at para 93 [*Peart ONCA*].
[9] *Peart ONCA,* 2006 CanLII 37566 (ONCA) at para 94.
[10] See generally Lawrence David, "Resource Allocation and Judicial Deference on Charter Review: The Price of Rights Protection According to the McLachlin Court" (2015), 73:1 UT Fac L Rev 36.
[11] *R v Gladue* 1999 CanLII 679 (SCC) [*Gladue*]; *R v Ipeelee* 2012 SCC 13 [*Ipellee*]; *R v Kokopenace*, 2015 SCC 28 [*Kokopenace*].
[12] *R v Kokopenace*, 2015 SCC 28 at para 281.
[13] *Ibid* at para 282.

people… there is evidence that this widespread racism has translated into systemic discrimination in the criminal system."[14]

The Chief Justice, in dissent in *Kokopenace,* notes that while there 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."[15]

The *Charter* does provide a basis for action, through the award of damages pursuant to s. 24(1). This provision has the capacity to provide relief to victims of racial discrimination, where the discrimination results in a *Charter* violation. Rather than turning a blind eye, defence counsel, Crown counsel and the judiciary need to purposively use s.24(1) of the *Charter* to remedy proven constitutional wrongs caused by deeply entrenched racial discrimination in the criminal justice system.

(b) Statistics and Examples

There are many historical cases reflecting on the nature of systemic racial discrimination and its impact on criminal investigations, some of which are detailed in Royal Commissions and inquiries. Many of these cases occurred many years ago, but the principles raised still apply today, and the issues they address are backed up by recent statistics. These reports include the Royal Commission on Aboriginal Peoples, the Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People (Volume 1), The Deaths of Helen Betty Osborne and John Joseph Harper (Volume 2), The Royal Commission on the Donald Marshall

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[14] *R v Kokopenace*, 2015 SCC 28 at para 283; *R v Williams*, 1998 CanLII 782 (SCC); 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> [Justice Inquiry of Manitoba].

[15] *R v Kokopenace*, 2015 SCC 28 at para 285. The Chief Justice would have awarded a declaration that the accused's rights were violated, because the issue was raised for the first time after the verdict. However, if the accused established that in all the circumstances a new trial was the only way to restore public confidence in the administration of justice, as the Court of Appeal did in this case, then a new trial is the appropriate remedy.

Jr. Prosecution, the Report of the Commission on Systemic Racism in the Ontario Criminal Justice System, The Report of the Commission of Systemic Racism in the Ontario Justice System, The Report of the Commission of Inquiry into Matters Relating to the Death of Neil Stonechild and The Honourable Frank Iacobucci's Report on First Nations Representation on Ontario Juries, to name a few.[16] I will highlight two examples here, to give meaning to the statement that racial discrimination is a real and complex issue that needs to be remedied in Canada.

(i) The Death of Helen Betty Osborne

Volume 2 of the Report of the Aboriginal Justice Inquiry of Manitoba summarizes the legacy of historical racism that permeated the investigation of Helen Betty Osborne's murder. Beyond the reality that the murder of Ms. Osborne was motivated by racism, the investigation was also permeated with conscious and unconscious racism against Aboriginal persons.[17] The Report found the police initially investigated only Aboriginal suspects and systematically violated their rights. The RCMP failed to properly investigate a non-Aboriginal suspect[18], and simultaneously treated Aboriginal suspects with indignity. Racism in the wider community also contributed to the need for this Inquiry and Report; those with information refused to come forward because the victim was an Aboriginal woman, and potential Aboriginal jurors were removed from the jury panel at trial.[19] Specific details about this insidious discrimination include: a Sheriff admitted that if the victim had been the daughter of a neighbour, he would have gone to police earlier with the information given to him by one of the men later convicted, and the general feeling that "Osborne was not the girl next door; she was Aboriginal in a white town." Those who cared

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[16] RCAP Report, *supra* note (add); Justice Inquiry of Manitoba *supra* note (add); 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).

[17] Justice Inquiry of Manitoba, *supra* note, vol 2 chapter 9 online: <http://www.ajic.mb.ca/volumell/chapter9.html>.

[18] Mr. Colgan, who was later granted immunity in exchange for testifying against the other two accused.

[19] The report also notes that Ms. Osborne's outsider status in her own community also contributed to the silence. It notes, "Even though she had lived in The Pas for to years by the time she was murdered, she was a stranger to the community, a person almost without identity." The report notes her gender may have played a role in the community's unwillingness to come forward with information or push for further investigation. Online: <http://www.ajic.mb.ca/volumell/chapter9.html>.

about (her from her own community) were not privy to the rumours around town that correctly pointed to her murderers.

(ii) The Royal Commission on the Donald Marshall Jr. Prosecution

The police, Crown prosecutors, defence counsel, the courts, the Department of the Attorney General and the RCMP all contributed to the wrongful conviction of Donald Marshall.[20] The Royal Commission concluded that "[t]he criminal justice system failed Donald Marshall, Jr. at virtually every turn."[21]

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."[22] This case presented "bald facts" that raised questions of racism and discrimination: Mr. Marshall, an Aboriginal youth, was charged with murdering a Black youth. He was investigated, tried and convicted by a white criminal justice system.[23] However, the Commission importantly notes that these issues are not the result of "any evil intention to discriminate by those in the criminal justice system."[24] But the unintended nature of discrimination does not make its impact any less insidious or devastating.[25] One impact of racial discrimination discussed in this Report is the erosion of confidence in our justice system and public perceptions of unfairness. If there is truth to any of these perceptions, distrust can spread through the community "with debilitating and corrosive effects within…the system."[26] Loss of confidence can present on a spectrum, from simply questioning the system, to complete loss of confidence in the system's integrity.[27] Restoring this confidence "can only be accomplished through the unwavering and visible application of the principles of absolute fairness and independence."[28]

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[20] Donald Marshall Commission *supra* note 16, vol 1 at 193.
[21] Donald Marshall Commission *supra* note ,16 vol 1 at 15.
[22] Donald Marshall Commission *supra* note ,16 vol 1 at 148.
[23] Donald Marshall Commission *supra* note ,16 vol 1 at 149.
[24] Donald Marshall Commission *supra* note ,16 vol 1 at 151.
[25] Donald Marshall Commission *supra* note ,16 vol 1 at 151.
[26] Donald Marshall Commission *supra* note ,16 vol 1 at 228.
[27] See generally Donald Marshall Commission *supra* note 16, vol 1 at 228-229.
[28] Donald Marshall Commission *supra* note 16, vol 1 at 194.

(iii) Recent Statistics

A similar report conducted today would likely reflect the same systemic issues in the above reports. Correctional Investigator Howard Sapers compiled statistics and reports relating to the over incarceration of Aboriginal people in Canada, and the statistics are getting worse over time.[29] In *Ipeelee,* the SCC noted, "statistics indicate that the overrepresentation and alienation of Aboriginal peoples in the criminal justice system has only worsened…the overrepresentation of Aboriginal people in the criminal justice system is worse than ever."[30] The racial profiling of Indigenous peoples and other racial minorities is an ever growing problem in Canada. One study 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 from unwanted police attention.[31]

There are many stories and documented studies regarding the high levels of racial discrimination against black individuals in Ontario, demonstrating the widespread and current nature of racial discrimination.[32]

II. WHY CHARTER DAMAGES?

Arguments on the exclusion of evidence under s. 24(2) during a criminal trial are available for those whose *Charter* violations resulted in the discovery of evidence. Additionally, an individual prosecuted solely on the basis of racial discrimination could perhaps succeed in getting a stay

