LICENCING STATE MISCONDUCT: REVISITING *NASOGALUAK* AND *WARD*

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A legal right only has meaning if, when the right is infringed, it can be vindicated in some way. Section 24 of the Canadian Charter of Rights and Freedoms *(*Charter*) provides a basis for courts to provide remedies for* Charter *violations, but the case law demonstrates the need for more robust remedies in the criminal context. Courts have restricted the application and meaning of section 24(1), resulting in an overreliance on stays of proceedings and sentence reductions. These remedies often fall short of censuring state misconduct and providing sufficient vindication. The authors suggest an alternative approach: under section 24(1), criminal courts, where appropriate, should provide monetary compensation to victims of police misconduct at the conclusion of criminal proceedings.*

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I. INTRODUCTION

A legal right has meaning if, when the right is infringed, it can be vindicated in some way. The Supreme Court of Canada has cautioned that if *Canadian Charter of Rights and Freedoms* (*Charter*) rights are of "little actual avail" despite being "high-sounding," public trust in the administration of justice will erode.[1] The vindication of *Charter* rights fosters trust in the legal system, showing rights holders that their rights are not meaningless. It would seem, then, that section 24(1) of the *Charter*, which provides that an individual whose *Charter* rights have been violated can apply to a court of competent jurisdiction for a remedy

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1 *R v Grant*, 2009 SCC 32 at para 76.

deemed appropriate and just,[2] should be foundational to the administration of justice. Over the years, the Supreme Court has elaborated to some extent on how section 24(1) should operate to ensure that *Charter* rights are respected. However, the remedies available to address violations of rights are still weak enough that many of the rights violations that come to the attention of judges (and there are many more that do not) are left without any form of correction, remedy, or vindication.

In 2010, the Supreme Court recognized the validity of two different remedies for *Charter* right violations crafted by lower courts: *R. v. Nasogaluak* provided for a reduction in the sentence a person convicted of an offence would otherwise have received; [3] *Ward v. Vancouver (City)* provided for a monetary damage award under section 24(1) as compensation for the right violation.[4] The Supreme Court in *Ward* held that a proper section 24(1) remedy is one which: (1) adequately compensates victims for injuries; (2) vindicates *Charter* rights; or (3) deters future violations of rights.[5] The remedy from *Nasogaluak* will fail to accomplish any of these goals in many cases, but the Supreme Court found that it was a legitimate remedy for *Charter*-infringing state misconduct.

Together, *Nasogaluak* and *Ward* result in a disturbing weakness in the protection of the fundamental rights of people to be free from police violence and intimidation. *Nasogaluak* allowed judges to remedy *Charter* rights violations at the sentencing stage by reducing sentences (albeit not below the statutory minimums) as a response to an abuse by law enforcement. On its own, *Nasogaluak* offers a remedy that is weak in its ability to properly account for these injuries, either because of mandatory minimum sentences or because the crime would not warrant a heavy sentence in any event. Sentencing is a possible arena in which to address *Charter* wrongs, but it is indirect and ineffective. The sentencing process has its own work to do. *Ward* was a civil suit in which the plaintiff sued the city after the Vancouver police violated his *Charter* rights. The Supreme Court created a new remedy of monetary damages for *Charter* abuses and awarded him $5,000, but at the same time determined that provincial criminal courts — the courts that hear most criminal cases — are not of "competent jurisdiction" to award section 24(1) damages.[6] The defendant would have to seek damages as part of a civil suit at a court that is of competent jurisdiction. But because it is so costly and risky to start a civil suit against the government, and because a sentence reduction may result in the denial of subsequent civil remedies, the combination of these two cases created the result that, in many criminal cases, sentence reduction is the only form of redress that is open, in practice, to the person whose rights have been violated. Worse still, law enforcement could easily come to see a sentence reduction as an acceptable trade-off for acting unconstitutionally during arrests or investigations — a result which jurisprudence after *Ward* and *Nasogaluak* has pointed to.

This article emphasizes that the Supreme Court ought to have crafted a more robust form of protection in *Ward* in order to avoid additional strain on sentencing practices as *Nasogaluak* does, and to offer victims of police abuses an accessible and effective remedy. One way that this protection could be offered is by giving judges hearing criminal cases the

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2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
3 2010 SCC 6 [*Nasogaluak*].
4 *Vancouver (City) v Ward*, 2010 SCC 27 [*Ward*].
5 *Ibid* at para 4.
6 *Ibid* at paras 16, 58.

ability to award a monetary remedy to defendants whose rights have been violated by police. This sort of remedy would be a more effective way for criminal trial judges to communicate their disapproval of abusive law enforcement practices. It would also be consistent with the Supreme Court's decision in *R v 974649* (*Dunedin*), which held that the question of whether a court is of "competent jurisdiction" must be interpreted expansively so as to avoid cutting off courts' limited options for effectively remedying *Charter* breaches.[7] In this article, we argue that courts should extend their section 24(1) jurisprudence to include a second kind of monetary remedy that would be specifically designed to vindicate the *Charter* rights of people who are in the criminal system. A monetary remedy for a constitutional wrong is fundamentally distinct from damages in tort such that its provision should not be constrained only to courts which have the jurisdiction to award damages as part of a civil process. Though a monetary remedy is not a panacea that would negate police misconduct, it would be one way of promoting police responsibility for *Charter*-infringing wrongdoing, thereby also promoting *Charter* compliance in a world in which *Charter* remedies are still underdeveloped.

II. REDUCTION TO STATUTORY MINIMUMS: A WEAK REMEDY FOR *CHARTER* VIOLATIONS

Section 24 of the *Charter* has two remedial provisions to address state action that violates people's *Charter* rights. Section 24(1) is broad and states that "[a]nyone 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."[8] On the other hand, section 24(2) only applies where the breach is connected to the acquisition of incriminating evidence that the Crown then wants to use to pursue a conviction. The provision itself states that in such circumstances, the proper remedy is the exclusion of the evidence, but only if the accused can show that admitting the evidence "would bring the administration of justice into disrepute."[9] As Lauren Gowler points out, section 24(1) is much broader and therefore is likely to be a better tool to address police misconduct and pursue police accountability.[10]

Section 24(1) allocates to judges the discretion as to which remedy would be appropriate in which circumstances. The Supreme Court has stated that it is "difficult to imagine language which could give the court a wider and less fettered discretion" than section 24(1) in crafting its remedies.[11] In addition to the remedy of damages in *Ward*, which will be explored in depth below, numerous other remedies are available in the civil and administrative contexts. Declaratory relief is available where there is a need to respect the prerogative powers of the executive.[12] A stay of proceedings may be available where there is a serious abuse of process that significantly interferes with section 7 procedural protections.[13] Injunctive relief against

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7 *R v 974649 Ontario Inc*, 2001 SCC 81 at paras 81–82 [*Dunedin*].

8 *Charter*, *supra* note 2, s 24(1).

9 *Ibid*, s 24(2).

10 Lauren Gowler, "Establishing Police Accountability: How Do We Stop *Charter* Violations from Happening?" (2024) 46:6 Man LJ 1 at 8–9.

11 *Mills v The Queen*, 1986 CanLII 17 at para 278 (SCC) [*Mills*].

12 *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 46.

