CASE COMMENT

BACKPEDALLING ON CHARTER DAMAGES: HENRY v. BRITISH COLUMBIA (ATTORNEY GENERAL)

I. Introduction

Section 24(1) of the *Canadian Charter of Rights and Freedoms* provides that a court may award "such remedy as the court considers appropriate and just in the circumstances" to a person whose Charter rights have been infringed.[1] In spite of this provision, the jurisprudence on the potential to award damages for a Charter breach was, for a long time, lacking. In the first 28 years after Canada adopted the Charter, the Supreme Court never provided meaningful guidance about when damages would be an available remedy. It finally did so in *Ward v. Vancouver (City)*,[2] a landmark decision in which a unanimous court set out a principled yet flexible framework for assessing such claims:

> . . . damages may be awarded for Charter breach under s. 24(1) where appropriate and just. The first step in the inquiry is to establish that a Charter right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages.[3]

The court's decision in *Ward* was well received by commentators, who called it "a reasoned balance between remedying Charter violations and public policy considerations"[4] and "a principled and promising foundation for Charter damages".[5]

1. Section 24(1), *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ("Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.") (*Charter*).
2. 2010 SCC 27, [2010] 2 S.C.R. 28, 321 D.L.R. (4th) 1 (S.C.C.) (*Ward*).
3. *Ibid.* at para. 4.
4. Professor James Stribopoulos, "The Sweet Taste of Just Desserts: Constitu-

Lower courts applied the four-step *Ward* framework to assess Charter damages claims in the years following, granting Charter damages only a handful of times. If critics feared *Ward* would open the floodgates to frivolous claims, such fears were proven to be unfounded.

Unfortunately, just five years after *Ward*, the court departed from its principled reasoning and muddied the waters with its decision in *Henry v. British Columbia (Attorney General)*.[6]

Mr. Henry was wrongfully convicted following numerous serious breaches of his right to disclosure from the Crown. He was imprisoned for 27 years before his eventual acquittal and release. Perhaps unsurprisingly, Mr. Henry commenced a claim for Charter damages against various parties, including a claim against the Attorney General of British Columbia ("AGBC") for the Crown's failure to make full disclosure of relevant information before and during his trial. The AGBC sought to strike Mr. Henry's claim for Charter damages, arguing that a claim for Charter damages premised on alleged prosecutorial misconduct requires proof of malice.

In *Henry*, a majority of the Supreme Court held that a claimant seeking Charter damages on the basis of a breach of the Crown's disclosure obligation must demonstrate that the Crown *intentionally* withheld information it knew or should have known was material to the defence. The imposition of this inflexible rule backpedals from *Ward*, adding a new requirement to the established four-step framework and disregarding the spirit of the decision. Moreover, the majority's decision in *Henry* appears inconsistent with various earlier decisions, in which the Supreme Court called for a purposive and flexible judicial approach to Charter remedies, responsive to the needs of each given case.

This paper will submit that the Supreme Court's majority decision in *Henry* is an unfortunate step backward for the law of Charter damages and has once again introduced uncertainty into an area that was only recently clarified. Part II will set out the necessary background, summarizing the Supreme Court's decisions in *Ward* and *Henry*, and briefly noting the handful of decisions applying the *Ward* framework to claims for Charter damages in the interim period. Part III will discuss the concerns the majority's decision in *Henry* raises in

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tional Damages for Charter Violations", *The Court*, July 26, 2010 (retrieved December 17, 2015), online: www.thecourt.ca/2010/07/26/the-sweet-taste-of-just-desserts-constitutional-damages-for-charter-violations.

5. Professor Kent Roach, "A Promising Late Spring for Charter Damages: *Ward v. Vancouver*" (2010), 29 NJCL 145.
6. 2015 SCC 24, [2015] 2 S.C.R. 214, 383 D.L.R. (4th) 383 (S.C.C.) (*Henry*).

light of the court's earlier decisions on Charter remedies, evaluate whether there is a well-founded explanation for the inconsistencies, and suggest that the concurring justices' approach to the issues in *Henry* provided preferable reasoning. Part IV will proceed to consider the implications of the decision in *Henry* for future Charter damages claims. Part V concludes.

II. Background

A. Vancouver (City) v. Ward

On August 1, 2002, Alan Cameron Ward, a lawyer in his mid-40s, attended a ceremony at which Prime Minister Jean Chrétien was to mark the opening of a gate to Vancouver's Chinatown. During the ceremony, the Vancouver Police Department was informed that an individual intended to throw a pie at the Prime Minister (who had been "pied" at a different event two years prior). Although his appearance was not entirely consistent with the description of the suspect, the police mistakenly identified Mr. Ward as the would-be pie-thrower and arrested him for breach of the peace. The police also impounded Mr. Ward's car, intending to search it after a warrant was obtained. Mr. Ward was taken to police lockup where he was strip searched and held for several hours before he was eventually released without charge.[7]

Mr. Ward commenced an action for Charter damages. The Supreme Court of British Columbia held that the strip search and vehicle seizure – although not conducted in bad faith – breached Mr. Ward's s. 8 right to be free from unreasonable search and seizure. Justice Tysoe thus awarded damages to Mr. Ward pursuant to s. 24(1) of the Charter: $5,000 for the strip search, and $100 for the seizure of his car.[8] The Court of Appeal upheld the ruling, although one dissenting justice held that Charter damages could not be awarded where the police simply made a mistake but did not act in bad faith.[9]

Mr. Ward's claim was appealed to the Supreme Court of Canada. This finally afforded the court an opportunity to articulate the principles guiding Charter damages and to establish a clear framework for determining whether damages are an appropriate remedy for a Charter breach.

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7. *Ward*, *supra*, footnote 2 at paras. 6-9.
8. *Ibid.*, at paras. 10-11.
9. *Ibid.*, at paras. 12-13.