[29] Office of the Correctional Investigator, online: <http://www.oci-bec.gc.ca/index-eng.aspx>.
[30] *Ipeelee,* 2012 SCC 13 at para 62.
[31] Nancy MacDonald, "Canada's prisons are the 'new residential schools'" *Maclean's* (February 18 2016), online: <http://www.macleans.ca/news/canada/canadas-prisons-are-the-new-residential-schools/>.
[32] Leo Russomanno, "Carding, not just a Toronto Problem" (June 8 2015), online: http://www.agpllp.ca/carding-not-just-a-toronto-problem; Desmond Cole, "The Skin I'm In: I've been interrogated by police more than 50 times—all because I'm black" *Toronto Life* (April 21 2015), online: <http://torontolife.com/city/life/skin-im-ive-interrogated-police-50-times-im-black/>.

under 24(1), but this is an extreme remedy that is sparingly granted.[33] However, remedies are rarely granted where an individual is stopped on the street, or searched or harassed or arrested or tried on the basis of racial discrimination. The most obvious remedy in these cases is *Charter* damage awards.[34]

Charter litigation to date has not been very successful in remedying racial injustice in Canada,[35] 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.[36] Race is not often successfully raised in *Charter* cases; perhaps because some counsel don't see the issue, others are uncomfortable engaging with it or are unsure how to argue racial profiling in a *Charter* case.[37] However, creative and evidence based arguments by counsel, paired with the judiciary's willingness to hand down imaginative remedial judgments have the potential to expand the availability of s.24(1) damages to remedy victims of discrimination.

(a) There Should be a Remedy for Every *Charter* Right Violation

"a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach."[38]

If racial discrimination results in a *Charter* right violation, then there should be an effective remedy available. However, this is not always the case. The common law has generally developed siloed jurisprudence on rights, versus remedies. There is much discussion in the

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[33] 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; *R v Regan*, [2002] 1 SCR 297.

[34] 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.

[35] David M. Tanovich, "The Charter of Whiteness" (2008) 40:2 Sup Ct Rev 656 at 662.

[36] *Ibid.*

[37] *Ibid* at 674, 676. Tanovich refers to *R v Law*, 2002 SCC 10, as an example of failing to raise an argument of racial discrimination, even in the face of uncontradicted evidence of the officers involved indicating they engaged in racial profiling. If this argument was raised, the SCC could have addressed the issue for the first time.

[38] *R v 974649 Ontario Inc*, 2001 SCC 575 at para 63.

private law context as to the divide between substantive rights and the law of remedies.[39] Are rights subsumed into remedies? If so, saying there is a "right" essentially means a remedy is granted.[40] On the other hand, remedies can be conceptualized as something available when a right exists and is violated- "the right defines the remedy."[41] Finally, if rights are all that matter, then remedies can be seen as the legal system's response to a rights grievance.[42] Clearly, these theories take on further considerations in the public law context. When these theories move beyond the rights and/or remedies between private parties into the domain of public law, a court must decide whether a remedy is warranted in the circumstances. Constitutional rights do not create "automatic or unlimited" remedies.[43]

Someone claiming constitutional damages can argue that it is illogical for a court to confirm the existence of a right without providing an avenue for claiming a remedy for that right's violation. That to refuse a remedy where a violation occurs is "confession of impotence"[44] that "disturbs the moral and logical symmetry of the legal order"; disturbing a court's authority.[45] However, this idealistic view must confront reality. Declaring a right and providing for a remedy require distinct reasoning processes with different criteria. Providing remedies for constitutional violations sometimes fractures the connection between rights and remedies. A claimant must "often traverse broad domains of official and governmental immunity"[46] before attaining compensation, vindication and deterrence; the settled purposes for awarding *Charter* damages. However, the gap between rights and remedies for constitutional violations can be narrowed to affirm the importance of *Charter* rights in Canada through the remedies made available for their breach, particularly the *Charter* rights of visible minorities.

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[39] see generally Helge Dedek, "The Relationship between Rights and Remedies in Private Law: A Comparison between the Common and the Civil Law Tradition" in Robert J Sharpe & Kent Roach eds, *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2010).
[40] Helge Dedek, "The Relationship between Rights and Remedies in Private Law: A Comparison between the Common and the Civil Law Tradition" in Robert J Sharpe & Kent Roach eds, *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2010) at 70.
[41] *Ibid.*
[42] *Ibid.*
[43] *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 292.
[44] Peter Schuck, *Suing Government* (New Haven: Yale University Press, 1983) at 26.
[45] *Ibid.*
[46] *Ibid.*

The above is an overly simplistic overview of rights and/or remedies. However, it provides space to start analyzing how Canadian jurisprudence conceptualizes *Charter* remedies. While s. 24(1) of the *Charter* allows anyone whose rights are violated to apply to a competent court for a just remedy, our courts can only elucidate the connection between constitutional rights and remedies through cumulative comments on how damages should be.[47] The availability of *Charter* remedies, such as damages, is determined on a case-by-case basis, with consideration of the common law.[48] Therefore, Canadian courts' conception of how connected and integrated rights and remedies truly are, requires analyzing their approach to the cases they hear. There is no better context to assess this approach than at the interface of racial discrimination, and the criminal investigation and prosecution of crimes. Here, the individual *Charter* rights of racial minorities are brought into close and complicated conflict with considerations of the state. This conflict has generally resulted in the failure to remedy violations resulting from racial discrimination. But *Charter* remedies provide an avenue of relief that is not yet closed to future claimants.

(b) The Advantages of Constitutional Damage Awards

Damage awards allow Parliament to choose its reaction to a judgment. In this way, damages are a remedy that prizes parliamentary sovereignty.[49] Awarding damages against the government does not disproportionately interfere with a government's choice of policy implementation,[50] yet damages still provide an incentive for government to change its ways to avoid the imposition of future damage awards. Further, awarding damages encourages other claimants to seek damage awards.[51] This furthers the development of remedies and constitutional law.

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[47] Gary S Gildin, "Strip Searches and Silos: Adopting a Holistic Approach to *Charter* Remedies" in Robert J Sharpe & Kent Roach eds, *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2010) at 232-233.
[48] *Vancouver (City) v Ward*, 2010 SCC 27 [*Ward SCC*] at para 22.
[49] Raj Anand, "Damages for Unconstitutional Actions: A Rule in Search of a Rationale" (2010) 27 NJCL at 167.
[50] 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.
[51] Raj Anand, "Damages for Unconstitutional Actions: A Rule in Search of a Rationale" (2010) 27 NJCL at 167.

On the other hand, it is unlikely that government will feel pressure to change if courts only impose low quantum damage awards.[52] Raj Anand also raises the concern that awarding damages for constitutional violations "could theoretically result in the perverse consequence of governments being able to buy their way out of constitutional compliance."[53] Ultimately, this *is* a possible result. However, with consistent adherence to awarding damages on the principle of vindication, this will likely balance out in favour of positive systemic change.[54] This concern can also be addressed through damage awards with high deterrence value along with strongly worded reasons for judgment that engage "political shaming".

(c) Can *Charter* Damages Remedy Discrimination?

Official misconduct, intentional or otherwise, that violates the constitutional rights of individuals is not one problem.[55] It is many problems, caused by different government officials for different reasons in different ways. Placed in the context of an issue as intersectional and complicated as racial discrimination, the web of problems may seem near impossible to address. It would be a mistake to say that effectively and efficiently awarding *Charter* damages for official misconduct relating to discrimination will solve the misconduct – it will not. However, it may help reduce the incidence of such conduct, may lead to changes in government policy, and in any event it will help to compensate those who are thrust into the criminal justice system on the basis of their race. It is one small, but effective, way to address the larger issue. Because *Charter* damages have the potential to provide tangible monetary relief to victims of discrimination and can lead to institutional change, it is an avenue worth exploring and developing through *Charter* jurisprudence.