13 In the administrative context, where there was a section 7 breach from the failure to disclose evidence, see *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38 at paras 74–77.

the executive is also available and such relief is "central to s. 24(1)."[14] This remedy may include a court's oversight with respect to compliance with the injunctive order.[15] Interlocutory injunctions are also available where certain conditions are met.[16] Finally, mandamus can be ordered in exceptional circumstances, where no other remedy is sufficient.[17]

There are fewer section 24(1) remedies that apply in the context of a criminal trial, even though it is in this very context where *Charter* violations often come to light. Assuming that the *Charter* violation is not tied to the collection of incriminating evidence, section 24(1) is the designated avenue through which *Charter*-infringing state misconduct is addressed.[18] A stay of proceedings can be ordered where there is a serious abuse of process,[19] or where there is unreasonable delay.[20] It can also be ordered where the accused suffers serious abusive conduct by law enforcement officers, under certain specific conditions.[21] Some criminal courts can also award costs where there is a "marked and unacceptable departure from the reasonable standards expected of the prosecution."[22] Habeas corpus may be available in limited circumstances.[23] These remedies may seem plentiful, but are seldom used given that the courts have constrained their appropriateness to certain circumstances or by certain conditions. In *Nasogaluak,* the Supreme Court added another remedial option: when the state violates the *Charter* rights of a criminal defendant, a sentencing judge can redress that violation through reducing the sentence imposed for the crime the individual has been convicted of, without recourse to the *Charter* at all.[24]

The facts that gave rise to the *Nasogaluak* judgment are themselves a good illustration of why the sentence reduction remedy is not an effective tool for guaranteeing *Charter* rights. Two police officers apprehended Mr. Nasogaluak for impaired driving. Nasogaluak, who was inebriated, appeared to have a hard time complying with police commands to get out of the car or put his hands up. While arresting him, the officers punched him in the head three times and, after pinning him to the ground, punched him in the back twice. The punches to the back were strong enough to break several of his ribs, and the broken ribs punctured his lung.[25] Overnight, the police held Nasogaluak in a cell at the station and provided no medical assistance despite his saying that he was hurt and that he could not breathe.[26] The next morning after being released, he went to the hospital where he required emergency surgery for a collapsed lung.[27] At trial, the judge found that the first two punches were lawful, but the third punch to the head and both punches to the back were unwarranted and the excessive use

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14 *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 70 [*Doucet-Boudreau*].
15 *Ibid* at paras 72–74.
16 *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 333–34.
17 *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at paras 147–50.
18 *R v Ferguson*, 2008 SCC 6 at para 60 [*Ferguson*].
19 That is, where there is an abuse of process that irreparably harms the accused's ability to make full answer and defence or have a fair trial under section 7: *R v O'Connor*, 1995 CanLII 51 at paras 68, 82 (SCC). See also *R v Taillefer*, 2003 SCC 70 at para 128.
20 *R v Jordan*, 2016 SCC 27.
21 *R v Bellusci*, 2012 SCC 44 at paras 31–32.
22 *Dunedin*, *supra* note 7 at para 87.
23 *R v Gamble*, 1988 CanLII 15 at paras 73–81 (SCC).
24 *Nasogaluak*, *supra* note 3 para 56.
25 *Ibid* at para 11.
26 *Ibid* at para 12.
27 *Ibid* at para 13.

of force constituted a violation of Nasogaluak's section 7 right to security of the person.[28] Choosing not to order a stay of proceedings, the judge convicted Nasogaluak and ordered a reduced sentence of a 12-month conditional discharge and a one-year driving prohibition, a sentence that was below the statutory minimum for the crime of impaired driving. The majority of the Court of Appeal of Alberta agreed that there was a *Charter* violation and that a sentence reduction was an appropriate remedy but found that the reduction could not go below the statutorily mandated minimum.[29]

On appeal at the Supreme Court, Justice Lebel, writing for a unanimous bench, agreed that sentencing was an appropriate mechanism through which to take account of the police beating, but that the sentence reduction could not fall below the legislated minimum. The reasoning by which he came to this decision was somewhat convoluted and left some ambiguities. Section 24(1) was discussed at great length, but Justice Lebel emphasized that it was not necessary to rely on the *Charter* to reduce a sentence. Judges, as he wrote, have always had this discretion as long as the reduction was within statutory limits.[30] Justice Lebel made it clear that, at least in the majority of cases, even a violation of the *Charter* does not permit the sentencing judge to drop below statutory sentencing minimums. Therefore, section 24(1) seems not to enhance a sentencing judge's ability to provide a remedy for violations of *Charter* rights in such cases. Yet, section 24(1) is also at work in the holding. Justice Lebel went to pains to express the relationship between the sentence reduction and the *Charter*. He found that the sentencing process must be "subject to the scrutiny of the *Charter* and its overarching values and principles."[31] He also wrote that "[a] sentence cannot be 'fit' if it does not respect the fundamental values" of the *Charter*.[32] A sentence reduction, according to Justice Lebel, can offer this respect for the values of the *Charter*. This implies that while the power to reduce a sentence does not emanate from the *Charter*, it will sometimes be an adequate judicial response to a rights violation from a state officer, putting the whole process in line with the fundamental values of the *Charter*.

While the trial judge would have crafted a *Charter* remedy of reducing the sentence below the statutory minimum, the Supreme Court found a weaker remedy that it held satisfied the *Charter*'s requirements without needing the *Charter* to do any work. Nasogaluak had his rights violated and should have received some form of redress, but this could only be done within the limits of the usual sentencing rules for the violation of which he was convicted. Justice Lebel left unanswered the question of whether a particularly egregious violation of *Charter* rights might warrant a sentence reduction below a mandatory minimum.[33] At any rate, a beating that leaves the victim with broken bones and requiring emergency surgery was not egregious enough.

Applying *Nasogaluak*, the Court of Appeal for Ontario subsequently held that departing from a statutory minimum is only justified in "exceptional cases" involving "particularly

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28 *Ibid* at paras 15–16.
29 *Ibid* at paras 19–21.
30 *Ibid* at paras 47, 50–53, 55.
31 *Ibid* at para 64.
32 *Ibid* at para 48.
33 *Ibid* at para 64. An exception to the mandatory minimum may not be available at all, due to *Ferguson*, where the Supreme Court prohibited constitutional exceptions to mandatory minimums based on concerns related to the rule of law and the separation of powers (*Ferguson*, *supra* note 18 at paras 55–56, 67, 69).

egregious misconduct" and where a sentence reduction below the statutory minimum is the sole available and effective remedy.[34] Although the *Charter* enhances individual rights, *Nasogaluak* implies that its enshrinement does not guarantee an enhanced protection of those rights through a remedy contravening statutory minimum sentences — instead, a non-*Charter* remedy can adequately vindicate breached *Charter* rights.

Another Supreme Court judgment, *R. v. Conway*, confirms this reading of *Nasogaluak*.[35] In *Conway*, Justice Abella, writing for the unanimous Supreme Court, relied on *Nasogaluak* for the proposition that "*Charter* rights can be effectively vindicated through the exercise of statutory powers and processes."[36] This explanation of *Nasogaluak* supports a reading of the case as holding that a recognition that *Charter* rights have been violated need not bring on a *Charter* remedy. Indeed, one can infer that the Supreme Court is of the opinion that a non-*Charter* remedy should be preferred if one can be found. The violated rights are vindicated through the judge's exercise of common-law powers: while a judge need not rely specifically on section 24(1) to order a sentence reduction for police abuse, the sentence reduction is seen as an effective vindication of *Charter* rights. In other words, it operates as a *Charter* remedy regardless of whether the authority to order it arises from the *Charter* or the common law. This is non-trivial, as *Charter* rights are only meaningful as long as the courts uphold them. Therefore, a finding that the ordinary operation of the law is sufficient to uphold *Charter* rights requires the inference that the ordinary operation of law in these cases protects those rights to the same extent that a specifically *Charter*-derived remedy would.

It is true that the *Charter* was created to enshrine values that were in the Canadian legal system already. However, the *Charter* was also intended to bolster and strengthen the protection of those rights. The Supreme Court has recognized this idea in holding that, no matter how expansive a *Charter* right is in theory, it "is only as meaningful as the remedy provided for its breach."[37] Indeed, section 24(1) is part of Canada's "constitutional scheme" for the vindication of *Charter* rights.[38] It stands for the principle that, when state misconduct violates a person's *Charter* rights, courts have a duty to provide an effective remedy to show that these rights hold substance.[39] Non-*Charter* remedies may certainly be adequate to address injustices and sufficiently uphold the value of *Charter* rights in some cases, but should be scrutinized for whether they deliver on section 24(1)'s promise of remedial protection.

