

**USING *CHARTER* DAMAGES TO PROVIDE
MEANINGFUL REDRESS AND PROMOTE STATE
ACCOUNTABILITY: A RE-EXAMINATION OF
THE OMAR KHADR CASE**

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ABSTRACT

In July 2017, the Government of Canada reportedly paid Omar Khadr \$10.5 million to settle his civil suit. Khadr sought damages under the *Canadian Charter of Rights and Freedoms* resulting from Canada's active participation in human rights breaches during his imprisonment at Guantánamo Bay. Although the *Charter* damages remedy serves critically important public law functions, it is not achieving its full potential in many cases. Using Khadr as a case study, I apply the framework developed in *Vancouver (City) v Ward* to analyze what Khadr's entitlement to *Charter* damages might have been if his civil claim had not settled. The Khadr case poses potential challenges relating to Crown prerogative, institutional competence, and causation. Despite these possible concerns, I argue that Khadr had a strong case for a large constitutional damages award based on the severity of Canada's actions and the impact of Canadian decision-making on a vulnerable youth detainee.

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CHAPTER ONE – INTRODUCTION

Omar Khadr, a Canadian citizen, was detained and imprisoned from July 2002 to May 2015. Thirteen years of his young life (from age fifteen to twenty-eight) were spent in captivity. Khadr was subjected to repeated instances of torture, mistreatment, and humiliation at the hands of the United States (“US”).¹ He was denied the most basic guarantees of due process and he was left to languish inside the legal abyss that is Guantánamo Bay. The Canadian government did not intervene on Khadr’s behalf (as other Western nations had done for their detained nationals), nor did it acknowledge his youth status. Instead, Canadian officials actively participated in Khadr’s ordeal by interviewing him and sharing intelligence with the US. Canada became inextricably tied to the harm Khadr suffered, but the full extent of Canadian complicity was never addressed by a court or a public inquiry. Khadr did not receive any compensation until his civil claim against the Government of Canada settled for \$10.5 million in July 2017.

In this thesis, I explore whether damages under the *Canadian Charter of Rights and Freedoms*² (“the *Charter*”) could have been ordered against the Government of Canada if Khadr’s case had not settled. *Charter* damages are an important remedy in Canadian public law. They provide monetary redress to claimants who have suffered breaches of fundamental rights. Khadr sought *Charter* damages resulting from constitutional violations committed by the Canadian government. He also sought private law damages for the torts of negligent investigation, conspiracy, and misfeasance of public office.³ Although the *Charter* damages remedy can be a powerful mechanism of state accountability, it is still in its developing stages. Certain problems have emerged, such as the general hesitation to order large awards, concerns about institutional competence, continued reliance on private law to shape the remedy, and questions about the effectiveness of the current framework⁴ used to assess *Charter* damages.

¹ Khadr claimed he was tortured at Bagram Air Base in Afghanistan and at Guantánamo. While recovering from injuries at Bagram, Khadr stated that he was forced to remain in stressful positions, go without pain medication, endure threats of rape, and urinate on himself. Khadr’s Factum submitted to the Supreme Court of Canada (“SCC”) in 2010 discussed how his chief interrogator at Bagram was ultimately convicted in the notorious beating death of Dilawar, another Bagram prisoner. While at Guantánamo, Khadr alleged he “was subjected to “walling” (meaning that he was repeatedly pressed against a wall until he passed out), shackled in painful positions for hours at a time, isolated for many months at a time, exposed to extreme temperatures, threatened with rendition and sexual violence, repeatedly picked up and dropped on the floor while shackled, forced to urinate on himself, and used as a human mop to clean up the mess and then denied a change of clothing for two days.” See *Prime Minister of Canada, et al. v Omar Ahmed Khadr*, 33289, Factum of the Respondent Omar Ahmed Khadr at paras 15-18, online: <<https://www.scc-csc.ca/case-dossier/info/af-ma-eng.aspx?cas=33289>> [Khadr SCC 2010 Factum].

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

³ *Omar Ahmed Khadr v Her Majesty the Queen in Right of Canada* Amended Amended Amended Fresh as Amended Statement of Claim to the Defendant, T-536-04 (24 October 2014) at para 1 [Khadr Civil Claim].

⁴ The SCC outlined a four-step framework in *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28 [Ward].

I argue that, if his claim had not settled, Khadr should have been entitled to a substantial *Charter* damages award to compensate him, promote the integrity of the *Charter*, and deter Canada's involvement in controversial foreign regimes. There are potential countervailing factors, however, which could impact a court's assessment of Khadr's damages claim. There is also a deficiency of relevant precedents to guide the quantification analysis in such an exceptional case. Working through how *Charter* damages might be assessed and quantified fosters greater understanding of the remedy, issues that can plague its analytical framework, and the principles that ought to guide its evolution. My research also comments on the merits of Khadr's constitutional damages claim, showing that his experience warrants a large award based on the severity and enduring impact of the *Charter* breaches.

This introductory chapter is split into four parts. In Part I, I briefly explain the purpose of the *Charter* damages remedy and the current framework used to assess whether damages are appropriate in each case. In Part II, I provide background about Omar Khadr and the events that led to his civil claim. In Part III, I outline the research undertaken in this project and the arguments advanced in the following chapters. Finally, I discuss the organization of the project in Part IV.

PART I: WHAT ARE CHARTER DAMAGES?

Subsection 24(1) of the *Charter* allows individuals whose constitutional rights have been violated to seek redress against the state.⁵ In 2010, the Supreme Court of Canada ("SCC") confirmed that subsection 24(1) contains a right to seek damages. In *Vancouver (City) v Ward*,⁶ ("Ward"), the Court developed a four-step framework to assess a claimant's eligibility for *Charter* damages. At the first stage, the claimant must prove that a *Charter* violation occurred. Second, he or she must demonstrate why damages are appropriate and just; *Charter* damages are not an automatic remedy.⁷ The burden shifts from the claimant to the state at the third step of the *Ward* framework, which allows the state to show why damages are inappropriate. This is referred to as the countervailing factors stage. Finally, if a court determines that damages are warranted, it must calculate the quantum of the award.⁸

The Court acknowledged in *Ward* that a *Charter* (or constitutional) damages remedy is not the same as a private law (or tort) damages remedy,⁹ noting that a *Charter* damages award "must further the

⁵ *Charter*, *supra* note 2 at ss 24(1).

⁶ *Supra* note 4.

⁷ The phrase 'per se' damages is used in the literature to describe the principle of awarding damages for the constitutional breach itself. Harm to the claimant is not required.

⁸ *Ward*, *supra* note 4 at para 4.

⁹ *Ibid* at para 22.

general objects of the *Charter*.¹⁰ Constitutional damages should therefore be viewed as conceptually distinct from private law damages. The Court highlighted three objectives of *Charter* damages: compensation, vindication, and deterrence.¹¹ Compensation is primarily concerned with repayment for personal loss. Vindication attempts to preserve the importance of *Charter* rights and ensure that they are not eroded over time. A deterrence-based damages award sends a message to the state that its conduct is unacceptable.¹² Vindication and deterrence-based awards are theoretically more difficult to quantify, but these are the more public objectives that help distinguish *Charter* damages from private law damages.

Although *Ward* was a breakthrough for litigants seeking constitutional relief, some commentators expressed concern that state immunity defences, problems with quantification, and access to justice concerns could stall *Ward*'s potential.¹³ More *Charter* damages claims are now being brought before courts, but the success rate is low.¹⁴ In some cases, courts have relied exclusively on private law damages to compensate aggrieved persons instead of conducting a meaningful review of whether *Charter* damages could serve different functions. Even when a claimant is awarded *Charter* damages, the quantum does not always reflect the severity or impact of the constitutional infringement.¹⁵ There are notable examples where large *Charter* damages awards have been ordered,¹⁶ but the awards in the majority of other cases are

¹⁰ *Ward*, *supra* note 4 at para 25.

¹¹ *Ibid* at para 4.

¹² *Ibid* at para 25.

¹³ See for example Kent Roach, "A Promising Late Spring for Charter Damages: *Ward v. Vancouver*" (2011) 29 NJCL 135 at 137-38 [Roach, "A Promising Late Spring"], Allen M. Linden, "Charter Damage Claims: New Dawn or Mirage?" (2012) 39 Adv Q 426 at 438, and Ranjan Agarwal & Joseph Marcus, "Where There is No Remedy, There is No Right: Using *Charter* Damages to Compensate Victims of Racial Profiling" (2015) 34 NJCL 75 at 95-97.

¹⁴ W.H. Charles, *Understanding Charter Damages – the Evolution of a Charter Remedy* (Toronto: Irwin Law, 2016) at 103.

¹⁵ A recent example of this is *Russell v British Columbia (Public Safety & Solicitor General)*, 2018 BCSC 1757, 2018 BCSC 1757 (CanLII) [*Russell*]. Although a proper *Ward* analysis was conducted, the Court only ordered \$1,000 in *Charter* damages based on a breach of Russell's right to access counsel. A thirteen hour period elapsed between when Russell asked to speak to a lawyer and when that right was implemented.

¹⁶ See for example *Henry v British Columbia (Attorney General)*, 2016 BCSC 1038, 2016 BCSC 1038 (CanLII) [*Henry BCSC*] (over \$8 million awarded in compensation, vindication, and deterrence-based damages to remedy a wrongful conviction stemming from prosecutorial misconduct, though this award was later reduced); *Taylor v London (City) Police Services*, 2016 ONSC 5839, 2016 ONSC 5839 (CanLII) (\$25,000 in compensatory *Charter* damages ordered to address psychological injuries stemming from the claimant's interaction with police and \$7,500 to address vindication and deterrence); *Elmardy v Toronto (City) Police Services Board*, 2017 ONSC 2074, 136 OR (3d) 471 (Div Ct) [*Elmardy*] (\$50,000 awarded to vindicate the claimant's rights and deter racial profiling); *Henebry v Ontario*, 2018 ONSC 6584, 2018 ONSC 6584 (CanLII) (\$20,000 in vindication and deterrence-based damages ordered to remedy *Charter* breaches caused by the negligence of correctional officers); *Brazeau v Attorney General (Canada)*, 2019 ONSC 1888, 2019 ONSC 1888 (CanLII) [*Brazeau*] (\$20 million in vindication and deterrence-based damages ordered on behalf of a class of mentally ill inmates to make structural changes to prisons), appeal to Ont CA proceeded November 6, 2019; and *Reddock v Canada (Attorney General)*, 2019 ONSC 5053, 2019 ONSC 5053 (CanLII) [*Reddock*] (\$20 million in compensation, vindication, and deterrence-based damages ordered to a class of inmates held in administrative segregation for more than fifteen consecutive days).

substantially less.¹⁷ It is questionable whether small awards even cover the legal costs incurred by litigants to bring their claims forward.

PART II: WHO IS OMAR KHADR?

Although he was born in Canada, Khadr's family moved to Afghanistan when he was eleven. His father, Ahmed Khadr, was a known associate of Osama Bin Laden. Ahmed was placed on a global terrorist watchlist after 9/11.¹⁸ Sheema Khan stated that "all the Khadr children had been indoctrinated with the al-Qaeda ideology from an early age."¹⁹ Pentagon reports alleged that Omar Khadr received weapons training so he could fight alongside al-Qaeda forces and construct improvised explosive devices.²⁰

Omar Khadr was apprehended by US forces in Afghanistan in July 2002. He was fifteen years old. Khadr was captured during what has been described as a firefight between US-led coalition forces and the occupants of an al-Qaeda compound. Sgt. Christopher Speer, an American Delta Force soldier, died from injuries sustained in the encounter. Khadr was accused of throwing the grenade that killed Sgt. Speer, although this allegation has been disputed.²¹ Khadr, seriously wounded in the conflict, was taken to Bagram Air Base in Afghanistan where he remained for more than two months.

Khadr was transferred to the US naval base at Guantánamo Bay, Cuba in October 2002. The base had become the host for suspects captured in the global War on Terror. Michelle Shephard observed that Khadr "was considered an intelligence treasure trove because of his father's connections and his own travels

¹⁷ Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Thomson Reuters, 2019) (accessed online through Thomson Reuters ProView November 6, 2019) at para 11.640 [Roach, *Constitutional Remedies in Canada*].

¹⁸ Sheema Khan, "Politics over Principles: The Case of Omar Khadr" in Janice Williamson, ed, *Omar Khadr Oh Canada* (Montreal & Kingston: McGill-Queen's University Press, 2012) at 54. See also Graeme Smith, "Man helped by Chrétien on most-wanted terror list", *The Globe and Mail* (27 December 2001), online: <<https://www.theglobeandmail.com/news/national/man-helped-by-chretien-on-most-wanted-terror-list/article4158498/>>.

¹⁹ Khan, *supra* note 18 at 54.

²⁰ Michelle Shephard, *Guantanamo's Child* (Mississauga: John Wiley & Sons Canada, Ltd., 2008) at 83 [Shephard, *Guantanamo's Child*].

²¹ The US military initially explained that, despite the lack of eyewitness testimony, Khadr was the one that threw the grenade because he was the only belligerent still alive. In 2008, a classified document accidentally released to reporters contained a different account of the circumstances. In the document, a US soldier who participated in the battle provided sworn testimony that two belligerents were still alive after the grenade had been thrown. The soldier testified to killing the first belligerent he saw alive and then shooting at Khadr, who was already wounded and facing away from him. This incident prompted Khadr's military lawyer to suggest that a cover-up may have occurred. See "New witness account shows Khadr charges should be dropped: lawyers", *CBC News* (5 February 2008), online: <<https://www.cbc.ca/news/world/new-witness-account-shows-khadr-charges-should-be-dropped-lawyers-1.765709>> and Michelle Shephard, "Khadr secret document released by accident", *Toronto Star* (4 February 2008), online: <https://www.thestar.com/news/canada/2008/02/04/khadr_secret_document_released_by_accident.html?li_source=LI&li_medium=star_web_ymbii>.

since 9/11.”²² Canada was not granted access to Khadr until February 2003 because consular visits were prohibited.²³ Representatives from the Canadian Security Intelligence Service (“CSIS”) and the Canadian Department of Foreign Affairs and International Trade (“DFAIT”) were allowed to meet with Khadr at Guantánamo for intelligence-gathering purposes on two occasions in 2003 and once in 2004.

Canadians questioned Khadr about “matters that provided important evidence relating to future criminal proceedings against him.”²⁴ Canada shared information gleaned from the interviews with US officials.²⁵ Khadr repeatedly told Canadians he had been tortured, imploring his interviewers to bring him back to Canada.²⁶ Critically, the 2004 interview was conducted with knowledge that Khadr had been subjected to extensive sleep deprivation before the Canadian visit.²⁷ In August 2005, Khadr’s lawyers obtained an injunction restraining Canadian officials from conducting further interviews.²⁸

It was not until November 2005 that Khadr was formally charged with an offence. More than three years had elapsed since his transfer to Guantánamo. He was accused of murder, attempted murder, conspiracy, and aiding the enemy.²⁹ His trial proceeded through the US military commission system. After the US Supreme Court ruled that the military commission scheme was unconstitutional in 2006,³⁰ the commission process was rebranded and Khadr was charged with war crimes in 2007. Khadr was accused of murder in violation of the law of war, attempted murder in violation of the law of war, conspiracy, providing material support for terrorism, and spying.³¹

The Supreme Court of Canada pronounced on the Khadr matter in 2008 and 2010. *Charter* violations were found on both occasions. In 2008,³² the Court determined that Canada’s refusal to provide records of the Guantánamo interviews amounted to a breach of the disclosure obligation in section 7 of the *Charter*.³³ Khadr was entitled to disclosure of the interview records and information obtained through those

²² Shephard, *Guantanamo’s Child*, *supra* note 20 at 103.

²³ *Ibid* at 116.

²⁴ Khadr Civil Claim, *supra* note 3 at para 35.

²⁵ *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 5, [2010] 1 SCR 44 [*Khadr SCC 2010*].

²⁶ Shephard, *Guantanamo’s Child*, *supra* note 20 at 123-24.

²⁷ *Khadr SCC 2010*, *supra* note 25 at para 5.

²⁸ See *Khadr (Next Friend of) v Canada*, 2005 FC 1076, [2006] 2 FCR 505 [*Khadr FC 2005*].

²⁹ Shephard, *Guantanamo’s Child*, *supra* note 20 at 177.

³⁰ See *Hamdan v Rumsfeld*, 548 US 557, 126 S Ct 2749 (USSC) (2006) [*Hamdan*]. The Court reviewed the legality of the order establishing prosecution by military commission. The majority found that the military commission procedure violated the Uniform Code of Military Justice and Common Article 3 of the *Geneva Conventions*.

³¹ Shephard, *Guantanamo’s Child*, *supra* note 20 at 204.

³² *Khadr v Canada (Minister of Justice)*, 2008 SCC 28, [2008] 2 SCR 125 [*Khadr SCC 2008*].

³³ *Ibid* at para 33.

interviews that was given to US authorities. The *Charter* applied to Canadian officials at Guantánamo when they shared information with the US and “became participants in a process that violate[d] Canada’s international obligations.”³⁴

In 2010,³⁵ the Court held that the actions of Canadian officials at Guantánamo deprived (and continued to deprive) Khadr of his liberty and security of the person under section 7 of the *Charter*.³⁶ The deprivation was not in accordance with the principles of fundamental justice because it “offend[ed] the most basic Canadian standards about the treatment of detained youth suspects.”³⁷ Despite finding a serious *Charter* breach, the Court concluded that a declaration of unconstitutionality under subsection 24(1) of the *Charter* was a sufficient remedy. Lower courts had ordered Canada to request Khadr’s repatriation,³⁸ but the SCC determined that this was institutionally inappropriate. The Court struck a stunningly deferential tone by allowing the federal government to determine the proper response to a severe violation.³⁹

One of the strongest influences that shaped the SCC’s decision in 2010 was Crown (or royal) prerogative. Prerogative powers are residual powers held by the executive branch. They are exercised over specific areas, including management of foreign affairs, negotiation of treaties, declarations of war, and granting pardons.⁴⁰ Historically, courts have been reticent to review prerogative decisions made by the executive due to concerns about the separation of powers. Exceptions are made, however, when these decisions engage the *Charter* rights of individuals.⁴¹ Although the SCC did review Canada’s decision-making in 2010, the Court determined that ordering the executive to seek Khadr’s repatriation was beyond its institutional competence.⁴²

Khadr pleaded guilty to the war crimes charges in October 2010. He was sentenced by a US military panel to forty years in prison. This was symbolic, however, because of pretrial plea negotiations which had not yet been divulged. The plea agreement imposed an eight year prison sentence and allowed Khadr to

³⁴ *Ibid* at para 36.

³⁵ *Khadr SCC 2010*, *supra* note 25.

³⁶ *Ibid* at paras 21-22.

³⁷ *Ibid* at para 25.

³⁸ See *Khadr v Canada (Prime Minister)*, 2009 FC 405, [2010] 1 FCR 34 [*Khadr FC 2009*] and *Khadr v Canada (Prime Minister)*, 2009 FCA 246, [2010] 1 FCR 73 [*Khadr FCA 2009*].

³⁹ *Khadr SCC 2010*, *supra* note 25 at para 39.

⁴⁰ Jennifer A. Klinck, “Modernizing Judicial Review of the Exercise of Prerogative Powers in Canada” 54:4 *Alta L Rev* 997 at 998-99.

⁴¹ See *Operation Dismantle v The Queen*, [1985] 1 SCR 441, 18 DLR (4th) 481 [*Operation Dismantle* cited to SCR] and *Black v Canada (Prime Minister)*, (2001), 54 OR (3d) 215, 2001 CanLII 8537 (Ont CA) [*Black* cited to CanLII].

⁴² *Khadr SCC 2010*, *supra* note 25 at para 46.

seek a transfer to Canada after serving one year in a US facility.⁴³ He eventually returned to Canada in September 2012 to continue serving his sentence.

In 2015,⁴⁴ the Khadr matter reached the Supreme Court of Canada for a third time. Khadr's lawyers fought Canada's determination of Khadr's inmate status, arguing that he should have been placed in a provincial facility rather than a maximum security federal prison. In 2014, the Alberta Court of Appeal found that Canada's decision was not in accordance with the *International Transfer of Offenders Act*⁴⁵ and it granted Khadr's *habeas corpus* application for transfer to a provincial facility.⁴⁶ The Supreme Court of Canada upheld the Court of Appeal's interpretation of the statute.

Khadr was released on bail in 2015 pending an appeal of his conviction in the US.⁴⁷ In July 2017, the Government of Canada reportedly paid \$10.5 million⁴⁸ to settle Khadr's \$20 million civil suit. The basis of the settlement and its terms are confidential. Government officials relied on the 2010 SCC decision and arguments about the rule of law to defend the payout, explaining that Khadr's human rights had been violated.⁴⁹ It can be inferred that the SCC's findings in 2008 and 2010 influenced the decision to settle.

In March 2019, the Alberta Court of Queen's Bench lifted stringent bail restrictions to which Khadr had been subject, finding that Khadr had served his sentence.⁵⁰ Treating his sentence as a youth sentence, the trial judge exercised discretion to consider time spent out on bail as time served.⁵¹ After nearly seventeen years of detention, imprisonment, and litigation, Khadr's liberty was restored.

PART III: RESEARCH PROJECT

It is an understatement to say that Omar Khadr has been, and continues to be, a divisive figure in Canada. After the settlement was reported in July 2017, controversy erupted. Many Canadians were angered

⁴³ Charlie Savage, "Child Soldier for Al Qaeda Is Sentenced for War Crimes", *New York Times* (1 November 2010), online: <<https://www.nytimes.com/2010/11/02/us/02detain.html>>.

⁴⁴ *Bowden Institution v Khadr*, 2015 SCC 26, [2015] 2 SCR 325 [*Khadr SCC 2015*].

⁴⁵ SC 2004, c 21 [*ITOA*].

⁴⁶ *Khadr v Edmonton Institution*, 2014 ABCA 225, 385 DLR (4th) 647 [*Khadr ABCA 2014*].

⁴⁷ Kim Mackrael & Sean Fine, "Harper unapologetic about Ottawa's efforts to keep Omar Khadr in prison", *The Globe and Mail* (8 May 2015), online: <<https://www.theglobeandmail.com/news/politics/harper-unapologetic-about-governments-efforts-to-keep-khadr-in-prison/article24334556/>>.

⁴⁸ Aaron Wherry, "What 3 legal minds think about the Omar Khadr settlement", *CBC News* (12 July 2017), online: <<https://www.cbc.ca/news/politics/omar-khadr-legal-analysis-aaron-wherry-1.4199409>> [Wherry, "3 Legal Minds"].

⁴⁹ Aaron Wherry, "Liberals defend and Tories attack Omar Khadr payout, both citing principles", *CBC News* (7 July 2017), online: <<https://www.cbc.ca/news/politics/omar-khadr-settlement-goodale-scheer-analysis-wherry-1.4194912>>.

⁵⁰ *Khadr v Warden of Bowden Institution*, 2019 ABQB 207, 372 CCC (3d) 219.

⁵¹ *Ibid* at paras 91-92.

by the government's decision. The settlement was justified to the public based in part on the government's calculation that proceeding with litigation would have been much more expensive.⁵² Given the complexity of the tort claims, it is far from certain that Khadr would have been able to prove all requisite elements. Further, the existence of a *Charter* breach does not automatically entitle a claimant to *Charter* damages. The *Ward* framework exists to determine whether constitutional damages are just and appropriate. To date, *Ward* has not been applied in a case like Khadr's where a prerogative power conflicted with the *Charter*.

I examine two distinct research questions in this thesis. The first question is: what factors would have influenced Khadr's entitlement to *Charter* damages if his civil claim had progressed to trial? This involves applying the first three steps of the *Ward* framework to ascertain whether *Charter* damages are just and appropriate. I argue that Khadr could establish a strong entitlement based on (a) the SCC's prior findings that *Charter* breaches occurred; (b) potential further *Charter* violations committed by the Canadian government that have never been addressed; and (c) the fact that a *Charter* damages award would promote all three objectives of the *Ward* framework: compensation, vindication, and deterrence.

Although Khadr is unlikely to encounter much difficulty at the first two stages of the *Ward* test, he faces potential issues at the third stage due to both countervailing factors identified in *Ward*: the existence of alternative remedies and concerns about good governance.⁵³ It is possible that a court hearing Khadr's civil claim could find that private law damages would adequately meet compensatory, vindictory, and deterrent objectives. Although I do not evaluate the success of the tort claims in this research, I discuss the difficulties Khadr faced in proving the required elements. I also discuss why private law damages, on their own, are insufficient to fully promote subsection 24(1)'s vindictory and deterrent objectives.

With respect to good governance, the state would likely submit that a large *Charter* damages award could jeopardize its decision-making under the foreign affairs prerogative or divert officials from properly performing their duties. The state could also argue that, due to the discretionary nature of its decision-making under the prerogative, it should only be held liable for conduct that involves bad faith or some other standard of fault. If this argument were successful, it would result in the creation of a new immunity or defence to *Charter* damages claims. Despite some concerns that could be raised by the state at the countervailing factors stage, I argue that none are powerful enough to warrant dismissal of Khadr's claim.

⁵² Michelle Shephard, "15 years and nearly \$5 million in legal costs later, Ottawa apologizes to Omar Khadr", *Toronto Star* (7 July 2017), online: <<https://www.thestar.com/news/canada/2017/07/07/lawyer-for-us-soldiers-widow-calls-for-urgent-hearing-on-freezing-khadrs-105-million-settlement.html>>.

⁵³ *Ward*, *supra* note 4 at para 33.

The second research question I examine is this: if Khadr were able to prevail against countervailing factors, how should *Charter* damages be quantified at the final stage of the *Ward* inquiry? There is a dearth of case law in the *Charter* damages jurisprudence to assist with the quantification of damages for the type of harm Khadr suffered. Using the British Columbia Supreme Court's quantification analysis in *Henry v British Columbia (Attorney General)*⁵⁴ ("*Henry BCSC*") as a starting point, I explore additional sources that could shape quantification in the Khadr case. These include wrongful conviction settlements, previous Government of Canada settlements with individuals detained and tortured by foreign authorities, Canadian human rights tribunal decisions, and private law damages cases. Although it can be tempting to default to well-established private law quantification principles, courts must remain cognizant of the unique purposes animating the *Charter* damages remedy.

The *Charter* damages jurisprudence reveals a level of uneasiness to order large, meaningful awards. I argue that a substantial *Charter* damages award is necessary to promote compelling objectives in the Khadr case, so I review reasons why a court might be reluctant to order a sizeable sum. I explore whether generally low quantum (outside of recent class actions)⁵⁵ stem from the *Ward* framework, the way *Ward* is being applied, or the institutional culture within which *Ward* operates. I argue that there are issues in all three areas. A focus on balancing the interests of the claimant and the state in the *Ward* framework, continued reliance on private law to deal with constitutional problems,⁵⁶ and judicial deference with respect to monetary remedies⁵⁷ are discussed as explanations for the remedy's sluggish evolution.