It may also seem that clearing the obstacles to awarding *Charter* damage awards is an inadequate approach to restructuring systemic problems, such as racial discrimination. This point is

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[52] *Ibid.*
[53] *Ibid* at 168. See also: 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.
[54] 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.
[55] Peter Schuck, *Suing Government* (New Haven: Yale University Press, 1983) at 3.

exacerbated when a lack of resources is cited as contributing to the underlying systemic problem. 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 it."[56] However, this is not a principled or adequate reason to limit *Charter* damage awards. This kind of reasoning ignores the individual who experienced the violation. The fact that a particular damage award doesn't deter all future inaction on its own is not a reason to deny a remedy to someone whose rights were infringed.[57] When awarded consistently on a principled basis, damage awards may collectively pressure government to implement policies that provide more checks on exercises of discretion that result in discrimination. Governments are in the best place to restructure official conduct to avoid liability – but they need incentive to do so.

(d) *Charter* Damages are not a Panacea

It is important to be mindful of existing procedural bars to claiming *Charter* damages. Several other substantive bars will be discussed below in parts IV and V. Section 24(1) invites individuals to apply to "a court of competent jurisdiction" to obtain a remedy. The SCC in *Vancouver (City) v Ward* confirmed that a court of competent jurisdiction must have the power to consider *Charter* questions and have inherent jurisdiction to award damages.[58] Superior courts have been reluctant to award damages in the midst of a criminal trial because of the fundamental differences between a criminal trial and the civil process.[59] However it is still possible that a provincial superior court may rely on its inherent jurisdiction in any proceedings to award damages under 24(1) where appropriate.[60] Generally, provincial courts are not courts of competent jurisdiction pursuant to s.24(1) – to commence a *Charter* damages claim an individual

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[56] Marilyn L Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984) 62 Can Bar Rev 517 at 562.
[57] *Ibid.*
[58] Kent Roach, *Constitutional Remedies in Canada*, loose-leaf (consulted last on 9 March 2016), (Aurora: Canada Law Book) at 11-7; *Vancouver (City) v Ward*, 2010 SCC 27 [*Ward SCC*]; *R v Conway*, 2010 SCC 22.
[59] *R v Mills*, [1986] 1 SCR 28, *R v Pang*, (1994) 95 CCC (3d) 60, Kent Roach, *Constitutional Remedies in Canada*, loose-leaf (consulted last on 9 March 2016), (Aurora: Canada Law Book) at 11-8.
[60] Kent Roach, *Constitutional Remedies in Canada*, loose-leaf (consulted last on 9 March 2016), (Aurora: Canada Law Book) at 11-9 – 11-10. For example, in *R v McGillivary* 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.

must file a claim in a provincial superior court[61] – but there has been movement on this issue. In 2011 the Saskatchewan Provincial Court found its enabling statute allowed it to award damages under s.24(1).[62]

It seems possible that in the future, *Charter* damages could be awarded by a superior court *or* a provincial court (at least in Saskatchewan) during criminal proceedings when a stay is too extreme a remedy, and exclusion of evidence is inapplicable. This is not yet a reality however, and currently allowing superior courts to award damages during a trial means an individual prosecuted in a superior court could have recourse to damages where an individual prosecuted in a provincial court would not. This is a serious limitation because well over 90% of criminal cases are dealt with in provincial court. The only recourse in such cases is a separate proceeding in Superior Court which is costly, time-consuming and normally requires the expensive assistance of counsel. Perhaps amendments to provincial court's enabling statutes could address this issue in the future.[63]

(e) Which *Charter* Violations Can Lead to a Remedy for Racial Discrimination?

Racial profiling often occurs under the guise of the police power to investigatively detain citizens. Police may make assumptions about the relation between race and crime, creating suspicion about a person in their mind.[64] These assumptions may be motivated by conscious or unconscious bias, and may quickly escalate into an arrest. Some officers may target individuals of a certain race because they believe it is a reliable investigative tool.[65] For example, evasive action may look suspicious, but in reality such action may stem from the suspect's historical and numerous interactions with the police and desire to avoid all future contact with police.[66] Further,

[61] Kent Roach, *Constitutional Remedies in Canada*, loose-leaf (consulted last on 9 March 2016), (Aurora: Canada Law Book) at 11-7.
[62] *R v Wetzell* 2011 SKPC 9.
[63] Kent Roach, *Constitutional Remedies in Canada*, loose-leaf (consulted last on 9 March 2016), (Aurora: Canada Law Book) at 11-12.
[64] 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 149-150.
[65] *Ibid* at 158.
[66] *Ibid* at 150.

Tanovich argues that racial profiling is neither an effective nor reliable way to investigate crime.[67]

While racial discrimination could arguably be addressed as a s.15 equality violation, the s.15 jurisprudence to date is not sufficiently clear to predictably use it to underpin a s.24(1) *Charter* claim in the criminal law context. The test under s.15 is rather unwieldy[68], and is usually used in the context of discriminatory *laws* as opposed to discriminatory *acts*. While the ultimate endgame and perhaps "secondary goal" [69] is for an individual to be investigated and prosecuted only where evidence warrants it and free from racial discrimination, basing a constitutional damages claim only on s.15 is to argue for redress where the right is unclear and not strongly linked to a remedy.

Justice Abella aptly described what equality means, and why it is a difficult standard to pin down:

> Equality is, at the very least, freedom from adverse discrimination. But what constitutes adverse discrimination changes with time, with information, with experience and with insight…Equality is thus a process – a process of constant and flexible examination, of vigilant introspection, and of aggressive open-mindedness. [70]

As *Charter* violations flowing from racial discrimination rarely lead to a meaningful remedy, the most predictable path should be argued first. While the right not to be discriminated against is the end goal of remedying racial discrimination in our criminal justice system, discrimination often results in many discrete violations along the way through unlawful searches, arbitrary detentions, unwarranted charges and the failure to disclose documents during trial.[71] A discriminatory investigation and prosecution will usually involve section 8 and 9 *Charter*

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[67] 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 164.
[68] Although it was recently condensed somewhat by Justice Abella, this time with a unanimous court, in *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30.
[69] 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.
[70] 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.
[71] 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 88-89.

breaches, or a s.7 violation if the individual is denied a fair trial or wrongfully convicted. As 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."[72]

Framing the issue as a s.15 violation may allow courts to side-step granting a remedy, because judges may be unfamiliar with the s.15 argument in the context of racial discrimination and the breach is harder to prove.

While this paper doesn't focus on 24(1) damages flowing from a s.15 *Charter* breach, this area nonetheless deserves closer attention in the future. A case currently before the Ontario Supreme Court (ONSC) is addressing a s.24(1) damages claim for ss.7, 8 and 15 *Charter* violations.[73] The statement of claim survived an application to strike two statements that alleged discrimination both on a personal level and a systemic level.[74] The ONSC found,

> With 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.[75]

The court acknowledged that a discrimination claim would be complicated, because discrimination claims are "inherently complicated."[76] The complexity of a claim, however, is not a bar to pleading it. Pleading it successfully will simply require extensive documentation and discovery processes.[77]

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[72] 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 396.
[73] An example of a challenge to the pleadings is in *Anoquot v Toronto Police Services Board*, 2015 ONSC 553.
[74] *Anoquot v Toronto Police Services Board*, 2015 ONSC 553 at para 18.
[75] *Ibid* at para 28.
[76] *Ibid* at para 34.
[77] *Ibid* at para 34.