First, the unanimous court observed that the language of s. 24(1)[10] grants the courts "broad discretion to determine what remedy is appropriate and just in the circumstances of a particular case".[11] The court held it would be improper for courts to limit this discretion "by casting it in a strait-jacket of judicially prescribed conditions".[12] Rather, it held that what is "appropriate and just" will depend on the facts of a particular case.[13] The court concluded that s. 24(1) is, in fact, broad enough to include the remedy of damages for a Charter breach.[14]

The court proceeded to set out a four-step framework for determining whether damages will constitute an appropriate and just remedy under s. 24(1) in a given case. First, the claimant must demonstrate that they suffered a Charter breach.[15] Second, the claimant bears the burden of demonstrating that damages would serve a useful function or purpose. Specifically, the court held that an order for damages may serve the objectives of compensation for any loss or suffering caused by the breach, vindication for the right that was breached, and/or deterrence of future breaches.[16] The court highlighted that all three objectives need not be served in a particular case and the fact that a claimant has not suffered personal loss should not preclude damages where the goals of vindication or deterrence call for a damages award.[17]

The court held that, if the claimant establishes that a Charter breach occurred and damages are functionally justified, the burden shifts to the state for the third step, where it may establish that countervailing considerations render a damages award inappropriate.[18] The court identified two possible countervailing factors: the existence of alternative remedies for the breach and concerns for good governance. The role of countervailing considerations became central in *Henry*, and warrants a closer look.

With respect to alternative remedies, the court in *Ward* highlighted that the existence of potential tort claims does not preclude

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10. "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."
11. *Ward*, *supra*, footnote 2 at para. 17.
12. *Ibid.*, at para. 18.
13. *Ibid.*, at para. 19.
14. *Ibid.*, at para. 21.
15. *Ibid.*, at para. 23.
16. *Ibid.*, at paras. 24-25.
17. *Ibid.*, at para. 30.
18. *Ibid.*, at paras. 32-33, 35, 39 and 45.

Charter damages.[19] It acknowledged, however, that in cases where the claimant has not suffered any loss, a declaration of Charter breach may be an adequate remedy.[20]

The court acknowledged that concerns for effective governance may in some circumstances outweigh the appropriateness of damages. However, it pre-empted the argument that the potential for Charter damages would necessarily harm good governance by creating a "chilling effect" on government action; the court noted that damages that deter the infringement of rights promote good governance – not undermine it – as compliance with the Charter "is a foundational principle of good governance".[21]

As a counterexample illustrating possible good governance concerns, the court referred to its decision in *Mackin*, in which it held that "absent conduct that is clearly wrong, in bad faith, or an abuse of power", courts should not award damages for harm suffered pursuant to a valid law that is subsequently declared to be unconstitutional.[22] On the facts of *Mackin*, the court held that awarding Charter damages could interfere with good governance; the rule of law would be undermined if the state were dissuaded from enforcing valid laws by the possibility of facing damages if the law were later declared invalid.[23]

However, the court unequivocally rejected the government's argument that the principle from *Mackin* applied in *Ward*, restricting the *Mackin* principle to situations of state action pursuant to valid statutes that are subsequently declared invalid.[24] The court accepted that there may be other situations where concerns for effective governance may render s. 24(1) damages inappropriate and noted that private law thresholds and defences may assist in determining when Charter damages would be just, emphasizing that the threshold for liability under s. 24(1) "must be distinct and autonomous from that developed under private law".[25]

With respect to the fourth step of the framework, assessing the quantum of damages, the court held that the quantum is similarly guided by the objectives of compensation, vindication and deterrence. It stated that a claimant should be restored to the position she would have been in but for the breach (considering both pecuniary

19. *Ibid.*, at para. 36.
20. *Ibid.*, at para. 37.
21. *Ibid.*, at para. 38.
22. *Mackin v. New Brunswick (Minister of Justice)*, 2002 SCC 13, [2002] 1 S.C.R. 405, 209 D.L.R. (4th) 564 (S.C.C.) at para. 78 (*Mackin*).
23. *Ward*, *supra*, footnote 2 at para. 39.
24. *Ibid.*, at para. 41.
25. *Ibid.*, at paras. 42-43.

and non-pecuniary loss), and that the seriousness of the breach should also guide the determination of quantum.[26]

Applying the framework to the facts of *Ward*, the court upheld the award of $5,000 in damages for the strip search but reversed the award of $100 for the seizure of Mr. Ward's car.[27] The court held that the vehicle seizure, although wrong, was not serious, and it did not engage the object of compensation as Mr. Ward had suffered no loss as a result (the car was never searched, and the police even drove him to pick up the vehicle). The court determined that a declaration that the seizure was a violation of Mr. Ward's s. 8 rights was an appropriate remedy to vindicate the right.[28]

B. Henry v. British Columbia (Attorney General)

Following a series of sexual assaults in certain Vancouver neighbourhoods from 1980 to 1982, the Vancouver police regarded two men as suspects. Donald McRae was placed under surveillance but never arrested for the assaults. Ivan Henry was arrested and, following a questionable photo line-up, identified by one of the victims and charged. Mr. Henry made numerous requests for disclosure of all victim statements and medical and forensic reports prior to trial, but the Crown did not disclose this material. Although he received a few statements when he renewed his request at the outset of trial, the Crown still failed to disclose 30 additional statements made by the victims, the notes of the original crime scene investigators, key forensic evidence, and the fact that Mr. McRae had also been considered a suspect (and had twice been arrested for prowling in the vicinity of the attacks). Mr. Henry was convicted of ten sexual offences at trial in 1983 and spent the following 27 years in prison.[29]

Mr. Henry applied to have his conviction reviewed more than 50 times in the following years while continuing to seek disclosure. It was not until a 2002 Vancouver Police investigation into numerous similar, unresolved sexual assaults in the same area after 1983, to which Donald McRae eventually pleaded guilty, that the Crown provided full disclosure to Mr. Henry. On this basis, Mr. Henry was able to reopen his appeal. In 2010, the British Columbia Court of Appeal quashed all ten of Mr. Henry's convictions, substituting acquittals for each.[30]

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26. *Ibid.*, at paras. 46-52.
27. *Ibid.*, at para. 79.
28. *Ibid.*, at paras. 77-78.
29. *Henry*, *supra*, footnote 6 at paras. 1-13.