A comparison between *Nasogaluak* and *R. v. Suter*,[40] a Supreme Court case on collateral consequences, raises more questions about the adequacy of non-*Charter* remedies to address *Charter* breaches. In *Suter*, the Supreme Court agreed that it was appropriate to reduce Mr. Suter's sentence in order to account for the fact that Mr. Suter was the victim of vigilante violence between committing the crime and sentencing. The Supreme Court held that collateral consequences, including violence experienced at the hands of non-state actors, can

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34 *R v Donnelly*, 2016 ONCA 988 at paras 158–59, 171, 173.
35 *R v Conway*, 2010 SCC 22 [*Conway*].
36 *Ibid* at para 103.
37 *Dunedin*, *supra* note 7 at paras 19–20.
38 *Doucet-Boudreau*, *supra* note 14 at para 59.
39 *Ibid* at paras 55–59. See also Kent Roach, "Enforcement of the Charter: Subsections 24(1) and 52(1)" (2013) 62 SCLR (2d) 473 at 476–80 [Roach, "Enforcement of the Charter"]. The Supreme Court recognized this as a court's duty in *Ferguson*, *supra* note 18 at para 34.
40 2018 SCC 34 [*Suter*].

correctly be considered at sentencing when sufficiently connected to the circumstances of the offender and the offence, similar to the approach of *Nasogaluak.*[41] The Supreme Court mentioned *Nasogaluak* several times in *Suter* but refrained from explicitly drawing an equivalence between how the state ought to respond to violence from state actors and violence from non-state actors. If there is no difference between how the legal system responds to harm the state inflicts and harm suffered in other situations, then it seems that the courts are not turning their minds sufficiently to the issue of protecting people's *Charter* rights, which are rights to be free from violence and interference from the state in particular. But the result of *Suter* is that these two forms of harm can be accounted for in the same way. This is another facet of the non-*Charter* sentencing remedy for *Charter* violations that should worry legal actors who take the protection of *Charter* rights seriously.

The trial judge in *Nasogaluak* found that this instance of police breaking Nasogaluak's bones was not egregious enough to require a stay of proceedings, and the Supreme Court did not revisit that finding. This may be the true fault of the case. Nevertheless, its impact on Canadian law has been in sentencing and the *Charter*. While seeming to broaden the scope of remedies for convicted offenders whose *Charter* rights were violated, *Nasogaluak* decreed that a weak existing judicial remedy was sufficient to answer *Charter* violations.

Notwithstanding that sentence reduction may in fact provide an appropriate remedy in cases of less serious state misconduct, there are three pertinent weaknesses of the remedy in *Nasogaluak*. First, it creates a situation in which judges may feel conflicting duties — on the one hand to consistent and principled sentencing for serious crimes, and on the other to upholding the values of the *Charter*, and it is not clear which judicial imperative will hold sway. Second, a slight reduction in sentence may have the effect of foreclosing other avenues of redress. For instance, diminishing the number of instances in which judges will order a stay of proceedings, since the sentence reduction is now available as a more cautious approach to remedying a rights violation. Third, the remedy will often be non-existent for people whose rights have been violated and who are then convicted of a crime where they would not have been sentenced significantly above the mandatory minimum, even in the absence of a violation of rights, not to mention people who are found not guilty. For these reasons, the remedy in *Nasogaluak* is at least as harmful as it is helpful to those whose rights have been violated by the police.

The remedy in *Nasogaluak* requires a court to address one issue, state misconduct, through another, sentencing, that is more properly a separate area. The sentencing principles contained in the *Criminal Code* do not demonstrate the same attentiveness to the affirmation of *Charter* rights as does section 24 because of their necessary focus on the offender and the offence.[42] The *Criminal Code* says that any sentence must be proportionate to the gravity of the offence and the degree of the offender's responsibility.[43] Remedial protection is, at most, peripheral to both of these principles. Although *Nasogaluak* noted that the determination of a fit sentence remains subject to the *Charter*'s "overarching values," it is limited by these

41 *Ibid* at paras 48–49.
42 *Criminal Code*, RSC 1985, c C-46, s 718.
43 *Ibid*, s 718.1.

sentencing provisions in practice.[44] The *Criminal Code* cannot live up to section 24(1)'s remedial promises because the two analyses exist on separate planes.

As previously noted, this could result in judges feeling a conflict between their duties to principled sentencing and to upholding *Charter* rights. Some judges may choose to infuse remedial principles into their sentencing analysis, while others may not. Alberta courts have twice pointed out this "unfortunate disconnect" between addressing state misconduct in sentencing and the principles of sentencing themselves.[45] The Supreme Court has not given much guidance on this issue. If anything, Justice Lebel's direction in *Nasogaluak* that statutory minimums must be respected would seem to indicate that other sentencing principles must also be upheld, such as consistency between like offenders and the need for the punishment to be in line with the moral blameworthiness of the act. This may leave little room for the sentence to reflect the rights violation.

Once judges have filtered the remedy through the sentencing process, it may appear that other avenues of remedy that would otherwise be available (such as a separate civil suit for damages) are foreclosed on the basis that the violation has already been addressed. Judges are unlikely to give a civil remedy for a wrong that has already been addressed in another judicial process, based on *Ward*. The Chief Justice opined in *Ward* that if other remedies met the requirements of an adequate *Charter* remedy, then an award of damages for a *Charter* violation would no longer be "appropriate and just."[46] Justice Lebel's judgment in *Nasogaluak* seems to imply that sentence reduction will often meet those requirements. There is a risk in this: people convicted of an offence may find that, without even being asked, the judge will order a small reduction in sentence, and that when they then sue civilly, another judge will dismiss the suit on the basis that their rights have already been vindicated through the criminal sentencing process.

Lastly, where the crime is not on the higher end of seriousness, and absent any aggravating factors, the *Nasogaluak* remedy will be non-existent. Imposing a sentence longer than that prescribed by the statutory minimum is justified where the sentencing court finds that the accused behaved in a way that worsens the seriousness of the crime or its surrounding circumstances.[47] But, per *Nasogaluak*, a sentence can rarely, if ever, go below this minimum. As Justice Agnew pointed out while commenting on *Nasogaluak* in the case of *R. v. Wetzel*, this means that, if in the given case there are no aggravating factors to raise the sentence above the minimum, the remedy disappears.[48] Many people would benefit from a meaningful redress for violations of their rights through the sentencing process, but if they do not behave in such a way that aggravates the length of sentence they would have received absent any *Charter* breaches, they are afforded no remedy at all.

For these three reasons — that it brings in extraneous factors to the sentencing process, forecloses other remedies, and will sometimes not present a remedy at all — common-law sentence reduction is not a sufficiently powerful remedy for what are often extremely serious *Charter* violations. As Gerald Chan has noted, the emphasis in the case appears to be away

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44 *Nasogaluak*, *supra* note 3 at para 64.
45 *R v Walters*, 2012 ABQB 83 at para 67; *R v Richards*, 2020 ABPC 218 at para 193.
46 *Ward*, *supra* note 4 at para 34.
47 *Nasogaluak*, *supra* note 3 at paras 43–45.
48 *R v Wetzel*, 2011 SKPC 9 at para 57.

from the protection of rights and toward minimizing the burden on government.[49] The result of *Nasogaluak* seems to be that sentence reductions, which will often be small differences to the sentence, will be handed down in order to redress abuses by the police, and no monetary award or other remedy that might provide an effective form of rights vindication or deterrence against police action will be available. It also offers no remedy for an accused who is acquitted. Given the seriousness of some of the injuries that are encompassed by the *Nasogaluak* ruling, perhaps it is not fitting that they be "filtered" through sentencing, but ought to be addressed directly. One possibility for a direct approach to address these injuries is with monetary compensation. This avenue of redress was addressed in *Ward*.