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

Ward confirmed that courts are empowered to grant damages under s.24(1) as a public law remedy against the state. Section 24(1) damages lie against governments, rather than individuals who exercise governmental functions or exceed legal.[78] The *Ward* decision provided much needed structure to the confused jurisprudential history of *Charter* damages. Broadly, the functional approach determines whether damages are "appropriate and just" in the circumstances.[79] More specifically, the *Ward* test requires proof of a *Charter* violation, a functional justification for damages, the absence of compelling countervailing factors and consideration of an appropriate quantum.[80]

In *Ward*, the Supreme Court of Canada carefully distinguished private law damages from constitutional damages. Where constitutional damages are awarded, the State, or society at large, compensates the claimant for breaches of that individual's constitutional rights.[81] "An action for public law damages – including constitutional damages – lies against the state and not against individual actors."[82] However, policy considerations relevant to private law damages may play a role in awarding public law damages.[83]

(a) *Ward*: The Facts

On August 1, 2002, members of the Vancouver Police Department (VPD) mistakenly identified Mr. Cameron Ward as an unknown individual who allegedly intended to throw a pie at Prime Minister Chrétien. VPD officers chased and arrested Mr. Ward as he was running at the time, appearing to avoid apprehension. The media brigade caught the whole disturbance on live television. The VPD officers took Mr. Ward to the police lockup. There, corrections officers strip-searched him. Mr. Ward's car was impounded during the incident, and searched once

[78] Kent Roach, *Constitutional Remedies in Canada*, loose-leaf (updated January 11, 2016), 2nd ed (Toronto, Ont: Canada Law Book, 2015) at 11-24.
[79] *Ward SCC,* 2010 SCC 27 at para 24.
[80] *Ibid* at para 15.
[81] *Ibid* at para 22.
[82] *Ibid* at para 22.
[83] *Ibid* at para 22.

officers received a search warrant. The officers did not find any pies and determined they had no grounds to charge Mr. Ward with anything. Mr. Ward spent several hours in a cell before being released 4.5 hours later.

The British Columbia Supreme Court (BCSC) found the City and the Province violated Mr. Ward's ss.7, 8 and 9 *Charter* rights as a result of the wrongful imprisonment, strip search and the wrongful seizure of his vehicle.[84] Justice Tysoe found the VPD 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.[85]The court awarded damages of $5000 against British Columbia for the s.8 violation, $5000 against the City of Vancouver for the detention, and $100 against the City for the unreasonable car seizure.[86] Mr. Ward brought an appeal against the City, arguing the arrest was unlawful and the damages for imprisonment were too low.[87] The City cross-appealed and argued the judge erred in ordering damages for the car seizure but did not appeal the $5000 for the detention.[88] British Columbia also appealed, acknowledging the strip search was unreasonable (and therefore a breach), but that damages could not be awarded absent a fault standard.[89] The British Columbia Court of Appeal (BCCA) dismissed Mr. Ward's appeal against the City and upheld the damage award against the province. Saunders JA dissented.[90]

(b) Is Bad Faith Required?

The lower courts in *Ward* addressed whether bad faith was required to award *Charter* damages. The trial judge found the officers did not act maliciously, or wrongfully enough to meet any tort standard.[91] This did not restrict the provision of Charter damages however, because the trial

[84] *Ward v City of Vancouver,* 2007 BCSC 3 at para 130 [*Ward BCSC*]
[85] *Ward BCSC,* 2007 BCSC 3 at para 123 [*Ward BCSC*].
[86] *Ward BCSC,* 2007 BCSC 3 at paras 128-129.
[87] *Ward v British Columbia*, 2009 BCCA 23 at para 5 [*Ward BCCA*].
[88] *Ward BCCA,* 2009 BCCA 23 at paras 6,28.
[89] *Ward BCCA,* 2009 BCCA 23 at para 7.
[90] *Ward BCCA,* 2009 BCCA 23 at para 26.
[91] The trial judge found the officers who detained Mr. Ward did not act with willful misconduct, and were therefore not individually liable in negligence for their actions due to protection from s.21 of the *Police Act* (*Ward BCSC* at para 103). However, the City of Vancouver is vicariously liable for torts committed by its officers (section 20 of the *Police Act).* Section 21 of the *Police Act* protects individual police officers from actions in negligence regarding the performance of their duties, unless the officer is guilty of dishonesty, gross negligence or willful misconduct

judge held that *Charter* damages did not require proof of malice.[92] Throughout the trial and appeal process, British Columbia asserted that no damages can lie against a government for a *Charter* breach "absent a concurrent tort, abuse of power, negligence or wilful blindness."[93] The government argued that the SCC decision in *Mackin v New Brunswick* applied to immunize the government from *Charter* damages, absent negligence or bad faith.[94] The trial judge and later the Court of Appeal rejected this argument: the *Mackin* line of cases requiring bad faith only applied in the context of striking down unconstitutional laws, not in the context of discretionary decision-making or carrying out duties such as arrest and detention.

The BCCA majority upheld the trial judge's ruling: the absence of bad faith is not a bar to awarding *Charter* damages.[95] The majority held,

> To 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.[96]

In dissent, Saunders JA was concerned that awarding s.24(1) damages for non-pecuniary loss would become a "fall-back" where negligence or another tort cannot be established.[97] Madam Justice Saunders would only award *Charter* damages, in the absence of a tort, where the state actors exhibit a "degree of deliberation in the *Charter* breach, wilful blindness, or bad faith."[98]

(c) *Ward* at the SCC: The Four-Part Test

The SCC upheld the BCCA's decision in part. The SCC upheld the contested $5000 against British Columbia for the strip search, but set aside the $100 award for the car seizure against the

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(s.21(3)(a)). Because there was no evidence the officers chose *not* to release Mr. Ward while *knowing* he should have been released, a tort was not established. Granted, the action for negligence was perhaps abandoned at trial, while the claim for false imprisonment was addressed in more detail. The trial judge notes this at paragraphs 95 and 103 of his judgment.

[92] *Ward BCSC,* 2007 BCSC 3 at para 111.
[93] *Ward BCCA,* 2009 BCCA 23 at para 34.
[94] *Ibid* at para 57; *Mackin v New Brunswick,* 2002 SCC 13.
[95] *Ibid* at para 47
[96] *Ibid* at para 63.
[97] *Ibid* at para 87.
[98] *Ibid* at para 89.

City.[99] In the end, Mr. Ward received $10,000 in *Charter* damages. The SCC also confirmed the four part test for awarding damages under s.24(1). Importantly, the SCC confirmed that *Charter* damages can be awarded absent bad faith.

The first two steps of this test are remedial, focusing on the *Charter* violation. The last two steps are limiting, and may decrease or nullify a damage award completely. First, the claimant must establish that a *Charter* breach occurred. Then, one or more of the purposes of *Charter* damages, which are compensation, vindication and deterrence, must justify the award of damages. Third, a court must consider whether countervailing factors render s.24(1) damages unjust.[100] Fourth, a court must assess an appropriate quantum of damages. This test is addressed in detail below, in conjunction with the recent decision in *Henry v British Columbia (Attorney General).*[101]

IV. DAMAGES FOR FAILURE TO DISCLOSE IN *HENRY*- IMPACT ON THE *WARD* TEST

(a) *Henry*: The Facts

In 2010, Ivan Henry was released from prison after spending almost 27 years behind bars. The BCCA found that Mr. Henry's sexual assault verdicts were unreasonable and that there were serious errors in the conduct of the trial.[102] Mr. Henry filed a claim against the City of Vancouver, the Attorney General of British Columbia and the Attorney General of Canada for damages resulting from ss. 7 and 11(d) *Charter* rights. A significant issue in this appeal was the fault requirement attaching to the Crown's failure to disclose during Mr. Henry's trial to ground an award of s.24(1) damages.[103] British Columbia, as it did in *Ward*, argued that fault was required. Specifically, British Columbia and the other Attorneys General argued that proof of

[99] *Ward SCC,* 2010 SCC 27 at para 79.
[100] *Ibid* at para 33.
[101] *Henry v British Columbia (Attorney General),* 2015 SCC 24 [*Henry*].
[102] *Ibid.* 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.
[103] *Ibid* at para 2.

malice is required in order for a claimant to receive *Charter* damages in the context of the Crown's failure to disclose.