Ultimately, judges must refocus the analysis on providing a responsive and effective remedy to *Charter* damages claimants who have suffered distinct kinds of harm, not on expanding the state's ability to defend itself. Ordering larger damages awards more frequently, especially in cases where serious rights violations have occurred, will help the remedy move past the current period of stagnancy and unpredictability.

PART IV: METHOD AND ORGANIZATION

This research project is a doctrinal analysis of the *Ward* framework in a particularized context. I use the Khadr civil claim as a case study to analyze issues plaguing the continuing development of the

⁵⁴ *Supra* note 16.

⁵⁵ See *Brazeau and Reddock*, *supra* note 16.

⁵⁶ For further information on *Charter* damages as a unique public law remedy distinct from private law, see Peter Adourian, *Charter Damages: Private Law in the "Unique Public Law Remedy"* (LLM Thesis, Osgoode Hall Law School, York University, 2018) [unpublished].

⁵⁷ See Lawrence David, "Resource Allocation and Judicial Deference on Charter Review: The Price of Rights Protection According to the McLachlin Court" (2015) 73 UT Fac L Rev 35.

Charter damages remedy. Khadr is a model *Charter* damages claimant, yet there are still obstacles that could constrain a court's decision to order an impactful remedy.

There are three reasons why I use Khadr as a case study. First, *Charter* breaches were found in Khadr's case, which helps establish his entitlement to *Charter* damages. Second, the facts raise issues relating to the exercise of Crown prerogative. To date, a court has not applied the *Ward* framework to a *Charter* damages claim stemming from state action under a prerogative power. Analyzing how Crown prerogative intersects with the *Ward* framework is helpful to understand how future cases in the foreign affairs realm might be approached. Finally, I focus on Khadr because of his tragic history. Although he may be an unsympathetic plaintiff to many, Khadr suffered immensely over a prolonged period. *Charter* damages would accomplish profoundly important objectives, such as deterring egregious conduct at the highest level of government and preserving the rule of law. Damages would also solidify the importance of using the remedial arm of the *Charter* to provide redress for serious constitutional infringements.

This chapter outlined the research project undertaken in this thesis. In Chapter Two, I explore subsection 24(1) of the *Charter* to understand its purpose. I dissect the *Ward* decision and evaluate its potential to enhance and expand the *Charter* damages remedy. I also canvass theoretical frameworks in the *Charter* damages literature that continue to guide analysis of the remedy. Finally, I survey cases in the post-*Ward Charter* damages jurisprudence to highlight some of the trends and problems mentioned above.

In Chapter Three, I discuss Khadr's detention, the Canadian government's response, and the litigation battles that ensued for over a decade. The analysis reveals that Canada was largely impervious to the plight of a teenager incarcerated in a highly controversial prison where human rights abuses were taking place. Considerable attention is given to the 2010 SCC decision and how it could affect Khadr's civil claim. I also outline the civil claim in greater detail and review sources that assessed the 2017 settlement.

In Chapter Four, I apply steps one to three of the *Ward* framework to establish Khadr's entitlement to *Charter* damages. I review additional sources of rights breaches in addition to the existing violations found by the SCC in 2008 and 2010. I then show how *Charter* damages promote compelling compensatory, vindictory, and deterrent functions. I discuss countervailing factors related to alternative remedies and good governance, ultimately arguing that these concerns should not threaten the success of Khadr's claim.

In Chapter Five, I discuss what the quantification analysis should look like in the Khadr case. I argue that, although private law can be helpful to quantify compensatory *Charter* damages, a court should

not be overly constrained by its principles. When quantifying vindication and deterrence-based *Charter* damages, a court has even greater latitude to craft a meaningful remedy. A court should therefore draw from all relevant sources in its assessment. I conclude the chapter by discussing forces that might be holding judges back from ordering large damages awards, arguing that this remedial timidity needs to be challenged so the remedy can progress.

Chapter Six offers concluding remarks.

CHAPTER TWO: THE EVOLUTION OF THE CHARTER DAMAGES REMEDY

INTRODUCTION

Canadian courts have struggled to define the parameters of a constitutional damages remedy since the mid-1980s. Marilyn Pilkington's theory of *Charter* damages⁵⁸ stressed that the remedy should exist as a standalone cause of action independent from private law.⁵⁹ Pilkington argued that a person whose constitutional right has been violated has suffered a unique kind of fundamental harm which "has fewer avenues of redress."⁶⁰ This theory emphasized that *Charter* damages serve different functions than private law damages.⁶¹ A court sends a message by awarding *Charter* damages and that message goes beyond compensating an individual claimant for harm he or she suffered. In some cases, a court's message is to highlight the importance of protecting *Charter* rights. In others, the message might be to deter a pattern of wrongful state conduct. *Charter* damages are a significant mechanism by which courts can provide redress to aggrieved persons, preserve the rule of law, and promote governmental compliance with the Constitution.

The existence of *Charter* damages as a standalone remedy – with its own set of defined objectives – was not acknowledged until 2010, twenty-eight years after the enactment of the *Charter*. Although the *Ward* judgment was progressive, it implicitly accepted the idea that *Charter* damages represented a threat to good governance in some situations.⁶² *Ward* also provided considerable leeway for a *Charter* damages claim to be defeated. The broad countervailing factors stage allows the state to argue that *Charter* damages are inappropriate for a variety of reasons. This can be problematic in areas where courts have traditionally afforded deference to other branches of government, such as matters involving the exercise of Crown prerogative or the allocation of public funds. Despite *Ward*'s potential to increase judicial reliance on the *Charter* damages remedy, indicators show that courts still tread lightly in this developing area.⁶³

Courts often struggle to determine when certain constitutional remedies are appropriate. This was obvious in the Khadr litigation. The Khadr case came before the Supreme Court of Canada three times and *Charter* infringements were found in 2008 and 2010. Despite the gravity of Khadr's circumstances, the

⁵⁸ Marilyn L. Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984) 62 Can Bar Rev 517 [Pilkington, "Damages as a Remedy"].

⁵⁹ *Ibid* at 536.

⁶⁰ *Ibid*.

⁶¹ *Ibid*.

⁶² See *Ward*, *supra* note 4 at para 39: "In some situations, however, the state may establish that an award of *Charter* damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity."

⁶³ Charles, *supra* note 14 at 103.

Court unanimously concluded in 2010 that declaratory relief was the proper remedy.⁶⁴ A year later, the Court unanimously ordered the federal Minister of Health to grant a controversial exemption which would allow a safe injection facility to continue providing assistance to drug users.⁶⁵ These decisions stand in stark contrast to one another, showing that the Khadr case presented remedial challenges to the Court.

Even though the SCC could have taken a more activist stance by ordering Canada to seek Khadr's repatriation (as the lower courts had done), the Court declined to do so. The Khadr case involved a unique blend of pressures and constraints. The Court attempted to balance concerns about respecting the government's discretion under Crown prerogative, upholding the rule of law, and maintaining proper institutional separation between the executive and judicial branches. The Court also had to contend with causation issues, defining the extraterritorial reach of the *Charter*, and the undeniable public and political controversy surrounding Khadr. In the end, the Court adopted an excessively deferential stance to avoid triggering conflict with the federal government. Although none of the previous Khadr judgments concerned *Charter* damages, the factors that influenced the Court in 2008 and 2010 are relevant to the *Ward* analysis. I address these issues in more detail in Chapter Three.

This chapter describes the evolution of the *Charter* damages remedy and its conceptual foundations. The discussion is divided into four parts. I begin by identifying the legal framework within which constitutional remedies are provided in Canada, explaining the differences between subsections 24(1) and 24(2) of the *Charter* and subsection 52(1) of the *Constitution Act, 1982*.⁶⁶ In Part II, I review foundational theories about *Charter* damages advanced by scholars during the early years of the *Charter*. Particular attention is given to commentary about the purpose and objectives of *Charter* damages and the debate about whether the remedy should be viewed as independent from private law. In Part III, I canvass Supreme Court of Canada cases that shaped the *Charter* damages remedy up to the *Ward* decision in 2010. The fourth and final part of the chapter examines *Ward* in greater detail, reviews scholarly opinions on the decision, and discusses continuing problems in the *Charter* damages jurisprudence.

PART I: THE FRAMEWORK FOR CONSTITUTIONAL REMEDIES

There are three distinct provisions in the Canadian Constitution that provide constitutional

⁶⁴ *Khadr* SCC 2010, *supra* note 25 at para 47.

⁶⁵ See *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 [*PHS*]. See also Paul Daly, "Royal Treatment: The Crown's Special Status in Administrative Law" (2017) 22:1 Rev Const Stud 81 at 101, where the author noted that the SCC's reasons in *PHS* "could easily be transposed to Mr. Khadr's case". The major point of difference between the two decisions, in Daly's view, was the influence of Crown prerogative.

⁶⁶ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

remedies: subsections 24(1) and 24(2) of the *Charter* and subsection 52(1) of the *Constitution Act, 1982*. Subsection 24(1) states that

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.⁶⁷

This broad provision allows aggrieved persons to seek relief from the state. Damages are only one possible outcome. Other remedial options include a declaration that the state has violated the *Charter*,⁶⁸ a stay of proceedings,⁶⁹ costs,⁷⁰ an order of *mandamus*,⁷¹ retaining supervisory jurisdiction,⁷² and an injunction.⁷³

Subsection 24(2) of the *Charter* is more narrowly constructed and tailored to criminal proceedings. The subsection 24(2) remedy empowers a court to exclude evidence obtained in violation of an accused's *Charter*-protected interests if the admission of that evidence "would bring the administration of justice into disrepute."⁷⁴ Subsection 52(1) of the *Constitution Act, 1982* invalidates unconstitutional legislation. Subsection 52(1) establishes the primacy of the Canadian Constitution and proclaims that laws inconsistent with the Constitution will be of no force and effect. Remedial options used by courts under subsection 52(1) include striking down a law,⁷⁵ severing offending language from the statute,⁷⁶ reading down a provision

⁶⁷ *Charter*, *supra* note 2 at ss 24(1).

⁶⁸ See *Khadr SCC 2010*, *supra* note 25 at para 48.

⁶⁹ A stay of proceedings is considered a drastic remedy under subsection 24(1), only ordered "in the clearest of cases" where the accused has suffered prejudice. See *R v O'Connor*, [1995] 4 SCR 411 at 460-61, 130 DLR (4th) 235.

⁷⁰ An award of costs can be made under subsection 24(1) to remedy violations stemming from "a marked and unacceptable departure from the reasonable standards expected of the prosecution." See *Ontario v 974649 Ontario Inc.*, 2001 SCC 81 at para 87, [2001] 3 SCR 575 [974649 *Ontario*].

⁷¹ An order of *mandamus* requires the state to take specific action. It was used in *PHS*, *supra* note 65, to compel the federal Minister of Health to grant an exemption from the *Controlled Drugs and Substances Act* which would allow PHS to continue operating a safe injection facility.

⁷² See *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 [*Doucet-Boudreau SCC*]. The trial judge found a violation of minority language rights protected by section 23 of the *Charter*. The trial judge ordered the province of Nova Scotia and the French language school board to use their best efforts to construct schools and provide homogenous French programs by certain dates. The judge retained supervisory jurisdiction to monitor the province's progress and hear reports on compliance. This decision was upheld by the SCC majority.

⁷³ The SCC also discussed injunctive relief in *Doucet-Boudreau SCC*, *supra* note 72 at para 70. The Court commented that injunctions could be ordered under subsection 24(1) because they allowed courts to "take actions to ensure that rights are enforced, and not merely declared." See Peter W. Hogg, *Constitutional Law of Canada*, 2018 Student ed (Toronto: Thomson Reuters, 2018) at 40-37 to 40-48 for a discussion of these subsection 24(1) remedies.

⁷⁴ *Charter*, *supra* note 2 at ss 24(2). See also *R v Grant*, 2009 SCC 32, [2009] 2 SCR 353.

⁷⁵ Subsection 52(1) compels a court to find that a law inconsistent with the Constitution is invalid. See Hogg, *supra* note 73 at 40-4.

⁷⁶ Severance is used when only part of a law is unconstitutional. It involves striking down the offensive portion of the law and leaving intact the part that is constitutionally compliant. See *Tétreault-Gadoury v Canada*, [1991] 2 SCR 22, 81 DLR (4th) 358, where the SCC found that the government's restriction of unemployment benefits to people under 65 violated section 15 of the *Charter*. The proper remedy in this case was to sever the age 65 bar contained in the

that is overbroad,⁷⁷ reading in language to remedy an under-inclusive provision,⁷⁸ ordering a temporary suspension of invalidity,⁷⁹ and providing an exemption for a particular claimant or group.⁸⁰

Subsection 24(1) was the subject of debate during the formation of the *Charter*. As Kent Roach explained, the initial *Charter* proposals put forth by the federal government did not contain an enforcement provision.⁸¹ The government subsequently proposed a narrow remedial clause, which Roach argued “revealed fears that courts would go beyond their competent jurisdiction to issue Charter remedies, that they would implement innovative forms of relief, and that they would enforce rights which would not apply to the applicants personally.”⁸² Early drafts of subsection 24(1) contained limiting language, providing that relief could only be granted when “no other effective recourse or remedy is available or provided for by law”.⁸³ A 1979 draft also stipulated that a claimant’s right had to be “infringed or denied to his or her detriment”⁸⁴ to seek relief, indicating that loss or harm must have occurred apart from the infringement. These phrases were omitted from the expansive final version of subsection 24(1) that exists today.

To illustrate the vital importance of a constitutionally entrenched remedial provision (and the fact

Unemployment Insurance Act and extend the benefits to individuals over 65. See Hogg, *supra* note 73 at 40-14 to 40-16.

⁷⁷ Reading down involves narrowing the focus of the provision to ensure constitutional compliance or to “cure constitutional defects” – see Kent Roach, “Enforcement of the Charter – Subsections 24(1) and 52(1)” (2013) 62 SCLR (2d) 473 at 477. See for example *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 SCR 401, where the SCC read down part of the search and seizure scheme in the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* because it did not provide proper safeguards for solicitor-client privilege.

⁷⁸ A notable example of reading in took place in *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385. In this case, the SCC found that Alberta’s anti-discrimination legislation violated the plaintiff’s section 15 rights under the *Charter*. The legislation did not list sexual orientation as a basis for discrimination. The Court added sexual orientation to the statute to ensure constitutional compliance and further the objectives of the legislation.

⁷⁹ A suspended declaration of invalidity is a deferential remedy that allows the legislature time to respond to a judicial determination of unconstitutionality. The law or provision which has been deemed unconstitutional will continue to be enforced for a certain period. The SCC used this remedy in *Carter v Canada*, 2015 SCC 5, [2015] 1 SCR 331, finding that *Criminal Code* provisions prohibiting assisted suicide violated section 7 of the *Charter*. The declaration of invalidity was suspended for a year to allow Parliament time to respond. The period of suspension was subsequently increased to sixteen months. See Hogg, *supra* note 73 at 40-12 to 40-13.

⁸⁰ In *R v Ferguson*, 2008 SCC 6, [2008] 1 SCR 96, the trial judge granted a constitutional exemption from a mandatory minimum sentence to a police officer who had been convicted of manslaughter. The SCC did not uphold this decision. Hogg noted that, while *Ferguson* did not prohibit constitutional exemptions, it was not encouraging. See Hogg, *supra* note 73 at 40-23. For further description of subsection 52(1) remedies, see Robert J. Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 6th ed (Toronto: Irwin Law, 2017) at 444-56.

⁸¹ Kent Roach, “Section 24(1) of the Charter: Strategy and Structure” (1987) 29 Crim LQ 222 at 224 [Roach, “Strategy and Structure”].

⁸² *Ibid* at 224-25.

⁸³ Dale Gibson, “Enforcement of the Canadian Charter of Rights and Freedoms (Section 24)” in *The Canadian Charter of Rights and Freedoms Commentary*, Walter S. Tarnopolsky & Gérald-A. Beaudoin, eds, (Toronto: Carswell, 1982) at 492, n 6.

⁸⁴ *Ibid*.

that damages were intended to be part of that provision), it is helpful to quote the words of Professor Joseph Magnet, who represented the Canadian Jewish Congress during the 1980-81 *Charter* Special Joint Committee debates:

Well, we think that to deal with problems like this, as well as the full panoply of rights which will be entrenched in the charter, that an enforcement clause is crucial, that the charter would be hollow without it and we think that this is in conformity with our international obligations under the Covenant on Civil and Political Rights, the text of which is set out for you. There is also a right in the Covenant to damages...⁸⁵

Francis Young, an advisor for the New Brunswick Human Rights Commission, echoed these concerns, stating that "...a new section should be added to the charter to provide for efficient recourse, like injunctions, statements, inadmissibility of evidence and damages."⁸⁶ Dale Gibson noted that successive drafts of subsection 24(1) expanded the scope of potential remedies to be awarded rather than confining a court's options to declaratory or injunctive relief as originally contemplated.⁸⁷ Gibson stated confidently that the new range of remedies "would clearly include damages, where suitable".⁸⁸ These comments reveal that constitutional damages were envisioned during the formation of the *Charter*.

Before moving on to the next section of this chapter, it is helpful to comment on the distinction between private law and public law. In Canada, the state can be held liable in both spheres. The remedies discussed above are all rooted in the *Constitution Act, 1982* and the *Charter* and they are designed to remedy unconstitutional laws or unconstitutional state action. These remedies affect the relationship between state and citizen and they fall within the domain of public law. Actions brought against the state in private law can involve negligence (where the state has breached a duty of care) and intentional torts (where the state has committed wrongs such as misfeasance of public office, false imprisonment, or battery). Private law typically governs the relationship between citizens, so it is based on different legal principles than public law. The most dominant principle in the private law realm is compensation for injury.

The state is shielded from liability in certain situations through the operation of immunities.⁸⁹ Some

⁸⁵ Adam M. Dodek, *The Charter Debates: The Special Joint Committee on the Constitution, 1980-81, and the Making of the Canadian Charter of Rights and Freedoms* (Toronto: University of Toronto Press, 2018) at 354.

⁸⁶ *Ibid* at 355.

⁸⁷ Gibson, *supra* note 83 at 502.

⁸⁸ *Ibid*.

⁸⁹ For a detailed discussion of the various private and public law immunities, see Adourian, *supra* note 56 at 21-28.

immunities are found in statutes⁹⁰ while others have developed through the common law.⁹¹ Certain immunities are considered absolute, while others are limited or qualified. The limited or qualified immunity protects state officials who act in good faith.⁹² Roach explained that the purpose of these immunities is to safeguard the functioning of government: “without them, officials might be prevented from performing their public duties in a vigorous fashion.”⁹³

Reliance on private law principles to shape the developing *Charter* damages remedy has been contested since the *Charter*’s inception.⁹⁴ Although private law can offer some guidance as the *Charter* damages remedy continues to evolve, it should not obscure or diminish the distinct functions served by constitutional damages. *Charter* damages should be focused on objectives beyond just compensation. These damages are awarded to remedy violations of fundamental human rights and freedoms, so the analysis that guides courts should reflect that reality. This tension between private law and the developing *Charter* damages remedy is discussed in more depth in the following section.

PART II: THEORETICAL PERSPECTIVES ON CHARTER DAMAGES

After the enactment of the *Charter* in 1982, the analysis of *Charter* damages was plagued by a lack of consensus about the purpose and scope of the remedy. As I will discuss in Part III, the lack of guidance from the SCC during the *Charter*’s formative years did not help the budding *Charter* damages remedy that some scholars attempted to promote. Academic commentators advanced competing views about the objectives of *Charter* damages and the principles that ought to guide the remedy. Debate ensued about whether it should be focused primarily on compensation and what role, if any, vindication or deterrence should play. As stated above, there was also disagreement on how much the *Charter* damages remedy should be influenced by private law principles. Some of the most relevant literature is reviewed below.

In 1984, Marilyn Pilkington advanced one of the most frequently-cited arguments in support of an expansive *Charter* damages remedy. She claimed that Canadian courts were given broad discretion under subsection 24(1) of the *Charter* and that constitutional remedies “should not be the vehicles of judicial

⁹⁰ See *Ernst v Alberta Energy Regulator*, 2017 SCC 1 at para 1, [2017] 1 SCR 3 [*Ernst*]. This case involved the constitutionality of a statutory immunity found in the Alberta Energy Board’s enabling statute “which preclude[d] all claims in relation to the Board’s actions purportedly done pursuant to the legislation which the Board administer[ed].”

⁹¹ A notable example of a common law immunity is the rule developed in *Mackin v New Brunswick*, 2002 SCC 13 at para 79, [2002] 1 SCR 405 [*Mackin*]. Described as a limited or qualified immunity, the *Mackin* rule holds that a court cannot order *Charter* damages together with a remedy under subsection 52(1) of the *Constitution Act, 1982* unless the state’s conduct is “clearly wrong, in bad faith or an abuse of power”. This immunity is discussed in more depth below.

⁹² Charles, *supra* note 14 at 53.

⁹³ Roach, *Constitutional Remedies in Canada*, *supra* note 17 at para 11.360.

⁹⁴ See Adourian, *supra* note 56 for a fulsome examination of this specific issue.

restraint.”⁹⁵ Pilkington noted the fundamental difference between a court’s role in adjudicating disputes in the private and public realm: “The emphasis shifts from dispute resolution to the articulation and enforcement of constitutional values.”⁹⁶ In her view, a court could award damages to a claimant who suffered no actual loss resulting from the infringement.⁹⁷ This became known as the ‘*per se*’ theory of *Charter* damages. Pilkington attached considerable importance to the vindication aspect of *Charter* damages, noting that a claimant who had obtained compensation in tort should still be able to seek damages under subsection 24(1) for vindication.⁹⁸

Pilkington expanded on these views in 1987, answering an important question that had arisen in the academic debate: “If [a person] has suffered actual injury why are damages under the common law of tort not sufficient remedy?”⁹⁹ Her response was that certain *Charter* rights do not have tort law equivalents. Even if there were a comparable right in tort law, Pilkington argued that it would not guarantee protection for the claimant’s constitutional entitlements.¹⁰⁰ Pilkington emphasized that a person whose constitutional right has been violated “surely has suffered damage of the most fundamental sort, regardless whether he or she can prove any tangible loss.”¹⁰¹ This principle justified the *per se* theory of liability.

In 1987, Roach argued that a rights-protection model should guide subsection 24(1)’s interpretation.¹⁰² In its simplest sense, this model focused on correcting violations of a specific individual’s constitutional right. It was not concerned with “vindicat[ing] the general public interest in constitutional behaviour.”¹⁰³ Roach contrasted subsections 24(1) and 24(2) of the *Charter*, noting that the former was “less collectivistic”¹⁰⁴ than the latter. Consequently, a court should not be overly concerned with the perception or interests of the broader community in crafting a remedy under subsection 24(1).¹⁰⁵ Although a core element of subsection 24(2) analysis is society’s perception of the criminal justice system, similar concerns should guide a court’s approach to remedies under subsection 24(1). Courts should be mindful of how a remedial decision will be perceived by Canadian society regardless of whether the remedy is being

⁹⁵ Pilkington, “Damages as a Remedy”, *supra* note 58 at 576.

⁹⁶ *Ibid* at 536.

⁹⁷ *Ibid* at 572.

⁹⁸ *Ibid* at 537.

⁹⁹ Marilyn Pilkington, “Monetary Redress for Charter Infringement” in Robert Sharpe, ed, *Charter Litigation* (Toronto: Butterworths, 1987) at 311 [Pilkington, “Monetary Redress”].

¹⁰⁰ *Ibid*.

¹⁰¹ *Ibid* at 314.

¹⁰² Roach, “Strategy and Structure”, *supra* note 81 at 223.

¹⁰³ *Ibid* at 238.

¹⁰⁴ *Ibid* at 223.

¹⁰⁵ *Ibid* at 235.

ordered pursuant to subsection 24(1) or 24(2). A court's overarching purpose is the same under both provisions: to give effect and meaning to *Charter* guarantees.

In a 1988 article¹⁰⁶ and 1990 text,¹⁰⁷ Ken Cooper-Stephenson sought to provide more detailed theoretical guidance for the developing *Charter* damages remedy, which he classified as a constitutional tort.¹⁰⁸ Cooper-Stephenson noted that "the obvious choice for the *Charter* damages remedy is to tap the doctrinal resources of tort law".¹⁰⁹ He stressed that the *Charter* damages remedy should be focused on compensating individual claimants, not deterring future state behaviour or addressing larger public problems.¹¹⁰ Cooper-Stephenson believed that other remedies under subsection 24(1) (such as injunctions or declarations) could accomplish broader "community reform".¹¹¹ *Charter* damages were "part of a structure of remedies which combine together to meet the collective needs of constitutional enforcement."¹¹² In other words, the *Charter* damages remedy should maintain its focus on corrective justice¹¹³ for individual claimants while injunctive or declaratory relief could influence state behaviour.¹¹⁴

Several years later, Ghislain Otis critically examined the emerging scholarly argument that damages could be awarded to remedy a *Charter* breach absent actual loss, injury, or serious misconduct.¹¹⁵ This is the *per se* theory of *Charter* damages described above. Otis argued that judicial reluctance to accept this view in Canada is warranted, although he expressed regret that courts had not provided much guidance to explain why such a foundation for the remedy is inappropriate.¹¹⁶ Otis opined that the prevailing academic theories of *Charter* damages could "risk looking upon monetary redress as a panacea".¹¹⁷

While he did not reject the notion that subsection 24(1) claims based on *per se* liability should still be actionable, Otis argued that these situations should not attract a monetary remedy beyond nominal

¹⁰⁶ Ken Cooper-Stephenson, "Tort Theory for the Charter Damages Remedy" (1988) 52:1 Sask L Rev 1 [Cooper-Stephenson, "Tort Theory"].

¹⁰⁷ Ken Cooper-Stephenson, *Charter Damages Claims* (Toronto: Carswell, 1990) [Cooper-Stephenson, *Charter Damages Claims*].

¹⁰⁸ *Ibid* at 61.

¹⁰⁹ Cooper-Stephenson, "Tort Theory", *supra* note 106 at 31.

¹¹⁰ *Ibid* at 85.

¹¹¹ Cooper-Stephenson, *Charter Damages Claims*, *supra* note 107 at 65.

¹¹² *Ibid*.

¹¹³ In simple terms, corrective justice aims to restore the plaintiff to the position he or she enjoyed prior to the wrong being committed. See Cooper-Stephenson, "Tort Theory", *supra* note 106 at 15.