As Chief Justice McLachlin and Justice Karakatsanis held, "There are few scenarios that can shake the public's confidence in the justice system more deeply than those alleged by Mr. Henry".[31] Mr. Henry commenced a civil action in 2011 for the harms suffered as a consequence of his wrongful convictions and lengthy incarceration, including claims against the AGBC for negligence, malicious prosecution, misfeasance in public office, abuse of process, and breach of his s. 7 and s. 11(*d*) Charter rights, all for failure to make full disclosure of relevant information before and during his trial. In pleadings motions, the parties disputed the requirements that must be pleaded to make out a claim for Charter damages on the basis of prosecutorial misconduct.[32] Although the B.C. Supreme Court held that it was sufficient for Mr. Henry to plead that the Crown's conduct represented "a marked and unacceptable depart-ure from the reasonable standards expected of prosecutors",[33] the Court of Appeal unanimously overturned the judgment, holding that only malicious acts and omissions of Crown counsel could form the basis for Charter damages.[34] Mr. Henry appealed to the Supreme Court, posing a constitutional question: Does s. 24(1) authorize a court to award damages against the Crown for prosecutorial misconduct absent proof of malice?[35] Although all six justices who took part in the Supreme Court's judgment agreed that proof of malice was not required, the court was divided on what is required for such a claim.

Justice Moldaver, writing for the majority, held that there is a high threshold for a successful Charter damages claim premised on the Crown's failure to make full disclosure, but one lower than malice. He held:

> . . . a cause of action will lie 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.[36]

In arriving at this decision, the majority accepted that *Ward* provides the governing legal framework,[37] then proceeded to change

30. *Ibid.*, at paras. 15-19.
31. *Ibid.*, at para. 115 (*per* McLachlin C.J.C. and Karakatsanis J., concurring).
32. *Ibid.*, at para. 21.
33. *Ibid.*, at para. 24.
34. *Ibid.*, at para. 25.
35. *Ibid.*, at para. 30.
36. *Ibid.*, at para. 31 (emphasis added).
37. *Ibid.*, at para. 34.

it. Justice Moldaver held that Charter damages must be allowed to "develop incrementally", and that their availability is not without limit.[38] After summarizing the four-step *Ward* framework, the majority delved into the third step where "the onus shifts to the state to rebut the claimant's case based on countervailing considerations".[39] The majority's decision hinged on concerns over good governance.

At bottom, the majority accepted Attorneys General's argument that "if the threshold of gravity is set too low for a Charter damages claim alleging Crown misconduct, the ability of prosecutors to discharge their important public duties will be undermined, with adverse consequences for the administration of justice",[40] and moreover agreed that "[t]he public interest is not well served when Crown counsel are motivated by fear of civil liability, rather than their sworn duty to fairly and effectively prosecute crime".[41]

Accordingly, the majority relied on *Mackin*, the example provided in *Ward*, to illustrate possible good governance concerns. Moldaver J. held that *Mackin* established a "heightened *per se* liability threshold" before Charter damages would be available for state action taken pursuant to a valid law that was later declared invalid.[42]

On this basis, the majority held that a heightened *per se* liability threshold should similarly be established to circumscribe the availability of Charter damages for claims of wrongful non-disclosure by prosecutors to avoid "open[ing] up the floodgates of civil liability and forc[ing] prosecutors to spend undue amounts of time and energy defending their conduct in court instead of performing their duties".[43]

The majority rejected the arguments of the Attorneys General in favour of imposing malice as the liability threshold for Charter damages for wrongful non-disclosure.[44] Moldaver J. held that the malice standard is apt for questions of discretionary decision-making, but the decision to disclose relevant information is not discretionary, but rather a constitutional obligation which must be properly discharged by the Crown.[45]

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38. *Ibid.*, at paras. 35-36, citing *Ward*, *supra*, footnote 2 at para. 21.
39. *Ibid.*, at para. 37.
40. *Ibid.*, at para. 39.
41. *Ibid.*, at para. 40.
42. *Ibid.*, at para. 42, citing *Mackin*, *supra*, footnote 22.
43. *Ibid.*, at paras. 40-41.
44. *Ibid.*, at paras. 52-56.
45. *Ibid.*, at para. 59. See also para 62, citing *Krieger v. Law Society (Alberta)*, 2002 SCC 65, [2002] 3 S.C.R. 372, 217 D.L.R. (4th) 513 (S.C.C.) at para. 54: "disclosure of relevant evidence is not . . . a matter of prosecutorial discretion

However, the majority proceeded to note that "difficult judgment calls" are often involved in disclosure decisions, including consideration of special protections for sexual assault claimants and arrangements for highly sensitive material.[46] Furthermore, Moldaver J. noted that "all failures to disclose are not made equal", citing a spectrum between the intentional suppression of crucial evidence and good faith errors in judgment about the relevance of tangential information.[47] He held that this "complex nature" of disclosure decisions should make the courts "exceedingly wary of setting a liability threshold that would award Charter damages for even minor instances of wrongful non-disclosure".[48] He highlighted two good governance concerns in particular:

> First, the liability threshold must ensure that Crown counsel will not be diverted from their important public duties by having to defend against a litany of civil claims. Second, the liability threshold must avoid a widespread "chilling effect" on the behaviour of prosecutors.[49]

Importantly, the majority imposed a new threshold liability requirement to address these concerns. In the key paragraph, Moldaver J. specifically rejected the idea of considering such issues in accordance with the *Ward* framework:

> No doubt many cases might be thwarted by countervailing considerations invoked at the third step of *Ward* – and in any event would attract a modest quantum of damages at step four, if the claimant were to succeed at trial. However, given the absence of a liability threshold, a claim alleging a relatively minor breach with minimal harm to the claimant might well survive a motion to strike at the pleadings stage, and could lead to an award of damages. With respect, I fear that my colleagues' approach [of considering case-by-case policy considerations at step three

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but, rather, is a prosecutorial duty"; para. 63, citing *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, 373 D.L.R. (4th) 577 (S.C.C.) at para. 45: "the Crown possesses no discretion to breach the Charter rights of an accused"; and para. 67:

> Disclosure is one of the Crown's fundamental obligations in a criminal prosecution. The Crown is duty-bound to disclose relevant information to the defence, and this obligation is a continuing one. This stringent and, at times, heavy burden on the Crown guarantees an accused's ability to make full answer and defence. Indeed, this was precisely the reason that the Court affirmed a *constitutional* right to disclosure more than two decades ago in *Stinchcombe*.