III. DAMAGES: A PROMISING REMEDY WITH A NARROW SCOPE

Monetary compensation as a type of *Charter* remedy was first introduced by *Vancouver (City) v. Ward*. In *Ward*, the individual whose rights were violated initiated the request for a remedy under section 24(1) as part of a civil proceeding. There were no criminal proceedings against Mr. Ward — he had committed no crime and was never charged. The police arrested Ward after they received a tip that someone was going to try to throw a pie at the Prime Minister during his visit to Vancouver that day. Their information was that the individual was a white male between 30 and 35 years with short dark hair, wearing a white T-shirt with red on it. Ward was in his mid-40s, with collar-length grey hair, and was wearing a grey T-shirt with red on it. Police officers noticed Ward running in the general direction of the Prime Minister's location and thought he might be the pie-thrower. The officers arrested Ward for breach of the peace and took him to police lockup. There, Ward was told to remove all of his clothing for a strip search. Ward took off most of his clothing but refused to take off his underwear, which he was then allowed to keep on. After the search, he was held in a cell for 4.5 hours before being released without charge.[50]

Ward brought two causes of action against the City of Vancouver (the City) and the Province of British Columbia (the Province) — one in tort and one based on section 24(1) requesting damages for the violation of his *Charter* rights. The trial judge determined there was no liability in tort for the strip search but found that the City was liable for the tort of wrongful imprisonment.[51] Additionally, the trial judge found the City and Province violated Mr. Ward's section 8 right against unreasonable search and seizure and the City violated his section 9 right against arbitrary imprisonment, thus, a section 24(1) remedy was available to him.[52] The Supreme Court agreed.[53] Chief Justice McLachlin, writing for the Supreme Court, found that damages could be an appropriate remedy under section 24(1).[54] They would be justified (countervailing factors being absent) if they furthered the general goals of the *Charter* through performing one or more of three functions: compensation for personal loss, vindication of *Charter* rights, and deterrence of future rights violations by state actors.[55] While compensation could be guided by analogy to tort law, Chief Justice McLachlin

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49 Gerald Chan, "Remedial Minimalism Under Section 24(1) of the Charter: *Bjelland*, *Khadr* and *Nasogaluak*" (2010) 51 SCLR (2d) 349 at 350–51.

50 *Ward*, *supra* note 4 at paras 6–9.

51 *Ibid* at para 10.

52 *Ibid*.

53 *Ibid* at paras 74–78.

54 *Ibid* at paras 20–21.

55 *Ibid* at para 25.

observed that damages with regard to the latter two objectives would be principally guided by the seriousness of the breach.[56]

Here we find a *Charter* remedy that can be more properly tailored to the abuse that an individual suffered at the hands of state actors than sentence reduction can be. Subsequent applications of *Ward,* such as in *Elmardy v. Toronto Police Services Board*, demonstrate that an important monetary remedy can send a strong message to a government agency and hold weight as censure of law enforcement misconduct.[57] In *Elmardy*, the police acted on a racist "hunch" that Mr. Elmardy, a Black man walking alone at night, was breaching bail conditions.[58] Elmardy was innocent, and sought damages after being punched in the face twice and left handcuffed lying on icy ground for 20 to 25 minutes while the police unlawfully searched his belongings.[59] The Court recognized the need to vindicate a broader societal "interest in having a police service comprised of officers who do not brutalize its citizens because of the colour of their skin and that sends the message to that service that this conduct must stop."[60] The Court held that a $50,000 damage award under section 24(1) was necessary to communicate this message.[61] While Lauren Gowler has rightly pointed out that small awards might be seen as a cost of doing business for the state,[62] a more significant award such as the one in *Elmardy* may send a stronger message, especially if it becomes something more than an anomaly.

Elmardy shows that section 24(1) can remedy *Charter* violations in a way that significantly vindicates the rights of people from historically oppressed groups who are victims of discriminatory police action. This makes it seem as if a monetary remedy could be a promising avenue for vindicating rights. However, in *Ward*, Chief Justice McLachlin created an important limitation to monetary damages. Though the question was not before the Supreme Court, Chief Justice McLachlin nevertheless specified that provincial criminal courts would not be considered courts of competent jurisdiction to award *Charter* damages for the purposes of section 24(1).[63]

The majority of criminal cases are tried in provincial courts.[64] This means that in the majority of cases the criminal accused would not be able to get damages as part of the same proceeding. They would need to separately initiate civil proceedings and then satisfy the burden of proving a "functional need" for *Charter* damages.[65] This puts the remedy effectively out of reach for many people, as it is costly and uncertain, and the awards may be

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56 *Ibid* at paras 50–52.

57 2017 ONSC 2074 [*Elmardy*]. See also *Richards v Canada (AG)*, 2022 FC 1763 (particularly at paras 273–76).

58 *Elmardy*, *ibid* at paras 7, 23.

59 *Ibid* at para 10.

60 *Ibid* at para 36.

61 *Ibid* at paras 36–37.

62 Gowler, *supra* note 10 at 10.

63 *Ward*, *supra* note 4 at para 58.

64 Department of Justice Canada, "The Judicial Structure," online: [perma.cc/63LY-AQU4]. See also Kent Roach, **"**A Promising Late Spring for Charter Damages: Ward v. Vancouver" (2011) 29:2 NJCL 145 at 152 [Roach, "Promising Late Spring"].

65 *Ward*, *supra* note 4 at para 24; Roach, "Promising Late Spring," *ibid* at 163. See also Roach, "Enforcement of the Charter," *supra* note 39 at 483.

small in relation to lawyers' fees for an action of that sort.[66] Additionally, people who are convicted would potentially have to waive sentence reduction from the *Nasogaluak* precedent in order to pursue an uncertain remedy elsewhere, if judges even allowed them the option. This is a difficult choice for an accused to make.

There are many reasons why a criminal accused with a civil claim might not pursue a civil remedy. In Canadian civil trials, if someone sues the government and loses, they may be responsible for a part of the government's litigation costs.[67] Add in the fact that Canadian courts have a long and well-entrenched history of only giving small awards for non-pecuniary damages, and it becomes an unattractive proposition from a purely financial perspective.[68] The low amount of potential awards also makes it less likely for lawyers to want to represent these litigants.[69] As with other civil proceedings, the criminal accused would be subject to statutory limitation periods, demanding that they act relatively swiftly if they wanted to sue — and this would be all the more difficult while living under the cloud of an ongoing criminal trial.[70] Claimants from remote areas who do not have ready access to courts are at an even greater disadvantage. In the summation of Kent Roach, "the downside costs of such litigation so outweigh the upside benefits in Canada" that it is unlikely many litigants will choose to pursue this avenue even where they feel legitimately mistreated by police.[71] The risk of being saddled with lawyers' fees and court costs combined with the small amount of the possible reward mean that even if someone is highly motivated to have their rights vindicated, it might simply be too much of a risk to pursue it. Unfortunately, and as the Supreme Court itself has recognized in *Dunedin*, accused persons often rely on legal aid to defend themselves against the state, so the option of a civil suit "may far too often prove illusory in practice."[72] The risk for these individuals of pursuing a monetary remedy outside of the criminal process would be even higher. While having the civil remedy is a step in the right direction in terms of recognizing police abuses and providing a potential avenue of vindication for *Charter* rights of criminalized peoples, *Ward* did not create a broad new avenue of recourse for victims of abuses by law enforcement, who are often poor and disenfranchised from the legal system.

IV. LICENCING STATE MISCONDUCT

The combined effect of the weakness of sentence reduction as a remedy for a *Charter* breach and the difficulty in obtaining monetary damages could have the effect of licencing state misconduct. Sentencing is not the place to consider censuring law enforcement or creating a police accountability mechanism, since the sentencing process is focused on the

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66 Keara Lundrigan makes this point in the context of the availability of damage awards under section 24(1) for section 11(b) *Charter* violations: Keara Lundrigan, "*R v Jordan*: A Ticking Time Bomb" (2018) 41:4 Man LJ 113 at 127–28.

67 *Crown Liability and Proceedings Act*, RSC 1985, c C-50, s 28.

68 Chan notes that the damage award of $5,000 for the violation that Ward suffered was "paltry" (Chan, *supra* note 49 at 379).

69 Kent Roach, "Remedies for Discriminatory Profiling" in Kent Roach & Robert Sharpe, eds, *Taking Remedies Seriously* (Ottawa: Canadian Institute for the Administration of Justice, 2010) 391 at 404 [Roach, "Remedies"].

70 *Ravndahl v Saskatchewan*, 2009 SCC 7. On this point, Kent Roach notes that "one would think that an ordinary statute should not defeat one's Charter's entitlement to seek a remedy" (Kent Roach, "Joe's Justice: Substantive, Procedural and Remedial Equality" (2022) 104 SCLR (2d) 163 at para 36).