¹¹⁴ Cooper-Stephenson, *Charter Damages Claims*, *supra* note 107 at 65.

¹¹⁵ Ghislain Otis, "Constitutional Liability for the Infringement of Rights Per Se: A Misguided Theory" (1992) 26 UBC L Rev 21.

¹¹⁶ *Ibid* at 25.

¹¹⁷ *Ibid* at 28.

damages.¹¹⁸ In his view, nominal damages (potentially awarded together with non-monetary remedies) could vindicate the claimant and “affir[m] the intrinsic importance of rights”.¹¹⁹ Nominal damages are used in private law to vindicate a plaintiff where there has been no injury. Otis emphasized that a substantial monetary award was not required to acknowledge the value of *Charter* rights or deter state action where no demonstrable loss or misconduct was apparent.¹²⁰

In 1993, Lorne Sossin examined the *Charter* damages remedy in the context of prosecutorial misconduct.¹²¹ Sossin described the continuing evolution of *Charter* damages as “murky”¹²² and analyzed whether compensation or deterrence should be the dominant concern for a *Charter* damages award designed to remedy prosecutorial misconduct. In opposition to Cooper-Stephenson, Sossin argued that compensation was an inappropriate basis upon which to ground the *Charter* damages remedy because of the formal equality principle animating the *Charter*.¹²³ The presumption that all claimants are equal under the *Charter*, in Sossin’s view, privileged certain litigants.¹²⁴ Sossin argued that deterrence should be the primary rationale underpinning a *Charter* damages award because unconstitutional state conduct (at least in the sphere of criminal prosecution) can often stem from systemic problems.¹²⁵ Sossin stressed that *Charter* damages awards “should be based on the importance of the right, and the gravity of the violation”¹²⁶ while private law causes of action would serve the compensatory function.¹²⁷

In 1995, David Mullan rounded out the academic debate by arguing that the future for *Charter* damages was rather bleak.¹²⁸ Mullan attempted to explain why, despite its breadth, the remedy was infrequently pursued by litigants or granted by courts in the *Charter*’s first decade. He argued that the SCC’s framing of certain provisions of the *Charter* (principally sections 7 and 15) limited the possibility of damages being awarded outside the criminal context.¹²⁹ Mullan also cited jurisprudence from comparable jurisdictions to show that courts were not prepared to accept that a constitutional breach automatically

¹¹⁸ *Ibid* at 22-23. Nominal damages are a small sum awarded symbolically to acknowledge wrongdoing where no actual loss is proven.

¹¹⁹ Otis, *supra* note 115 at 31.

¹²⁰ *Ibid* at 39.

¹²¹ Lorne Sossin, “Crown Prosecutors and Constitutional Torts: The Promise and Politics of *Charter* Damages” (1993) 19 *Queen's LJ* 372.

¹²² *Ibid* at 393.

¹²³ *Ibid* at 400.

¹²⁴ *Ibid*. See also Adourian, *supra* note 56 at 14 for a discussion of this issue.

¹²⁵ *Ibid* at 403.

¹²⁶ *Ibid* at 401-2.

¹²⁷ *Ibid* at 402.

¹²⁸ David J. Mullan, “Damages For Violation of Constitutional Rights – A False Spring?” (1995) 6:1 *NJCL* 105 at 105.

¹²⁹ *Ibid* at 108.

triggered *per se* state liability and a corresponding damages award.¹³⁰ In his view, Canadian courts were likely to remain cautious and continue relying on existing common law principles and immunities which limited the state's exposure to *Charter* damages.¹³¹

The discussion of *Charter* damages in the academic literature grew quiet in the late 1990s and 2000s. In his comprehensive text on the subject, W.H. Charles examined what he described as the second phase of *Charter* damages evolution from 1995 to 2010. He determined that courts at all levels awarded *Charter* damages in approximately one-third of cases in this period.¹³² When the analysis was narrowed to just appellate decisions, damages were awarded in roughly half the cases.¹³³

Writing just before the *Ward* judgment in 2010, Raj Anand argued that the continued trend of limiting *Charter* damages claims was “at odds with a purposive interpretation of the Constitution.”¹³⁴ Anand was emphatic that *Charter* damages were necessary to uphold and promote the *Charter*'s objectives. Like Mullan, Anand traced judicial hesitation to award *Charter* damages partly to state immunity defences.¹³⁵ Anand endorsed a robust ‘Pilkingtonian’ view of the remedy, arguing that the importation of tort law principles into the *Charter* damages analysis was inappropriate. Specifically, the principle of double recovery (which provides that a plaintiff should not be compensated twice for the same injury) “render[ed] the existence of constitutional torts redundant.”¹³⁶

Anand's commentary reflected dissatisfaction with the way courts had interpreted and applied the *Charter* damages remedy prior to *Ward*. The limited guidance given by the Supreme Court of Canada arguably contributed to the remedy's lack of vitality. The absence of a clear standard to assess whether *Charter* damages were appropriate also created inconsistency in the jurisprudence with respect to fault requirements, double recovery, the overall purpose of the remedy, and what objectives it ought to promote. To understand the *Charter* damages landscape as it existed prior to *Ward* (and why the *Ward* decision was necessary), influential judicial decisions are examined in the following section.

¹³⁰ *Ibid* at 121.

¹³¹ *Ibid* at 126.

¹³² Charles, *supra* note 14 at 23.

¹³³ *Ibid* at 23-4.

¹³⁴ Raj Anand, “Damages for Unconstitutional Actions: A Rule In Search of a Rationale” (2009-2010) 27 NJCL 159 at 159.

¹³⁵ *Ibid* at 160-61. Anand also discussed several other issues plaguing the evolution of the remedy: the existence of more desirable equitable remedies, the idea that the state could ‘buy its way out’ of the constitutional breach, causation issues, the fear that the judicial system could be overburdened by *Charter* damages claims, the potential heavy financial burden imposed on the state, and concerns about separation of powers.

¹³⁶ *Ibid* at 169.

PART III: THE ROAD TO WARD

As discussed above, Charles found that *Charter* damages claims were rejected in two thirds of cases between 1995 and 2010.¹³⁷ Although the number of successful *Charter* damages cases increased in this period compared to the years following the passage of the *Charter*,¹³⁸ the results were not particularly inspiring. The main reasons for rejection of *Charter* damages claims in the 1995-2010 period were failure to meet a fault requirement (such as bad faith) or failure to prove that a *Charter* breach occurred.¹³⁹ The average *Charter* damages award ordered during this period was \$12,482.¹⁴⁰ This figure omits the very high award made in *McTaggart v Ontario*¹⁴¹ (“*McTaggart*”) so as not to distort the real average.

The literature discussed in Part II demonstrated that a coherent framework for *Charter* damages was missing in the early decades of the *Charter*. The SCC did not address this gap until 1994. In *RJR-MacDonald Inc. v Canada (AG)*,¹⁴² the Court briefly commented that “no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the *Charter*.”¹⁴³ Despite this partial acknowledgement of the remedy’s existence, the Court did not offer any comments to help guide its evolution. The Court simply pronounced that *Charter* damages were “not the primary remedy in *Charter* cases.”¹⁴⁴

The Supreme Court of Canada addressed subsection 24(1) again in the early 2000s, though some of its decisions did not directly concern *Charter* damages. In *R v 974649 Ontario Inc.*¹⁴⁵ (“*974649 Ontario*”), the Court focused on a narrow procedural issue: whether a judge of a provincial court had

¹³⁷ Charles, *supra* note 14 at 23.

¹³⁸ *Ibid* at 24.

¹³⁹ *Ibid*.

¹⁴⁰ *Ibid* at 25.

¹⁴¹ (2000), 48 WCB (2d) 234, 2000 CarswellOnt 4808 (WL Next Can) (Ont Sup Ct) [*McTaggart* cited to WL Next Can]. In *McTaggart*, the plaintiff was imprisoned for twenty months on an intermittent basis and subject to bail restrictions for approximately thirty-three months. He brought an action for malicious prosecution against the police and the Crown relating to multiple bank robberies for which he was charged, tried, and convicted. After a new trial was ordered by the Ontario Court of Appeal for *McTaggart*’s two convictions, the Crown withdrew the charges. The malicious prosecution claim focused on a police officer’s decision to withhold exculpatory evidence from the Crown. The Superior Court of Justice found that a police officer’s failure to disclose material information constituted a violation of *McTaggart*’s section 7 *Charter* right. The Court determined that *Charter* damages were appropriate and ordered \$210,000 in general damages and \$20,000 in punitive damages.

¹⁴² [1994] 1 SCR 311, 111 DLR (4th) 385 [cited to SCR]. This case involved tobacco companies seeking a stay of enforcement. The companies wanted to delay the implementation and enforcement of regulations which required tobacco manufacturers to alter their packaging. The stay was sought pending resolution of a challenge to the regulations’ constitutionality at the Supreme Court of Canada. The SCC ultimately dismissed the companies’ motion because the balance of convenience weighed in favour of the public interest in health.

¹⁴³ *Ibid* at 342.

¹⁴⁴ *Ibid* at 341.

¹⁴⁵ *974649 Ontario*, *supra* note 70.

jurisdiction under subsection 24(1) to order costs against the Crown for a breach of the *Charter*. The opening paragraph of the decision contained the following pronouncement: “To the extent that it is difficult or impossible to obtain remedies for *Charter* breaches, the *Charter* ceases to be an effective instrument for maintaining the rights of Canadians.”¹⁴⁶ In keeping with the spirit of this statement, the SCC held that it was appropriate for a trial judge acting pursuant to his or her authority under provincial offences legislation to award costs against the Crown.¹⁴⁷

Despite the progressive tone of 974649 *Ontario*, the SCC took a step back in 2002 when it decided *Mackin v New Brunswick (Minister of Justice)*¹⁴⁸ (“*Mackin*”). This case specifically concerned *Charter* damages. The issue in *Mackin* was whether the elimination of the provincial court supernumerary judge position in New Brunswick violated subsection 11(d) of the *Charter*. Two provincial court judges brought claims against the province, arguing that legislation that abolished the supernumerary position “affected the components of tenure and financial security that form part of judicial independence.”¹⁴⁹ The claimants challenged the constitutionality of the legislation under subsection 52(1) of the *Constitution Act, 1982* and sought damages and costs under subsection 24(1) of the *Charter*. The SCC found a violation of subsection 11(d) that could not be justified. The Court followed previous decisions which established a general rule against awarding concurrent remedies (i.e. a declaration of invalidity under subsection 52(1) coupled with an order for damages under subsection 24(1)).¹⁵⁰ The Court was reticent to award *Charter* damages in earlier cases where constitutional challenges to legislation were brought because it “would be tantamount to giving the declaration of invalidity retroactive effect.”¹⁵¹

Charter damages were sought in addition to the constitutional challenge in *Mackin*, so the Court applied the rule against concurrent remedies. The Court also introduced a test to define circumstances which could trigger an exception to the rule. If state actors exercised their duties “in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable.”¹⁵² *Charter* damages could only be ordered alongside a subsection 52(1) remedy for “conduct that is clearly wrong, in bad faith or an abuse of power”.¹⁵³ The Court attempted to justify its

¹⁴⁶ *Ibid* at para 1.

¹⁴⁷ *Ibid* at para 97.

¹⁴⁸ *Supra* note 91.

¹⁴⁹ *Ibid* at para 7.

¹⁵⁰ See *Schachter v Canada*, [1992] 2 SCR 679, 93 DLR (4th) 1 [*Schachter* cited to SCR] and *Guimond c Québec (Procureur general)*, [1996] 3 SCR 347, 138 DLR (4th) 647.

¹⁵¹ *Schachter*, *supra* note 150 at 720.

¹⁵² *Mackin*, *supra* note 91 at para 79, Gonthier J.

¹⁵³ *Ibid*.

conclusion that bad faith was required based on the need for “balance between the protection of constitutional rights and the need for effective government.”¹⁵⁴ Put another way, the Court did not want to hinder the government’s legislative discretion or make state officials fearful of applying the law in the course of their duties.¹⁵⁵ This perceived tension between rights protection and good governance¹⁵⁶ influenced the Court’s decision in *Ward* several years later.

Mackin did not resolve confusion about whether the state had to commit some type of fault before *Charter* damages could be awarded. If anything, *Mackin* complicated the situation. *Hawley v Bapoo*,¹⁵⁷ a decision of the Ontario Superior Court, recognized the divisions in *Charter* damages case law. The Court noted that “there [had] been disagreement about the need for mala fides on the part of the government actor and what, if any role, his or her good faith plays in the decision to award damages.”¹⁵⁸ The Court conducted a lengthy analysis of the jurisprudence, concluding that there was “nothing in the text or history of the Charter”¹⁵⁹ that suggested proof of state of mind was necessary to award damages outside the *Mackin* context. Further, the Court commented that imposing a bad faith requirement would undermine the purpose of a constitutional damages remedy. If a claimant could prove bad faith, he or she could succeed in tort actions.¹⁶⁰ It is regrettable that the damages portion of this judgment was overturned by the Ontario Court of Appeal. The appellate court was bound by its judgment in *Ferri v Root*,¹⁶¹ which required wilfulness or bad faith to order *Charter* damages.

The SCC revisited subsection 24(1) of the *Charter* again in *Doucet-Boudreau v Nova Scotia (Minister of Education)*¹⁶² (“*Doucet-Boudreau*”). The Court addressed whether a trial judge’s decision to retain jurisdiction over a complicated remedial order was appropriate. The trial judge found a violation of minority language rights enshrined in section 23 of the *Charter*. Specifically, the trial judge determined that the Government of Nova Scotia “had not given sufficient attention to the serious rate of assimilation among

¹⁵⁴ *Ibid.*

¹⁵⁵ See *Ward*, *supra* note 4 at para 41.

¹⁵⁶ See Adourian, *supra* note 56 at 27. Adourian expressed his confusion as to why the SCC treated rights protection and good governance as being “at odds”.

¹⁵⁷ (2005), 76 OR (3d) 649, 2005 CanLII 36451 (Ont Sup Ct) [*Hawley ONSC* cited to CanLII], rev’d in part 2007 ONCA 503, 2007 ONCA 503 (CanLII).

¹⁵⁸ *Hawley ONSC*, *supra* note 157 at para 157.

¹⁵⁹ *Ibid* at para 194.

¹⁶⁰ *Ibid.*

¹⁶¹ 2007 ONCA 79 at para 108, 279 DLR (4th) 643 [*Ferri*], leave to appeal to SCC refused, 31972 (16 August 2007): “Liability for a constitutional tort...requires wilfulness or *mala fides* in the creation of a risk or course of conduct that leads to damages.”

¹⁶² *Doucet-Boudreau SCC*, *supra* note 72.

Acadians and Francophones in Nova Scotia.”¹⁶³ This pressing issue was not given priority even though it was constitutionally mandated, which violated section 23. The trial judge ordered a creative and expansive remedy under subsection 24(1) to ensure compliance with constitutional guarantees. The province and the provincial French language school board were ordered to use their best efforts to construct schools and provide homogenous French programs by certain dates. The judge retained supervisory jurisdiction to monitor the province’s progress and hear reports on compliance.¹⁶⁴ The province successfully appealed the portion of the decision relating to retention of jurisdiction to the Nova Scotia Court of Appeal.¹⁶⁵

A narrow majority of the Supreme Court of Canada allowed the appeal brought by the Francophone parents. The Court stated that subsection 24(1) of the *Charter* should be interpreted purposively to give effect to the principle that “where there is a right, there must be a remedy.”¹⁶⁶ This approach required that courts develop responsive and effective remedies to promote the purpose of the right at issue *and* the remedies section.¹⁶⁷ The majority concluded that the trial judge’s ruling was meaningfully crafted in response to “ongoing cultural erosion”.¹⁶⁸ Four justices dissented, however, arguing that the retention of jurisdiction after the trial judge had issued a final decision violated separation of powers doctrine.¹⁶⁹ The dissenting judgment, written by Justices LeBel and Deschamps, devoted considerable time to delineating the judiciary’s proper role in crafting constitutional remedies. The dissenting justices emphasized that, once a decision is made, judges should “resist the temptation to directly oversee or supervise the administration of their orders.”¹⁷⁰

The SCC majority provided a set of principles in *Doucet-Boudreau* to help determine if a remedy under subsection 24(1) is appropriate and just. The first principle is that the remedy should “meaningfully vindicat[e] the rights and freedoms of the claimants.”¹⁷¹ A meaningful remedy will appreciate the claimant’s unique experience and the manner in which his or her constitutional right was violated.¹⁷² Second, an appropriate and just remedy will respect the constitutional separation of powers and rely on legitimate means to secure its implementation.¹⁷³ Third, the court or tribunal ordering the remedy must not “leap into

¹⁶³ *Ibid* at para 6, Iacobucci and Arbour JJ.

¹⁶⁴ *Ibid* at paras 5-8, Iacobucci and Arbour JJ.

¹⁶⁵ See *Doucet-Boudreau v Nova Scotia (Department of Education)*, 2001 NSCA 104, 194 NSR (2d) 323.

¹⁶⁶ *Doucet-Boudreau SCC*, *supra* note 72 at para 25, Iacobucci and Arbour JJ.

¹⁶⁷ *Ibid*.

¹⁶⁸ *Ibid* at para 40, Iacobucci and Arbour JJ.

¹⁶⁹ *Ibid* at para 92, LeBel and Deschamps JJ.

¹⁷⁰ *Ibid* at para 111, LeBel and Deschamps JJ.

¹⁷¹ *Ibid* at para 55, Iacobucci and Arbour JJ.

¹⁷² *Ibid*.

¹⁷³ *Ibid* at para 56, Iacobucci and Arbour JJ.

the kinds of decisions and functions for which its design and expertise are manifestly unsuited.”¹⁷⁴ The remedy must be within the court or tribunal’s proper sphere of authority. Finally, the remedy must be fair to the state and not “impose substantial hardships that are unrelated to securing the right.”¹⁷⁵

Although the SCC majority upheld a polarizing supervisory order in *Doucet-Boudreau* and offered principles to guide the purposive interpretation of subsection 24(1), some comments could be viewed as limiting potential remedies. Three out of the four principles were focused on separation of powers concerns and institutional competence. Only one principle concentrated directly on the vindication of a claimant’s right and Charles noted that there was no discussion of deterrence in the Court’s framework.¹⁷⁶ Further, the Court was fractured in *Doucet-Boudreau*. The majority emphasized that a truly purposive approach to *Charter* remedies must focus on the responsiveness of the remedy (to properly address the rights violation) and the effectiveness of the remedy (to further the overall purpose of subsection 24(1)).¹⁷⁷

By contrast, the four dissenting justices in *Doucet-Boudreau* focused more on the proper institutional role of courts, stressing that the trial judge’s decision to retain supervisory jurisdiction overstepped carefully delineated boundaries and offended the separation of powers.¹⁷⁸ While the majority praised the trial judge’s remedial creativity to combat a pervasive problem that the government failed to properly address, the dissenting justices preferred a more restrained, deferential approach that respected the tradition of governmental compliance with judicial orders.¹⁷⁹ The tension between activism and restraint with respect to remedies, as well as the need to balance the interests of the claimant and the state, affected the Court’s decision in *Khadr SCC 2010* and its crafting of the *Ward* framework.

The Supreme Court’s decision in *Khadr SCC 2010* was released in January 2010, six months before *Ward*. The SCC concluded that the Federal Court’s order of *mandamus* (requiring the Government of Canada to seek Khadr’s repatriation from Guantánamo Bay) was inappropriate.¹⁸⁰ The Court found that the actions of Canadian officials who interviewed Khadr at Guantánamo in 2003 and 2004 triggered a violation of Khadr’s section 7 *Charter* rights that was not in accordance with principles of fundamental justice. The Court determined that intelligence gleaned from the Canadian interviews with Khadr, which was shared

¹⁷⁴ *Ibid* at para 57, Iacobucci and Arbour JJ.

¹⁷⁵ *Ibid* at para 58, Iacobucci and Arbour JJ.

¹⁷⁶ Charles, *supra* note 14 at 53.

¹⁷⁷ *Doucet-Boudreau SCC*, *supra* note 72 at para 25, Iacobucci and Arbour JJ.

¹⁷⁸ *Ibid* at paras 118-19, LeBel and Deschamps JJ.

¹⁷⁹ *Ibid* at para 106, LeBel and Deschamps JJ.

¹⁸⁰ *Khadr SCC 2010*, *supra* note 25 at para 2.

with the US, “may have provided important evidence relating to [Khadr’s] criminal proceedings”.¹⁸¹ Further, Canadian officials conducted the 2004 interview with knowledge that “Khadr had been subjected to three weeks of scheduled sleep deprivation”.¹⁸² Despite these disturbing findings, the Court concluded that a declaration was a suitable remedy under subsection 24(1).¹⁸³ This supposedly achieved the proper balance between acknowledging the harm done to Khadr and affording deference to the executive branch’s prerogative powers.

Khadr SCC 2010 will be discussed in greater detail in Chapter Three, but it is important to mention in a review of subsection 24(1) cases prior to *Ward*. Even though the Court cited *Doucet-Boudreau* for the proposition that an appropriate and just remedy under subsection 24(1) should provide meaningful vindication of the claimant’s rights,¹⁸⁴ declaratory relief was deemed sufficient. This decision undermined the purposive approach to subsection 24(1) outlined in *Doucet-Boudreau*. It also revealed the Court’s concern about its institutional role and its capacity to order remedies affecting the exercise of Crown prerogative.

Although some of the cases discussed above enhanced the jurisprudential foundation for the developing *Charter* damages remedy, there was still no practical analytical framework to guide courts. Further, Charles noted that when courts did order *Charter* damages from 1995 to 2010, most awards were compensation-based.¹⁸⁵ Many issues still plagued the *Charter* damages remedy in 2010 that needed to be addressed by Canada’s highest court. There was confusion in the case law about fault requirements, especially relating to the conduct of police. There was also uncertainty about whether *per se* damages could be awarded when a claimant could not demonstrate actual loss. Charles observed that certain terminology used by different courts in the assessment of *Charter* damages (i.e. “symbolic” or “moral” damages)¹⁸⁶ “complicate[d] an already difficult and ambiguous situation”.¹⁸⁷ Finally, the question of whether *Charter*

¹⁸¹ *Ibid* at para 24.

¹⁸² *Ibid*.

¹⁸³ *Ibid* at para 47.

¹⁸⁴ *Ibid* at para 30, citing *Doucet-Boudreau SCC*, *supra* note 72 at para 55, Iacobucci and Arbour JJ.

¹⁸⁵ Charles, *supra* note 14 at 27.

¹⁸⁶ In 2004, the SCC released a controversial judgment in *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 SCR 657. This case concerned the British Columbia government’s denial of funding for a certain behavioural therapy for autistic children. The parents of affected children successfully argued that this was an infringement of the *Charter*’s equality guarantee in section 15. The trial judge granted a “symbolic” *Charter* damages award of \$20,000 to each claimant, totalling \$80,000. This award, described as modest in comparison to the families’ actual expenses, was designed to provide partial compensation. This decision was upheld on appeal. A unanimous SCC allowed the appeal because the claimants failed to establish a *Charter* breach. The Court did not discuss the *Charter* damages analyses of the lower courts. This was regrettable given some of the disagreements that occurred in the lower court decisions, particularly with regard to terminology.

¹⁸⁷ Charles, *supra* note 14 at 30.

damages should be awarded in addition to (or independent of) private law damages did not have a definitive answer. The time was ripe for the Supreme Court of Canada to finally address these issues when *Ward* came before the Court in 2010. The *Ward* judgment is analyzed in the next section, along with academic responses to the decision and its continuing impact on the *Charter* damages jurisprudence.

PART IV: WARD'S CONTINUING INFLUENCE

Ward recognized the distinct purposes of *Charter* damages and the remedy's importance in public law.¹⁸⁸ The unanimous judgment, written by Chief Justice McLachlin, accurately described judicial authorities on *Charter* damages as "sparse".¹⁸⁹ Alan Ward's claim for *Charter* damages arose from an instance of mistaken identification. In 2002, the Vancouver Police received a tip that an individual with certain characteristics planned to throw a pie in the face of then-Prime Minister Jean Chrétien. Ward unluckily matched the description. Perceiving Ward to be fleeing the scene, the police chased and detained him in the street. After being handcuffed, Ward became agitated about the detention. He was subsequently arrested for breach of the peace, taken to the police station, and strip searched upon arrival. He spent approximately four and a half hours in detention and his car was impounded before he was ultimately released.¹⁹⁰

Ward sought private law damages (for the torts of assault, battery, false imprisonment, and negligence) and constitutional damages (resulting from alleged breaches of sections 7, 8, and 9 of the *Charter*) against the City of Vancouver, the province of British Columbia, and individual police and corrections officers. He also sought a declaration that his *Charter* rights had been infringed. The trial judge found that the assault, battery, and negligence claims failed. False imprisonment was proven based on the unnecessarily long duration of Ward's detention.¹⁹¹ The Court also concluded that breaches of sections 7, 8, and 9 occurred: the arrest was lawful, but the strip search and impoundment were not. The trial judge granted a declaration that Ward's rights were violated. \$5,000 in private law damages was ordered as compensation for Ward's false imprisonment. A further \$5,100 in *Charter* damages was ordered: \$5,000 for the strip search and \$100 for the impoundment.¹⁹² The trial judge awarded *Charter* damages absent bad faith or negligence. The decision was upheld on appeal, albeit with a dissent emphasizing that bad faith should be required.¹⁹³

¹⁸⁸ *Ward*, *supra* note 4 at para 31.

¹⁸⁹ *Ibid* at para 3.

¹⁹⁰ *Ibid* at paras 6-9.

¹⁹¹ *Ward v Vancouver (City)*, 2007 BCSC 3 at para 98, 2007 BCSC 3 (CanLII).

¹⁹² *Ibid* at para 130.