The main distinction between *Ward* and *Henry* is the involvement of Crown counsel. The conduct of Crown counsel not the conduct of police officers is at issue in *Henry.*[104] This appears to attract a more protectionist approach from courts, and raises issues of qualified immunity for prosecutorial discretion. Further, *Henry* deals with a s.7 violation, whereas *Ward* dealt primarily with ss.8 and 9 violations. The trial decision in this case is currently on reserve, but one may expect to see a much larger damage award than in *Ward*, if the facts as alleged are proven.

(b) *Henry* at the SCC: The Test for *Charter* Damages in the Disclosure Context

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

> 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.[105]

The Chief Justice and Karakatsanis J dissented and found this fault-based standard was inconsistent with the purpose of s.24(1) and the principled framework developed in *Ward*.[106]

While *Henry* applied the *Ward* test, it fundamentally shifted the purposive and remedial approach taken in *Ward.* Kent Roach notes, *Henry* "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."[107]

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[104] As opposed to the trial, which covers the acts of all officials involved. The City of Vancouver and the Federal Government have already settled, but the actions of British Columbia are at issue in the trial.
[105] *Henry*, 2015 SCC 24 at para 31.
[106] *Henry*, 2015 SCC 24 at para 104.
[107] Kent Roach, *Constitutional Remedies in Canada*, loose-leaf (updated January 11, 2016), 2nd ed (Toronto, Ont: Canada Law Book, 2015) at 11-32.

V. THE *WARD* TEST IN LIGHT OF *HENRY*, APPLIED TO RACIAL DISCRIMINATION

The *Ward* framework is well formulated to deal with *Charter* violations involving racial discrimination. The absence of a clear fault or causation requirement mirrors the nature of racial discrimination: that it is usually unconsciously implemented and can imbue a series of transitions within the criminal justice system rather than presenting as a clear cause and effect violation. However, the *Henry* decision poses some substantive obstacles to claiming damages arising out of Crown conduct, particularly the failure to disclose as required under *Stinchcombe*.[108] This part analyzes the test for awarding damages under s.24(1) and applies it in the context of racial discrimination.

(a) Establishing a Charter Breach

The first stage of the *Ward* test requires the claimant to bear the initial burden of proving *prima facie* that a *Charter* breach occurred.[109] In the context of racial discrimination, a claimant must prove the discrimination or racial profiling led to a *Charter* violation on the basis of circumstantial evidence.

(i) The Standard of Proof

Courts and tribunals have become more willing to take racial discrimination seriously in the context of *Charter* violations. With adequate evidence, courts acknowledge that racial discrimination is not just the acts of a few bad apples, but rather a systemic problem.[110] In addition to the systemic root causes of discrimination, state misconduct can be racially motivated even when the individual doesn't consciously appreciate the discriminatory nature of his or her

[108] *R v Stinchcombe*,1991 CanLII 45 (SCC).
[109] *Henry*, 2015 SCC 24 at para 37.
[110] 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 89; *Nassiah v Peel (Regional Municipality) Police Services Board*, 2007 HRTO 14 at para 212.

action.[111] 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?"[112] Therefore it is important that a claim of racial profiling or discrimination leading to a *Charter* violation can be successfully grounded in circumstantial rather than direct evidence.[113]

In *R v Brown,* the court 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."[114] To find that an officer engaged in racial profiling, it must be more probable than not that the real reason for the stop was the person of interest's race.[115] Circumstantial evidence of discrimination can be adduced through indicia of racial profiling; factors that have been recognized by courts through the assistance of studies, academic writing and expert evidence.[116] In *Peart v Peel (Regional Municipality) Police Services Board* the ONCA referred to these indicia as "social facts", flowing from the trier of fact's assessment of the evidence in any given case.[117] The indicia of racial profiling in a traffic stop case include: the continuation of surveillance after determining a car is not stolen, officers assuming the individuals have drugs or guns, a high risk take down (which assumes the individuals are dangerous) and violence even where there is no evidence of illegal activity. [118]

Expert evidence will be key in proving any racial discrimination or profiling claim. Courts have acknowledged that experts can assist a court in drawing the necessary inferences about discrimination.[119] Further, it is unlikely that courts will make ground-breaking decisions without

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[111] *Peart v Peel (Regional Municipality) Police Services Board,* 2006 CanLII 37566 (ONCA) at para 42.
[112] David M. Tanovich, "The Charter of Whiteness" (2008) 40:2 Sup Ct Rev 656 at 678.
[113] *R v Brown,* 2003 CanLII 52142 (ONCA). Notably, this case has not been used in BC as much as it has in Ontario. However two other more recent cases that use *Brown* as an authority are *Hamalengwa v Bentley*, 2011 ONSC 4245 and *Sidhu v Canada (The Attorney General)*, 2015 YKSC 53.
[114] *R v Brown* at para 45. The appeal of this case dealt with a further 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. It is these comments that I focus on when I reference this case.
[115] *R v Brown* at para 11; *R v Thompson*, 2014 ONSC 4749 at para 41
[116] *Peart ONCA,* 2006 CanLII 37566 (ONCA) at para 95.
[117] *Ibid* at para 96.
[118] *Peart v Peel (Regional Municipality) Police Services Board*, 2003 CanLII 42339 (ONSC) at para 20.
[119] *Peart ONCA,* 2006 CanLII 37566 (ONCA) at para 98.

strong evidence before them. As Doherty JA noted in *Peart,* "The reality of racial profiling cannot be denied" but he was not prepared to accept that racial profiling was "the rule rather than the exception."[120] He was not prepared 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."[121]

Evidence corresponding to the phenomenon of racial profiling or an inference that a police officer is lying about why an accused was detained or arrested is capable of supporting a finding of a Charter violation because of racial profiling.[122] If the court finds the accused to be a credible witness whose testimony is reasonable and supported by corroborating evidence (such as geographical evidence of where an incident took place), and the countering witness is not credible, a court can find it is more likely than not that profiling occurred.[123]

A recent Quebec municipal court decision applied *R v Brown* and found that on a balance of probabilities one of the reasons the police stopped the accused was racial profiling.[124] The officer proceeded to question the accused about where he was going, due to the fact he was Aboriginal. The judge found this breached his ss.9 and 15 *Charter* rights, and the court ordered a stay of proceedings pursuant to s.24(1) of the *Charter*.[125] In another lower court decision, the BC Provincial Court found the facts indicated it was more probably than not that the officer involved was not truthful because there were "simply too many circumstances" that made his explanation improbable.[126] The court held the stop violated the accused's s.9 *Charter* rights.

While these lower court decisions do not relate to claims for damages under s.24(1), it demonstrates how lower courts can apply the *Brown* standard. Similar arguments can be used to prove a *Charter* breach for the purposes of an application for damages under s.24(1) of the *Charter*.[127]

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[120] *Peart ONCA,* 2006 CanLII 37566 (ONCA) at para 146.
[121] *Ibid* at para 146.
[122] *R v Brown* at para 45; *Peart ONCA,* 2006 CanLII 37566 (ONCA) at para 114.
[123] *R v Campbell*, 2005 CanLII 2337 (QC CQ).
[124] *St. Anicet (Parish of) v Gordon*, 2014 QCCM 290 at paras 55-56.
[125] *Ibid* at para 58.
[126] *R v Huang*, 2010 BCPC 336 at para 5.
[127] See also *North Bay (City) v Singh*, 2015 ONCJ 500, for a similar application of *R v Brown* in the Charter context.