71 Roach, "Remedies," *supra* note 69 at 405.

72 *Dunedin*, *supra* note 7 at para 82. See also *R v McCallen*, 43 OR (3d) 56 (CA) (the Court noted: "In many cases it would be unrealistic to expect a convicted accused … to have the resources or the inclination to pursue a separate civil proceeding" at 81).

victim's own blame and censure instead.[73] And, where the judicial structuring of a remedy for such conduct makes its effects so mild, especially in its deterrent effect, law enforcement will have little incentive to uphold *Charter* principles. Of course, doing the right thing should be its own incentive to law enforcement, but the cases cited in this article are evidence enough that that incentive does not do all the work that it should. The result is that there may be no adequate mechanism for police responsibility when abusive and unlawful conduct is linked to an arrest or a conviction.

Cases such as *R. v. Bonds* serve as a good illustration of the need for a more robust remedy as part of the criminal process.[74] Ms. Bonds, a Black woman in her mid-twenties, was detained by the police and then let go. When she asked for an explanation for her initial detention, she was told that the officers arrested her for being intoxicated in a public place, despite there being no reasonable and probable grounds for that charge, as the trial judge later found.[75] At the station, things got much worse. At least four police officers took part in a violent strip search which involved cutting off Bonds' shirt and bra, as well as kneeing her in the back, among other humiliations. She was then left in a cell with no covering on the upper half of her body for three hours. This is a clear case of a violation of section 7 (liberty and security of the person), section 8 (unlawful search), and section 12 (cruel and unusual punishment) of the *Charter*. In addition to this, because she struggled and tried to defend herself during this violent, degrading, and unlawful search, she was charged with assaulting the police.[76] This charge hung over her head for two years, until it came before a judge who was horrified by the video evidence of Bonds' experience in custody and ordered a stay of proceedings, as well as strongly reprimanded both the police and the Crown.[77]

The stay of proceedings was the best remedy that the provincial judge could offer Bonds, despite the fact that a conviction would not have arisen even without the stay being ordered. The officer who cut off her bra was charged with sexual assault but was acquitted at trial because the judge found that Bonds' own actions legitimized the need for a strip search (which was contrary to the findings from Bonds' trial).[78] Thereafter, Bonds had to go to her only possible means of getting a legal remedy: the uncertain, costly, publicity-attracting, and time-consuming civil claims process. She sought damages from the Ottawa Police Service and the officers involved. Though the suit ended in a settlement, Bonds was forced to produce the resources required and relive the ordeal yet another time and for several more years, after years of the criminal process and having the video played at her own criminal trial and at the officer's trial.[79] It would have been understandable if Bonds had not wanted to pursue a civil suit at all. Bonds had tried to explain the impact that the ordeal had on her: "I have a loss of

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73 Marie Manikis, "Recognising State Blame in Sentencing: A Communicative and Relational Framework" (2022) 81:2 Cambridge LJ 294 at 298, 316.

74 2010 ONCJ 561 [*Bonds*].

75 *Ibid* at para 8.

76 Danardo Jones & Elizabeth Sheehy, "*R v Desjourdy*: A Narrative of White Innocence and Racialized Danger" (2021) 99:3 Can Bar Rev 611 at 613.

77 *Bonds*, *supra* note 74 at paras 26–27.

78 *R v Desjourdy*, 2013 ONCJ 170 at para 108. This was pointed out by Jones & Sheehy, *supra* note 76 at 614.

79 Jones & Sheehy, *ibid* at 614.

words. It's hard to describe what happened.... After all of this, I'm trying to figure out who I am and trying to figure out my way in life. I don't know who I am anymore."[80]

Many people would decline to delve back into the experience after two years of having a criminal charge hang over their heads, to pursue an uncertain and costly damages award. Danardo Jones and Elizabeth Sheehy point out that *Bonds* calls for more effective mechanisms for police accountability for abusive and unlawful conduct in the criminal context.[81] Given the egregiousness of the officers' conduct in this case, it is hard to find a reason why the criminal trial judge should not have been empowered to order some remedy beyond the stay of proceedings, which was not a real remedy for the violation in this case since Bonds was innocent. The stay of proceedings was just in itself but did not bring justice for the violence that was done to Bonds, and its deterrent effect was trifling. It is clear from *Bonds* that the current remedial framework within the criminal trial process can fail to accomplish any of the remedial objectives of compensation, vindication, and deterrence. But in thinking about the remedial nature of section 24(1) and its application in *Elmardy* and *Ward*, it would seem that a much more just remedy might have been expediently applied in this case if the trial judge had been able to do more than order a stay of proceedings, and had been empowered to award a significant monetary remedy to Bonds.

The interactions between the current remedial pathways crafted by *Nasogaluak* and *Ward* may tend to persuade people that the Canadian legal system accepts that law enforcement will violate people's rights in these ways. A (usually small) reduction in sentence will be delivered to the criminalized person if they are convicted of the crime charged. In most of these cases (namely, criminal cases where there is no exclusion of evidence issue at play), it is highly unlikely that any other remedy will be awarded. When this happens, there will be little compensation, vindication, or deterrence. Police may view the limited remedy of sentence reduction as an acceptable cost for the privilege of violating individuals' rights. The police can take shortcuts and act unjustly with some minimal cost to the bottom line — that is, the length of sentence that will eventually be imposed on the accused.

The lack of remedies for *Charter* violations has a disproportionate effect on marginalized people and thereby exacerbates existing inequalities in Canadian society. First, since racialized and other marginalized persons face higher levels of police surveillance, interaction, and abuse, they are subject to more *Charter* violations. If these violations have no effective remedy, then this injustice compounds. For instance, the Ontario Human Rights Commission has demonstrated the disproportionate arbitrary stops, detentions, arrests, and charges, the inappropriate and unjustified searches, and the excessive force used by police upon arrest faced by Toronto's Black population.[82] The weak remedy of sentence reduction dilutes the protection of *Charter* rights when state officials act in this sort of unjust way toward racialized persons and an arrest or conviction results. Gabriella Jamieson adds that when racial profiling motivates *Charter*-infringing police misconduct to any degree, victims

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[80] *Ibid* at 644, citing Gary Dimmock, "I Hope and Pray it's Not a Racial Thing," *Ottawa Citizen* (28 November 2010) A1. David Tanovich also reported that Bonds "said little publicly about her ordeal": David M Tanovich, "Gendered and Racialized Violence, Strip Searches, Sexual Assault and Abuse of Prosecutorial Power" (2011) 79:6 CR 132 at 136.

[81] Jones & Sheehy, *supra* note 76 at 613, 615.

[82] Ontario Human Rights Commission, *A Collective Impact: Interim Report on the Inquiry into Racial Profiling and Racial Discrimination of Black Persons by the Toronto Police Service* (Toronto: OHRC, 2018) at 19–24, 30–31.

may come to view their rights as less worthy of vindication than the rights of their white counterparts if no proper remedy is afforded.[83]

Further, given Canada's history of racism, the ongoing abusive police misconduct against racialized persons exposes an "impunity for abuse of power,"[84] as Jones and Sheehy point out in commenting on *Bonds*. Unfortunately, because the *Nasogaluak* and *Ward* combination makes it unreasonably difficult for people whose rights have been violated and who are then charged with a crime to obtain a remedy with a sufficient deterrent effect, this impunity is maintained. This result contributes to the systemic distrust in police and in the administration of justice that many racialized communities already possess.[85] Second, where relatively privileged individuals like Ward, a lawyer, have the combination of financial means, time, legal knowledge, and cultural capital to get the vindication of their rights, less affluent victims may not. The result is that the victims of *Charter* breaches who successfully obtain vindication are not usually the ones who suffer the most egregious conduct but are the ones who have the resources (of time, money, expertise, and so on) to bring a civil claim. A 2020 Court of Appeal for Ontario decision is such an example where the claimant, a young man who was subject to a police-administered bag search before joining a public protest, brought a claim for section 24(1) damages and was awarded $500.[86] This case highlights two things. First, while this was not nearly one of the most egregious violations of rights that the caselaw reveals, this was one in which there was a remedy for the violation, because this young man sued. Second, if the award is going to be $500, it will almost never be worth a lawyer's time to take a case like this on contingency, or worth it for a claimant to hire a lawyer to pursue a case like this. This is one of the relatively few cases in which *Charter* damages were awarded despite the fact that a cursory review of criminal cases reveals the prevalence of much more serious police misconduct. Though all sorts of *Charter* breaches deserve to be addressed, the remedy afforded will not necessarily be proportional to the harm suffered and will instead depend on the victim's ability to seek redress. The compounding effect of these two consequences, where police abuse a person who is both racialized and poor, is even more troubling. This hierarchical system of remedial protection, which vindicates the rights of the less affluent and the racialized to a lesser degree, can hardly be consistent with *Charter* values.