¹⁹³ See *Ward v Vancouver (City)*, 2009 BCCA 23 at para 90, 304 DLR (4th) 653, Saunders JA (dissenting): "the general theory of the law of damages does not support an award of damages pursuant to s. 24 of the *Charter* against

The SCC upheld the trial judge’s decision except for the \$100 impoundment award. The Court reasoned that Ward did not suffer loss relating to the seizure of his car, so damages were not functionally justified.¹⁹⁴ The SCC concluded that a declaration under subsection 24(1) was appropriate to vindicate Ward’s section 8 *Charter* right and to deter “future improper car seizures”.¹⁹⁵ In doing so, the Court subtly rejected the theory of *per se* compensatory damages being ordered without proof of loss or harm.¹⁹⁶ The Court noted, however, that absence of loss “does not preclude damages where the objectives of vindication or deterrence clearly call for an award.”¹⁹⁷

The Court emphasized the important distinction between an action in tort (seeking private law damages) and an action brought under subsection 24(1) of the *Charter* (seeking constitutional damages): “[t]he nature of the [*Charter* damages] remedy is to require the state (or society writ large) to compensate an individual for breaches of the individual’s constitutional rights.”¹⁹⁸ This is why the state, not individual actors, must be named as the defendant in an application for *Charter* damages.¹⁹⁹

The Court established a four-step test in an attempt to provide much-needed clarity to judges deciding *Charter* damages claims. At step one of the *Ward* framework, the claimant must prove that a *Charter* breach occurred. There is no mention of a fault requirement; the Court described the *Charter* violation as “the wrong on which the claim for damages is based.”²⁰⁰ Put differently, the breach itself can be considered fault on behalf of the state. At the first stage of the *Ward* analysis, the claimant is only required to demonstrate that a constitutional violation took place.

At step two, the claimant is expected to show why *Charter* damages are functionally justified. Damages must serve one of three potential functions: compensation, vindication, or deterrence.²⁰¹ Different concerns animate all three objectives. Compensation is usually treated as “the most prominent of the three functions”²⁰² and generally focuses on restoring the claimant to the position he or she held prior to the unconstitutional conduct. Vindication is more theoretical, targeting the broader societal harm flowing from

corrections officers who, in the course of their employment and without malice or bad faith, made a mistake and misinterpreted a government policy as requiring the search in issue.”

¹⁹⁴ *Ward*, *supra* note 4 at para 77.

¹⁹⁵ *Ibid* at para 78.

¹⁹⁶ See Roach, “A Promising Late Spring”, *supra* note 13 at 153.

¹⁹⁷ *Ward*, *supra* note 4 at para 30.

¹⁹⁸ *Ibid* at para 22.

¹⁹⁹ *Ibid*.

²⁰⁰ *Ibid* at para 23.

²⁰¹ *Ibid* at para 25.

²⁰² *Ibid* at para 27.

a *Charter* breach.²⁰³ Deterrence-based awards strive to encourage future compliance with the *Charter* and send a clear message to the state that its conduct is unacceptable.²⁰⁴

The state is given the opportunity to demonstrate why *Charter* damages are inappropriate at step three. The Court did not provide a list of countervailing factors that could limit a claimant's entitlement to damages. Instead, the Court commented that "[a] complete catalogue of countervailing considerations"²⁰⁵ would develop as the jurisprudence evolved. The two factors discussed were "the existence of alternative remedies and concerns for good governance."²⁰⁶ To defend against a *Charter* damages claim, the state can argue that the compensation, vindication, and/or deterrence objectives are properly addressed by other remedies (i.e. private law damages or a declaration under subsection 24(1)). The state can also argue that its ability to effectively govern would be jeopardized by a *Charter* damages award.²⁰⁷

The Court commented at step three that the carving out of future *Mackin*-esque state immunities could result from certain situations where good governance concerns are raised.²⁰⁸ No guidance was provided about the circumstances which could trigger these further defences. The Court merely noted that these situations would require "a minimum threshold [of fault], such as clear disregard for the claimant's *Charter* rights".²⁰⁹ Borrowing from private law, the Court stated that the appropriate degree of fault would vary with the nature of the claim and the governance issues raised.²¹⁰ The Court reaffirmed the importance of *Mackin* in this passage and left the door open to further immunities being created. I presume that, due to the Court's comments about *Mackin* appearing in its discussion of countervailing factors, issues involving fault and immunities would be addressed at that stage of the inquiry after the claimant has demonstrated an entitlement to *Charter* damages.

If no valid arguments are advanced by the state at the countervailing factors stage, the analysis moves to the fourth and final step of the *Ward* framework: quantification. The Court noted that tort law principles are useful in quantifying compensation-based damages awards, but less so for awards based on

²⁰³ *Ibid* at para 28.

²⁰⁴ *Ibid* at para 29.

²⁰⁵ *Ibid* at para 33.

²⁰⁶ *Ibid*.

²⁰⁷ *Ibid* at paras 35-39.

²⁰⁸ *Ibid* at para 43.

²⁰⁹ *Ibid*.

²¹⁰ *Ibid*. Using private law examples, the Court commented that the tort of malicious prosecution required proof of malice (because of the highly discretionary nature of prosecutorial decision-making), while the tort of negligent investigation required proof of a lower negligence standard.

vindication or deterrence.²¹¹ The Court cautioned that *Charter* damages awards must strive for fairness between the parties involved. An appropriate and just award would strike a balance between the claimant and the state.²¹² Consequently, large awards “may be inappropriate or unjust from the public perspective.”²¹³

Although the *Ward* framework is flexible and adaptive, its interest-balancing approach is marred by a lack of clarity at the countervailing factors stage and a tone of restraint at the quantification stage. These issues have produced inconsistent results and generally low damages awards. Jason Varuhas commented that, in an interest-balancing test, “the interest in protecting and vindicating the right ought to be given primacy, and structure ought to be imposed on the balancing exercise.”²¹⁴ Varuhas mentioned the “unbreakable relationship between right and remedy”,²¹⁵ a principle stressed by the SCC in *Doucet-Boudreau*.²¹⁶ Varuhas argued that “redress [should be] denied only if there are very strong reasons, based in evidence, to believe that relief would precipitate significant negative effects.”²¹⁷ If a *Charter* damages framework does not emphasize the need to provide claimants with responsive and effective remedies, and valid claims can be eclipsed by theoretical policy concerns, the purpose of subsection 24(1) is weakened.

Instead of prioritizing the importance of constitutional rights protection, the SCC recognized several limitations on *Charter* damages claims in *Ward*. Two countervailing factors were identified and the Court implied that more would develop as the jurisprudence matured.²¹⁸ The good governance factor was broadly defined and it is not clear how serious a threat to effective governance must be to trigger the creation of a further state immunity. The Court also did not specify the fault threshold that would apply to a limited immunity involving *Charter* damages claims. The Court determined that the fault threshold would likely vary depending on the situation, leaving the matter to be decided by future trial courts.²¹⁹

The Court’s focus on compensation as the principal objective of *Charter* damages can also be viewed as a limitation. There will be cases where claimants experienced a constitutional violation, yet they are unable to provide clear evidence of personal loss. In *Ward*, the Court did not uphold the \$100 damages award for the car seizure because Ward did not suffer loss resulting from the section 8 *Charter* breach.²²⁰

²¹¹ *Ibid* at para 51.

²¹² *Ibid* at para 53.

²¹³ *Ibid*.

²¹⁴ Jason Varuhas, *Damages and Human Rights* (Portland, Oregon: Hart Publishing, 2016) at 418.

²¹⁵ *Ibid* at 419.

²¹⁶ See *Doucet-Boudreau SCC*, *supra* note 72 at para 25, Iacobucci and Arbour JJ.

²¹⁷ Varuhas, *supra* note 214 at 420.

²¹⁸ *Ward*, *supra* note 4 at para 33.

²¹⁹ *Ibid* at para 43.

²²⁰ *Ibid* at para 77.

The Court could have upheld the \$100 award under the heads of vindication or deterrence (which do not require evidence of personal loss), but it chose not to do so. Although vindication and deterrence were identified by the Court as important goals, they were described as “play[ing] supporting roles”²²¹ in most cases. The subordination of vindication and deterrence – the objectives that help make *Charter* damages distinct from private law damages – ensured that compensation and corrective justice remained the dominant purpose of the remedy.

Further, the Court’s preoccupation with quantifying a *Charter* damages award that is fair to both parties could be used as a rationale to keep awards low and dilute the strength of the remedy. The concern with fairness and interest-balancing is rooted in *Doucet-Boudreau*. The Court also observed that fairness is a concern in private law, so it ought to have a corresponding place in the *Ward* framework.²²² Fairness should not be the prevailing concern at the quantification stage, particularly for an award that is premised on vindication or deterrence. The idea of equalizing violator and victim in the constitutional context is inappropriate, especially in situations where the breach is egregious or wilful. The state is the defendant in a *Charter* damages claim, not a private citizen. A court is also responsible for upholding the Constitution in a *Charter* damages claim, not settling a private dispute.²²³

Limiting the quantum of *Charter* damages awarded to remedy a troubling constitutional breach risks tempering the severity of the violative conduct and minimizing the importance of the *Charter* right at issue. Although a court must not be unduly harsh, it should not feel hindered from making a large, impactful award in appropriate circumstances – especially for the purpose of vindication and/or deterrence. A court ought to consider fairness as a relevant concern, but fairness should not justify paltry damages awards where claimants experienced significant violations of core rights or where state action needs to be strongly deterred.

In *Ward*, the Court examined how constitutional damages awards are quantified in other jurisdictions, noting a general trend of caution.²²⁴ The Court was clear that large damages awards may be inappropriate because of their potential to deter beneficial government action and divert public funds to private individuals.²²⁵ Although large damages awards should not become the norm to remedy all *Charter* violations, lower courts should not be discouraged from awarding sizeable sums where appropriate. This

²²¹ *Ibid* at para 47.

²²² *Ibid* at para 53.

²²³ See Pilkington, “Damages as a Remedy”, *supra* note 58 at 536.

²²⁴ *Ward*, *supra* note 4 at para 54.

²²⁵ *Ibid* at para 53.

kind of language from Canada's highest court did not encourage judges to make substantial awards to defend *Charter* guarantees. To understand *Ward's* impact, it is helpful to canvass the academic discussion that followed the release of the decision. I review scholarly opinions in the next section and summarize relevant post-*Ward* judgments in the final section of this chapter to illustrate continuing problems with the framework and how it is being applied.

Academic Responses to Ward

The *Ward* decision revived academic interest in the *Charter* damages remedy. Some scholars were cautiously optimistic that the decision could usher in a new era of rights protection. Responding directly to Mullan's piece sixteen years earlier, Roach maintained that *Ward* was a promising step forward for *Charter* damages because the SCC provided a coherent framework to guide adjudication of these claims and move away from courts having "unfettered remedial discretion."²²⁶ The Court's focus on three distinct (but imprecise) remedial goals – compensation, vindication, and deterrence – established "a foundation for continued interpretation and debate".²²⁷

Justice Allen Linden put forward a more skeptical argument, suggesting that *Ward* was unlikely to trigger any kind of revolution in *Charter* damages jurisprudence.²²⁸ In his view, *Charter* damages would be used in rare cases, but the remedy could become more significant if small damages awards were increased.²²⁹ Like Cooper-Stephenson, Justice Linden preferred that the remedy be classified as a constitutional tort (language the Court did not adopt in *Ward*), arguing that private law should be "allowed to help in the evolution of this new jurisprudence."²³⁰ Robert Charney and Josh Hunter²³¹ also emphasized the importance of private law guiding the *Charter* damages remedy. The authors, both government counsel, argued that *Ward* "did not stray very far from basic tort law principles."²³² Charney and Hunter maintained that the level of harm required to trigger liability in tort law should not be ignored in the *Charter* context. They stressed that the SCC's comments in *Ward* indicated that some level of fault would still have to be proven to justify a *Charter* damages award.²³³

²²⁶ Roach, "A Promising Late Spring", *supra* note 13 at 137.

²²⁷ *Ibid* at 144.

²²⁸ Linden, *supra* note 13 at 428.

²²⁹ *Ibid* at 439.

²³⁰ *Ibid* at 430.

²³¹ Robert E. Charney & Josh Hunter, "Tort Lite? – *Vancouver (City) v. Ward* and the Availability of Damages for Charter Infringements" (2011) 54 SCLR (2d) 393.

²³² *Ibid* at 395.

²³³ *Ibid*.

Concerns about the impact of judicial deference in the remedial context emerged in the post-*Ward* literature. Writing just as the *Ward* judgment was released, Gerald Chan expressed his unease about the quantum of damages ordered (\$5,000) to remedy a significant and humiliating *Charter* breach.²³⁴ He noted that this small sum was unlikely to (a) encourage anyone to pursue a *Charter* damages claim; or (b) deter egregious state behaviour.²³⁵ Chan argued that three previous SCC decisions involving subsection 24(1)²³⁶ (one of which was *Khadr SCC 2010*) reflected a departure from the broad interpretation of subsection 24(1) encouraged in previous cases.²³⁷ Chan maintained that these judgments represented a shift in the Court's priorities.²³⁸ In his view, the Court seemed to focus more on minimizing the effect of a remedy on the state rather than providing meaningful redress to promote vindication of the *Charter*.²³⁹ Although he did not provide a detailed discussion of *Ward* or *Charter* damages, Chan's outlook for the subsection 24(1) remedy as a whole was not terribly optimistic.

Michael Plaxton and Carissima Mathen²⁴⁰ echoed some of Chan's concerns about deference in the remedial sphere. The authors argued that cases decided by the SCC in 2009-2010 showed that subsection 24(1) can be "easily circumscribed by legislation, Crown prerogative, and institutional function."²⁴¹ Plaxton and Mathen focused their critique of *Ward* on issues arising from the Court's comments on deterrence. Although the SCC cautioned against awarding remedies that could jeopardize the state's ability to govern, Plaxton and Mathen argued that this reticence could actually reinforce "institutionalized negligence".²⁴² Further, the authors noted the Court's discouragement of large damages awards "except in cases where they perform a primarily *compensatory* function."²⁴³ This principle, they argued, hinders claimants from seeking *Charter* damages based on deterrence unless they are also seeking significant compensation.²⁴⁴

In 2015, Lawrence David examined the relationship between deference and resource allocation in the McLachlin Court.²⁴⁵ He argued that, in crafting *Charter* remedies, the Court was influenced by "the

²³⁴ Gerald Chan, "Remedial Minimalism under Section 24(1) of the Charter: Bjelland, Khadr, and Nasogaluak" (2010) 51 SCLR (2d) 349 at 379.

²³⁵ *Ibid.*

²³⁶ The cases discussed by Chan included *R v Bjelland*, 2009 SCC 38, [2009] 2 SCR 651, *Khadr SCC 2010*, *supra* note 25, and *R v Nasogaluak*, 2010 SCC 6, [2010] 1 SCR 206.

²³⁷ Chan, *supra* note 234 at 349.

²³⁸ *Ibid* at 354.

²³⁹ *Ibid.*

²⁴⁰ Michael Plaxton and Carissima Mathen, "Developments in Constitutional Law: The 2009-2010 Term" (2010) 52 SCLR (2d) 65.

²⁴¹ *Ibid* at 163.

²⁴² *Ibid* at 158-59.

²⁴³ *Ibid* at 160.

²⁴⁴ *Ibid.*

²⁴⁵ David, *supra* note 57.

potential fiscal impact of an adverse judicial decision”²⁴⁶ and recognition of the boundaries of its institutional role.²⁴⁷ David analyzed the *Ward* framework, noting that the countervailing factors stage of the analysis showed that “judicial deference remain[ed] a controlling judicial norm.”²⁴⁸ He concluded that deference will be a powerful factor affecting a court’s discretion when a claimant seeks a large damages award.²⁴⁹ This is due to the careful balancing that must occur when a court attempts to fashion an appropriate remedy that necessarily involves payment of public funds.²⁵⁰ The deference built in to the *Ward* framework was, however, not a problem for David. He argued that “Although deference colours the Court’s receptivity to positive Charter claims and influences the crafting of remedies, it will never extend to insulating fiscal considerations from judicial scrutiny.”²⁵¹

The SCC revisited *Charter* damages in two cases since *Ward*: *Henry v British Columbia (Attorney General)*,²⁵² (“*Henry SCC*”) and *Ernst v Alberta Energy Regulator*²⁵³ (“*Ernst*”). *Henry SCC* involved a plea for *Charter* damages to remedy a wrongful conviction which stemmed from prosecutorial misconduct. *Ernst* raised the issue of whether a regulatory board could rely on a statutory immunity clause to bar a *Charter* damages claim resulting from an alleged violation of freedom of expression. The SCC was divided in both cases, sparking criticism that the majority opinions unnecessarily deviated from the *Ward* framework. Specifically, commentators took issue with the high degree of fault being imposed in *Henry SCC* and the premature dismissal of the claim in *Ernst*.²⁵⁴

In *Henry SCC*, the claimant sought *Charter* damages from the British Columbia Crown for misconduct resulting from a failure to disclose. Henry was convicted of ten sexual offences, declared a dangerous offender, and wrongly imprisoned for nearly twenty-seven years. Lower courts disagreed on the applicable fault threshold for this type of claim. Although the SCC majority²⁵⁵ acknowledged that malice

²⁴⁶ *Ibid* at 39.

²⁴⁷ *Ibid*.

²⁴⁸ *Ibid* at 60.

²⁴⁹ *Ibid*.

²⁵⁰ *Ibid*.

²⁵¹ *Ibid* at 62.

²⁵² 2015 SCC 24, [2015] 2 SCR 214 [*Henry SCC*].

²⁵³ *Supra* note 90.

²⁵⁴ See for example Brooke MacKenzie, “Backpedalling on Charter Damages: *Henry v British Columbia (Attorney General)*” (2016) 45 *Advoc Q* 359, Lorne Sossin, “Damaging The Charter: *Ernst v. Alberta Energy Regulator*” (20 January 2017), online: *TheCourt.ca* <<http://www.thecourt.ca/damaging-charter-ernst-v-alberta/>> [Sossin, “Damaging the Charter”], Kent Roach, “Developments in *Charter* Damages” (Paper delivered at the 16th Annual Charter Conference, Toronto, 2 October 2017), and Adourian, *supra* note 56.

²⁵⁵ Justice Moldaver wrote the majority opinion in *Henry SCC*, while Chief Justice McLachlin (as she then was) and Justice Karakatsanis wrote a concurring opinion. The concurring justices disagreed with the majority’s conclusion that a fault requirement needed to be imposed.

was an excessive standard, the fault threshold deemed appropriate was also a high bar:

...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.²⁵⁶

The Court was concerned that a low standard could trigger an influx of inconsequential disclosure-based claims, overburdening prosecutors.²⁵⁷ Adourian described the *Henry SCC* test “as requiring a *Charter* infringement plus intentional action, reasonable foreseeability, as well as causation and harm.”²⁵⁸ Henry met this onerous standard in *Henry BCSC*, however, receiving over \$8 million in *Charter* damages.²⁵⁹

In *Ernst*, decided two years after *Henry SCC*, the Court was called on to assess the constitutionality of an immunity clause in the Alberta Energy Regulator’s enabling statute, which lower courts treated as a complete bar to Ernst’s *Charter* damages claim. Ernst argued that her right to freedom of expression under subsection 2(b) of the *Charter* was breached due to the Regulator’s punitive actions. She alleged that the Regulator restricted her ability to make complaints regarding oil and gas development and prevented her from participating in its investigations. This was due to her vocal past criticism of the Regulator’s actions.²⁶⁰

A plurality²⁶¹ of five SCC judges dismissed Ernst’s appeal while four judges dissented. The majority opinion found that countervailing factors outweighed what would have been a functionally just *Charter* damages award. The majority determined that judicial review was a more effective alternative remedy for Ernst’s claim²⁶² and that *Charter* damages could chill the Regulator’s decision-making and

²⁵⁶ *Henry SCC*, *supra* note 252 at para 31, Moldaver J.

²⁵⁷ *Ibid* at para 70, Moldaver J.

²⁵⁸ Adourian, *supra* note 56 at 50.

²⁵⁹ Regrettably, this award was reduced by the trial judge in a subsequent decision. The province of British Columbia applied for an order providing that Henry’s settlements with other defendants (the City of Vancouver and the Attorney General of Canada) be deducted from what the province was ordered to pay. This order was granted and over \$5 million was deducted from Henry’s award based on the rule against double recovery. See *Henry v British Columbia (Attorney General)*, 2016 BCSC 2082, 2016 BCSC 2082 (CanLII), *aff’d* 2017 BCCA 420, 2017 BCCA 420 (CanLII), leave to appeal to SCC refused, 37940 (25 October 2018).

²⁶⁰ *Ernst*, *supra* note 90 at para 144.

²⁶¹ Justice Cromwell wrote what would become the plurality decision in *Ernst* and Chief Justice McLachlin (as she then was), Justice Brown, and Justice Moldaver wrote a dissenting opinion. Justice Abella released a concurring opinion where she agreed that Ernst’s *Charter* damages claim should be struck, but she reasoned that the constitutionality of the immunity clause could not be properly assessed given that Ernst had not challenged it in prior proceedings and a full evidentiary record was not available.

²⁶² *Ernst*, *supra* note 90 at para 37, Cromwell J.

divert its attention from its quasi-judicial regulatory function.²⁶³ The constitutionality of the immunity clause was not reviewed because of the majority's sweeping finding that *Charter* damages could never be a proper remedy awarded against a regulatory body exercising some adjudicative functions.²⁶⁴

Henry SCC and *Ernst* complicated the *Charter* damages analysis and the precedents could affect how the remedy is used in future cases.²⁶⁵ Roach commented that *Henry SCC* and *Ernst* showed a troubling judicial willingness to "allow contextual good governance concerns...to shape the requirements for *Charter* damages."²⁶⁶ The good governance concerns raised by the majorities in both decisions were largely speculative; the minority opinions did not agree that the concerns posed serious threats to the proper functioning of government. The dissenting opinion in *Ernst* cautioned that "courts must consider good governance concerns in a manner that remains protective of *Charter* rights, since the "appropriate and just" analysis under s. 24(1) is designed to redress the *Charter* breach."²⁶⁷

Despite the considerable merit of the claims brought by Henry and Ernst, the majority opinions imposed barriers to future *Charter* damages claims against Crown prosecutors and certain regulatory boards. Although these types of claims are unrelated to the Khadr case, it is important to recognize that a majority of the SCC embraced a more restrictive interpretation of the evolving *Charter* damages remedy in the Court's two post-*Ward* decisions. *Henry SCC* and *Ernst* showed how theoretical good governance concerns can limit or bar valid claims.

There is also renewed concern that the Court borrowed too much from private law principles in *Henry SCC* and *Ernst* and diluted what it described as the remedy's distinct purpose in *Ward*.²⁶⁸ Adourian argued that *Henry SCC* distorted *Ward's* interest-balancing framework by imposing a fault requirement on the claimant at the preliminary stage of the inquiry.²⁶⁹ Lorne Sossin observed that the majority opinion in *Ernst* likened *Charter* damages claims to civil claims for private law damages, which were prevented by the immunity clause.²⁷⁰ By denying a claimant the very opportunity to present arguments, *Ernst*

²⁶³ The *Ernst* majority reasoned that *Charter* damages could "distract [the Regulator] from its statutory duties, potentially have a chilling effect on its decision-making, compromise its impartiality, and open up new and undesirable modes of collateral attack on its decisions." See *ibid* at para 55, Cromwell J.

²⁶⁴ *Ibid* at para 24, Cromwell J.

²⁶⁵ See Adourian, *supra* note 56 at 79: "The combined effect of *Henry* and *Ernst* is that over-generalized private law tort doctrines can be routinely used to defeat *Charter* damages claims contrary to *Ward*."

²⁶⁶ Roach, *Constitutional Remedies in Canada*, *supra* note 17 at para 11.641.

²⁶⁷ *Ernst*, *supra* note 90 at para 169.

²⁶⁸ See Adourian, *supra* note 56 at 5.

²⁶⁹ *Ibid* at 79.

²⁷⁰ Sossin, "Damaging the Charter", *supra* note 254.

“misconstrue[d] the place of *Charter* damages in the context of Canada’s Constitutional architecture”.²⁷¹

The empirical analysis undertaken by Charles showed that *Ward* has not encouraged greater judicial reliance on the *Charter* damages remedy. Although Charles found that there have been more *Charter* damages cases being heard per year after *Ward*, he observed a declining success rate.²⁷² This was due to a variety of factors such as failure to prove a *Charter* breach, not suing the proper party, persuasive countervailing factors, and the failure to meet a high standard of fault.²⁷³ Even with the declining success rate, however, Charles noted a modest increase in the average quantum of *Charter* damages awarded.²⁷⁴ Gabriella Jamieson commented that *Ward* “is likely, but not certainly, on a narrowing trajectory.”²⁷⁵

Relevant Trends in the Post-Ward Jurisprudence

To conclude this chapter, it is helpful to briefly review some of the most significant judgments released after *Ward* to illustrate continuing problems. Although there have been victories for certain claimants where large damages awards were ordered (notably in recent class action proceedings),²⁷⁶ there are examples where substantial damages awards were overturned by appellate courts.²⁷⁷ In most cases, courts have exhibited a generally cautious approach toward *Charter* damages.

I discuss three observations I noted while surveying post-*Ward* case law, all of which are relevant

²⁷¹ *Ibid.*

²⁷² Charles, *supra* note 14 at 102-3.

²⁷³ *Ibid* at 103-4.

²⁷⁴ *Ibid* at 126. The average quantum rose from \$8,633 (from 1984-2010) to \$12,500 (from 2010-2014).

²⁷⁵ Gabriella Jamieson, “Using Section 24(1) *Charter* Damages to Remedy Racial Discrimination in the Criminal Justice System” (2017) 22 *Appeal* 71 at 96.

²⁷⁶ See *supra* note 16.

²⁷⁷ In *British Columbia Teachers’ Federation v British Columbia*, 2014 BCSC 121, 2014 BCSC 121 (CanLII), rev’d 2015 BCCA 184, 384 DLR (4th) 385, aff’d in part 2016 SCC 49, [2016] 2 SCR 407, the trial judge declared legislation related to collective agreements in the education sector unconstitutional and awarded \$2 million in damages to the Federation. The appeal was allowed by a majority of the British Columbia Court of Appeal. Justice Donald dissented, though he would have allowed the appeal with respect to the damages award based on the province’s attempts to mitigate the effects of the unconstitutional legislation. Without providing reasons, the SCC majority relied on the dissenting opinion of Justice Donald to allow the appeal in part. Justices Côté and Brown dissented. In *Ogiamien v Ontario (Ministry of Community Safety and Correctional Services)*, 2016 ONSC 3080, 132 OR (3d) 376, rev’d 2017 ONCA 667, 416 DLR (4th) 124, two inmates were awarded \$25,000 and \$60,000, respectively, relating to harm suffered from prison lockdown procedures which violated section 12 of the *Charter* (which protects against cruel and unusual treatment). The award was overturned by the Ontario Court of Appeal because the Attorneys General were not given proper notice of the damages claim. This amounted to a denial of procedural fairness. In *Conseil scolaire francophone de la Colombie-Britannique v British Columbia (Education)*, 2016 BCSC 1764, 2016 BCSC 1764 (CanLII), rev’d in part 2018 BCCA 305, 425 DLR (4th) 230, leave to appeal to SCC granted 38332 (11 April 2019), British Columbia was ordered to pay \$6 million in transportation costs to the French language school board resulting from a breach of minority language rights in section 23 of the *Charter*. The award was overturned by the British Columbia Court of Appeal because of the trial judge’s failure to properly apply *Mackin*. The appeal was heard by the SCC on September 26, 2019 with judgment reserved.

to the analysis of the Khadr civil claim. First, there is a disconnect between the gravity of the *Charter* breach and the quantum of damages awarded in some cases. This is problematic because small awards arguably do not promote the objectives laid out in *Ward*, especially vindication and deterrence. Second, issues relating to fault still plague the developing remedy. The application of fault requirements outside the *Mackin* context typically occur, however, in cases involving police. Finally, the existence of a concurrent tort claim has the potential to bar or unduly limit the *Charter* damages claim. Some progressive cases appreciate the distinction between private and public law damages, awarding both types of damages to accomplish different functions. Other decisions rely solely on private law damages to resolve a claim despite the existence of serious *Charter* breaches.