(ii) Shifting the Burden

It has been argued that an allegation of racial profiling should justify a shifting burden of proof.[128] This argument was unsuccessful at the ONCA in *R v Brown* and *Peart*, but proposing a shifting burden of proof may be successful in the future once more cases prove *Charter* violations on the basis of discrimination. The African Canadian Legal Clinic (ACLC) intervened at the Court of Appeal level in both *R v Brown* and *Peart.* The ACLC argued that where racial profiling is alleged against police, the onus should shift to police to demonstrate that improper racial considerations were not a factor contributing to the state action.[129] They submitted that fairness considerations favour placing the burden on police, because they have access to more information than a claimant.[130] The ACLC argued that where the individual subjected to arrest or detention is black, and this can presumably be extended to other racial minorities, the onus of proof should fall on the police.[131] Their argument flowed from the proposition that because racial profiling is so common that when alleged, placing the burden on police rather than the claimant is more likely to achieve an accurate result.[132]

In dismissing the ACLC's argument in both appeals[133] the court claimed 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"[134] and therefore the shift is not justified. Further, demonstrating that the other party is in a better position to disprove an issue is not enough to reverse the burden of proof.[135] Fairness only justifies a reverse onus 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."[136]

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[128] *R v Brown, supra*; *Peart ONCA,* 2006 CanLII 37566 (ONCA).
[129] *Peart ONCA,* 2006 CanLII 37566 (ONCA) at para 136.
[130] *Ibid* at para 148.
[131] *Ibid* at para 144.
[132] *Ibid* at para 145.
[133] *Ibid* at para 140.
[134] *Ibid* at para 143.
[135] *Ibid* at para 149.
[136] *Ibid* at para 149.

The court 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.[137] As the court noted, the traditional rule has resulted in successful claims in the past.[138] Importantly though, 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.[139] As the above reasons indicate, it would be a large step in reasoning for a non-Ontario court to come to the opposite conclusions on this point.

(iii) Other Challenges in Proving a *Charter* Breach Through Discrimination

One finding in *Peart* is troubling. The court found that when initial contact with police is tainted by racial discrimination, it does not mean all further actions or contact is equally tainted.[140] I suggest it will be a very rare case in which the initial profiling and consequent violation does not flow through all subsequent police and Crown conduct, where unchecked. After all, without the initial improper racial considerations that brought the individual into contact with the criminal justice system, the individual may not have encountered the system at all. At a minimum, there should be a presumption that the discrimination does flow, unless proven otherwise. This argument can be pre-emptively countered through appropriate expert evidence and precise argument on this point.

Another challenge these claims may encounter are applications to strike claims that reference racial profiling and discrimination. Where the pleadings don’t properly tie together “both the historical and the ongoing improper police conduct to the racial discrimination claim” the claim may be struck for lack of particularity.[141]

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[137] *Ibid* at para 147.
[138] R. v. Peck, [2001] O.J. No. 4581 (S.C.J.); R. v. Kahn(2004), 189 C.C.C. (3d) 49 (Ont. S.C.J.); R. v. Campbell, [2005] Q.J. No. 394 (Q.C.Q.); R. v. Nguyen, [2006] O.J. No. 272 (S.C.J.)) - note up.
[139] *Peart ONCA, supra* note at para 151.
[140] *Ibid* at para 92.
[141] *Sidhu v Canada (The Attorney General)*, 2015 YKSC 53 at para 17; *Anoquot v Toronto Police Services*, 2015 ONSC 553 (the statements in this case survived an application to strike paragraphs from the notice of claim).

(b) The Functional Justification of Damages

Once a *Charter* breach is established, damages must be functionally justified. To be appropriate and just, damages must serve a useful function or purpose.[142] Damages awarded under s.24(1) may serve the purposes of compensation, vindication and deterrence.[143] The presence of one or more of these purposes meets the requirement that *Charter* damages are "appropriate and just."[144]

(i) Compensation

Compensation demands that the claimant is compensated for personal loss. In the private law context, compensation is the primary (if not the only) justification. In *Ward,* the Court defined compensation broadly, and stated it will often be the "most prominent function" of damages.[145] *Charter* damages can compensate physical, psychological and pecuniary harm, but also harm to intangible interests such as distress, humiliation, embarrassment, anxiety and pain and suffering.[146] This is consistent with a purposive analysis of *Charter* rights, because they protect non-pecuniary values "including fairness, privacy, security of the person, liberty and equality."[147] *Ward* clearly indicates that these kinds of interests can be remedied by s.24(1). Importantly, the Court stated that a claimant who did not suffer "personal loss" through the *Charter* violation will not preclude a damage award where the other purposes "clearly call for an award."[148] In the context of discrimination, compensation can take various forms. The amount of compensation required will depend on which *Charter* right is violated, and what harm flowed from the violation.

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[142] *Ward SCC,* 2010 SCC 27 at para 24.
[143] *Ibid* at para 25.
[144] *Ibid* at para 31.
[145] *Ibid* at para 25.
[146] *Ibid* at paras 27,50.
[147] Kent Roach, *Constitutional Remedies in Canada*, loose-leaf (updated January 11, 2016), 2nd ed (Toronto, Ont: Canada Law Book, 2015) at 11-26.
[148] *Ward SCC,* 2010 SCC 27 at para 30.

(ii) Vindication

Vindication recognizes that constitutional violations not only harm the claimant involved, but also harm society as a whole. The purpose of vindication affirms our constitutional values.[149] *Charter* damages serve to compensate the individual whose rights were violated, but they also affirm constitutional values and the rule of law through the purpose of vindication. While compensation focuses on the individual, vindication "focuses on the harm the Charter breach causes to the state and to society."[150] Even if a violation does not result in compensable harm to the individual, public confidence in the court's interaction with the *Charter* may be impaired and still justify a damage award.[151] A remedial system that fails to compensate victims of a certain kind of official wrongdoing is neither effective nor just.[152] As Peter Schuck argues in the American context, "No social or moral order can sustain itself, much less flourish, unless it can affirm, reinforce, and reify the fundamental values that define it."[153] This purpose is particularly important for a racial discrimination claim. Systemic discrimination breeds distrust of the justice system, and awarding damages on the basis of vindication can demonstrate a commitment to remedying the issue and perhaps help to re-build 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."[154]

(iii) Deterrence

Section 24(1) damages can also serve the purpose of deterrence. The court emphasized that deterrence in this context is general deterrence:

> deterrence as an object of *Charter* damages is not aimed at deterring the specific wrong-doer, but rather at influencing government behaviour in order to secure state compliance with the *Charter* in the future.[155]

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[149] *Ward SCC,* 2010 SCC 27 at para 28.
[150] *Ibid* at para 28.
[151] Kent Roach, *Constitutional Remedies in Canada*, loose-leaf (updated January 11, 2016), 2nd ed (Toronto, Ont: Canada Law Book, 2015) at 11-27.
[152] Peter Schuck, *Suing Government* (New Haven: Yale University Press, 1983) at 23.
[153] *Ibid.*
[154] *Henry*, 2015 SCC 24 at para 115.
[155] *Ward SCC,* 2010 SCC 27, at para 29.

Prior to the *Ward* decision, deterrence was rarely recognized "as a legitimate goal for constitutional remedies."[156] Kent Roach states that recognizing deterrence as a valid purpose for awarding damages has the potential to reshape remedies jurisprudence.[157] Awarding damages on the basis of deterrence can regulate government behaviour to achieve *Charter* compliance.[158] While it is unlikely an award would be appropriate and just on the basis of *only* deterrence,[159] *Ward* makes it clear that deterrence can at least complement a compensatory purpose, strengthening the effect of the damages. The potential of deterrence was somewhat stifled in *Henry.* As the Chief Justice noted, awarding damages for the purpose of deterrence even where bad faith is absent is important for pushing the state to "remain vigilant in meeting its constitutional obligations."[160]

Fostering a legal regime that encourages legal challenges can also act as deterrence.[161] Raising obstacles in the form of unprincipled fault requirements can blunt deterrence[162] because it shifts the risk of litigation to the claimant, and permits remedied *Charter* violations. In the context of discrimination, deterrence is extremely important. Because of the unconscious nature of racial discrimination, general deterrence can push governments to implement better training or policies to counteract the effects of discriminatory acts throughout the criminal justice system.