V. MONETARY RELIEF AS A CRIMINAL LAW REMEDY

The provision of a monetary remedy would be an appropriate response to *Charter*-infringing state misconduct for criminal accuseds facing trial in provincial or superior courts. In the existing jurisdictional scheme for criminal offences, superior courts have absolute jurisdiction over a small enumerated set of serious indictable offences, and provincial courts have absolute jurisdiction over less serious indictable offences.[87] Further, an accused facing

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[83] Gabriella Jamieson, "Using Section 24(1) *Charter* Damages to Remedy Racial Discrimination in the Criminal Justice System" (2017) 22 Appeal 71 at 76.

[84] Jones & Sheehy, *supra* note 76 at 615.

[85] 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 92. See also Jamieson, *supra* note 83 at 76.

[86] *Stewart v Toronto (Police Service Board)*, 2020 ONCA 255 at paras 4, 8.

[87] The provincial criminal court has absolute jurisdiction over offences contained in section 553 of the *Criminal Code*, *supra* note 42 (less serious indictable offences), whereas the provincial superior court has absolute jurisdiction over offences contained is section 469 of the *Criminal Code*, *ibid* (more serious indictable offences).

an indictable offence not classified as either can elect to have a trial at either type of court.[88] Generally speaking, superior courts hold "inherent" jurisdiction: broad jurisdiction derived from the common law.[89] On the other hand, provincial courts are creations of provincial statute, within which their jurisdiction is demarcated.[90] Both types of courts are considered competent and appropriate to deal with applications for *Charter* remedies.[91]

In the criminal context, provincial courts cannot award section 24(1) damages, per the Supreme Court's ruling in *Ward*.[92] Though Chief Justice McLachlin offered no support for this holding,[93] it may be because provincial courts are not empowered by statute to award damages in private law. On the other hand, though *Ward* held that superior courts can award damages under section 24(1), superior courts have seldom done so in the context of the criminal process, often holding that it is an issue for the civil context.[94] This section argues that both provincial courts and superior courts hearing criminal cases should be considered courts of competent jurisdiction to provide monetary relief under the *Charter*, because monetary relief in this context is not the equivalent of damages in private law, and because section 24(1) and the Supreme Court's interpretation thereof promotes such an approach.

A. WHAT ESTABLISHES "COMPETENT JURISDICTION"?

The Supreme Court's earlier decisions in *Mills* and *Dunedin* explain why the Supreme Court in *Ward* prescribed monetary relief as a *Charter* remedy in the criminal context.[95] The majority in *Mills* held that "*Charter* remedies should, in general, be accorded within the normal procedural context in which an issue arises,"[96] and therefore that civil remedies such as damages should "await action in a civil court."[97] Over a decade later, the Supreme Court in *Dunedin* relied on this point to hold that a court has jurisdiction to award a particular remedy if the provision of that remedy is within the regular practices of the court, based on its "function and structure."[98] The respondents in *Dunedin* were charged under the *Occupational Health and Safety Act* for failing to comply with safety standards during a construction project.[99] During the proceeding, the Crown twice failed to disclose a copy of the Prosecution Approval Form, claiming that it was protected under solicitor-client privilege. When the respondents made a motion for disclosure, the justice of the peace, sitting as a trial judge under the *Provincial Offences Act*, accepted that this non-disclosure violated the respondents' *Charter* rights. The justice of the peace ordered the appellant Crown to pay legal costs for the respondents' disclosure motion as a remedy. The Crown appealed the order,

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88 For all indictable offences which are in the middle — that is, not contained in either section 553 or 469 — the accused can elect to have their trial in either court: *ibid*, ss 554, 536.

89 See generally *MacMillan Bloedel Ltd v Simpson*, 1995 CanLII 57 (SCC) (the Supreme Court explores the contours of superior courts' "inherent" jurisdiction).

90 See e.g. *Courts of Justice Act*, RSO 1990, c C.43. See also *Dunedin*, *supra* note 7 at para 26.

91 *Mills*, *supra* note 11 at paras 265–66.

92 *Ward*, *supra* note 4 at para 58.

93 *Ibid*.

94 See e.g. *R v MJ*, 2024 ONSC 138 at paras 24–25; *Charley v The Queen*, 2018 ONSC 1163 at para 45.

95 *Mills*, *supra* note 11; *Dunedin*, *supra* note 7.

96 *Mills*, *ibid* at para 293.

97 *Ibid* at para 292.

98 *Dunedin*, *supra* note 7 at paras 45–46.

99 *Occupational Health and Safety Act*, RSO 1990, c O.1; *Dunedin*, *supra* note 7 at para 2.

arguing that the provincial offences court did not have jurisdiction to award costs under section 24(1).

The Supreme Court in *Dunedin* held that, since the *Charter* itself does not confer remedial jurisdiction, a court has to have jurisdiction to grant the remedy in question based on the court's function and structure.[100] The Supreme Court explained that the "function and structure" test is a contextual analysis that can be informed by the accepted practices of the court, and has to be conducted in light of the *Charter*'s enactment.[101] The Supreme Court went on to emphasize the importance of taking an "expansive" approach when conducting this analysis.[102] In assessing the function and structure of statutory criminal courts, the Supreme Court turned to *Mills* to consider their function in the "broader criminal justice system."[103] Based on the function served by criminal trials, the Supreme Court found that a statutory criminal court has the power to grant those *Charter* remedies that are "incidental" to those trials.[104] And, because doing so was within the function and structure of provincial offences courts, the Supreme Court determined that the provincial court had the jurisdiction to award costs under section 24(1). *Dunedin* and *Mills* both suggest that criminal courts do not have the jurisdiction to award damages because it is not within the regular ambit of criminal court powers.

B. MONETARY *CHARTER* REMEDIES SERVE A BROADER FUNCTION THAN PRIVATE LAW DAMAGES

The function and structure of the criminal court — provincial and superior — should be seen as consistent with the provision of monetary relief under section 24(1) because the broader function of constitutional remedies suggests that such relief may properly play a role in both the criminal and civil context. In general, providing a remedy when a right is infringed "is to 'realize' a legal norm" — to turn a right into a "living truth."[105] But constitutional rights are protections against certain forms of *state* action in particular; this distinguishes them from private law rights, which constrain non-state actors. Constitutional remedies thus uphold the rule of law in a way that remedies in private law do not. Relatedly, constitutional remedies serve a distinct democratic purpose: to protect individuals from the overreach and possible abuse of the powerful state.

Thus, the compensatory focus of the private law remedy does not capture the essence of the constitutional remedy. As noted by Chief Justice McLachlin in *Ward*, although the term "damages" may describe the remedy of monetary relief under the *Charter*, a claim for damages under section 24(1) "is not a private law action in the nature of a tort claim for which the state is vicariously liable but [a distinct] public law action directly against the state for

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100 *Dunedin*, *ibid* at paras 26–27.

101 *Ibid* at para 39. See also *ibid* at paras 43, 45–46 (the Supreme Court emphasizes the importance of taking a contextual approach).

102 *Ibid* at paras 24, 89.

103 *Ibid* at para 51.

104 *Ibid* at para 59. See also *ibid* at paras 50–53 (the Supreme Court looked to *Mills* in developing the "function and structure" approach).