(i) *Disconnect Between the Gravity of the Charter Breach and the Quantum of Damages*

There are several post-*Ward* cases where courts found significant *Charter* breaches, yet small sums were awarded. These cases show that fears about the relatively low \$5,000 damages award in *Ward* becoming a precedent were justified. It is difficult to comprehend how an inconsequential sum can compensate, vindicate, or deter serious breaches of constitutional rights. To truly promote these objectives and shape future cases, courts must depart from some existing *Charter* damages precedents.

The influence of the \$5,000 *Charter* damages award in *Ward* was obvious in *Lamka v Waterloo Regional Police Services Board*²⁷⁸ (“*Lamka*”). The plaintiff sought \$25,000 in damages based on an allegedly wrongful arrest. The Court found the arrest lawful, but the overnight detention of Lamka and the strip search to which she was subjected breached sections 7, 8, and 9 of the *Charter*.²⁷⁹ The Small Claims Court found that the violations “easily passe[d] the minimum threshold of seriousness to make an award of civil damages”.²⁸⁰ Citing the \$5,000 damages award in *Ward* (which also concerned a strip search), the Court found no reason to increase the quantum in Lamka’s case.²⁸¹ Roach noted that this case, which “involved more egregious and pervasive Charter violations”²⁸² than *Ward*, was “troubling because it suggest[ed] that the \$5,000 award in *Ward* may be emerging as a starting point if not a cap on Charter damages”.²⁸³

In *Mason v Turner*,²⁸⁴ the British Columbia Supreme Court found a significant breach of subsection

²⁷⁸ 2012 CanLII 98291, 2012 CarswellOnt 14587 (WLNext Can) (Ont Small Cl Ct) [*Lamka* cited to WLNext Can].

²⁷⁹ *Ibid* at paras 84-86.

²⁸⁰ *Ibid* at para 88.

²⁸¹ *Ibid* at para 89.

²⁸² Roach, *Constitutional Remedies in Canada*, *supra* note 17 at para 11.721.

²⁸³ *Ibid*.

²⁸⁴ 2014 BCSC 211, 2014 BCSC 211 (CanLII) [*Mason*].

10(b) of the *Charter*, which protects an accused's right to counsel. Mason brought an action for damages based on allegations that she was unlawfully detained, unlawfully searched, and assaulted by police. Mason's boyfriend was stopped by police for a traffic violation which subsequently shifted to a drug investigation once the detaining officer smelled marijuana. The officer informed all three passengers (one of whom was Mason) that they would be searched. The officer failed to inform the three passengers of their right to counsel in subsection 10(b) when the nature of the detention changed.²⁸⁵

The Court in *Mason* found that this inexplicable failure on the part of the detaining officer was significant.²⁸⁶ Despite this conclusion, the Court awarded \$500 in vindication and deterrence-based *Charter* damages because there was no evidence of personal loss.²⁸⁷ Ms. Mason's various tort claims (which included assault, false arrest, negligence, and false imprisonment) were unsuccessful.²⁸⁸ Even though the Court awarded *Charter* damages to Mason (and did not rely on mere declaratory relief), the \$500 quantum was exceedingly low for a serious breach of a fundamental *Charter* right. The Court did not appreciate that the impact of the breach on Mason may have been profound, even though she was unable to show evidence of specific loss. Further, the Court identified the "need to deter police officers from effectively ignoring s. 10(b) of the *Charter*"²⁸⁹ as justification for a damages award. \$500 was not a proper response to such a compelling rationale. Mason appealed the decision, arguing that a more appropriate damages figure would have been in the \$25,000 range.²⁹⁰ She was unable to identify a specific error committed by the trial judge, so the order was upheld.

A more recent example of the disconnect between the severity of a *Charter* breach and the quantum of damages is *Russell v British Columbia (Public Safety and Solicitor General)*.²⁹¹ Russell was charged with four offences and he spent the night in jail. Due to his aggressive behaviour, Russell was prevented from speaking with a lawyer until immediately before his bail hearing the following day. The British Columbia Supreme Court found that the thirteen hour delay in speaking to counsel breached subsection 10(b).²⁹² Despite the considerable length of time that elapsed to secure a fundamental right (that is to be implemented without delay), the Court ordered \$1,000 in vindication and deterrence-based *Charter* damages. The Court found that Russell had not suffered any personal loss and the officers did not act in

²⁸⁵ *Ibid* at para 110.

²⁸⁶ *Ibid* at para 113.

²⁸⁷ *Ibid* at paras 122-23.

²⁸⁸ *Ibid* at para 101.

²⁸⁹ *Ibid* at para 132.

²⁹⁰ *Mason v Turner*, 2016 BCCA 58 at para 1, 2016 BCCA 58 (CanLII).

²⁹¹ *Supra* note 15.

²⁹² *Ibid* at para 59.

bad faith, which weighed against a substantial damages award.²⁹³ This judgment re-emphasized that compensation and loss-based awards are still driving the *Charter* damages analysis. \$1,000 was deemed sufficient to vindicate and deter a decision made by law enforcement to ignore constitutional duties.²⁹⁴

(ii) *Continued Confusion Over Fault Requirements*

Although it is seemingly clear from *Ward* that fault is not required to award *Charter* damages (because the *Charter* breach is the legal wrong giving rise to the claim),²⁹⁵ there is still some confusion in the case law. This typically appears in cases involving claims against the police. *Charter* damages are often claimed together with the tort of malicious prosecution (which requires proof of malice), so it is probable that courts have been influenced by the high private law fault standard despite the distinction between tort and *Charter* claims.²⁹⁶

In *Forrest v Kirkland*,²⁹⁷ the Ontario Divisional Court upheld the trial judge's conclusion that bad faith was needed to justify a *Charter* damages award against an Ontario Provincial Police officer.²⁹⁸ The trial judgment was released prior to *Ward*. The appellant argued that *Ward* made the trial judge's conclusion on bad faith erroneous.²⁹⁹ The Divisional Court disagreed, noting that "Chief Justice McLachlin did not state [in *Ward*] that *mala fides* was not required to prove a breach of a *Charter* right."³⁰⁰ Even though the Court understood that constitutional damages claims are conceptually different from private law claims, it applied the same standard of fault in both areas.

A similar view of *Charter* damages was advanced in *Farley v Ottawa Police Services Board*,³⁰¹ ("Farley") which involved allegations of negligence and malicious prosecution against the police. The claimant also sought *Charter* damages relating to his being prosecuted twice for murder. He was ultimately acquitted after a lengthy period of incarceration. Ottawa Police Services moved for summary judgment, which was granted. The Ontario Superior Court found that the police had reasonable cause to suspect Farley,

²⁹³ *Ibid* at para 74.

²⁹⁴ *Ibid* at para 70.

²⁹⁵ See *Ward*, *supra* note 4 at para 23.

²⁹⁶ See Charles, *supra* note 14 at 105.

²⁹⁷ 2012 ONSC 429, 2012 ONSC 429 (CanLII) (Div Ct).

²⁹⁸ *Ibid* at para 51.

²⁹⁹ *Ibid*.

³⁰⁰ *Ibid*.

³⁰¹ 2016 ONSC 7817, 2016 ONSC 7817 (CanLII) [*Farley*], *aff'd* 2017 ONCA 689, 2017 ONCA 689 (CanLII), leave to appeal to SCC refused 37891 (28 June 2018).

so there was no breach of the *Charter*.³⁰² The Court commented that *Charter* damages were “an extraordinary remedy”³⁰³ not to be awarded without proof of fault. Bad faith was necessary for a successful malicious prosecution claim, so it was also needed for a successful *Charter* damages claim.³⁰⁴ The Court relied on *Ferri v Root*,³⁰⁵ a pre-*Ward* case, to justify its conclusion.

Certain cases have imposed a bad faith requirement in the context of highly discretionary decisions. These cases could be problematic for decisions made under Crown prerogative, which are considered highly discretionary. In *MacRae v Feeney*,³⁰⁶ (“*MacRae*”) the Alberta Court of Appeal reviewed the dismissal of MacRae’s *Charter* damages claim relating to a police investigation and arrest. Citing *Henry SCC*, MacRae argued that he did not have to prove the police acted in bad faith to claim *Charter* damages.³⁰⁷ The Court of Appeal found that *Henry SCC*’s comments about fault (specifically that malice was not the proper threshold) were “confined to claims of wrongful non-disclosure by prosecutors.”³⁰⁸ The Court cited *Henry SCC* for the proposition that the improper purpose standard of fault

is apt when the impugned conduct is a highly discretionary decision such as the decision to initiate or continue a prosecution, because discretionary decision-making can best be evaluated by reference to the decision-maker’s motives.³⁰⁹

MacRae’s case involved a discretionary decision whether to investigate or prosecute, so proof of bad faith or wilfulness was required to support the *Charter* damages claim.³¹⁰ The Court of Appeal upheld the trial judgment, also relying on *Ferri v Root* for support.

The *MacRae* case was followed in *Naqvi v Canada*³¹¹ (“*Naqvi*”). Naqvi (a Canadian citizen) claimed that her right to freedom of religion under subsection 2(a) of the *Charter* and her right to equality under section 15 were infringed by the decision of a visa officer. Naqvi’s application to sponsor her husband was refused based on questions about the validity of her marriage.³¹² She sought over a million dollars in *Charter* damages. The Federal Crown appealed the prothonotary’s decision not to strike Naqvi’s claim.

³⁰² The Court noted that the precise sections of the *Charter* that may have been breached were “not specified in the pleading but would presumably include the right not to be arbitrarily detained or imprisoned, not to be imprisoned unlawfully and the presumption of innocence.” See *Farley*, *supra* note 301 at para 38.

³⁰³ *Ibid* at para 37.

³⁰⁴ *Ibid* at para 39.

³⁰⁵ *Supra* note 161.

³⁰⁶ 2016 ABCA 343, 2016 ABCA 343 (CanLII) [*MacRae*], leave to appeal to SCC refused, 37378 (6 April 2017).

³⁰⁷ *Ibid* at para 8.

³⁰⁸ *Ibid* at para 11.

³⁰⁹ *Ibid* at para 12, citing *Henry SCC*, *supra* note 252 at para 59, Moldaver J.

³¹⁰ *MacRae*, *supra* note 306 at para 13.

³¹¹ 2017 FC 1092, 2017 FC 1092 (CanLII) [*Naqvi*].

³¹² *Ibid* at para 2.

The Federal Court determined that the visa officer's decision was highly discretionary, so Naqvi was required to show that the decision was made in bad faith or for an improper purpose.³¹³ Naqvi did not plead any facts to show this standard was met, so her claim was struck. Despite the Court's acknowledgement that the visa officer's decision was "poorly made",³¹⁴ it did not give rise to *Charter* damages absent proof of "an additional, wilful element of wrongdoing, such as bad faith or prejudice".³¹⁵ Roach noted that the *Naqvi* decision was a misunderstanding of *Ward's* rejection of *per se* liability for *Charter* damages.³¹⁶ In his view, although claimants are required to show that damages are functionally justified, this does not mean that proof of bad faith or malice is necessary.³¹⁷

(iii) *Concurrent Tort and Charter Damages Claims*

It is common for claimants to advance concurrent tort and *Charter* damages claims relating to the same set of facts. Although this is efficient and it should theoretically increase a claimant's chance of success, *Ward* allows the tort claim to eclipse the *Charter* damages claim in some situations due to the principle of double recovery. The Court in *Farley* commented that *Charter* damages could only be awarded "if *Charter* rights were violated and if damages and other remedies available at law are inadequate."³¹⁸ This language is rooted in *Ward*, where the SCC identified the existence of alternative remedies as a countervailing factor that could weigh against *Charter* damages.³¹⁹ If private law damages could properly address the relevant objectives, there would be no functional need for *Charter* damages.³²⁰ This reasoning has the potential to undermine the distinct purposes served by *Charter* damages beyond just compensation. It could also downgrade *Charter* damages to what Charney and Hunter referred to as "a consolation prize",³²¹ implying that tort damages are the preferred mode of redress for constitutional infringements.

Although the presence of a tort claim could jeopardize a claimant's entitlement to *Charter* damages, it is difficult to predict whether this will occur. There are examples in the post-*Ward* case law where *Charter* damages were not awarded because tort damages were deemed sufficient to dispose of the matter and meet the functional objectives outlined in *Ward*. In *Dixon v Hamilton (City) Police Services Board*,³²² private law damages were ordered to compensate a claimant who had been arrested for breaking and entering,

³¹³ *Ibid* at para 34.

³¹⁴ *Ibid* at para 41.

³¹⁵ *Ibid*.

³¹⁶ Roach, *Constitutional Remedies in Canada*, *supra* note 17 at para 11.671.

³¹⁷ *Ibid*.

³¹⁸ *Farley*, *supra* note 301 at para 38.

³¹⁹ See *Ward*, *supra* note 4 at para 34.

³²⁰ *Ibid*.

³²¹ Charney & Hunter, *supra* note 231 at 395.

³²² [2011] OJ No 3836 (QL) (Ont Sup Ct).

detained for three and a half days, and then subjected to restrictive bail conditions for nine months before charges were withdrawn. The claimant (who was African-American) did not match the description of the suspect (described as Caucasian) and he had a valid alibi. The Court ordered just over \$45,000 in private law damages for false imprisonment, false arrest, and negligent investigation. \$10,000 of that award was for punitive damages. Despite finding a breach of sections 7 and 9 of the *Charter*, the Court determined that it could not order *Charter* damages “when it is concurrent to the tort damages of the case.”³²³ The Court did not discuss whether *Charter* damages could accomplish different objectives.

Similarly, in *Price v Kelday*,³²⁴ just over \$40,000 in private law damages was awarded to remedy negligent investigation and false arrest. Despite finding a breach of section 9 of the *Charter*, additional *Charter* damages were not awarded because there was no bad faith or improper purpose on the part of police. In *Jeremiah v Hamilton-Wentworth Police Services Board*,³²⁵ nearly \$50,000 in private law damages was awarded to remedy violations of sections 8 and 9 of the *Charter* which amounted to an assault on the plaintiff. Despite the excessive force used by police, the Court determined that the conduct was not “malicious, high handed, or oppressive”³²⁶ which could justify a *Charter* damages award. In both of these examples, the courts seemed reticent to order *Charter* damages unless the conduct at issue rose to a certain level of blameworthiness.

There are other cases, however, which show courts are willing to award concurrent tort and *Charter* damages for different reasons, avoiding the duplication problem mentioned in *Ward*. In *Elmardy v Toronto Police Services Board*,³²⁷ the Ontario Divisional Court expanded the damages award made at trial³²⁸ based on evidence of racial profiling that triggered a violation of the claimant’s section 15 equality rights under the *Charter*. The Court ordered \$25,000 in punitive damages against a particular police officer and \$50,000 in vindication and deterrence-based *Charter* damages against the police board to remedy a pervasive social problem. The Court noted that the trial judge did not discuss the objectives of *Charter* damages outlined in *Ward*, which was problematic because “deterrence and vindication in the public law context are different from deterrence and vindication in the private law context.”³²⁹

³²³ *Ibid* at para 124.

³²⁴ 2017 ONSC 6494, 2017 ONSC 6494 (CanLII).

³²⁵ 2018 ONSC 5762, 2018 ONSC 5762 (CanLII).

³²⁶ *Ibid* at para 191.

³²⁷ *Supra* note 16.

³²⁸ The trial judge awarded \$5,000 in tort damages for battery and \$18,000 in punitive damages. The judge also granted declaratory relief under subsection 24(1) of the *Charter* and ordered \$4,000 in *Charter* damages for breaches of sections 8, 9, and 10 of the *Charter*.

³²⁹ *Elmardy*, *supra* note 16 at para 30.

In *Carr v Ottawa Police Services Board*,³³⁰ the Ontario Superior Court ordered nearly \$250,000 in private law damages to remedy false arrest, false imprisonment, negligent investigation, and excessive use of force by police. The Court acknowledged that these compensatory awards “put [Carr] in the same position she would have been had her *Charter* rights not been infringed.”³³¹ Despite this observation, the Court ordered \$7,500 in deterrence-based *Charter* damages for the breach of Carr’s section 7 right triggered by her being left naked in a holding cell for several hours.³³² This reflects a proper application of *Ward* and a shrewd understanding of the different remedial goals served by public law damages.

Similarly, in *Fong v British Columbia (Minister of Justice)*,³³³ the British Columbia Supreme Court granted both private law damages and *Charter* damages based on different objectives. \$2,000 in vindication-based *Charter* damages was awarded in addition to \$63,000 in compensatory private law damages. Although the Court’s *Charter* damages analysis was brief, it acknowledged the distinct purposes of both awards.³³⁴ Regrettably, Fong’s *Charter* damages award was later varied because the provincial Attorney General did not receive proper notice of the constitutional remedy being sought.³³⁵

CONCLUSION

The brief review of post-*Ward* cases in the preceding section showed that problems still plague the *Charter* damages remedy. Although *Ward* recognized the multifaceted nature of constitutional damages, the decision reinforced certain principles that can limit valid claims or reduce the quantum of damages. The broad countervailing factors analysis in the *Ward* framework gave the state considerable latitude to argue against a *Charter* damages award. The Court’s discouragement of large awards in the name of fairness also benefitted the state. Although it is important that governments not be overwhelmed by an influx of claims, it is imperative that individuals receive meaningful redress for the distinct type of harm that results from a constitutional breach. It is also crucial for the rule of law that the state be held liable when it commits such a violation. The current landscape within which the *Charter* damages remedy is developing casts doubt on whether deserving claimants will receive proper relief.

The Omar Khadr civil claim – which challenged decisions made under Crown prerogative – raises new issues for the *Ward* framework. Although the Government of Canada’s 2017 settlement with Khadr

³³⁰ 2017 ONSC 4331, 2017 ONSC 4331 (CanLII) [*Carr*].

³³¹ *Ibid* at para 245.

³³² *Ibid* at para 248.

³³³ 2019 BCSC 263, 2019 BCSC 263 (CanLII).

³³⁴ *Ibid* at para 438.

³³⁵ *Fong v British Columbia (Minister of Justice)*, 2019 BCSC 1003, 2019 BCSC 1003 (CanLII). On consent of the parties, the Court vacated the *Charter* damages award and added it to the private law non-pecuniary damages award.

has been discussed at length in the press,³³⁶ it has not been subject to comprehensive academic analysis. There is no scholarly examination of how the *Ward* framework would have been applied to Khadr's civil claim or how Crown prerogative would be dealt with at the countervailing factors stage of the inquiry. The reason for the lack of scholarship in this specific area, in my view, is because a claim for *Charter* damages resulting from an exercise of Crown prerogative has never been fully litigated.³³⁷ The research undertaken in the following chapters seeks to contribute to the growing body of *Charter* damages scholarship by examining issues with the *Ward* framework in a particularized – but fundamentally important – context.

In Chapters Four and Five, I explore potential roadblocks that *Ward* and the existing *Charter* damages case law could pose in the adjudication of Khadr's civil claim. I discuss both countervailing factors *Ward* identified: the existence of alternative remedies and concerns regarding good governance. The decisions at issue in the Khadr case were discretionary and they were made pursuant to the foreign affairs prerogative, so I examine whether good governance concerns would be strong enough to warrant creation of a new limited immunity. I also assess whether the *Charter* damages jurisprudence is evolved enough to accommodate and encourage a large, impactful damages award in Khadr's case. Relatively low awards, combined with the prioritization of compensatory damages, the influence of private law principles, and concerns about institutional competence, could hinder a robust *Charter* damages award even when strong functional justifications are present.

In the next chapter, I discuss the government's handling of the Khadr case and I review the judicial decisions which recognized violations of Khadr's *Charter* rights in more detail. I also examine the academic discussion surrounding the Khadr litigation, Crown prerogative, and the mostly critical response to *Khadr SCC 2010*. This is designed to provide greater background about the Khadr case, the influence of previous judicial findings, and the nature of Canada's involvement.

³³⁶ See, for example, Wherry, "3 Legal Minds", *supra* note 48.

³³⁷ The most similar case is *Aleksic v Canada (Attorney General)*, (2002), 215 DLR (4th) 720, 2002 CanLII 63926 (Div Ct), where the plaintiffs sought damages in tort and under the *Charter* relating to Canada's involvement in the NATO bombing of Yugoslavia in 1999. These foreign policy decisions fell under Crown prerogative. The state's motion to strike the claim was granted by the majority of the Divisional Court because the tort claims were non-justiciable and there was no *Charter* breach upon which to base an award of damages.

CHAPTER THREE: UNDERSTANDING THE KHADR LITIGATION

INTRODUCTION

Before applying the *Ward* framework to the Khadr civil claim, it is important to understand Omar Khadr's litigation history. Khadr waged a series of legal battles with the Government of Canada throughout his detention. Decisions on Khadr's claims were made by the Federal Court, Federal Court of Appeal, and Supreme Court of Canada. Some judgments were victories for the Khadr legal team while others were disappointments. Many of these opinions will continue to shape constitutional law jurisprudence for decades to come. The purpose of this chapter is twofold. First, I provide background about Canada's actions toward Khadr. Reviewing the decisions of successive Canadian governments provides greater clarity about the perceived level of fault or blameworthiness attributed to the state, which could be a factor in the third and fourth stages of the *Ward* analysis. Second, I discuss previous Khadr judgments to understand what courts already determined – and what they did not consider – in this controversial case.

I argue that previous decisions in the Khadr litigation would undoubtedly influence a court's analysis of whether *Charter* damages are appropriate and just in Khadr's civil claim. While the SCC recognized violations of Khadr's *Charter* rights in 2008 and 2010, state liability was carefully delineated. The Court adopted a highly deferential stance in the 2010 decision by ordering declaratory relief instead of repatriation. *Charter* damages were never considered by a court pronouncing on the Khadr case; the focus was on injunctive relief, disclosure, repatriation, or inmate classification. Consequently, no findings were made with respect to private law or public law damages that could prejudice Khadr's civil claim.

This chapter is divided into three parts. I begin by examining the Canadian government's response to Khadr's case up to his eventual repatriation in 2012. In Part II, I analyze the most impactful judicial decisions involving Khadr. Emphasis is given to the 2008 and 2010 SCC judgments. In Part III, I briefly review the academic literature that discussed the Khadr litigation, the influence of Crown prerogative, and judicial deference. In Part IV, I outline Khadr's civil claim and survey limited authorities that commented on the claim and the 2017 settlement.

PART I: CANADA'S RESPONSE TO KHADR'S DETENTION AND MISTREATMENT

Khadr was captured by US forces in Abu Ykhiel, Afghanistan in July 2002 for allegedly throwing a grenade that later killed Sgt. Christopher Speer. Khadr suffered serious injuries, having been "shot twice in the back and once through his left shoulder, struck with shrapnel in his left eye, and wounded in his left

thigh, knee, ankle and foot.”³³⁸ Khadr lost consciousness for a week after the battle and his wounds “were infected, swollen, and still seeping blood for months following his capture.”³³⁹ He was taken to Bagram Air Base in Afghanistan, where he spent the next few months. Khadr alleged he was tortured at Bagram on multiple occasions³⁴⁰ and interrogated “approximately forty-two times.”³⁴¹ He was transferred to Guantánamo in October 2002 at sixteen years of age and his mistreatment continued. Khadr spent more than three years at Guantánamo before being charged with an offence³⁴² and more than ten years before being transferred back to Canada. He was housed with adult inmates and denied access to counsel, consular assistance, educational opportunities, and contact with family.³⁴³ He was subjected to sleep deprivation, isolation and solitary confinement, intimidation, and the spectre of indefinite detention.³⁴⁴

Regrettably, Khadr is notorious for being the only Canadian prosecuted at Guantánamo,³⁴⁵ the first person prosecuted for war crimes by the US since the 1940s,³⁴⁶ and the last citizen of a Western democracy to remain at Guantánamo.³⁴⁷ The Canadian government’s actions were a domestic and international embarrassment, amounting to complicity in the violation of a minor’s human rights.

Initial Response of the Chrétien Government

When Khadr was transferred to Guantánamo in October 2002, Jean Chrétien was Prime Minister of Canada and he had taken a firm stance on Canada’s abstention from the US invasion of Iraq. This led to considerable tension between Canada and the US and the Khadr case presented a further aggravation.³⁴⁸ Chrétien previously intervened on behalf of Khadr’s father, Ahmed, relating to allegations that he participated in the 1995 Egyptian embassy bombing in Islamabad. During a visit to Pakistan in 1996, Chrétien sought assurances from Pakistani Prime Minister Benazir Bhutto that Ahmed Khadr receive fair treatment from Pakistani authorities. Ahmed Khadr was later released, but interest in his involvement with Osama Bin Laden grew in the late 1990s. Ahmed Khadr was eventually placed on a terror watch list in

³³⁸ Cynthia Banham, *Liberal Democracies and the Torture of Their Citizens* (Portland, Oregon: Hart Publishing, 2017) at 162.

³³⁹ Khadr Civil Claim, *supra* note 3 at para 17.

³⁴⁰ See *supra* note 1 for a summary of the abuse Khadr suffered at Bagram and Guantánamo.

³⁴¹ Khadr Civil Claim, *supra* note 3 at para 19.

³⁴² Shephard, *Guantanamo’s Child*, *supra* note 20 at 177.

³⁴³ Audrey Macklin, “Comment on Canada (Prime Minister) v. Khadr (2010)” (2010) 51 SCLR (2d) 295 at 296 [Macklin, “Comment on Khadr”].

³⁴⁴ Khadr Civil Claim, *supra* note 3 at para 25.

³⁴⁵ The other Canadian held at Guantánamo was Khadr’s brother, Abdurahman Khadr, who was released in 2003.

³⁴⁶ Shephard, *Guantanamo’s Child*, *supra* note 20 at 179.