(c) Countervailing Factors

Ward recognized that damages may not be warranted, even if they serve the purposes of compensation, vindication or deterrence, if compelling countervailing factors exist.[163] These

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[156] Kent Roach "A Promising Late Spring for Charter Damages: *Ward v Vancouver*" (2011), 29 NJCL 135 at 156.
[157] *Ibid.*
[158] *Ward SCC,* 2010 SCC 27 at para 29.
[159] Kent Roach, *Constitutional Remedies in Canada*, loose-leaf (updated January 11, 2016), 2nd ed (Toronto, Ont: Canada Law Book, 2015) at 11-28.
[160] *Henry*, 2015 SCC 24 at para 116.
[161] Peter Schuck, *Suing Government* (New Haven: Yale University Press, 1983) at 17.
[162] *Ibid.*
[163] *Ward SCC,* 2010 SCC 27 at para 33.

factors include the availability of alternative remedies and effective governance concerns.[164] Effectively, countervailing factors have the same result as the imposition of a fault requirement, qualified immunity or good faith immunity.[165] But the Court in *Ward* suggests countervailing factors should be contextualized in each case.[166] While this approach risks unpredictability for both parties, it "also requires the government to bear the burden of justifying restrictions on Charter remedies"[167] in all cases. The *Ward* contextual approach is consistent with the *Charter*'s structure; it provides rights and remedies to individuals, but allows government to justify reasonable restrictions when required.[168]

(i) Alternative Remedies

A court will not award double compensation. If an alternate remedy fulfills the purposes of *Charter* damages, then no further *Charter* damages will be awarded.[169] Someone who has already received a tort damage award could only receive a nominal award or simply a declaration under 24(1).[170] However, the claimant does not need to exhaust all other remedies first and a claimant can run concurrent claims in tort and *Charter* damages, as long as the result is not double compensation.[171]

(ii) Good Governance Concerns

In *Ward*, the government failed to establish that good governance concerns negated a damage award.[172] The Court dismissed the argument that *Charter* damages will always chill government

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[164] *Ward SCC, supra* note at para 33.
[165] Kent Roach, *Constitutional Remedies in Canada*, loose-leaf (updated January 11, 2016), 2nd ed (Toronto, Ont: Canada Law Book, 2015) at 11-29.
[166] *Ibid.*
[167] *Ibid.*
[168] *Ibid.*
[169] *Ward SCC,* 2010 SCC 27 at para 34.
[170] Kent Roach, *Constitutional Remedies in Canada*, loose-leaf (updated January 11, 2016), 2nd ed (Toronto, Ont: Canada Law Book, 2015) at 11-29.
[171] *Ward SCC,* 2010 SCC 27 at paras 35-36.
[172] *Ibid* at para 68.

conduct, because the logical conclusion of this means *Charter* damages would *never* be appropriate.[173] 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 many violations of the Charter rights of a single Charter applicant should be defeated on effective governance grounds.[174]

Further, the floodgates concern regarding the no-fault requirement is not supported by evidence. 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."[175] 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 the floodgates argument regarding *Charter* damage awards. There are many examples of the natural restraints against *Charter* damage claims: 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.[176] Most importantly, damage awards since *Ward* have not been large; launching a claim for *Charter* damages is often not "economically rational."[177]

However, there will be cases where good governance will work to limit the availabilty of damages, for example where the violation is pursuant to legislation later declared invalid under s.52(1) of the *Charter*.[178] The SCC acknowledged that the possibility of *Charter* damages

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[173] *Ward SCC,* 2010 SCC 27 at para 38.
[174] Kent Roach, *Constitutional Remedies in Canada*, loose-leaf (updated January 11, 2016), 2nd ed (Toronto, Ont: Canada Law Book, 2015) at 11-31.
[175] *Ward*, respondent's factum at para 140.
[176] Kent Roach, *Constitutional Remedies in Canada*, loose-leaf (updated January 11, 2016), 2nd ed (Toronto, Ont: Canada Law Book, 2015) at 11-6. However there are 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.
[177] *Ibid* at 11-2.
[178] *Ward SCC,* at para 39; Kent Roach, *Constitutional Remedies in Canada*, loose-leaf (updated January 11, 2016), 2nd ed (Toronto, Ont: Canada Law Book, 2015) at 11-30.

flowing from enforcing a law (that might later be declared invalid) would undermine the rule of law.[179] This immunity protects the legislative and policy-making functions of government.[180]

(iii) Good Governance Concerns in *Henry*

The *Ward* test allows government argument on the limitation of *Charter* damages if it adversely impacts effective government. Essentially, this limiting potential reduces the compensatory value of *Charter* damages in certain contexts. Instead of making the state bear the cost of a *Charter* violation, it can shift to the individual.[181] In *Henry*, the majority decision increased the gap within which an individual has to bear the costs of a *Charter* violation; good governance concerns now circumscribe the award of damages for the Crown's failure to disclose.[182] Where the Crown's failure to disclose was unintentional, no *Charter* damages will flow.

The majority in *Henry* found that *not* limiting the availability of *Charter* damages in the context of the Crown's failure to disclose would cause a flood of claims and expose prosecutors to an unprecedented scope of liability that would affect the exercise of their vital public function."[183] It seems the majority felt the risk of a no-fault (or more precisely, a no-intent) standard loomed large as a good governance concern, even in the context of the duty to disclose. While courts are loathe to wade into review of a prosecutor's exercise 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.[184] As the Chief Justice found in dissent,

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[179] *Ward SCC,* 2010 SCC 27 at para 39; *Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13 at paras 81-82.
[180] *Ward SCC*, 2010 SCC 27 at para 39
[181] 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, she 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: Kent Roach, *Constitutional Remedies in Canada*, loose-leaf (updated January 11, 2016), 2nd ed (Toronto, Ont: Canada Law Book, 2015) at 11-27.
[182] *Henry,* 2015 SCC 24 at paras 39-42.
[183] *Ibid* at paras 72, 77.
[184] *Ibid* at paras 49, 128. The prosecutor need only disclose "relevant" evidence. However, what is relevant is a matter of discretion.

> [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.[185]

Nevertheless, Moldaver J for the majority drew heavily from the line of malicious prosecution cases dealing with core prosecutorial discretion; his concern regarding the chilling effect on Crown counsel's ability to do day-to-day duties resulted in his imposition of an intent standard.[186] He held that fear of liability in a no-fault regime would lead to "defensive lawyering"; adding an extraneous consideration into "the Crown's role as a quasi-judicial officer."[187] This is a debatable and unfair proposition. It leaves the harmed party without a remedy for the lack of disclosure where it was unintentional, merely careless, or even negligence.

Arguably the majority's intent standard falls so close to malice it will require the same type of proof to successfully claim *Charter* damages. While "intent" does not invoke "motive" as much as "malice" does, it is hard to imagine where a prosecutor would intend to withhold disclosure, knowing or reasonably being expected to know that the failure to disclose is material and would impinge the accused's right to full answer and defence, where there is no bad faith or motive behind the intent. 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"[188] or that "prosecutors were put on notice of the existence of the information and failed to obtain possession of it"[189], this inference is simply available to the trier of fact, not mandatory.[190] The majority asserts the purpose of the intent and knowledge requirements is to set a threshold high enough to address good governance and let only serious instances of non-disclosure form the basis of a s.24(1) remedy.[191] As I will address below, the majority fails to consider that serious

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[185] *Henry,* 2015 SCC 24 at para 129.
[186] *Ibid* at paras 40, 45. The malicious prosecution cases are *Nelles v Ontario* [1989] 2 SCR 170*, Proulx v Quebec (Attorney General)* 2001 SCC 66, *and Miazga v Kvello Estate*, 2009 SCC 51.
[187] *Henry,* 2015 SCC 24 at para 73.
[188] *Ibid* at para 86.
[189] *Ibid* at para 86; *R v McNeil*, 2009 SCC 3 at para 49.
[190] *Henry,* 2015 SCC 24 at para 86. I note 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.*
[191] *Ibid* at para 89.