105 Paul Gewirtz, "Remedies and Resistance" (1983) 92:4 Yale LJ 585 at 587, citing *Cooper v Aaron*, 358 US 1 at 20 (1958). The Supreme Court in *Dunedin* held that, no matter how expansive a *Charter* right is in theory, it is only "as meaningful as the remedy provided for its breach" (*Dunedin*, *supra* note 7 at paras 19–20).

which the state is primarily liable."[106] So, though conceiving of a *Charter* remedy through the compensatory framework of private law may be an effective place to start in interpreting section 24(1),[107] monetary relief under the *Charter* is not compensatory in the same sense. There would be no need, for example, to determine the costs that the victim incurred on the basis of the *Charter* breach as there would be in a private law claim for damages. The determination of the appropriate remedy under the *Charter* is based instead on a judge's estimation of the severity of the breach. That determination has two aspects: (1) the seriousness of the state's conduct; and (2) the seriousness of the violation of the individual's rights.[108] These considerations derive from a point made by the Supreme Court in *Ward*: that, beyond providing compensation to victims, monetary remedies for *Charter* infringements vindicate the existence of *Charter* rights, and deter *Charter*-infringing state misconduct.[109] To use a private law based analysis rooted solely in the notion of compensation would be to lose sight of these purposes.[110]

A monetary remedy should thus not be classified solely as one emanating from a civil process. An award for monetary relief fits squarely within the function and structure of the criminal process of the provincial and superior court. As *Dunedin* emphasized, the empowering statute may be informative for the function and structure determination, but a court's function and structure can also be evinced by its accepted practices.[111] And criminal courts often deal with monetary payments: for example, they award costs, restitution, and fines.[112] As John Pottow has noted, the Supreme Court's hesitancy to recognize monetary *Charter* remedies in the criminal process may be more of a question of nomenclature — of properly naming and classifying "damages" in this context.[113] The question could be resolved by using another term for monetary relief that does not imply that the remedy serves the same function as that of compensatory damages in private law, for instance, simply calling it a monetary *Charter* remedy.

Of course, there are practical considerations regarding awarding section 24(1) monetary relief in the criminal process that relate to the function and structure of criminal courts. First, asking a court to make a calculation of a monetary award within a criminal trial would undoubtedly lengthen the criminal trial process. Per *Ward*, after the accused and the Crown make arguments about the existence of the *Charter* breach, the accused attempts to prove that there is a functional need for a monetary award, and the Crown attempts to prove that there

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106 *Ward*, *supra* note 4 at para 22, citing *Dunlea v Attorney-General*, [2000] NZCA 84 at para 81.

107 Marilyn L Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984) 62:4 Can Bar Rev 517 at 542. See generally Ken Cooper-Stephenson, "Tort Theory for the Charter Damages Remedy" (1988) 52:1 Sask L Rev 1. This point is also argued in JAE Pottow, "Constitutional Remedies in the Criminal Context: A Unified Approach to Section 24" (2000) 43:4 Crim LQ 459 at 476–77 [Pottow, "Part I"].

108 *Ward*, *supra* note 4 at para 52.

109 *Ibid* at para 4.

110 Raj Anand, "Damages for Unconstitutional Actions: A Rule in Search of a Rationale" (2010) 27 NJCL 159 at 169. See also Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Thomson Reuters, 2011) (loose-leaf updated 2021, release 2), ch 11, §11:2; "Damage Awards for Constitutional Torts: A Reconsideration After *Carey v. Piphus*" (1980) 93:5 Harv L Rev 966 at 980.

111 *Dunedin*, *supra* note 7 at para 46.

112 See e.g. *Criminal Code*, *supra* note 42, ss 826–27, 809 (Costs); *Criminal Code*, *ibid*, ss 737.1, 738 (Restitution); *Criminal Code*, *ibid*, ss 734(1), 736 (Fines). See also *Dunedin*, *supra* note 7 at para 97 (held that the provincial offences court can award costs).

113 JAE Pottow, "Constitutional Remedies in the Criminal Context: A Unified Approach to Section 24 (Part III)" (2001) 44:2 Crim LQ 223 at 244 [Pottow, "Part III"], citing Lorne Sossin, "Crown Prosecutors and Constitutional Torts: The Promise and Politics of *Charter* Damages" (1993) 19:1 Queen's LJ 372.

are countervailing considerations.[114] If the accused is successful, the court will determine the quantum of the award. Of course, determinations of whether there exists a *Charter* breach and of appropriate remedies are already made in the context of the criminal process. The only potentially longer part of our suggestion from other remedial options would be the determination of the quantum. But similar determinations of quantum are also already being made in the criminal process: for instance, the quantum of time to reduce a sentence by (*Nasogaluak*), and the quantum of costs to award against the Crown (*Dunedin*). And because the criminal trial decides on *Charter* questions anyways, asking the parties to argue for monetary relief in the civil process as well is only more time-consuming for the Canadian court system overall. The second practical consideration was pointed out by Justice Lamer, as he then was, in dissent in *Mills*: that the determination of a monetary award in the context of the criminal trial may undermine trial fairness for the accused.[115] For instance, putting the accused on the stand to testify to the *Charter* violations may undermine their right against self-incrimination or right to silence.[116] Where this is of concern, the trial judge could hear the *Charter* issue voir dire (if there is a jury) or wait until after the guilt of the accused has been established. The point is that there are tools available to the trial judge to ensure that both the accused and the Crown are provided procedural fairness when awarding monetary relief in the context of a criminal trial.

C. SECTION 24(1) PRIORITIZES DIRECT ACCESS TO EFFECTIVE REMEDIES

The prohibition on provincial criminal courts awarding monetary relief under the *Charter* as set out in *Ward* reflects an unduly restrictive approach and leads to the very result that the Supreme Court sought to avoid in *Dunedin*. Though *Mills* explicitly held that claims for damages belong in civil court,[117] later, the Supreme Court in *Dunedin* was concerned with adopting an approach that would fragment "the availability of *Charter* remedies between provincial offences courts and superior courts."[118] The holding from *Ward* leads to the result that superior courts can award monetary relief under section 24(1), but provincial (statutory) courts cannot. Because of this discrepancy, it would be unusual for superior courts to start awarding monetary *Charter* damages in the criminal process, since they are not available for most criminal cases.

Neither the language of section 24(1) nor its legislative history contemplates much jurisdictional limitation on statutory courts — if any. In fact, the drafting history of the section evidences Parliament's intentional flexibility in granting broad discretion to courts in fashioning remedies.[119] In *Mills*, Justice Lamer, as he then was, explained why this might be the case: "a constitutional remedy and its accessibility should not in principle be open to statutory limitation."[120] The *Dunedin* Supreme Court also suggested that the legislative will behind the phrase "court of competent jurisdiction" was only to limit the provision of

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114 *Ward*, *supra* note 4 at paras 32–33.
115 *Mills*, *supra* note 11 at para 42.
116 This concern is pointed out by and addressed in Pottow, "Part I," *supra* note 107 at 473.
117 *Mills*, *supra* note 11 at para 292
118 *Dunedin*, *supra* note 7 at para 82.
119 *Mills*, *supra* note 11 at para 278: "It is difficult to imagine language which could give the court a wider and less fettered discretion." See also Pottow, "Part I," *supra* note 107 at 481–82 (explains the drafting history of the section).
120 *Mills*, *ibid* at para 63, Lamer J, dissenting.

remedies to *existing* courts and tribunals (that is, section 24(1) does not allow for the creation of special "*Charter* courts").[121] The Supreme Court continued:

> No additional legislative "stamp of approval" is contemplated. Indeed, the operation of the *Charter* as the "supreme law of the land" would be wholly frustrated if its application were deferred until the legislatures revisited each pre-*Charter* court or tribunal to confer the necessary jurisdiction to grant *Charter* remedies. Moreover, forcing these courts and tribunals to function as if the *Charter* were never enacted, even where their operation squarely implicates *Charter* rights and freedoms, risks seriously (and unnecessarily) compromising their effective functioning. It may also impact the quality of justice rendered at the end of the day.[122]