46. *Ibid.*, at para. 60.
47. *Ibid.*, at para. 69.
48. *Ibid.*, at para. 70.
49. *Ibid.*, at para. 71 (emphasis added).

> of the *Ward* framework] runs the risk of opening the floodgates to scores of marginal claims.[50]

Accordingly, the majority established a heightened liability threshold for Charter damages claims alleging wrongful non-disclosure, holding that the claimant would have to convince the fact-finder that the Crown intentionally withheld information it knew or ought to have known was material to the defence and that the claimant suffered harm as a result.[51]

In considering the facts before them, the majority held that Mr. Henry's claim as pleaded – alleging "very serious instances of wrongful non-disclosure that demonstrate a shocking disregard for his Charter rights" – would meet this new threshold.[52] Moldaver J. noted that it "may be inferred" the Crown intentionally withheld information if the claimant proves that prosecutors were actually in possession of the information and failed to disclose it.[53]

Chief Justice McLachlin and Justice Karakatsanis jointly authored a concurring opinion. They held that *Ward* provided an appropriate framework for evaluating the competing considerations at play and that consequently Mr. Henry needed to plead only facts that established the first two steps of *Ward*: (1) a breach of his Charter rights; and (2) that damages are an appropriate and just remedy to advance the purposes of compensation, vindication, or deterrence.[54]

The concurring justices held that the countervailing considerations raised by the Attorneys General were misplaced in this case,[55] and that, in any event, "[i]t is for the state to plead facts on the third step of countervailing factors, should it choose to do so.[56]

It is worth highlighting that the Supreme Court's decision in *Henry* was on an appeal of a pleadings motion and the case is ongoing. At the time of writing, procedural motions continue and the action has not yet been determined on the merits.[57]

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50. *Ibid.*, at para. 78 (incorporating language from para. 75 in parentheses).
51. *Ibid.* at paras. 82 and 85.
52. *Ibid.* at para. 81.
53. *Ibid.* at para. 86.
54. *Ibid.* at paras. 107-8 (*per* McLachlin C.J.C. and Karakatsanis J., concurring).
55. *Ibid.* at paras. 123-32.
56. *Ibid.* at para. 108.
57. Specifically, the latest reported developments have included motions disputing the admissibility of certain expert opinions, and a motion respecting issue estoppel *vis-à-vis* findings in an earlier decision of the British Columbia Court of Appeal. See *Henry v. British Columbia (Attorney General)*, 2015 BCSC 1849, 258 A.C.W.S. (3d) 744, 2015 CarswellBC 2914 (B.C. S.C.); *Henry v. British Columbia (Attorney General)*, 2015 BCSC 1798, 259

C. Other applications of the Ward framework

Following its development in *Ward*, the framework for assessing Charter damages claims has been applied in only a handful of reported decisions.[58] It certainly does not appear to have resulted in a litany of claims. Although some claims for Charter damages have made it through the pleadings stage,[59] it would not be fair to say that *Ward* opened the floodgates. Most Charter damages claims that were commenced since *Ward* have been dismissed, all prior to the Supreme Court's decision in *Henry*.[60]

At the time of writing, only two reported decisions in which a court has awarded Charter damages since *Ward* could be located,[61]

A.C.W.S. (3d) 296, 2015 CarswellBC 2842 (B.C. S.C.); *Henry v. British Columbia (Attorney General)*, 2015 BCSC 1799, 259 A.C.W.S. (3d) 297, 2015 CarswellBC 2843 (B.C. S.C.).

58. As of February 12, 2016, Quicklaw lists only 14 decisions as "following" *Ward*, other than the concurring opinion in *Henry*. Further, upon review, not all such decisions actually pertain to claims for Charter damages (see, *e.g. R. v. L. (S.E.)*, 2012 ABQB 377, 264 C.R.R. (2d) 75, [2012] 10 W.W.R. 837 (Alta. Q.B.), leave to appeal refused 2013 ABCA 45, 276 C.R.R. (2d) 92, [2013] 11 W.W.R. 703 (Alta. C.A.), which considered costs following a Charter motion for non-disclosure during a criminal trial).

59. See *Biladeau v. Ontario (Attorney General)*, 2014 ONCA 848, 322 C.R.R. (2d) 354, 328 O.A.C. 180 (Ont. C.A.), which allowed an appeal after claims of malicious prosecution and *Charter* damages were struck (and which claim appears to be ongoing at the time of writing), and *Brazeau v. Canada (Attorney General)*, 2012 FC 648, [2012] F.C.J. No. 1489 (F.C.), in which one of three pleaded bases for Charter damages survived the pleadings stage, but was ultimately dismissed on motion: *Brazeau v. Canada (Attorney General)*, 2015 FC 151, 249 A.C.W.S. (3d) 920, 2015 CarswellNat 284 (F.C.).

60. See *Forrest v. Kirkland*, 2012 ONSC 429, 296 O.A.C. 244, [2012] O.J. No. 518 (Ont. Div. Ct.) (dismissing claim for s. 24(1) damages and malicious prosecution on the basis that there was no *Charter* breach and no *mala fides* in laying the charge); *Probert v. Waterloo (City) Regional Police Services Board*, [2011] O.J. No. 6664 (March 14, 2011), Marentette D.J. (Ont. S.C.J.) (declined to award s. 24(1) damages for an unlawful arrest, detention, and strip search, as other remedies (for battery and false imprisonment) adequately served the functional justifications); *Dixon v. Hamilton (City) Police Services Board* (May 24, 2011), Doc. CV-09-15954, [2011] O.J. No. 3836 (Ont. S.C.J.) (Charter damages not awarded, as general compensatory damages already awarded constituted an adequate remedy); and *Hunter v. Ontario Society for the Prevention of Cruelty to Animals*, 2014 ONSC 6084, 322 C.R.R. (2d) 189, 329 O.A.C. 103 (Ont. Div. Ct.), additional reasons 2014 ONSC 6856, 247 A.C.W.S. (3d) 783, [2014] O.J. No. 5634 (award of $2,500 in Charter damages overturned on appeal, as the trial judge did not engage in an analysis of the justificatory objectives for Charter damages as required by *Ward*, and compensatory damages received at trial were sufficient to serve those objectives).