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.

The chilling effect concern essentially promotes the idea that awarding damages, absent a fault requirement as per *Ward,* would over-deter Crown counsel in their duties of disclosure. While this may occur in very limited circumstances, perhaps the knowledge that disclosure decisions that prolong an individual's involvement in the criminal justice process on the basis of racial discrimination would promote better disclosure decisions. As the Chief Justice noted, "Good governance is strengthened, not undermined, by holding the state to account where it fails to meet its *Charter* obligations."[192] Holding the state to account also feeds back into the general deterrence value of *Charter* damages.[193]

Kent Roach argues that "any restraint on the award of *Charter* damages should be internal to s.24(1)"[194] and factored into the meaning of "appropriate and just" because traditional common law actions such as malicious prosecution or negligent investigation are still available against individual actors who commit discrete and malicious harm to individuals. While the policy considerations engaged in these common law actions may be relevant to limiting *Charter* damages under good governance, *Charter* damages are against the state, not against individual 'bad' actors. Therefore the chilling effect arguments often made in regards to common law civil actions are "considerably less and different" than if individuals were personally liable.

In this light, the majority's concern regarding interference with Crown prosecutors is confusing and contradictory. In order to avoid defensive lawyering and chilling effects, the majority imposed a qualified immunity rule for failure to disclose. This only works to reduce the remedial value of *Charter* damages by negating compensation, deterrence and vindication where *Charter* violations flow from the failure to disclose. This immunity only serves to shift the cost of the violations to the victim, and complicates the trial process.

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[192] *Henry,* 2015 SCC 24 at para 129.
[193] *Ibid* at para 129.
[194] Kent Roach, *Constitutional Remedies in Canada*, loose-leaf (updated January 11, 2016), 2nd ed (Toronto, Ont: Canada Law Book, 2015) at 11-25.

Further, laying *Charter* damages against the state as a whole, rather than implicating the intentions of individual government actors, will have the same effect as the qualified immunity rule imposed by the majority in *Henry.* This too, will take the spotlight off the individual Crown's actions or intention, and focus on the accused's resulting harm in the criminal process. To make matters more confusing, disclosure is not a discretionary decision; it is a constitutional obligation since *Stinchcombe*.[195] While I argue *Charter* damages could arguably even extend to violations resulting from core prosecutorial discretion in some contexts, surely reducing the scope of available remedies *short* of prosecutorial discretion is unwarranted.

(iv) The Impact on Racial Discrimination Claims

The imposition of an intent standard is hugely problematic for racial discrimination claims that result from *Charter* violations extending into the trial process (and beyond). The majority imposed a limit on liability, shifting the burden to the claimant, without any more than speculative evidence. Many historical inquiries into wrongful convictions have noted the interacting nature of unconscious systemic discrimination and the failure to disclose. Racial discrimination, where it exists, will rarely dissipate when a file comes into contact with Crown counsel. Further, making *Charter* damages categorically unavailable to victims of racial discrimination where Crown does not intend to discriminate is an extreme response to a problem that is not even proven to exist.

Discrimination 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 because of racism is inviting 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.

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[195] *Henry,* 2015 SCC 24 at para 128.

The Manitoba Justice Inquiry and the Donald Marshall Report both speak to the unconscious nature of racial discrimination. In his article on the causes of wrongful convictions, Bruce MacFarlane explores the nature of tunnel vision in criminal investigation.[196] Tunnel vision involves an overly narrow focus through the investigation and prosecution and can colour evaluation of the information received, and the unconscious response to that information.[197] 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.[198] 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,[199] Crown counsel may unconsciously make decisions on what is relevant or material to the case based on confirmation bias, linked to racial discrimination.[200] This is not to say that all Crown counsel are furthering racial discrimination, only that where the failure to disclose arises from unconscious racial bias, the *Henry* standard of intent denies a damage award under s.24(1), without a principled consideration of the impact of narrowing the availability of damages. As Peter Schuck comments in the American context, a remedial system that fails to compensate victims of only a certain kind of official wrongdoing is not just.[201] 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.[202]

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[196] 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). Many thanks to David Gill for pointing out this article in his unpublished paper on the *Henry* decision.
[197] *Ibid* at 34.
[198] *Ibid.*
[199] *R v Brown*, 2003 CanLII 52142 (ONCA) at para 7.
[200] 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) at 36.
[201] Peter Schuck, *Suing Government* (New Haven: Yale University Press, 1983) at 23.
[202] *Ibid.*

(d) Quantum of Damages

The “presence and force of” the purposes underlying a damage award will determine the quantum of those damages.[203] Compensation will usually be the most significant purpose, followed by vindication and deterrence.[204] Compensation engages the goal of restoring the claimant to her pre-breach condition where loss is proven, as it does in tort law.[205] But the Court notes, “cases may arise where vindication or deterrence play a major and even exclusive role.”[206] In these cases, tort law is less applicable, as the damage award assumes a more punitive aspect.[207] Courts should determine what is rational an proportionate in the circumstances, guided by precedent.[208] What is rational and proportionate will depend on the seriousness of the breach; what is the impact on the claimant, and the seriousness of the state misconduct?[209] The more serious the breach, the higher the quantum of the award will be.[210]

Ultimately, the damage award must be fair to both the claimant and the state.[211] The Court warns 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.”[212] Despite this, the award must be meaningful and compensate *Charter* breaches as independent wrongs, “worthy of compensation in …[their] own right.”[213]

As discussed, racial discrimination is a large, systemic issue. When *Charter* violations stem from discrimination, arguably the seriousness of the state misconduct is high. However, because the focus on awarding *Charter* damages focuses on the state as a whole, rather than individual misconduct, courts should be careful to focus on the breaches as independent wrongs in their own right. Where there is individual misconduct, this should increase the quantum of damages

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[203] *Ward SCC,* 2010 SCC 27 at para 47.
[204] *Ibid* at para 47.
[205] *Ibid* at paras 48, 50.
[206] *Ibid* at para 47.
[207] *Ibid* at paras 51,56.
[208] *Ibid* at para 51.
[209] *Ibid* at para 52.
[210] *Ibid* at para 52.
[211] *Ibid* at para 53.
[212] *Ibid* at para 53.
[213] *Ibid* at para 54.

(although, if there is specific misconduct that can be addressed through an existing tort, a claimant might run into the issue of adequate alternative remedies).

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 needs to be remedied. There are legal and financial obstacles to obtaining *Charter* damages that extend beyond the possible legal arguments I have discussed. These obstacles also need to be addressed through legislative amendments, policy directions and legal aid funding. As mentioned in part II, generally a claimant cannot pursue *Charter* damages in provincial courts, and *Charter* damages cannot be awarded within the confines of a criminal trial. Part V outlines that *Charter* damage claims can be prohibitively expensive, and individuals will likely find themselves fighting against government institutions that will defend and appeal ground-breaking decisions with vigour. 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 the state behaviour is not publically highlighted or deterred, as it would be in a *Charter* damages claim.

While *Charter* damages do not provide the only or the most complete response to systemic racism, they provide relief to the victim while urging the government to address discrimination through broader policy making and training. Section 24(1) the *Charter* provides a broad basis for action. Rather than widening gaps to refuse remedies without a principled basis, s.24(1) should be broadly interpreted to provide remedial relief to victims of racial discrimination.