The quality of justice rendered by provincial criminal courts is diminished by the lack of monetary *Charter* relief because it leaves these judges with less effective options in fashioning remedies. Provincial criminal courts cannot award a monetary remedy, per *Ward*, which effectively curtails criminal courts from awarding this type of remedy entirely. They instead turn to the *Nasogaluak* sentence reduction remedy instead, though it is generally inadequate. *Dunedin*'s expansive approach seems to encourage courts to avoid creating a situation where a person is deprived of the ability to obtain an effective remedy because their case is before a court of provincial jurisdiction.[123]

The "competent jurisdiction" requirement in the wording of section 24(1) should be interpreted expansively, and even creatively, to provide all criminal courts with the authority to ensure that victims of *Charter* violations have access to effective remedies. *Dunedin* explained that the task underlying the interpretation of section 24(1) is to provide "*direct* access to *Charter* remedies while respecting, so far as possible, 'the existing jurisdictional scheme of the courts.'"[124] *Dunedin* was careful to avoid depriving the provincial court of the only effective remedy at its disposal to recognize the harm incurred by the victim of the *Charter* breach.[125] While there will be cases where a monetary remedy is inappropriate or unwarranted, in some cases a monetary award may be the only suitable way of giving effect to the *Charter*'s guarantee of individual rights (perhaps in cases involving offences subject to mandatory minimums). The Supreme Court has recognized its own ability to interpret section 24(1) with "novel and creative features when compared to traditional and historical remedial practice" to ensure that effective *Charter* remedies are provided.[126] Monetary remedies will not always be available for the violation of the *Charter* rights of victims facing criminal trial but should be an accessible option where remedies such as sentence reduction fall short. The recognition of criminal courts' jurisdiction to award monetary relief under section 24(1) would ensure that *Charter* rights are no less meaningful for victims of state misconduct who are facing trial.

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121 *Dunedin*, *supra* note 7 at para 40. See also *Mills*, *ibid* at para 262.

122 *Dunedin*, *ibid* at para 41.

123 *Ibid* at para 81. This concern was also recognized in *Mills*, *supra* note 11 at para 38, Lamer J, dissenting. See also Kent Roach, "Section 24(1) of the Charter: Strategy and Structure" (1987) 29:2 Crim LQ 222 at 239, 241 (critiques "procedural conservatism"); Pottow, "Part I," *supra* note 107; Pottow, "Part III," *supra* note 113.

124 *Dunedin*, *ibid* at para 23 [emphasis added]. The Supreme Court in *Ernst v Alberta Energy Regulator*, 2017 SCC 1 at para 27 [*Ernst*] also remarked that "[s]ection 24(1) of the *Charter* confers on the courts a broad remedial authority" in order to provide effective vindication of *Charter* rights.

125 *Dunedin*, *ibid* at para 81.

126 *Doucet-Boudreau*, *supra* note 14 at para 59.

D. ASSESSING THE COUNTERVAILING CONSIDERATIONS FROM *WARD*

The availability of monetary relief in criminal courts would not be frustrated by the countervailing considerations of good governance nor is it rendered superfluous by the existence of alternative remedies. The Supreme Court in *Ward* and later in *Ernst* held that after the claimant establishes a *Charter* breach and shows that an award for damages serves a functional remedial purpose, the Crown can negate the appropriateness of the award on the basis of countervailing considerations.[127] *Ward* suggested two such considerations: the existence of alternative remedies, and concerns for good governance.[128]

Regarding the existence of alternative remedies, monetary relief in the criminal context is needed *because* of the lack of alternative effective remedial paths for people who have been victims of police abuse who end up in a criminal trial. The sentence reduction is ineffective, and the ability to bring a separate civil suit is severely limited by resource concerns and because it might limit the possibility of the accused successfully obtaining an additional remedy. Other potential non-*Charter* remedies within sentencing, such as that of increasing the conversion rate of pre-trial detention,[129] would not address our argument that the sentencing process itself will often be an inadequate arena for remedial provision. And as remarked, quasi-*Charter* remedies in sentencing that alter the sentence, release the accused from custody, or stay the proceedings muddy the distinction between non-guilt of the accused and wrongdoing by law enforcement in any case. The second countervailing consideration — the concern for good governance — weighs in favour of providing monetary relief in the criminal law context. An award for monetary relief would have a more effective deterrent impact on state misconduct, inherently *promoting* good governance. The Supreme Court in *Ward* suggested something to this effect: "insofar as s. 24(1) damages deter *Charter* breaches, they promote good governance. Compliance with *Charter* standards is a foundational principle of good governance."[130] So, with respect to the countervailing considerations named in *Ward*, there is no reason why an award for monetary relief in the criminal context should be deemed not appropriate and just.

The Supreme Court's reasons in *Mills* and later in *Dunedin* suggest that criminal courts lack jurisdiction to award damages under section 24(1) because criminal courts do not ordinarily have the jurisdiction to award private law damages. But a constitutional remedy is fundamentally different from a private law one such that it should not be considered an award for "damages" at all. Further, the jurisdictional constraint in the wording of section 24(1) was intended to be interpreted expansively to provide courts with the authority to ensure that victims of *Charter* violations have direct access to effective remedies, even when this requires creativity. The remedy for a *Charter* breach should lie where the breach is uncovered: during the criminal trial. Provincial courts and superior courts hearing criminal cases should use monetary relief to give meaning to *Charter* rights when other remedial options fall short.

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127 *Ward*, *supra* note 4 at paras 32–33, 45; *Ernst*, *supra* note 124 at para 27. Both courts held that countervailing considerations negate the appropriateness and justness of the remedy.

128 *Ward*, *ibid* at paras 33, 42. See also *Ernst*, *ibid* at para 26. This list of countervailing factors named by the Supreme Court is not exhaustive: *Ernst*, *ibid* at para 28.

129 *R v Summers*, 2014 SCC 26 (held that this is constitutional).

130 *Ward*, *supra* note 4 at para 38.

VI. CONCLUSION

The rights of individuals who come into contact with police are worthy of much more robust remedial protection. Justice Lebel wrote in *Nasogaluak* that "[a] sentence cannot be 'fit' if it does not respect the fundamental values [of] the *Charter*."[131] But at the same time, *Nasogaluak* affirms that a *Charter* breach may not require a *Charter* remedy. The alternative remedy of a sentence reduction can rarely adequately meet the remedial objectives of section 24 (1) set out in *Ward* of compensation, vindication, and deterrence of future violations while also fulfilling the principles of sentencing set out in section 718 of the *Criminal Code*.[132]

Sentence reduction is the common remedy in the case of people whose rights have been violated during the leadup to a criminal conviction, because provincial court judges cannot award a monetary remedy, per *Ward*, and will instead use the remedy at their disposal: the one created in *Nasogaluak*. It is likely that neither the victims of *Charter* right violations nor law enforcement will perceive this as a strong statement against abusive police practices. A person whose rights were violated may find it difficult to obtain the appropriate civil remedy either because of the difficulty of starting civil litigation or because the violation was already "remedied" by a small sentence reduction, leaving the other *Charter* remedy in a legal grey area.

A monetary remedy for *Charter* violations as part of the criminal process is one option that could send a strong message to law enforcement that the judiciary disapproves of their illegal and abusive tactics. It would be a stronger message than sentence reduction to the statutory minimum in most cases. Such a monetary remedy would enhance consistency in the legal process in three ways. First, it would allow judges to maintain consistency in sentences between guilty individuals whose rights were violated and those whose rights were not violated, thereby respecting proportionality principles of sentencing, rather than the judge feeling pressure to reduce one of the sentences as the only avenue available to address abuse by police. Second, it would ensure some consistency in remedial protection offered to victims of abuse who are convicted of the offence, as Nasogaluak was, and victims who are acquitted. Lastly, it would more consistently uphold the unwavering substance behind the high-sounding rights promised by the *Charter*, no matter the victim's racial or financial privilege or vulnerability. It would be a dramatic shift in practice for superior and provincial criminal courts but would be consistent with the structure and function of the criminal court and with the purposes of section 24(1) of the *Charter*. While the holding in *Nasogaluak* bolstered the existence of a remedy available within the criminal process, it failed to offer meaningful protection on the level that *Charter* rights require. Victims of police brutality facing criminal trial deserve better.

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131 *Nasogaluak*, *supra* note 3 at para 48.
132 *Criminal Code*, *supra* note 42.