61. The author acknowledges the possibility that more Charter damages awards

namely, *Lamka v. Waterloo Regional Police Services Board*,[62] in which the Ontario Small Claims Court awarded $5,000 for an unnecessary strip search, and *Mason v. Turner*,[63] in which the B.C. Supreme Court awarded $500 for a "serious" violation of the claimant's s. 10(*b*) right to counsel.

III. Concerns with the majority's decision in Henry

A. Departing from the Ward framework

As noted above, the Supreme Court's decision in *Ward* was praised by commentators. Notably, Professor Kent Roach wrote that *Ward* "appropriately establishes broad principles to guide the exercise of remedial discretion, as opposed to leaving the issue to unfettered remedial discretion or binding remedial discretion by inflexible rules such as the requirement for proof of specified forms of fault".[64] By imposing a heightened liability threshold specifically for claims of prosecutorial non-disclosure, the majority in *Henry* has unfortunately implemented precisely the sort of inflexible rule that Roach discouraged. And by departing from the *Ward* framework, the court has introduced unwarranted uncertainty for other, as-yet-unlitigated bases of Charter damage claims.

Reviewing the majority's reasons, it becomes apparent that its decision was premised on appropriate principles from *Ward* and the Charter remedy decisions before it; indeed, the same principles underscored both the majority and concurring reasons. All the justices agreed that *Ward* provides the governing legal framework,[65] and that Crown disclosure is a constitutional obligation, not a discretionary decision.[66] The majority also stated the following principles in the course of arriving at its decision:

- Section 24(1) "commands a broad and purposive interpretation" and "must be construed generously, in a manner that best ensures the attainment of its objects".[67]

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may have been ordered than those contained in reported decisions, particularly since the quantum of Charter damages will typically fit within the jurisdiction of Small Claims Courts, and Small Claims Court decisions are inconsistently reported.

62. (2012), 272 C.R.R. (2d) 286, 223 A.C.W.S. (3d) 618, [2012] O.J. No. 5591 (Ont. S.C.J.).
63. 2014 BCSC 211, 301 C.R.R. (2d) 344, [2014] B.C.J. No. 230 (B.C. S.C.), affirmed 2016 BCCA 58, [2016] B.C.J. No. 306, 2016 CarswellBC 401 (C.A.).
64. Roach, *supra*, footnote 5 at 137.
65. *Henry*, *supra*, footnote 6 at paras. 37 and 107.
66. *Ibid.*, at paras. 59 and 127-128.

- Section 24(1) guarantees Charter rights will be upheld by granting "effective remedies" to claimants, and is crucial to the overall structure of the Charter because "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach".[68]
- A purposive approach to Charter remedies requires courts to craft remedies that are effective and responsive to the state conduct at issue.[69]

The majority veered off track, however, when it allowed policy concerns to steer it away from the *Ward* framework, rather than addressing those policy considerations within the framework. The majority held that the spectre of civil liability may negatively influence prosecutors' decision-making and accepted the concern that the floodgates of civil liability would open and force prosecutors to spend undue time and energy defending their conduct in civil court rather than performing their public duties.[70] The majority then made these policy concerns the linchpin of its decision, holding that they "provide compelling reasons why the availability of Charter damages should be circumscribed through the establishment of a high threshold".[71]

Establishing a threshold for Charter damages liability diverges from the principled *Ward* framework by introducing a new, preliminary step just for allegations of wrongful non-disclosure.

Ward called for a case-by-case determination of the appropriateness of Charter damages, driven by the remedial purposes of compensation, deterrence, and vindication, as balanced against any relevant countervailing concerns raised by the state. As expressed by Professor Roach, such an approach provides for "contextual and open-ended balancing of the factors for and against damages in any particular case . . . [allowing] both sides to make full arguments on the advantages and disadvantages of damages in the particular case without having to fit their arguments into narrow categories".[72] The majority reasons in *Henry* depart from the functional and contextual

67. *Ibid.*, at para 64, citing *R. v. 974649 Ontario Inc.)*, 2001 SCC 81, [2001] 3 S.C.R. 575, 206 D.L.R. (4th) 444 (S.C.C.) (*Dunedin*) at para. 18.
68. *Ibid.*, citing *Dunedin* at paras. 19-20.
69. *Ibid.* at para. 65, citing *Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, 232 D.L.R. (4th) 577 (S.C.C.) (*Doucet-Boudreau*).
70. *Ibid.*, at paras. 40-41.
71. *Henry*, *supra*, footnote 6 at para. 41.
72. Roach, *supra*, footnote 5 at 148 (emphasis added).

approach of *Ward* in favour of a "checklist approach"[73] that requires a specific level of fault for a specific category of claim.

Moreover, the establishment of a liability threshold flies in the face of a key principle stated in *Ward*, which dates back to an early Charter remedy decision by the court. Quoting *Mills v. The Queen*, the court in *Ward* observed that "[i]t is impossible to reduce this wide discretion [granted by s. 24(1)] to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion".[74] By setting a threshold that a Charter damages claimant must clear before proceeding past the pleadings stage, the *Henry* majority has done just that, pre-empting the wide discretion granted by s. 24(1).

Lastly, by requiring the claimant to convince the fact finder that the threshold fault requirement has been met, the *Henry* majority reversed the onus of proof from *Ward*. Although *Ward* placed the onus on the state to establish that countervailing considerations rendered an award of damages inappropriate in the circumstances, *Henry* requires a claimant to pre-emptively refute a possible countervailing consideration by showing the Crown's conduct was sufficiently serious to overcome fears of a chilling effect on state conduct.

B. The absence of a principled explanation for the deviation from Ward

The majority established a threshold test for Charter damages claims for prosecutorial non-disclosure on the basis of the supposedly "considerable risk that baseless damages claims against the Crown would proliferate",[75] which it feared would divert Crown counsel from their public duties by forcing them to defend against "a litany of civil claims".[76] Moldaver J. stated no basis for this fear, and cited no evidence in the record that would support the existence of such a risk. The majority's fear of a proliferation of damages claims for non-disclosure appears entirely speculative – and runs counter to 33 years of Charter jurisprudence without a precedent for such claims.