³⁴⁷ See Rod Nickel, “Guantanamo’s last Western detainee returned to Canada”, *Reuters* (29 September 2012) online: <<https://uk.reuters.com/article/uk-guantanamo-khadr/guantanamos-last-western-detainee-returned-to-canada-idUKBRE88S09E20120929>>.

³⁴⁸ Shephard, *Guantanamo’s Child*, *supra* note 20 at 120.

2001³⁴⁹ and his “extensive involvement in sympathizing with al Qaeda and supporting terrorist activities, particularly by arranging financing, later became quite notoriously well known”.³⁵⁰ This was an embarrassment for Chrétien and it undeniably influenced his government’s position toward Omar Khadr.³⁵¹

Despite Chrétien’s history with the Khadr family, Shephard noted that the Canadian government tried to gain access to Khadr in early meetings with US officials.³⁵² The US was adamant, however, that access would only be granted for intelligence-gathering purposes; consular visits were prohibited at Guantánamo.³⁵³ The first visit did not take place until February 2003, six months after the first diplomatic note was sent by the Canadian government on August 30, 2002.³⁵⁴ This note “asked that a consular official be allowed to see Omar at Bagram, requested that Omar’s age be considered and that he not be transferred to Guantánamo”.³⁵⁵ In a second diplomatic note dated September 13, 2002, Canada again expressed concern over Khadr’s age and his potential transfer to Guantánamo.³⁵⁶ Foreign Affairs Minister Bill Graham emphasized Khadr’s youth status and Canada’s commitment to fight against the use of child soldiers in a press release.³⁵⁷ Shortly after this statement, however, an advisor from Foreign Affairs recommended that Canada “claw back”³⁵⁸ references to Khadr’s age.

Concerns about the processes used to detain prisoners at Guantánamo began shortly after the facility became operational in 2002. In April 2002, Amnesty International sent a memorandum to the US government discussing the legality of its practices at Guantánamo.³⁵⁹ Amnesty International outlined its concerns that the US had detained prisoners in conditions that did not meet minimum standards of international law, denied prisoners legal counsel and basic due process guarantees, and subjected them to

³⁴⁹ Smith, “Man Helped by Chrétien”, *supra* note 18.

³⁵⁰ Alex Neve, “The View from Guantanamo Bay – Reflections on Omar Khadr’s Journey Through Military Injustice” (2010) University of Ottawa Centre for International Policy Studies Working Paper, online: <https://www.cips-cepi.ca/wp-content/uploads/2011/01/CIPS_WP_Neve_November2010.pdf> at 4.

³⁵¹ See *ibid* and Khan, *supra* note 18 at 54.

³⁵² Shephard, *Guantanamo’s Child*, *supra* note 20 at 120.

³⁵³ *Ibid*.

³⁵⁴ *Ibid* at 116.

³⁵⁵ *Ibid*.

³⁵⁶ Associated Press, “Letter shows Canada asked U.S. not to send Khadr to Guantanamo”, *CBC News* (17 April 2008), online: <<https://www.cbc.ca/news/world/letter-shows-canada-asked-u-s-not-to-send-khadr-to-guantanamo-1.774047>>.

³⁵⁷ Michelle Shephard, “Ottawa played down Khadr concerns”, *Toronto Star* (20 August 2007), online: <https://www.thestar.com/news/world/2007/08/20/ottawa_played_down_khadr_concerns.html>.

³⁵⁸ See *ibid* and Gar Pardy, “The Saga of Omar Khadr” in Janice Williamson, ed, *Omar Khadr, Oh Canada* (Montreal & Kingston: McGill-Queen’s University Press, 2012) at 82.

³⁵⁹ Amnesty International, *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay* (April 2002), AI Index: AMR 51/053/2002, online: <<https://www.amnesty.org/download/Documents/116000/amr510532002en.pdf>>.

the possibility of indefinite detention.³⁶⁰ In its 2003 annual report based on events that occurred in 2002, Human Rights Watch reaffirmed its position that the US was holding Guantánamo detainees “in legal limbo”³⁶¹ and it had failed to comply with the *Geneva Conventions*.³⁶² The prison was inspected by the Red Cross in 2004 and a leaked report contained findings that the policies used at Guantánamo amounted to torture.³⁶³ Shephard described Canada’s position on Guantánamo at this point as one of “silent consent”³⁶⁴ amidst the growing number of nations who expressed criticism.

The CSIS and DFAIT Interviews

Despite the ongoing controversy surrounding Guantánamo, CSIS and DFAIT agents conducted interviews with Khadr in February and September 2003. A further interview was conducted by an official from DFAIT in March 2004. These interviews became the focal point of the constitutional litigation between Khadr and the Government of Canada. Before being granted access to Khadr, Canadian agencies had to agree to conditions imposed by the US. The most important restrictions were that interviews with Khadr would be videotaped and Canada had to provide copies of final reports.³⁶⁵

The February 2003 interview lasted for four days. The duration of the interviews ranged from one to four hours per day. Although he was initially receptive to questions from CSIS, Khadr’s demeanour changed on the second day. He told Canadian officials he had been tortured by the US and he asked for protection.³⁶⁶ Less is known about the September 2003 interview. Two CSIS agents asked Khadr further questions, but he was uncooperative. He again asked to return to Canada.³⁶⁷ The 2004 visit consisted of two hour and a half long interviews conducted by a DFAIT official over two days. Again, Khadr refused to answer questions unless he was brought back to Canada.³⁶⁸ A summary of the 2004 interview referenced Khadr being placed in the ‘frequent flyer program’ for three weeks leading up to the visit.³⁶⁹ The purpose

³⁶⁰ *Ibid* at 2-3.

³⁶¹ Human Rights Watch, *World Report 2003 – United States* (14 January 2003), online: <<https://www.hrw.org/legacy/wr2k3/us.html>>.

³⁶² *Ibid*.

³⁶³ Neil A. Lewis, “Red Cross Finds Detainee Abuse in Guantánamo”, *New York Times* (30 November 2004), online: <<https://www.nytimes.com/2004/11/30/politics/red-cross-finds-detainee-abuse-in-guantanamo.html>>.

³⁶⁴ Shephard, *Guantanamo’s Child*, *supra* note 20 at 184.

³⁶⁵ Security Intelligence Review Committee, *CSIS’s Role in the Matter of Omar Khadr* (SIRC STUDY 2008-5) (8 July 2009), File No 2800-143, online: <<http://www.sirc-csars.gc.ca/opbapb/2008-05/index-eng.html>> [*SIRC Report*].

³⁶⁶ Air Force Office of Special Investigations, “Report of Investigative Activity” (24 February 2003), Exhibit “AA”, Volume III of Joint Record in *Canada (Attorney General) v Khadr*, Supreme Court of Canada, File No 33289, accessed online at Khadr Case Resources Page, Bora Laskin Law Library: <https://www.law.utoronto.ca/documents/Mackin/JointRecord_III.pdf> at 289.

³⁶⁷ Shephard, *Guantanamo’s Child*, *supra* note 20 at 124.

³⁶⁸ *Ibid* at 125.

³⁶⁹ Department of Foreign Affairs and International Trade, “Umar Khadr: a meeting with” (20 April 2004), Exhibit “DD” in Volume III of Joint Record in *Canada (Attorney General) v Khadr*, Supreme Court of Canada, File No 33289,

of the sleep deprivation technique, which involved a transfer to a different cell every three hours, was “to make [Khadr] more amenable and willing to talk”.³⁷⁰ The DFAIT official who interviewed Khadr in 2004 noted that his behaviour was a product of repeated abuse by authority figures throughout his life.³⁷¹

In a 2008 affidavit, Khadr explained how his detention conditions deteriorated after the first interview with Canadians:

After the Canadians left and I told the Americans that my previous statements were untrue, life got much worse for me. They took away all of my things except for a mattress. I had no Koran and no blanket. They would shackle me during interrogations and leave me in harsh and painful positions for hours at a time. One navy interrogator would pull my hair and spit in my face.³⁷²

Khadr also discussed having his security designation altered following what is assumed to be the 2004 interview, which resulted in a month of isolation spent in a freezing cold room.³⁷³

In 2005, Jack Hooper (a high ranking CSIS official who helped coordinate the interviews) was questioned by Khadr’s lawyers. Khadr’s Canadian legal team sought an injunction to prevent further questioning of Khadr by Canadian officials. Hooper confirmed that the purpose of the CSIS visits was to gather intelligence to assist in Canadian terrorism investigations.³⁷⁴ When asked if CSIS sought assurances from the US about what might be done with statements provided by Khadr in the interviews, Hooper answered in the negative.³⁷⁵ Hooper was also asked whether Khadr was informed at the outset of the interview that it would be confidential, in line with CSIS policy. Hooper replied that he was unsure.³⁷⁶ Khadr’s lawyers inquired about whether Khadr was told (a) that his statements would be shared with US authorities; (b) what the reasons for his detention were; (c) about the possibility he could face the death penalty or life imprisonment; or (d) that he had a right to have counsel present. Hooper replied that he did

accessed online at Khadr Case Resources Page, Bora Laskin Law Library: <https://www.law.utoronto.ca/documents/Mackin/JointRecord_III.pdf> at 297.

³⁷⁰ *Ibid.*

³⁷¹ Shephard, *Guantanamo’s Child*, *supra* note 20 at 126.

³⁷² Affidavit of Omar Ahmed Khadr (sworn 30 July 2008), accessed online at Khadr Case Resources Page, Bora Laskin Law Library: <https://www.law.utoronto.ca/documents/Mackin/khadr_repat_AffidavitofOmarKhadr.PDF> at para 50.

³⁷³ *Ibid* at para 53.

³⁷⁴ Transcript of cross-examination on Affidavit of William Hooper (T-536-04) (sworn 18 February 2005, transcript dated 2 March 2005), Exhibit “GG” in Volume III of Joint Record in *Canada (Attorney General) v Khadr*, Supreme Court of Canada, File No 33289, accessed online at Khadr Case Resources Page, Bora Laskin Law Library: <https://www.law.utoronto.ca/documents/Mackin/JointRecord_III.pdf> at 310.

³⁷⁵ *Ibid* at 311.

³⁷⁶ *Ibid.*

not know.³⁷⁷ Khadr's lawyers successfully obtained the injunction barring further questioning of Khadr at Guantánamo,³⁷⁸ although welfare visits continued to take place.

Growing Pressure and Reports on Canadian Involvement in the Khadr Case

After three years of indefinite detention, Khadr was charged with murder, attempted murder, conspiracy, and aiding the enemy in November 2005.³⁷⁹ By 2006, it became impossible to ignore what was occurring at Guantánamo. Hunger strikes, a large-scale riot, and multiple suicides had taken place.³⁸⁰ If power had not transferred to Stephen Harper's Conservative Party in 2006, it is possible Khadr may have been repatriated before 2012. The passive stance of the Harper government was remarkably consistent over many years despite considerable advocacy efforts brought on Khadr's behalf.

As Khadr's case progressed, Canada did not express public concern about the military commission procedure,³⁸¹ which was deemed unconstitutional by the US Supreme Court.³⁸² The Canadian government obtained assurances from the US, however, that the death penalty would not be sought at Khadr's trial.³⁸³ When Khadr's case was dismissed³⁸⁴ at the beginning of his trial in June 2007, Foreign Affairs Minister Peter MacKay re-emphasized Canada's passive stance.³⁸⁵ When the Pentagon announced its intention to appeal the dismissal, MacKay focused on the need for the commission process "to run its course".³⁸⁶

Pressure on the Harper government increased in mid-2007. An open letter dated June 14, 2007 was sent to Prime Minister Harper calling for Khadr's repatriation to Canada and describing the military commission process as "fundamentally and irreparably flawed".³⁸⁷ The letter was signed by a long list of

³⁷⁷ *Ibid* at 315.

³⁷⁸ *Khadr FC 2005*, *supra* note 28.

³⁷⁹ Shephard, *Guantanamo's Child*, *supra* note 20 at 177.

³⁸⁰ *Ibid* at 193-94.

³⁸¹ The military commission procedure was widely criticized for failing to uphold basic standards of due process in order to secure convictions. Two particularly controversial elements of the military commission procedure were that prosecutors could introduce hearsay evidence and detainees had to be represented by military counsel. See Shephard, *Guantanamo's Child*, *supra* note 20 at 177-78.

³⁸² See Hamdan, *supra* note 30.

³⁸³ Shephard, *Guantanamo's Child*, *supra* note 20 at 178.

³⁸⁴ The case was dismissed at the arraignment stage on jurisdictional grounds. The judge determined that the military commission process was equipped to try "unlawful enemy combatants". Khadr had been designated an "enemy combatant". See Michelle Shephard, "Khadr charges dismissed", *Toronto Star* (4 June 2007), online: <https://www.thestar.com/news/2007/06/04/khadr_charges_dismissed.html>.

³⁸⁵ *Ibid* at 214.

³⁸⁶ Tim Harper & Michelle Shephard, "Ottawa unbending in Khadr case", *Toronto Star* (7 July 2007), online: <<https://www.pressreader.com/canada/toronto-star/20070707/284180806434717>>.

³⁸⁷ Open Letter to Prime Minister Stephen Harper (14 June 2007), accessed online at Khadr Case Resources Page, Bora Laskin Law Library: <https://www.law.utoronto.ca/documents/Mackin/Khadr_OpenLetter.pdf>.

government ministers, Members of Parliament, advocacy organizations, law professors, lawyers, and interested individuals. It closed by emphasizing that Canada lagged behind other Western nations who intervened to protect their citizens and demonstrate their sovereignty.³⁸⁸ The Canadian Bar Association (“CBA”) also sent a letter to Prime Minister Harper on August 13, 2007 stressing Canada’s international treaty obligations with respect to child soldiers.³⁸⁹ The CBA insisted that Canada’s reliance on US assurances that due process was being provided to Khadr was insufficient.³⁹⁰

Even as concerns about the legitimacy of the allegations against Khadr emerged in early 2008,³⁹¹ the Harper government remained uninvolved. In February 2008, a coalition of Canadian political parties joined the advocacy effort to press for Khadr’s repatriation.³⁹² By April 2008, the House of Commons Subcommittee on International Human Rights began to hold public hearings on the Khadr case. The Subcommittee heard testimony from a number of witnesses, including Khadr’s military lawyers, the CBA, and advocacy groups. The Standing Committee on Foreign Affairs and International Development released a report containing its findings in June 2008 (“the Standing Committee report”).³⁹³ This was issued shortly after the SCC found that Canada’s refusal to disclose records of the Guantánamo interviews to Khadr amounted to a *Charter* breach.³⁹⁴

The Standing Committee report concluded that Khadr should have been treated as a child soldier entitled to protection.³⁹⁵ Although the military commission system under which Khadr was being tried was modified after being declared unconstitutional by the US Supreme Court, the Standing Committee report noted that there were “serious concerns...about the extent to which the revised process me[t] international legal and human rights standards.”³⁹⁶ The report recommended that Canada (a) demand Khadr’s military commission proceedings be terminated; (b) challenge the US’s continued ‘right’ to detain Khadr as an enemy combatant despite an acquittal or termination of proceedings against him; (c) demand that Khadr be

³⁸⁸ *Ibid.*

³⁸⁹ Letter from Canadian Bar Association to Prime Minister Stephen Harper (12 August 2007), online: <<https://www.cba.org/CMSPages/GetFile.aspx?guid=5a75b056-0a1e-4bf6-8f87-575c7e4fd74a>>.

³⁹⁰ *Ibid.*

³⁹¹ A classified document, inadvertently released, cast doubt on the military’s version of events that Khadr was the one who threw the grenade that killed Sgt. Speer. As a result of this development, Khadr’s military lawyer requested that the charges against Khadr be dropped. See CBC News, “New witness account”, *supra* note 21.

³⁹² Khan, *supra* note 18 at 60.

³⁹³ House of Commons, Standing Committee on Foreign Affairs and International Development, *Omar Khadr – Report of the Standing Committee on Foreign Affairs and International Development* (June 2008) (Chair: Kevin Sorenson), online: <<http://www.ourcommons.ca/Content/Committee/392/FAAE/Reports/RP3572352/faaerp07/faaerp07-e.pdf>>. [*Standing Committee Report*].

³⁹⁴ *Khadr SCC 2008*, *supra* note 32.

³⁹⁵ *Standing Committee Report*, *supra* note 393 at 4.

³⁹⁶ *Ibid* at 5.

released from Guantánamo; (d) honour its commitments under international law; and (e) prepare an “appropriate rehabilitation and reintegration program”³⁹⁷ for Khadr.³⁹⁸

The Standing Committee report also contained a dissenting opinion written by the governing Conservative Party. The dissent referred to the “one-dimensional approach”³⁹⁹ used by the subcommittee that reviewed Khadr’s case, which “upheld an interpretation of Mr. Khadr as a victim.”⁴⁰⁰ The government’s position is neatly summarized in the following excerpt:

Mr. Khadr could become a litmus test on Canada’s commitment to impeding global terrorism and the results of our actions today could result in consequences that are not in the long-term interest of the country.⁴⁰¹

The dissenting opinion referred to Canada’s supposed duty to assist Khadr as a strictly moral, rather than legal, obligation.⁴⁰² The government emphasized the possible risk posed by Khadr to Canadian national security and it stressed the importance of Canada’s international commitments to fight terrorism.⁴⁰³

In July 2008, video footage of the February 2003 interview with Khadr was made public by Khadr’s Canadian legal team. In the disturbing video, sixteen-year-old Khadr sobbed and begged for protection.⁴⁰⁴ Controversy erupted within and outside Canada, which triggered an investigation by the Security Intelligence Review Committee (“SIRC”)⁴⁰⁵ in September 2008. SIRC was tasked with reviewing the role played by CSIS in the Khadr matter.

In its July 2009 report, SIRC acknowledged the legitimate purpose of CSIS’s interviews with Khadr at Guantánamo to gather intelligence. SIRC ultimately concluded, however, that CSIS failed to appreciate two important factors in deciding to interview Khadr. The first was in relation to the controversy surrounding human rights abuses at Guantánamo. SIRC found that coverage of the abuses was widespread in February 2003, but there was no evidence to show CSIS considered this information in its decision-

³⁹⁷ *Ibid* at 7.

³⁹⁸ *Ibid* at 6-7.

³⁹⁹ *Ibid* at 15.

⁴⁰⁰ *Ibid*.

⁴⁰¹ *Ibid*.

⁴⁰² *Ibid*.

⁴⁰³ *Ibid* at 16-17.

⁴⁰⁴ CBC News, “‘You don’t care about me,’ Omar Khadr sobs in interview tapes”, *CBC News* (15 July 2008), online: <<https://www.cbc.ca/news/canada/you-don-t-care-about-me-omar-khadr-sobs-in-interview-tapes-1.709736>>.

⁴⁰⁵ Michelle Shephard, “CSIS failed in Khadr case, review finds”, *Toronto Star* (16 July 2009), online: <https://www.thestar.com/news/canada/2009/07/16/csis_failed_in_khadr_case_review_finds.html>.

making.⁴⁰⁶ The second factor was Khadr's age, which was also not taken into account.⁴⁰⁷ The report noted that Khadr had not received any advice or guidance prior to the CSIS interviews because "he had been kept incommunicado and been denied access to legal counsel, consular representation or family members."⁴⁰⁸ Although the report criticized aspects of CSIS's decision-making, it did not conclude that CSIS played a role in Khadr's mistreatment.⁴⁰⁹

Events Leading to Khadr's Repatriation

The SCC released its second decision on the Khadr matter in January 2010, declaring that the questioning of Khadr at Guantánamo and subsequent information sharing with the US violated his rights under section 7 of the *Charter*.⁴¹⁰ The SCC did not order the Harper government to request Khadr's repatriation; instead, the Court allowed the executive to determine how to remedy the breach.⁴¹¹ Days after the ruling was released, Foreign Affairs Minister Lawrence Cannon stated that the government's policy toward Khadr had not changed and repatriation would not be sought.⁴¹² In response to the SCC decision, the Harper government sent a diplomatic note to the US Embassy on February 16, 2010. The note sought

assurances that any evidence or statements shared with U.S. authorities as a result of the interviews with Mr. Khadr by Canadian agents and officials not be used against him by U.S. authorities in the context of proceedings before the Military Commission or elsewhere.⁴¹³

The US replied on April 27, 2010, stating that military commission prosecutors were governed by legislation "which provide[d] safeguards against the admission in military commission proceedings of evidence obtained through improper means."⁴¹⁴ No meaningful assurances were provided.

Khadr's lawyers applied for judicial review of the government's response to *Khadr SCC 2010*, seeking an order of *mandamus* to compel the Harper government to request Khadr's repatriation. The Federal Court's decision was released in July 2010. Justice Zinn found that the breach of Khadr's *Charter*

⁴⁰⁶ *SIRC Report*, *supra* note 365.

⁴⁰⁷ *Ibid.*

⁴⁰⁸ *Ibid.*

⁴⁰⁹ CBC News, "CSIS ignored Khadr's human rights: report", *CBC News* (15 July 2009), online: <<https://www.cbc.ca/news/canada/csis-ignored-khadr-s-human-rights-report-1.834555>>.

⁴¹⁰ *Khadr SCC 2010*, *supra* note 25 at para 2.

⁴¹¹ *Ibid.*

⁴¹² Kirk Makin, "Ignoring Supreme Court's Khadr ruling, Ottawa won't request repatriation", *The Globe and Mail* (3 February 2010), online: <<https://www.theglobeandmail.com/news/politics/ignoring-supreme-courts-khadr-ruling-ottawa-wont-request-repatriation/article1365051/>>.

⁴¹³ *Khadr v Canada (Prime Minister)*, 2010 FC 715 at Annex A, [2010] 4 FCR 36 [*Khadr FC 2010*].

⁴¹⁴ See *ibid* at Annex B.

rights had not been adequately remedied.⁴¹⁵ Canada was given seven days to inform Khadr of “all untried remedies that it maintain[ed] would potentially cure or ameliorate its breach of Mr. Khadr’s *Charter* rights”.⁴¹⁶ Justice Zinn also retained jurisdiction to supervise this process and impose a remedy if Canada failed to do so.⁴¹⁷ Canada sought a stay of enforcement of Justice Zinn’s order pending appeal. The Federal Court of Appeal granted the stay, finding that Justice Zinn’s order was a potential “affront to the division of powers”.⁴¹⁸ By the time the appeal was heard, it was declared moot because of Khadr’s guilty plea.⁴¹⁹

Khadr’s military commission trial began on August 12, 2010 and was set to resume on October 25, 2010. Khadr accepted a pre-trial agreement on October 13, 2010.⁴²⁰ Diplomatic notes were exchanged between Canada and the US on October 23, 2010 with respect to the deal. The agreement provided that Khadr could be transferred to Canada after serving one year in US detention.⁴²¹ The initial note from the US State Department to Canada indicated that the US would support his transfer to Canada to serve the remainder of his sentence or a lesser sentence determined by Canadian law.⁴²² Canada responded that the Harper government would “favourably consider Mr. Khadr’s application to be transferred to Canada”⁴²³ if such a transfer were approved by the US.

The plea agreement imposed an eight year maximum sentence with the possibility of transfer after one year.⁴²⁴ In early November 2010, Foreign Affairs Minister Lawrence Cannon indicated that Canada would implement the terms of the agreement.⁴²⁵ Khadr’s completed transfer application was sent to Public Safety Minister Vic Toews in April 2012, but Toews requested footage of psychiatric assessments done on Khadr before the transfer could be approved.⁴²⁶ The footage was released by the Pentagon in September 2012 and Khadr – the last Western detainee still remaining at Guantánamo – returned to Canada on

⁴¹⁵ *Ibid* at para 89.

⁴¹⁶ *Ibid* at 35.

⁴¹⁷ *Ibid* at 36.

⁴¹⁸ *Khadr v Canada (Prime Minister)*, 2010 FCA 199 at para 19, [2012] 1 FCR 396 [*Khadr FCA 2010*].

⁴¹⁹ *Khadr v Canada (Prime Minister)*, 2011 FCA 92 at para 1, 333 DLR (4th) 303.

⁴²⁰ *Khadr Civil Claim*, *supra* note 3 at para 44.

⁴²¹ United States Department of State, “Memorandum for Michael L. Bruhn, Executive Secretary, Department of Defense” (Washington: 24 October 2010), accessed online at *Khadr Case Resources Page*, Bora Laskin Law Library: <https://www.law.utoronto.ca/documents/Mackin/Khadr_Diplomatic_Notes.pdf> at 2.

⁴²² *Ibid* at 3.

⁴²³ *Ibid* at 6.

⁴²⁴ CBC News, “Canada to ‘implement’ Khadr plea deal”, *CBC News* (1 November 2010), online: <<https://www.cbc.ca/news/politics/canada-to-implement-khadr-plea-deal-1.902213>>.

⁴²⁵ *Ibid*.

⁴²⁶ Steven Chase, “Ottawa throws wrench in Khadr repatriation”, *The Globe and Mail* (20 July 2012), online: <<https://www.theglobeandmail.com/news/politics/ottawa-throws-wrench-in-khadr-repatriation/article4430435/>>.

September 29, 2012.⁴²⁷ Although Toews agreed to the transfer, he emphasized that Khadr pleaded guilty to war crimes and was an al Qaeda supporter.⁴²⁸

Canada seemed willfully blind to the abuses occurring at Guantánamo, the conditions of detention, and how its actions exacerbated Khadr's extreme vulnerability. Evaluating Canada's level of blameworthiness is relevant to the *Charter* damages analysis. The presence of bad faith or egregious conduct can impact the *Ward* analysis in two ways. First, it is relevant to the assessment of whether a limited immunity is applicable. If the state attempts to rely on an immunity defence to bar or limit *Charter* damages, the claimant will need to show the state was at fault. *Ward* emphasized that the applicable fault standard will vary depending on the situation.⁴²⁹ Second, fault can be used to help justify an award based on vindication or deterrence, or to increase the quantum.⁴³⁰

The Canadian government would likely argue that it never intended to harm Khadr and its strategy was to avoid interfering in an American judicial process. Khadr was being detained by the US, so there were limits to the assistance Canadians could provide. The US prevented Canadian officials from having consular visits with Khadr. Canada sent diplomatic notes asking that Khadr not be sent to Guantánamo, which were ignored. Canada also sought repeated assurances from the US that Khadr was being treated fairly. Even though these assurances may have had little meaning, they were requested. Finally, Canada secured a commitment from the US that it would not seek the death penalty for Khadr. Although these actions reflect a minimal level of consular assistance, the government did take some steps to help Khadr.