Interestingly, the majority acknowledged that the Crown's disclosure decisions are often challenged in the course of a criminal prosecution, at which time the criminal court determines the lawfulness

73. *Ibid.*, at 147.
74. *Ward*, *supra*, footnote 2 at para. 18, citing *R. v. Mills*, [1986] 1 S.C.R. 863, 29 D.L.R. (4th) 161, 26 C.C.C. (3d) 481 (S.C.C.) (*Mills*) (emphasis added).
75. *Ibid.* at para. 70.
76. *Ibid.* at para. 71.

of the Crown withholding certain information.[77] This further undercuts the majority's concern that "baseless damages claims against the Crown would proliferate" without a heightened liability threshold.[78] Allegations of non-disclosure most frequently arise during the criminal prosecution, at which time the Crown will either (a) be ordered to disclose the information in question, with minimal prejudice to accused (as it would be prior to any conviction or sentencing), or (b) be immune from liability for Charter damages for non-disclosure, as the non-disclosure will "have the benefit of judicial imprimatur", even if the judicial determination is later overturned.[79]

The majority also accepted that apprehensions of a possible "chilling effect" on Crown counsel supported a high liability threshold, holding that "[f]ear of civil liability may lead to defensive lawyering by prosecutors".[80] The argument that Charter damages would harm good governance by having a chilling effect on government action was expressly rejected in *Ward*, where the court noted that where damages deter the infringement of rights, they promote good governance, not undermine it.[81] It is not only difficult to square the *Henry* majority's acceptance of a chilling effect with *Ward*, but also to simply understand the logic of the argument. As stated by Professor Roach:

> 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 such grounds. As the Court recognized, routine arguments that Charter damage awards adversely affect good governance discount the fact both deterrence and compliance with the Charter "is a foundation principle of good governance".[82]

Moreover, it is hard to imagine precisely what actions of Crown counsel would be "chilled" by the possibility of Charter damages for wrongful non-disclosure. As all the justices agreed, Crown disclosure is a constitutional obligation; it is not a discretionary decision that may be chilled, but rather a matter of legal duty. To the extent that Crown conduct is affected by the possibility of Charter damages for non-disclosure, the logical response would be for the Crown to be deterred from withholding potentially relevant information, and to err on the side of disclosure. Wouldn't that be a positive outcome?

77. *Henry*, *supra*, footnote 6 at para. 90.
78. *Ibid.*, at para. 70.
79. *Ibid.*, at para. 90.
80. *Ibid.*, at para. 73.
81. *Ward*, *supra*, footnote 2 at para. 38.
82. Roach, *supra*, footnote 5 at 150 (emphasis added).

Even if one is to accept the legitimacy of these two "good governance" concerns, the majority's reasons fail to provide a principled justification in favour addressing them by establishing a threshold requirement, rather than simply considering them at the third step of the existing *Ward* framework. Step three of the *Ward* framework was specifically intended to address countervailing considerations, but Moldaver J. stated that requiring the claimant to establish the new threshold requirement (that the Crown intentionally withheld information, and knew or ought to have known the information was material) was necessary to address good governance concerns.[83]

It appears the primary purpose of introducing a new requirement is to facilitate the Crown's ability to bring motions to strike Charter damages claims. The majority held:

> The mere fact of having to respond to an onslaught of litigation, even if ultimately unsuccessful, would chill the actions of prosecutors and divert them from their proper functions. It would be far too easy for a claimant with a weak claim to . . . drive prosecutors into civil court. Bringing a Charter damages claim for prosecutorial misconduct should not be a mere exercise in artful pleading. In contrast, the threshold I have outlined ensures that many unmeritorious claims will be weeded out at an early stage, either on a motion to strike or on a motion for summary judgment.[84]

Troublingly, the majority appears to support weeding out not only unmeritorious claims, but also "marginal" cases where the claimant is able to prove a Charter breach that caused them harm and overcomes an assessment of countervailing considerations at the third step. Moldaver J. held:

> [In] the absence of a liability threshold, a claim alleging a relatively minor breach with minimal harm to the claimant might well survive a motion to strike at the pleadings stage, and could lead to an award of damages. With respect, I fear that [this] approach runs the risk of opening the floodgates to scores of marginal claims.[85]

This reasoning is problematic in a few ways. First, it overlooks various incentives against bringing a claim that is unlikely to succeed and/or of low value that are inherent to the civil justice system (particularly the amount of time, effort, and money required to proceed to trial, and the risk of adverse costs awards). Second, it appears to unduly privilege prosecutors over other professionals performing a public duty by granting them a circumscribed sphere of potential liability. For instance, doctors – who similarly perform

83. *Henry*, *supra*, footnote 6 at paras. 86-89.
84. *Ibid.*, at para. 94 (emphasis added).
85. *Ibid.*, at para. 78.

important societal functions – are held to a negligence simpliciter standard in civil claims. Actions for damages alleging medical malpractice are common, and doctors thus must perform their duties in spite of a legitimate fear of an "onslaught of litigation". However, facing a "litany of civil claims" still does not divert physicians from their proper function; they hire lawyers (with their professional liability insurance, which prosecutors similarly have) to handle the claims, and may only attend at trial when required to give evidence. Notably, the concurring justices adopted a more reasonable position respecting the fear of diverting prosecutors from their proper functions, stating:

> . . . there is no reason to suppose that recognizing Mr. Henry's claim will divert prosecutors from their day-to-day work. Most issues of disclosure are settled at trial. In the rare case, like this one, where they arise after conviction, the prosecutor, if alive, may be called on to testify. The involvement of prosecutors is nonetheless likely to be limited.[86]

The majority justified its imposition of "a heightened *per se* liability threshold" for non-disclosure claims on the basis that such a threshold was established in *Mackin*.[87] The court in *Mackin* held that courts will not award damages for harm suffered as a result of the application of a valid law that is subsequently declared to be unconstitutional, unless "conduct that is clearly wrong, in bad faith, or an abuse of power" warrants an award of damages.[88] Relying on *Schachter*, *Mackin* also held that, as a rule, an action for s. 24(1) damages cannot be combined with an action for a declaration of invalidity based on s. 52.[89] Charter damages were not awarded in *Mackin* because the court had declared the law in question invalid, and there was no misconduct that rendered damages otherwise warranted.[90]