These efforts were completely overshadowed, however, by conduct that demonstrated Canada's indifference toward Khadr's human rights and its obligations under domestic and international law. Canada initiated interviews with Khadr on three occasions, allowed the interviews to be videotaped, and shared intelligence with the US. Canadian officials were aware of Khadr's age and the conditions of his detention. When Khadr was repatriated in 2012, Canada "dutifully respect[ed] and enforce[d] a sentence obtained with the help of unconstitutionally obtained evidence."⁴³¹

⁴²⁷ CBC News, "Omar Khadr returns to Canada", *CBC News* (29 September 2012), online: <<https://www.cbc.ca/news/canada/omar-khadr-returns-to-canada-1.937754>>.

⁴²⁸ Michelle Shephard, "Omar Khadr repatriated to Canada", *Toronto Star* (29 September 2012), online: <https://www.thestar.com/news/2012/09/29/omar_khadr_repatriated_to_canada.html>.

⁴²⁹ *Ward*, *supra* note 4 at para 43.

⁴³⁰ See *Elmardy*, *supra* note 16 and *Carr*, *supra* note 330.

⁴³¹ Andrew Stobo Sniderman, "The Melancholy Truth: Corrective and Equitable Justice for Omar Khadr" (2014) 23 Dal J Leg Stud 172 at 183.

The most glaring events that could give rise to a finding of bad faith were (a) the decision to conduct the 2004 interview with Khadr despite knowledge that he was tortured beforehand; (b) the lack of meaningful action taken by the Harper government to address a clear breach of Khadr's rights after *Khadr SCC 2010* was released;⁴³² (c) the delay in implementing the transfer outlined in Khadr's plea deal; and (d) the decision to hold Khadr in maximum security facilities in Canada, which resulted in his further exposure to solitary confinement. It is reasonable to conclude that Canada knew or ought to have known that these actions were likely to cause harm to Khadr. These issues will be explored further in Chapter Four.

In the next section, I review the most relevant judicial decisions involving Khadr. It is important to understand how the *Charter* breaches in these judgments were framed. In 2008 and 2010, the SCC never criticized the government's policy of non-intervention in Khadr's case. Instead, the *Charter* violations stemmed from the 2003 and 2004 Guantánamo interviews. Further, the Court did not comment on a potential duty to protect Khadr in 2010 even though the Federal Court made this finding⁴³³ and it was given significant attention in the parties' facts.⁴³⁴ Finally, the issue of Canadian complicity in Khadr's abuse was never directly addressed.

PART II: KHADR'S LITIGATION HISTORY IN CANADIAN COURTS

2005-2008: Disclosure and Injunction Victories

The first substantive victories for the Khadr legal team came in 2005. A request for disclosure of information from the minister of foreign affairs was granted⁴³⁵ and an injunction prohibiting further interrogation of Khadr by Canadian officials was ordered.⁴³⁶ In the latter case, Khadr's lawyers argued that his rights under section 7 of the *Charter* had been breached by the conduct of CSIS and DFAIT officials – specifically by their failure to advise Khadr of his right to silence and right to access counsel. Although the Court did not make any findings with respect to the *Charter* (this issue was to be addressed at trial), it granted an interlocutory injunction to prevent further information sharing and thereby reduce the possibility of Khadr being convicted in US proceedings based on unconstitutionally obtained evidence.⁴³⁷

⁴³² *Ibid* at 185: “The Supreme Court’s deferential declaration was also ill-suited to a situation in which the executive had demonstrated *bad faith* by failing to take steps to ensure an effective remedy.”

⁴³³ See *Khadr FC 2009*, *supra* note 38 at para 64.

⁴³⁴ The facts submitted by the parties to the SCC in *Khadr SCC 2010* can be found at <<https://www.scc-csc.ca/case-dossier/info/af-ma-eng.aspx?cas=33289>>.

⁴³⁵ *Khadr (Next Friend of) v Canada (Minister of Foreign Affairs)*, 2005 FC 135 at para 18, 249 DLR (4th) 515. The minister of foreign affairs was ordered to produce relevant material that formed part of the record upon which the minister's alleged decision to refuse consular services was based. This material included information about Khadr's detention and information that was used to brief the minister about consular visits, conditions of detention, requirements of due legal process, and legal protections.

⁴³⁶ See *Khadr FC 2005*, *supra* note 28.

⁴³⁷ *Ibid* at para 44.

After Khadr was formally charged in November 2005, his lawyers demanded disclosure of everything in the Crown's possession that related to the charges.⁴³⁸ The Canadian government refused the demand, so Khadr's lawyers brought an application for judicial review of the decision not to disclose. In 2006, the Federal Court denied the request for an order of *mandamus* to compel disclosure and Khadr's judicial review application was dismissed.⁴³⁹ The Federal Court of Appeal allowed the appeal in 2007.⁴⁴⁰ The Court found that the *Charter* was engaged because Canadian agents who interviewed Khadr and shared information with the US "assisted U.S. authorities in conducting the investigation against [Khadr] and in preparing a case against him."⁴⁴¹ The Crown was ordered to produce all material in its possession and the Federal Court was instructed to determine which documents needed to be disclosed to Khadr under section 7 of the *Charter*.⁴⁴²

The Federal Court of Appeal decision was affirmed by the Supreme Court of Canada in 2008⁴⁴³ ("*Khadr SCC 2008*"). This was the first time the Khadr matter reached Canada's highest court. The SCC determined that the *Charter* applied where Canadian agents "participat[ed] in a process that was violative of Canada's binding obligations under international law".⁴⁴⁴ The Court afforded considerable weight to US Supreme Court decisions concerning the legality of detention procedures at Guantánamo.⁴⁴⁵ The findings of the US Supreme Court were sufficient to establish that, at the time CSIS conducted its interviews of Khadr in 2003, detention and trial procedure at Guantánamo was "a clear violation of fundamental human rights protected by international law."⁴⁴⁶ Canada's refusal to disclose anything to Khadr following the charges brought against him breached section 7 of the *Charter*.⁴⁴⁷ The appropriate remedy was for the Crown to disclose interview records and information obtained from those interviews that was shared with the US.⁴⁴⁸

⁴³⁸ See *Khadr v Canada (Minister of Justice)*, 2006 FC 509 at para 3, 2006 FC 509 (CanLII). Some of this material had been previously disclosed to Khadr through access to information requests, though it contained significant deletions and redactions. The 2005 disclosure request being reviewed was extensive, seeking "copies of all materials in the possession of all departments of the Crown in Right of Canada which might be relevant to the charges raised against Mr. Khadr in accordance with the requirements of *R. v. Stinchcombe*, [1991] 3 S.C.R. 326". This request also sought access to the heavily redacted content. Khadr's lawyers argued that the disclosure requirement applied even though Khadr was being prosecuted by a foreign government.

⁴³⁹ *Ibid* at para 22.

⁴⁴⁰ *Khadr v Canada (Minister of Justice)*, 2007 FCA 182, 280 DLR (4th) 469.

⁴⁴¹ *Ibid* at para 34.

⁴⁴² *Ibid* at para 42.

⁴⁴³ *Khadr SCC 2008*, *supra* note 32.

⁴⁴⁴ *Ibid* at para 19.

⁴⁴⁵ See *Rasul v Bush*, 542 US 466, 124 S Ct 2686 (USSC) (2004) and *Hamdan*, *supra* note 30. In *Rasul*, the Court determined that Guantánamo detainees could challenge their detention through *habeas corpus* petitions.

⁴⁴⁶ *Khadr SCC 2008*, *supra* note 32 at para 24.

⁴⁴⁷ *Ibid* at para 33.

⁴⁴⁸ *Ibid* at para 37.

Khadr SCC 2008 was the first time a Canadian court found that Khadr's *Charter* rights had been violated by the actions of Canadian officials. The SCC did not find, however, that the circumstances of Khadr's questioning or the subsequent sharing of information with the US triggered the *Charter* breach. Canada's participation in an illegal regime engaged the *Charter* and the government's refusal to disclose breached section 7, so the Court's remedy was confined to correcting that constitutional violation. The true issue in the Khadr litigation – the extent of Canadian involvement in Khadr's mistreatment and continued detention – was not directly addressed. Further, a court had never considered the appropriate relief to which Khadr may have been entitled beyond an injunction or disclosure order. The SCC was given a second chance to review the Khadr matter in 2010 and order a more impactful remedy.

The Path to Khadr SCC 2010

Khadr's legal team brought an application for judicial review of the Canadian government's decision not to request Khadr's repatriation from Guantánamo. A crucial piece of information had come to light through Canada's disclosure: Canadian agents knew that seventeen-year-old Khadr was subjected to the 'frequent flyer' sleep deprivation program prior to the 2004 interview.⁴⁴⁹ Justice O'Reilly of the Federal Court found that the state's "knowing involvement in the mistreatment of Mr. Khadr [was] an even more compelling basis on which to find that the Charter applied to Canadian officials at Guantánamo Bay."⁴⁵⁰ After reviewing Canada's international treaty obligations,⁴⁵¹ Justice O'Reilly determined that the Canadian government had "a duty to protect persons in Mr. Khadr's circumstances as a principle of fundamental justice."⁴⁵² This duty was triggered by Khadr's unique circumstances "and the multiplicity of departures from international norms that [had] taken place."⁴⁵³

Justice O'Reilly determined that the appropriate remedy was an order directing the Canadian government to request Khadr's repatriation.⁴⁵⁴ The state could not demonstrate that this request would cause harm to Canada-US relations or to Canada's tough anti-terrorism stance.⁴⁵⁵ Justice O'Reilly concluded that a repatriation request was "at the lower end of [the] spectrum of diplomatic intervention and, therefore,

⁴⁴⁹ *Khadr FC 2009*, *supra* note 38 at para 11.

⁴⁵⁰ *Ibid* at para 52.

⁴⁵¹ The Court reviewed the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, [1987] Can TS No 36 (entered into force 26 June 1987) [CAT]; the *Convention on the Rights of the Child*, 20 November 1989, [1992] Can TS No 3 (entered into force 2 September 1990) [CRC]; and the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 25 May 2000, [2002] Can TS No 5 (entered into force 12 February 2002) [Optional Protocol].

⁴⁵² *Khadr FC 2009*, *supra* note 38 at para 71.

⁴⁵³ *Ibid* at para 74.

⁴⁵⁴ *Ibid* at para 92.

⁴⁵⁵ *Ibid* at paras 84, 86.

minimally intrusive on the Crown's prerogative in relation to foreign affairs."⁴⁵⁶ The federal government was ordered to send a request to the US seeking Khadr's repatriation as soon as possible.⁴⁵⁷

Justice O'Reilly's judgment was stayed pending Canada's appeal, which was dismissed by the Federal Court of Appeal.⁴⁵⁸ The appellate court outlined actions taken by the Canadian government with respect to Khadr, including welfare visits and diplomatic notes.⁴⁵⁹ The majority upheld Justice O'Reilly's judgment, emphasizing that decisions made under the foreign affairs prerogative were not exempt from constitutional scrutiny.⁴⁶⁰ Justice Nadon dissented, arguing that Justice O'Reilly's decision erred in two respects: first, that Canada had done little to protect Khadr; and second, that Khadr's repatriation was the suitable remedy.⁴⁶¹ In his view, Justice O'Reilly failed to give proper consideration to Canada's actions and "the extent to which Canada's ability to protect [Khadr] was limited."⁴⁶² Justice Nadon concluded that the lower court's decision to order the government to request Khadr's repatriation was "a direct interference into Canada's conduct of its foreign affairs."⁴⁶³ Justice Nadon would have allowed the appeal.

Canada appealed the Federal Court of Appeal decision and the matter was heard by the Supreme Court of Canada in November 2009. The decision, released in January 2010, was the culmination of over five years of litigation. The SCC had an opportunity to remedy wrongs done to Khadr by the Canadian government, yet it unanimously chose to adopt a highly deferential stance to avoid intruding on matters falling under Crown prerogative. Despite the important considerations at play and the unquestionable impact of the decision, the Court's comments were confined to just over ten pages.

The SCC reviewed evidence that had come to light regarding the value of information obtained from the CSIS and DFAIT interviews. The record before the Court implied that information extracted from the interviews "provided significant evidence in relation to [the] charges."⁴⁶⁴ Further, the "relaxed rules of

⁴⁵⁶ *Ibid* at para 89.

⁴⁵⁷ *Ibid* at para 92.

⁴⁵⁸ See *Khadr FCA 2009*, *supra* note 38.

⁴⁵⁹ The Federal Court of Appeal found that "Welfare visits occurred in March of 2005, December of 2005, July of 2006, June, August and November of 2007, and monthly from February to June of 2008." The Court also reviewed seven diplomatic notes sent by Canada to the US between June 2004 and April 2006. These notes sought assurances that Khadr would be entitled to a review of his detention, would not receive the death penalty, could receive an independent medical examination, and be granted access to his preferred counsel. Some notes expressed concern about Khadr's lack of access to legal representation and his allegations of abuse. See *Khadr FCA 2009*, *supra* note 38 at paras 22-24.

⁴⁶⁰ *Ibid* at para 58.

⁴⁶¹ *Ibid* at para 85, Nadon J.

⁴⁶² *Ibid* at para 95, Nadon J.

⁴⁶³ *Ibid* at para 106, Nadon J.

⁴⁶⁴ *Khadr SCC 2010*, *supra* note 25 at para 20.

evidence”⁴⁶⁵ in the Guantánamo military commission process could allow the admission of statements made by Khadr to Canadians as evidence at his trial.⁴⁶⁶ The Court found that the actions of Canadian agents at Guantánamo contributed to Khadr’s continuing detention, triggering a section 7 *Charter* breach.⁴⁶⁷ The violation was not in accordance with fundamental justice because Khadr was a youth at the time of the interviews, he was denied access to a lawyer, and Canadian officials knew that information arising from the interviews would be handed over to the US.⁴⁶⁸ The Court described the violation as ongoing because information extracted from Khadr during the interviews could still be used against him at trial.⁴⁶⁹

The first part of the SCC decision establishing the *Charter* breach was largely unobjectionable. A considerable shift occurred when the Court addressed whether Justice O’Reilly exceeded his discretion in ordering the Canadian government to request Khadr’s repatriation. Although the Court found the proposed repatriation remedy theoretically suitable, it refused to uphold Justice O’Reilly’s order. With minimal explanation, the Court deemed the order to *request* Khadr’s repatriation an unjustifiable intrusion into the realm of Crown prerogative.

The SCC emphasized that the ability of courts to review decisions made under a prerogative power is limited and courts must “remain sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions”.⁴⁷⁰ The Court found that Justice O’Reilly did not give proper weight to the executive’s complicated responsibility to make decisions relating to foreign affairs.⁴⁷¹ The SCC noted three concerns associated with the remedy of repatriation:

Mr. Khadr is not under the control of the Canadian government; the likelihood that the proposed remedy will be effective is unclear; and the impact on Canadian foreign relations of a repatriation request cannot be properly assessed by the Court.⁴⁷²

The Court determined that the appropriate remedy was a declaration under subsection 24(1) of the *Charter* that Khadr’s constitutional rights had been violated. The declaration was proper given “the limitations of the Court’s institutional competence, and the need to respect the prerogative powers of the executive.”⁴⁷³

⁴⁶⁵ *Ibid.*

⁴⁶⁶ *Ibid.*

⁴⁶⁷ *Ibid* at para 21.

⁴⁶⁸ *Ibid* at para 25.

⁴⁶⁹ *Ibid* at para 30.

⁴⁷⁰ *Ibid* at para 37.

⁴⁷¹ *Ibid* at para 39.

⁴⁷² *Ibid* at para 43.

⁴⁷³ *Ibid* at para 46.

Even though damages were not considered in *Khadr SCC 2010*, the remedial deference exhibited by the SCC could affect a court's analysis of a *Charter* damages claim based on the same set of underlying facts. *Khadr SCC 2010* protected executive discretion in prerogative decision-making. The follow-up litigation that arose in response to the Harper government's inaction was worrisome. Despite the Federal Court's finding that Khadr's *Charter* rights were not properly remedied after *Khadr SCC 2010*, its progressive order requiring the government to develop strategies to cure the breach was overturned by the Federal Court of Appeal. The appellate court's intervention was based on the SCC's comments about inappropriate interference with Crown prerogative.

It is helpful to briefly canvass the academic response to *Khadr SCC 2010* to further appreciate how the judgment could influence a court hearing Khadr's civil claim. Understanding the forces that motivated and constrained the SCC in 2010 helps illuminate the significance of the decision for Khadr's *Charter* damages claim. Scholarly opinions are reviewed in the next section.

PART III: REFLECTIONS ON THE KHADR LITIGATION

The Lack of Meaningful Remedy

One of the most powerful critiques of *Khadr SCC 2010* was that it failed to provide a meaningful remedy for a profound constitutional breach. Scholars described the decision as “appallingly weak”,⁴⁷⁴ “disappointing”,⁴⁷⁵ and inadequate.⁴⁷⁶ Audrey Macklin argued that the SCC “preserve[d] the veneer of the rule of law, with none of the content.”⁴⁷⁷ The Court had an opportunity to emphasize the importance of *Charter* rights and the urgency of Khadr's circumstances. Khadr's legal team sought his repatriation because it was the only option to prevent him from being convicted of war crimes based on unconstitutionally obtained evidence.

Repatriation was the only meaningful remedy available to the Court in 2010. The SCC's decision not to order the government to request Khadr's repatriation – and the Harper government's cavalier attitude toward the Court's declaration that Khadr's rights had been violated – provide support for Khadr's *Charter* damages claim. Khadr could argue that the *Charter* breaches in his case were never properly remedied, which helps establish functional justification for damages.

⁴⁷⁴ Amir Attaran & Jon Khan, “Solving the “Khadr Problem”: Retention of Jurisdiction - A Comparative Analysis” (2015) 34 NJCL 145 at 146.

⁴⁷⁵ Chan, *supra* note 234 at 363.

⁴⁷⁶ See Lorna McGregor, “Are Declaratory Orders Appropriate for Continuing Human Rights Violations - The Case of *Khadr v Canada*” (2010) 10:3 Hum Rts L Rev 487 at 490.

⁴⁷⁷ Macklin, “Comment on Khadr”, *supra* note 343 at 299.

The Parameters of the Charter Breach and Causation

In 2010, the SCC found that the continued possibility of US reliance on Canadian intelligence gleaned from the 2003 and 2004 interviews represented an ongoing *Charter* breach.⁴⁷⁸ The specific actions that triggered the violation were quite narrow. The Court did not find that the Harper government's non-interventionist stance was a cause of the continuing rights deprivation or a contributing factor. Roach noted that, if the US had given Canada assurances that it would not use Canadian information at Khadr's trial, "Such a statement might have broken the causal link between the 2003 and 2004 interviews and Khadr's detention and the ongoing effects of Canada's violations".⁴⁷⁹

Although the Court found that Canada played a role in Khadr's ordeal, it did not conclude that Canada was a principal violator of Khadr's rights. Macklin observed that the 2010 SCC decision treated "the United States as the sole violator of [Khadr's] right to liberty and security of the person"⁴⁸⁰ and questioned the extent to which Canadian officials "were causally connected to the perpetuation of those rights deprivations".⁴⁸¹ The Court found that the section 7 breach stemmed from decisions to interview and share information. Canada's passive stance towards Khadr's prosecution was not criticized. The Court also avoided labelling Khadr's abuse as torture and applicable international law was not discussed.⁴⁸²

On one hand, the SCC's reluctance to impose greater liability on the Canadian government for Khadr's plight (and its focus on the US as the direct cause of Khadr's deprivation) could pose problems during the application of *Ward*. Even if Khadr were able to make compelling arguments in support of a large *Charter* damages award, it is conceivable that a court might find a large award inappropriate given the scope of the SCC's previous findings. On the other hand, the narrow framing of the *Charter* breaches gives a subsequent court latitude to expand the state's liability. *Khadr SCC 2008* and *Khadr SCC 2010* both addressed the consequences of the 2003 and 2004 Guantánamo interviews. Neither decision analyzed nor attempted to remedy years of implicit condonation of human rights abuses by the Canadian government. Khadr could argue that Canada's unwavering stance of non-intervention, its failure to meaningfully respond to *Khadr SCC 2010*, its delay in processing Khadr's transfer back to Canada, and its decision to house him in maximum security prisons aggravated the deprivation he experienced.⁴⁸³ If this argument were

⁴⁷⁸ *Khadr SCC 2010*, *supra* note 25 at para 30.

⁴⁷⁹ Kent Roach, "The Supreme Court at the Bar of Politics": The Afghan Detainee and Omar Khadr Cases" (2010) 28 NJCL 115 at 143 [Roach, "Bar of Politics"].

⁴⁸⁰ Macklin, "Comment on Khadr", *supra* note 343 at 304-05.

⁴⁸¹ *Ibid.*

⁴⁸² See Gib Van Ert, "Torture and the Supreme Court of Canada" (2014) 65 UNBLJ 21 at 34-35.

⁴⁸³ The idea of the state aggravating harm inflicted by a third party was addressed in *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 88-89, [2013] 3 SCR 1101 [*Bedford*].

successful, it could result in additional *Charter* breaches being found.

The Court's Institutional Role and the Influence of Crown Prerogative

Some commentators noted that the SCC was keen to avoid a looming constitutional crisis in *Khadr SCC 2010*. The Court could have ignited conflict if it ordered the federal government to request Khadr's repatriation and that order was not obeyed.⁴⁸⁴ Writing before the case was heard by the SCC, Errol Mendes argued that the Court would be called on to "demarcate...the limits of executive power in an area that, before the advent of the *Charter* in Canada, was substantially beyond the power of the courts to supervise."⁴⁸⁵ Mendes believed the 2010 judgment would make a strong statement about whether *Charter* rights should be protected in situations where it was not politically expedient to do so.⁴⁸⁶

David Rangaviz observed that, although the SCC decision avoided conflict, it eroded the Court's apparent power and legitimacy.⁴⁸⁷ Macklin commented that *Khadr SCC 2010* "expose[d] the dual character of the Supreme Court of Canada as a forum of principle and as an actor in institutional politics."⁴⁸⁸ Roach noted that "The Court appeared to have fundamental concerns about its remedial competence in the foreign affairs context."⁴⁸⁹ The profound effect of the Court's statements on Crown prerogative and the limits of its institutional role are captured by Roach's remarks:

These statements raise the disturbing possibility that the Court has concluded that some judicial remedies that dictate the exercise of foreign affairs prerogative powers are permanently out of bounds. Such a conclusion would mean that follow-up litigation would likely not be effective because the Court would again face limits on its remedial powers and could only again make declarations about the violation.⁴⁹⁰

This scenario is exactly what occurred. Although Justice Zinn of the Federal Court attempted to supervise the Harper government's progress toward implementing a meaningful remedy after the 2010 SCC decision, his judgment was stayed by the Federal Court of Appeal on the grounds that it could be perceived as a threat to the separation of powers.⁴⁹¹ Roach noted in a later article that the Federal Court of Appeal

⁴⁸⁴ See Emmett Macfarlane, "Failing to Walk the Rights Talk? Post-9/11 Security Policy and the Supreme Court of Canada" (2012) 16:2 Rev Const Stud 159 at 176 and David Rangaviz, "Dangerous Deference: The Supreme Court of Canada in *Canada v. Khadr*" (2011) 46 Harv CR-CLL Rev 253 at 265.

⁴⁸⁵ Errol P. Mendes, "Dismantling the Clash Between the Prerogative Power to Conduct Foreign Affairs and the *Charter* in *Prime Minister of Canada et al v. Omar Khadr*" (2009) 26:1 NJCL 67 at 82-83.

⁴⁸⁶ *Ibid* at 83.

⁴⁸⁷ Rangaviz, *supra* note 484 at 267.

⁴⁸⁸ Macklin, "Comment on Khadr", *supra* note 343 at 329.

⁴⁸⁹ Roach, "Bar of Politics", *supra* note 479 at 147-8.

⁴⁹⁰ *Ibid* at 148.

⁴⁹¹ *Khadr FCA 2010*, *supra* note 418 at para 19.

decision “suggest[ed] that the [Supreme] Court has reintroduced a reflexive deference to the state”⁴⁹² and “compromise[d] traditional visions of rights protection”.⁴⁹³ Efforts to promote a meaningful remedy in response to *Khadr SCC 2010* were stymied by the decision itself.

The Impact of the Court’s Deferential Posture

Some scholars voiced concerns about the implications of the Court’s deferential stance in *Khadr SCC 2010*. Roach argued that the decision could have endorsed “a partial political questions doctrine...which may render courts powerless to order remedies that affect the prerogative powers of government to make diplomatic representations.”⁴⁹⁴ In simple terms, a political question is best addressed by a branch of government other than the judiciary because of the question’s politically sensitive nature. This doctrine is an American creation that implores the judiciary to respect institutional boundaries and leave political decision-making to the proper branch of government.⁴⁹⁵ Roach noted that this doctrine was rejected by the SCC in *Operation Dismantle Inc. v R*,⁴⁹⁶ (“*Operation Dismantle*”) where the Court determined that “decisions of the federal cabinet are reviewable by the courts under the *Charter*”.⁴⁹⁷ Roach discussed the impactful concurring opinion of Justice Wilson in *Operation Dismantle*, which emphasized that the Court’s function “was not to second guess government policy, but to determine whether it violated the *Charter* and to provide appropriate and just remedies”.⁴⁹⁸

Emmett Macfarlane asserted that *Khadr SCC 2010* was an example of deference based on “institutional logic that privilege[d] executive prerogative powers in a manner that [was] wholly inconsistent with the Court’s overall approach to the *Charter*.”⁴⁹⁹ Macfarlane did not argue that deferential decisions were improper, so long as they were based on sound interpretations of appropriate institutional divisions.⁵⁰⁰ In *Khadr SCC 2010*, however, the Court adopted an extremely deferential approach where it had the institutional latitude to order a more impactful remedy. This, in Macfarlane’s view, amounted to a “sizable stain on the Court’s record in balancing rights and security concerns”.⁵⁰¹

⁴⁹² Kent Roach, “Section 7 of the *Charter* and National Security: Rights Protection and Proportionality versus Deference and Status” (2011) 42:3 Ottawa L Rev 337 at 349-50.

⁴⁹³ *Ibid* at 350.

⁴⁹⁴ *Ibid* at 366.

⁴⁹⁵ See *Operation Dismantle*, *supra* note 41 at 467, Wilson J.

⁴⁹⁶ Roach, “Bar of Politics”, *supra* note 479 at 121.

⁴⁹⁷ *Operation Dismantle*, *supra* note 41 at 447-48, Dickson J.

⁴⁹⁸ Roach, “Bar of Politics”, *supra* note 479 at 121.

⁴⁹⁹ Macfarlane, *supra* note 484 at 173.

⁵⁰⁰ *Ibid* at 178-79.

⁵⁰¹ *Ibid* at 178.