Although the court in *Ward* read *Mackin* as requiring a "minimum threshold of gravity" for state conduct warranting damages (in that case, "conduct that is clearly wrong, in bad faith or an abuse of power"),[91] it is not clear that was what the court was doing when it decided *Mackin*, years before its decision in *Ward*. If the facts of *Mackin* were grafted on to the *Ward* framework, *Mackin* might be

86. *Ibid.*, at para. 132 (*per* McLachlin C.J.C. and Karakatsanis J., concurring).
87. *Ibid.*, at para. 42.
88. *Mackin*, *supra* footnote 22 at para. 78.
89. *Ibid.*, at para. 80-81, citing *Schachter v. Canada*, [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1, 92 C.L.L.C. 14 (S.C.C.) (*Schachter*).
90. *Ibid.*, at paras. 82-83.
91. *Ward*, *supra*, footnote 2 at para. 39, citing *Mackin*, *supra*, footnote 22 at para. 78.

read as failing at step one, as there would no breach upon which to base a damages award, or failing at step two, as the declaration of invalidity would adequately achieve the functional objectives of vindication and deterrence. *Mackin* is not exactly stable footing for the majority's decision to rest upon.

Lastly, *Ward*'s rejection of a damages remedy for the seizure of Mr. Ward's car demonstrated the court's hesitation to award damages for "marginal" claims. This aspect of the court's decision in *Ward* highlighted the reasonableness of the functional approach, establishing that the *Ward* framework could lead to an award of damages where appropriate, but not in every case of a Charter breach. The majority in *Henry* failed to articulate a basis for its fears of opening the damages floodgates, and did not explain why – if those fears came to fruition – the *Ward* framework would not be up to the challenge.

C. Incongruence with earlier Charter remedy jurisprudence

In addition to the principles from *Ward*, the majority's decision in *Henry* is at odds with earlier Charter jurisprudence concerning remedies.

In particular, *Henry* is out of keeping with the principles laid out in *Doucet-Boudreau*, a leading case on what constitutes an appropriate and just remedy under s. 24(1).[92] The court in *Doucet-Boudreau* concluded that the meaning of "appropriate and just in the circumstances" will depend on the nature and right of the infringement and the facts of the particular case at issue. However, it also articulated broad guiding considerations for determining Charter remedies, holding that an appropriate and just remedy will (1) meaningfully vindicate the rights and freedoms of the claimants; (2) employ means that are legitimate within the framework of our constitutional democracy; (3) invoke the function and powers of a court; and (4) be fair to the party against whom the order is made.[93]

Requiring a threshold level of fault (*i.e.* intentional withholding of material information) in order to award damages to a claimant who suffered harm as a result of the Crown's wrongful non-disclosure runs the risk of failing to meaningfully vindicate the claimant's rights. If claimants are unable to avail themselves of other, private law causes of action, they will be without a remedy if their s. 24(1) claim does not meet the intention threshold – even if their Charter rights were in fact breached, possibly with serious consequences.

92. *Doucet-Boudreau*, *supra*, footnote 69.
93. *Ibid.*, at paras. 52-58.

This risk of failing to vindicate the claimant's rights is enhanced by the *Henry* majority's failure to discuss the interplay between their newly established liability threshold and non-damages remedies under s. 24(1). If a claimant fails to establish the fault threshold, it appears their claim could be struck in its entirety – possibly without the opportunity to seek alternative remedies under s. 24(1), such as a declaration.

More importantly, however, the *Henry* majority failed to heed the court's statements in *Doucet-Boudreau* respecting the importance of flexibility in the judicial approach to s. 24 remedies:

> . . . s. 24, because of its broad language and the myriad of roles it may play in cases, should be allowed to evolve to meet the challenges and circumstances of those cases. That evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.[94]

By imposing a threshold requirement over and above the *Ward* framework, *Henry* departed from the approach advocated in *Doucet-Boudreau*. A threshold fault requirement is inflexible, and risks being unresponsive to the needs of a given case.

Briefly, *Henry* also runs afoul of the court's statements *in Mills*,[95] *R. v. Gamble*,[96] *and Dunedin*[97] respecting the broad grant of discretion offered by s. 24(1) and the need to give a generous and purposive interpretation to the Charter's remedial provisions.

In *Mills*, the court considered the language of s. 24(1) (providing that a claimant may obtain such remedy "as the court considers appropriate and just in the circumstances") and held:

> It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion . . . the circumstances will be infinitely variable from case to case and the remedy will vary with the circumstances.[98]

Imposing a prerequisite threshold level of fault for the award of damages for a certain Charter breach undoubtedly pre-empts the

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94. *Ibid.*, at para. 59 (emphasis added).
95. *Supra*, footnote 74.
96. [1988] 2 S.C.R. 595, 45 C.C.C. (3d) 204, 66 C.R. (3d) 193 (S.C.C.) (*Gamble*).
97. *Supra*, footnote 67.
98. *Mills*, *supra*, footnote 74.

discretion of future courts to determine what is "appropriate and just in the circumstances", limiting their ability to make a case-by-case determination considering the particular circumstances, as *Mills* envisions.

In *Gamble*, Justice Wilson, writing for the majority, held that the administration of Charter remedies should be driven by the purposes of the Charter.[99] With respect, one worries that the majority decision in *Henry* was unduly driven by policy considerations, particularly the (possibly unfounded) concern to protect Crown attorneys against becoming overwhelmed by civil litigation. This would fail to apply a purposive approach to the grant of Charter remedies.

Lastly, the Supreme Court in *Dunedin* made an important statement of principle, holding that s. 24(1) is crucial to the overall structure of the Charter because "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach".[100] *Henry* creates a real risk that breaches of Charter rights will not be meaningfully vindicated if claimants are unable to meet an inflexible threshold requirement.

D. A preferable approach to s. 24(1) damages for wrongful non-disclosure

The concurring justices in *Henry* outlined a superior approach to assessing a claim for Charter damages as a remedy for a breach of the Crown's disclosure obligations: simply applying the *Ward* framework, which appropriately balances the competing considerations that arise.[101] Justices McLachlin and Karakatsanis would have only required Mr. Henry to plead facts sufficient to establish a breach of his Charter rights and that damages would advance the purposes of compensation, vindication, or deterrence, then leave it to the state to raise any countervailing factors, if appropriate.[102]

Notably, the majority did not in any meaningful way address the functional objectives of compensation, vindication, and deterrence in arriving at its decision. Not only did the majority's reasons overwhelmingly prioritize the consideration of possible "countervailing considerations" but they shifted the burden to raise such

99. *Gamble*, *supra*, footnote 96 at para. 66. See also *Dunedin*, *supra*, footnote 67 at para. 18: "Section 24(1) 'commands a broad and purposive interpretation' and 'must be construed generously, in a manner that best ensures the attainment of its objects'".
100. *Dunedin*, *supra*, footnote 67 at paras. 19-20.
101. *Henry*, *supra*, footnote 6 at paras. 106-107 (*per* McLachlin C.J.C. and Karakatsanis J., concurring).
102. *Ibid.*, at para. 108.

considerations away from the state, requiring the claimant to pre-emptively establish that the state's actions met the threshold fault requirement. The concurring justices honoured *Ward* by retaining its balanced approach to both the functions of Charter damages and possible countervailing considerations, and maintaining the burdens of proof allocated by the *Ward* court.

The concurring justices in *Henry* held that the countervailing considerations raised by the AGBC were "misplaced" because disclosure is not an issue of prosecutorial discretion. The majority responded to this view by highlighting possible difficulties that may arise in the course of decision-making about disclosure (such as issues concerning highly sensitive information and special protections required for sexual assault complainants), and arguing that such decisions should be motivated by principle, not the fear of incurring civil liability.[103] Although the majority takes a valid position in noting that there are at least some "good governance" considerations at play with respect to disclosure, this dispute is beside the point; the issue is when and how countervailing considerations should be considered.

On this point, the concurring justices adopt the more appropriate approach, holding that raising countervailing considerations is the responsibility of the state, and that they should be addressed in the third step of the *Ward* framework, not as a threshold question. As the concurring justices stated, there was "no principled basis for imposing any threshold of fault or intention on Mr. Henry's claim for Charter damages".[104]

IV. Moving forward: Implications of Henry

For Mr. Henry, the practical implications of the majority's approach are not likely to be significant. Even though the majority imposed a heightened liability threshold for Charter damages claims alleging wrongful non-disclosure, it held that Mr. Henry's claim as pleaded would meet the new threshold.[105] That being said, Mr. Henry's allegations were extremely serious, involving repeated failures to disclose exculpatory information that ultimately led to 27 years of wrongful imprisonment. It is hard to imagine a set of facts that would cry out for Charter damages more loudly (although the dispute was largely resolved in their favour, one questions the wisdom of the Attorneys General in using *Henry* as their test case for

103. *Ibid.*, at paras. 60 and 80.
104. *Ibid.*, at para. 133.
105. *Ibid.*, at para. 81.

challenging Charter damages resulting from a breach of disclosure rights, given its facts). One hopes Mr. Henry will ultimately be awarded meaningful damages.

But what should future Charter damages claimants expect in light of the *Henry* decision? For claims of wrongful non-disclosure, the threshold intention requirement appears likely to serve as a strict gatekeeper, blocking claims that fail to identify the material information prosecutors failed to disclose from proceeding past the pleadings phase.

Future cases will be left to interpret the scope of the majority's threshold intention requirement. The majority held that "the evidentiary burden on the claimant is not a high one", as a claimant can demonstrate that the Crown "intentionally withheld information" by proving simply that prosecutors were in possession of information and failed to disclose it, or that they were put on notice of the existence of information and failed to obtain it. Moldaver J. held that in either circumstance, "the intention to withhold may be inferred".[106] He further held that knowledge of the materiality of the information "can be imputed based on what a reasonable prosecutor would know in the circumstances" – but stressed that despite this reasonableness aspect, the liability threshold was higher than negligence.[107]

Justice Moldaver's comments could stand to be clarified. Having held that intentional wrongdoing "may be inferred" from the fact that prosecutors actually had information and failed to disclose it, it remained unclear whether the inference of intention would necessarily be drawn: did he mean that intention will be inferred in such circumstances, or that intention may or may not be inferred? In either case, presumably the inference is rebuttable – there appears to be room for the threshold requirement to become unwieldy.

The structure of the applicable framework for assessing Charter damages based in wrongful non-disclosure also requires clarification. Although the threshold requirement emerged from the concept of "countervailing considerations" at the third step of the *Ward* framework, it was imposed by the majority in the context of a pleadings motion, without working through the framework to assess the claim on the merits. Future claimants of Charter damages for wrongful non-disclosure may be left with more questions than answers following *Henry*: will this threshold requirement take hold only in the context of motions to strike, or will it form part of a modified *Ward* framework for non-disclosure claims? Will the

106. *Ibid.*, at para. 86.
107. *Ibid.*, at para. 88.

threshold requirement be considered as a prerequisite step to the *Ward* framework, or will it form part of the step three analysis? Where does the burden of proof properly lie?

As the liability threshold developed by the majority was specifically tailored to the non-disclosure context, the effect of *Henry* on claims for Charter damages on any other basis remains to be seen. Either way, the majority's decision has retreated from a clear, principled, and unified framework for Charter damages claims. It is possible the courts will consequently adopt a piecemeal approach, creating manifold threshold requirements for fault or the severity of the breach moving forward. Although the *Ward* framework was to be flexibly applied on a case-by-case basis, it remained a coherent and principled approach. The uncertainty introduced by *Henry* has undermined that structure.

V. Conclusion

After 28 years of uncertainty surrounding the circumstances in which damages could be awarded for Charter breaches pursuant to s. 24(1), the Supreme Court established a reasonable and balanced framework for determining the appropriateness of Charter damages in *Ward*. Although the *Ward* framework appeared to be working well, the court backed down from this principled approach just five years later with its decision in *Henry*.

Henry has reintroduced uncertainty into the law respecting Charter damages by imposing a new requirement solely for claims of wrongful non-disclosure by the Crown. Moreover, the majority's decision confused the onus of proof for the various steps of the *Ward* framework, and opened a Pandora's box by setting a precedent for new rules to be added for certain categories of claims. Perhaps most importantly, *Henry* fails to honour well-established principles calling for a purposive and flexible approach to Charter remedies that will be responsive to the needs of each given case. One hopes the court does not wait another 28 years before clarifying the law on Charter damages once more.

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