The SCC's deference to the executive in 2010 could influence a court's analysis of whether *Charter* damages are appropriate for Omar Khadr. Although the Court reviewed the actions of the executive for compliance with the *Charter*, it exhibited considerable apprehensiveness with respect to remedy. Crown prerogative could become an influential countervailing factor under the good governance umbrella of *Ward*. As shown in Chapter Two, good governance is broadly defined and it is subject to continued interpretation. Ordering a substantial *Charter* damages award for decisions made under the foreign affairs prerogative could be seen as chilling government discretion in a sensitive area, which *Ward* sought to prevent.

Ordering a large damages award could also be viewed as a court challenging its institutional competence and disturbing traditional divisions of power. I argue in Chapter Four, however, that an impactful *Charter* damages award in Khadr's case would reaffirm fundamental principles about state accountability expressed in *Operation Dismantle*. This kind of groundbreaking decision would acknowledge the judiciary's responsibility to provide meaningful redress for breaches of the *Charter* – even when those breaches arise in areas that have traditionally commanded deference. To set the stage for the application of the *Ward* framework to the Khadr civil claim in Chapters Four and Five, I review the claim and the 2017 settlement in the next section.

PART IV: THE CIVIL CLAIM AND SETTLEMENT

The allegations against the Government of Canada in Khadr's civil statement of claim are extensive. The claim was initiated in 2004 and last amended in 2014. Khadr sought \$20 million in compensatory, *Charter*, punitive, and aggravated damages. He claimed compensatory private law damages resulting from the torts of negligent investigation, conspiracy, and misfeasance of public office.⁵⁰² He also sought *Charter* damages and a declaration under subsection 24(1) relating to alleged violations of sections 7, 10(a), 10(b), and 12 of the *Charter*.⁵⁰³ Finally, Khadr claimed punitive and aggravated damages and an unspecified amount of special damages which would be particularized before trial.⁵⁰⁴

Khadr argued that the Canadian government was complicit in the abuses committed by the US.⁵⁰⁵ Rather than try to protect Khadr and acknowledge his youth status, Canada conspired with the US to set up intelligence-gathering interviews, gain information about Khadr, and “exploit[t] the circumstances of his imprisonment”.⁵⁰⁶ Providing information gleaned from these interviews to US officials was done to “ensure

⁵⁰² Khadr Civil Claim, *supra* note 3 at para 1(a).

⁵⁰³ *Ibid* at para 1(b).

⁵⁰⁴ *Ibid* at para 1(c) and (d).

⁵⁰⁵ *Ibid* at para 3.

⁵⁰⁶ *Ibid* at para 11.

Omar's ongoing and indefinite detention."⁵⁰⁷ The claim alleged that Canada deliberately placed Khadr in jeopardy by asking him about sensitive matters that could be used as evidence in a future criminal prosecution.⁵⁰⁸ This was made worse by Canada's failure to seek restrictions on how information provided to the US might be used.⁵⁰⁹

The claim referred to Khadr's guilty plea before the US military commission in 2010 as coerced and made under duress.⁵¹⁰ Khadr was faced with the prospect of further detention at Guantánamo or pleading guilty and potentially coming back to Canada. The claim discussed the Canadian government's inexplicable delay in implementing Khadr's transfer under the plea agreement.⁵¹¹ A list of US acts taken in furtherance of the alleged conspiracy, of which Canada was aware, was also provided. Some of these acts included denying Khadr access to counsel and contact with family, subjecting him to routine interrogations, indefinite detention, and torture, using inherently flawed legal procedure to prosecute him, and committing violations of the *Geneva Conventions*.⁵¹² The claim emphasized that, even with knowledge of these practices, Canada refused to intervene.⁵¹³

In early July 2017, the approximately \$10.5 million settlement between Khadr and the Government of Canada was leaked. The government also issued a formal apology to Khadr. The principal justifications for the settlement communicated to the public were that (a) continuing to litigate the Khadr civil claim would have been far more expensive; and (b) it was time to bring an end to the Khadr saga and do the right thing. Opinions on the settlement were fractured along political lines. Garnett Genuis, a Conservative Member of Parliament ("MP"), argued that the settlement was a regrettable political choice, not a legal obligation.⁵¹⁴ Responding directly to Genuis, Liberal MP Steven MacKinnon defended the settlement as the proper response to "a case the government had virtually no chance of winning."⁵¹⁵

CBC News published several opinions about the Khadr case from legal commentators.⁵¹⁶ Lawyer Eugene Meehan argued that Canada did not have much choice in deciding to settle with Khadr given the

⁵⁰⁷ *Ibid* at para 22.

⁵⁰⁸ *Ibid* at para 35.

⁵⁰⁹ *Ibid* at para 34.

⁵¹⁰ *Ibid* at paras 43, 46.

⁵¹¹ *Ibid* at para 52.

⁵¹² *Ibid* at para 55.

⁵¹³ *Ibid* at para 56.

⁵¹⁴ Garnett Genuis, "The 'grievous injustice' of the Khadr settlement", *Macleans* (19 July 2017), online: <<https://www.macleans.ca/politics/ottawa/the-grievous-injustice-of-the-khadr-settlement/>>.

⁵¹⁵ Steven MacKinnon, "Why we had to settle with Omar Khadr", *Macleans* (26 July 2017), online: <<https://www.macleans.ca/politics/ottawa/why-we-had-to-settle-with-omar-khadr/>>.

⁵¹⁶ Wherry, "3 Legal Minds", *supra* note 48.

SCC's findings in 2008 and 2010. Treating *Charter* damages as a foregone conclusion, Meehan cited large payments in wrongful conviction cases as the probable "upper limit for charter breaches."⁵¹⁷ Howard Anglin, former deputy chief of staff and senior advisor to the Harper government, highlighted the complexities of the Khadr case and the legal issues at play. Anglin argued that "[t]here was good reason to have the courts hear and decide these claims, as they could affect how Canada treats future consular cases."⁵¹⁸ Finally, Lorne Sossin expressed his view that the civil claim had a reasonable chance of success at trial. Sossin stressed, however, that protracted litigation would have imposed a high financial cost.⁵¹⁹

Macklin praised the government's decision to settle, noting that litigation "would...force disclosure of conduct by Canadian officials that would publicly disgrace the government, and potentially lead to liability and a damages award that would dwarf the amount of a settlement".⁵²⁰ Craig Forcese emphasized that two SCC decisions found breaches of Khadr's section 7 rights, so adjudication of his civil claim would have focused mostly on quantifying the damages award.⁵²¹ Forcese commented, however, that he did not "underestimate the complexities of the *Ward* case and its standard for damages in Charter cases."⁵²² Forcese noted the government's prudence in settling the claim because of the myriad costs associated with continued litigation and the real possibility of being held liable for damages *and* Khadr's legal costs.⁵²³

Asher Honickman cast doubt on the success of Khadr's claim.⁵²⁴ He argued that some of the tort allegations would have required proof of intent, which posed evidentiary issues. Honickman also mentioned the rather uninspiring track record for *Charter* damages claims following *Ward*. Notable cases where large *Charter* damages awards were made (i.e. *Henry BCSC*) involved Canada's direct involvement in cruel and unusual treatment or wrongful imprisonment. Honickman argued that the SCC did not make these kinds of findings with respect to Canada's treatment of Khadr, so his likelihood of obtaining a sizeable *Charter* damages award was low.⁵²⁵ Mark Mancini arrived at a similar conclusion, challenging the opinion that

⁵¹⁷ *Ibid.*

⁵¹⁸ *Ibid.*

⁵¹⁹ *Ibid.*

⁵²⁰ Audrey Macklin, "Ottawa failed Omar Khadr: That's why he deserves compensation", *The Globe and Mail* (5 July 2017), online: <<https://beta.theglobeandmail.com/opinion/ottawa-failed-khadr-thats-why-he-deserves-compensation/article35552410/?ref=http://www.theglobeandmail.com&>>.

⁵²¹ Craig Forcese, "A Once & Final Parsing of the Legal Context for the Khadr Settlement" (11 July 2017) *National Security Law Blog*, online: <<http://craigforcese.squarespace.com/national-security-law-blog/2017/7/11/a-once-final-parsing-of-the-legal-context-for-the-khadr-sett.html>>.

⁵²² *Ibid.*

⁵²³ *Ibid.*

⁵²⁴ Asher Honickman, "The Legal Case Against the Khadr Settlement", *Advocates for the Rule of Law* (9 August 2017), online: <<http://www.ruleoflaw.ca/the-legal-case-against-the-khadr-settlement/>>.

⁵²⁵ *Ibid.*

Khadr would have been entitled to a large *Charter* damages award at trial.⁵²⁶ In his view, it would have been difficult for a court to functionally justify a sizeable compensation and vindication-based damages award (as opposed to a deterrence-based award) because (a) damages could never return Khadr to the position he enjoyed prior to the *Charter* breaches; and (b) his losses were not capable of being properly measured.⁵²⁷ Mancini also noted that the quantification of Khadr's damages would depend on "an imaginative judiciary"⁵²⁸ due to the lack of relevant case law.

CONCLUSION

Omar Khadr has an extensive and complicated litigation history with the Government of Canada. The issues in his case involve national security and terrorism, alleged war crimes, discretionary decision-making under Crown prerogative, the extraterritorial application of the *Charter*, relations between Canada and the US, the institutional competence of courts, and state accountability. The case has been heavily politicized since the early years of Khadr's detention and it remains incredibly divisive to this day.

In Chapters Four and Five, I apply the *Ward* framework to the Khadr civil claim to assess whether Khadr should have been entitled to *Charter* damages and, if so, how those damages ought to be quantified. I do not share the view that *Charter* damages would have been automatic. Although the Canadian government's handling of the Khadr matter was appalling, past judicial decisions illustrate the complexity associated with granting remedies in this case. As outlined in Part II of this chapter, the SCC's findings in 2008 and 2010 were confined to the actions of Canadian officials in specific circumstances. These decisions were not indictments of the Canadian government's overall approach toward Khadr.

Critically, no court has pronounced on the suitability of subsection 24(1) damages to remedy the consequences of Canada's involvement in Khadr's case. I argue that *Charter* damages fulfill all three objectives outlined in *Ward*: compensation, vindication, and deterrence. There are several arguments, however, that could be advanced by the state to limit Khadr's entitlement to *Charter* damages at the countervailing factors stage of the *Ward* inquiry. These include the existence of alternative remedies, potential interference with the government's decision-making under the foreign affairs prerogative, and concerns about causation and institutional competence. I ultimately argue that the strong functional justifications supporting Khadr's *Charter* damages claim outweigh potential countervailing factors.

⁵²⁶ Mark Mancini, "A Respectful Dissent from the Khadr Consensus", *Advocates for the Rule of Law* (27 July 2017), online: <<http://www.ruleoflaw.ca/a-respectful-dissent-from-the-khadr-consensus/>>.

⁵²⁷ *Ibid.*

⁵²⁸ *Ibid.*

CHAPTER FOUR: ESTABLISHING KHADR'S ENTITLEMENT TO CHARTER DAMAGES

INTRODUCTION

Chapters Two and Three emphasized two key themes. First, the *Charter* damages remedy has been slow to evolve and damages are infrequently ordered in the post-*Ward* jurisprudence. When claimants are awarded *Charter* damages for blatant violations of their *Charter* rights, the sum is not always commensurate with the degree of the infringement. Courts still seem focused on compensation as the overarching objective of the remedy. Vindication and deterrence are often secondary considerations, save for exceptional cases.⁵²⁹ To meaningfully vindicate rights, deter unconstitutional state conduct, and help the *Charter* damages remedy progress, damages awards should be higher.

The second theme illuminated in Chapter Three is that the Khadr civil claim is decidedly complex. Even though some commentators portray Khadr's likelihood of obtaining a damages award as inevitable, the claim contains a unique mix of factors that a court has never confronted in the *Charter* damages context. Predicting how the *Ward* framework would be applied to decisions made under a prerogative power is helpful to understand how far the remedial arm of the *Charter* can go to protect fundamental guarantees. This analysis may also be of assistance in future cases involving Canadian complicity in a foreign power's mistreatment of detained citizens or *Charter* damages claims relating to prerogative-based decisions.

Working through the possible stumbling blocks in the Khadr case – concerning Crown prerogative, causation and blameworthiness, institutional competence, and the applicability of a state immunity – exposes issues with the *Ward* framework and how it is being applied. *Ward* is capable of providing meaningful relief to claimants, but it can be hindered by its preoccupation with interest-balancing,⁵³⁰ its reluctance to encourage large damages awards, its allowance of further state immunities to be recognized, and its lack of emphasis on the vindication and deterrence objectives that arguably separate *Charter* damages from private law damages.

This chapter contains a step-by-step application of the first three stages of the *Ward* framework to the known facts of the Khadr civil claim. In Part I, I discuss the first step: the claimant's burden of establishing that a *Charter* breach occurred. The Supreme Court of Canada found on two separate occasions

⁵²⁹ See *Henry BCSC, Elmardy, Brazeau, and Reddock*, *supra* note 16.

⁵³⁰ See Varuhas, *supra* note 214 at 421-22: "Even if one maintains a preference for balancing, the legal tests adopted should institutionalise the primacy of protecting rights." Varuhas's concern was that interest-balancing frameworks risk pitting the claimant's interests against the public's interests and "collaps[ing] into unstructured balancing."

that Khadr's section 7 *Charter* rights were breached. I briefly review these findings and discuss additional Canadian actions that either (a) aggravated the harm Khadr suffered; or (b) amounted to a further breach of Khadr's *Charter* rights.

In Part II, I analyze the functional justifications for *Charter* damages in Khadr's circumstances. Although the SCC described compensation as the primary objective of the *Charter* damages remedy, there are compelling vindicatory and deterrent goals that should be promoted in Khadr's case.

In Part III, I discuss countervailing factors. There are potential obstacles for Khadr's *Charter* damages claim at this stage of the *Ward* inquiry as the burden shifts to the state to show why damages might be inappropriate. Khadr could face issues relating to both countervailing factors identified in *Ward*: the suitability of alternative remedies (such as a declaration or private law damages) and possible threats to good governance (such as excessive interference with prerogative decision-making).

A further issue arises at the countervailing factors stage. If genuine concerns about good governance are evident, a court hearing Khadr's civil claim could create a new limited immunity for decisions made under Crown prerogative. This would require that the state must commit some type of fault before it is liable for *Charter* damages. I discuss this issue in Part III of this chapter, arguing that it is inappropriate to create such an immunity based on the extraordinary facts of the Khadr case.

Despite concerns that could be raised by the state at the countervailing factors stage, Khadr's *Charter* damages claim should survive the third step of the *Ward* inquiry and proceed to the final stage of quantification. Although private law damages might be able to provide personal compensation for Khadr, I argue that they are insufficient to properly vindicate and deter the egregious constitutional wrongs that occurred. I also show that good governance concerns related to chilling decision-making discretion in the foreign affairs sphere are unfounded. A court ordering *Charter* damages to Khadr would not be directing the executive to exercise the foreign affairs prerogative in a specific way. The damages award would be minimally intrusive, designed to meaningfully respond to proven constitutional violations. The compelling justifications I outline in Part II of this chapter, particularly with regard to the objects of vindication and deterrence, should outweigh any apprehension raised by countervailing factors.

I review the factors which would influence quantification – the fourth and final stage of the *Ward* inquiry – in Chapter Five. Quantification of damages in a novel case like Khadr's is a complicated endeavour in need of detailed analysis. The most relevant cases that could shape the quantification of

Charter damages in Khadr’s case come from wrongful conviction jurisprudence (including *Henry BCSC*) and previous settlements paid to Canadians who were detained and tortured abroad. These cases, along with applicable damages principles from private law, are discussed in the next chapter. I argue that, because of the extraordinary facts in the Khadr case, a court should draw from all relevant sources in crafting an appropriate and just award.

PART I: DEFINING THE *CHARTER* BREACH

The first step of the *Ward* framework requires the claimant to demonstrate that a *Charter* breach occurred.⁵³¹ *Ward* did not impose any kind of fault threshold at this stage.⁵³² The state conduct at issue does not have to rise above a certain level of severity for a damages claim to be advanced. The claimant bears the burden of showing that a *Charter* infringement occurred; nothing more is required.

In 2008, the SCC determined that Canada’s refusal to disclose Guantánamo interview records to Khadr amounted to a section 7 breach.⁵³³ The appropriate remedy was to order the government to produce unredacted copies of all information relevant to Khadr’s charges, which would be reviewed by a judge for privilege or public interest immunity.⁵³⁴ In 2010, the SCC found that Canada’s decision to interview the teenaged Khadr in 2003 and 2004 and share intelligence with the US amounted to a continuing breach of section 7.⁵³⁵ The Court concluded that the appropriate remedy was a declaration of unconstitutionality. The declaration acknowledged that Canada’s active participation in the Guantánamo regime “contributed to Mr. Khadr’s ongoing detention”,⁵³⁶ violating his rights to liberty and security of the person.

It is possible the state could argue that *res judicata* or issue estoppel⁵³⁷ should bar a court’s consideration of a further remedy under subsection 24(1) of the *Charter* because constitutional remedies were previously ordered. It is important to note, however, that the SCC never considered the suitability of

⁵³¹ *Ward*, *supra* note 4 at para 23.

⁵³² See Roach, *Constitutional Remedies in Canada*, *supra* note 17 at para 11.490: “The court in *Ward* has now decisively rejected the idea that any particular state of mind or fault independent of a finding of a *Charter* violation is required to justify *Charter* damages.”

⁵³³ *Khadr SCC 2008*, *supra* note 32 at para 33.

⁵³⁴ *Ibid* at paras 37-42.

⁵³⁵ *Khadr SCC 2010*, *supra* note 25 at para 21.

⁵³⁶ *Ibid* at para 48.

⁵³⁷ The doctrines of *res judicata* and issue estoppel operate to prevent claims or issues from being litigated twice. *Res judicata* will bar a second claim brought with respect to the same underlying facts and original cause of action. Issue estoppel will prevent a litigant from raising an issue that has been clearly determined in a previous judicial decision. See *Khadr FC 2010*, *supra* note 413 at paras 40-41, where the Court discussed a *res judicata* argument raised by Canada relating to the re-litigation of Khadr’s request for repatriation. See also *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 SCR 460.

Charter damages in 2008 or 2010. These decisions focused squarely on disclosure and repatriation requests sought through judicial review. Further, neither previous remedy meaningfully addressed the extent of Canada's role in Khadr's harm. It cannot be said that the question before a court hearing Khadr's civil claim would be the same as it was in 2008 or 2010. Even if a court found merit to *res judicata* or issue estoppel arguments in relation to the previous violations, I argue that there are other potential sources of rights breaches upon which Khadr's *Charter* damages entitlement can be grounded.

As discussed in Chapter Three, the SCC limited the scope of the 2008 and 2010 *Charter* breaches to the consequences flowing from the CSIS and DFAIT interviews and the subsequent information sharing. Although the Court concluded that Canadian officials actively participated in an illegal process that deprived Khadr of his human rights, the SCC emphasized that the US was the principal architect of the rights deprivation.⁵³⁸ At no point did the Court question the non-interventionist stance of successive Canadian governments or their repeated failure to provide any kind of protection to Khadr as a juvenile.

Macklin noted that *Khadr SCC 2010* did not discuss Canadian complicity in the US's actions.⁵³⁹ Instead, Canada's role was framed as that of a limited participant. In Macklin's view, this avoidance of the real issue (Canadian complicity in Khadr's mistreatment), was "the fundamental issue lying at the heart of [the] case."⁵⁴⁰ Depending on the kind of evidence produced in Khadr's civil claim and the justiciability of the issues,⁵⁴¹ a court could have found additional *Charter* breaches. These potential further violations are discussed below.

Canada's Complicity in Khadr's Detention and Mistreatment

The Khadr claim alleged that the Canadian government clearly knew about the abuse occurring at Guantánamo and the harm that had befallen Khadr.⁵⁴² Mining a youth suspect for intelligence (rather than attempting to protect him from further mistreatment) amounted to Canada's knowing participation in an

⁵³⁸ *Khadr SCC 2010*, *supra* note 25 at para 19.

⁵³⁹ Macklin, "Comment on Khadr", *supra* note 343 at 317.

⁵⁴⁰ *Ibid.*

⁵⁴¹ These issues stem from decision-making under the foreign affairs prerogative, so justiciability could be a concern. The claims would relate to decisions affecting Khadr's rights under the *Charter*, however, which are reviewable. See *Smith v Canada (Attorney General)*, 2009 FC 228 at para 26, [2010] 1 FCR 3: "Decisions involving pure policy or political choices in the nature of Crown prerogatives are generally not amenable to judicial review because their subject matter is not suitable to judicial assessment. But where the subject matter of a decision directly affects the rights or legitimate expectations of an individual, a Court is both competent and qualified to review it."

⁵⁴² Khadr Civil Claim, *supra* note 3 at para 8. It is well-documented that Khadr told Canadian officials during interviews that he had been tortured at Bagram and Guantánamo. See Banham, *Liberal Democracies*, *supra* note 338 at 163. For a description of what happened to Khadr, see *supra* note 1.

illegal regime.⁵⁴³ Khadr made the same arguments about Canada's complicity at the Supreme Court of Canada in 2010. In his factum, Khadr argued that Canada's decision to proceed with the 2004 interview, despite its knowledge that Khadr had been sleep deprived, triggered Canadian complicity in breaches of international law.⁵⁴⁴

The SCC did not address Canada's alleged complicity in Khadr's torture or mistreatment in 2008 or 2010, so this issue is likely justiciable. The state could again raise arguments based on *res judicata* or issue estoppel, but these are unlikely to succeed. There has never been proper judicial analysis of this issue, let alone a final decision. The SCC did not draw any direct conclusions about Khadr's personal experiences at Bagram or Guantánamo except with regard to the sleep deprivation techniques used by the US prior to the 2004 interview.⁵⁴⁵ If a court hearing Khadr's civil claim received evidence about the complicity issue and the conditions at Guantánamo, it should be free to make its own findings about the nature of Khadr's detention, his allegations of torture and mistreatment, and Canada's involvement.

Although Canada may not have *directly* inflicted harm on Khadr while he was detained at Guantánamo, the government became implicated in Khadr's mistreatment beginning in February 2003 with the first interview. Section 7 case law has established that Canada cannot escape liability under the *Charter* because a third party commits the violative acts.⁵⁴⁶ The SCC already found in 2010 that Canada's sharing of information with the US contributed to Khadr's continued detention.⁵⁴⁷ If a court hearing Khadr's civil claim made specific findings about the detention conditions and torture allegations in Khadr's case, Canada could be implicated in a further, even more profound breach of Khadr's section 7 interests.

The SCC also did not consider Canada's obligations under international treaties in 2008 and 2010. In 2009, Justice O'Reilly of the Federal Court reviewed the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* ("CAT"), the *Convention on the Rights of the Child* ("CRC"), and the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of*

⁵⁴³ Khadr Civil Claim, *supra* note 3 at para 6.

⁵⁴⁴ Khadr SCC 2010 Factum, *supra* note 1 at paras 75-76.

⁵⁴⁵ Khadr SCC 2010, *supra* note 25 at para 5.

⁵⁴⁶ See *United States v Burns*, 2001 SCC 7 at para 54, [2001] 1 SCR 283, where the SCC held that "While the Canadian government would not itself inflict capital punishment, its decision to extradite [fugitives] without assurances [that the death penalty would not be sought] would be a necessary link in the chain of causation to that potential result." See also *Bedford*, *supra* note 483 at para 89, where the Court noted that it made "no difference that the conduct of pimps and johns is the immediate source of the harms suffered by prostitutes." The state played a role in allowing that harm to occur.

⁵⁴⁷ Khadr SCC 2010, *supra* note 25 at para 21.

Children in Armed Conflict (“Optional Protocol”).⁵⁴⁸ Justice O’Reilly found that Canada had duties and responsibilities under these treaties which were ignored.⁵⁴⁹ Specific findings were made with respect to Khadr’s status as a child soldier under the Optional Protocol:

Clearly, Canada was obliged to recognize that Mr. Khadr, being a child, was vulnerable to being caught up in armed conflict as a result of his personal and social circumstances in 2002 and before. It cannot resile from its recognition of the need to protect minors, like Mr. Khadr, who are drawn into hostilities before they can apply mature judgment to the choices they face.⁵⁵⁰

The 2009 Federal Court of Appeal judgment also discussed these international obligations. It was therefore striking that none of the treaties were cited in *Khadr SCC 2010*, especially given Khadr’s age and level of vulnerability. If a court hearing Khadr’s civil claim confronted the question of Canadian complicity in Khadr’s torture and mistreatment, it is expected that these treaties would be reviewed and Canada’s behaviour would fall dramatically short of acceptable standards.

Even if a court chose not to engage with the complicity issue (which would be difficult to avoid given Khadr’s conspiracy claim), it should address Canada’s conduct following the SCC’s declaration of unconstitutionality in *Khadr SCC 2010*. Canada’s decisions after this judgment are critical. The Harper government’s continued stance of non-intervention arguably contributed to Khadr’s decision to plead guilty. The delay in processing Khadr’s transfer back to Canada and the decision to house him in maximum security facilities also contributed to the harm he suffered. These decisions aggravated the baseline level of harm Khadr experienced as a result of indefinite detention, abuse, and isolation. Instead of working to meaningfully remedy a continuing *Charter* breach and mitigate Khadr’s suffering, Canada’s behaviour caused further damage.

The Lack of Meaningful Response to Khadr SCC 2010

The Harper government did not change its position with respect to Khadr’s repatriation in light of a declaration from the highest court in Canada that Khadr’s rights had been violated. The only action taken by the Harper government was to send the aforementioned diplomatic note to the US.⁵⁵¹ The muted Canadian response to *Khadr SCC 2010*, combined with Khadr’s lack of success in the follow-up litigation, undoubtedly influenced his decision to plead guilty before the military commission in October 2010.

Although the executive branch must comply with judicial orders, the SCC did not order the

⁵⁴⁸ See *supra* note 451 for all three treaty citations.

⁵⁴⁹ See *Khadr FC 2009*, *supra* note 38 at para 56 for Justice O’Reilly’s discussion of relevant international instruments.

⁵⁵⁰ *Ibid* at para 68.

⁵⁵¹ See *Khadr FC 2010*, *supra* note 413 at Annex A.

executive to take any specific action in 2010. The Court's decision to grant Khadr a declaration was designed to "provide the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the *Charter*."⁵⁵² Following the 2010 ruling, the Harper government did not make any statements or give any assurances that it would repatriate Khadr. Communications to the media emphasized that the decision not to repatriate Khadr had not changed.⁵⁵³

The limited action taken by the Harper government following *Khadr SCC 2010* was scrutinized in *Khadr FC 2010*, released in July 2010. Although this decision was stayed by the Federal Court of Appeal, it contained some significant findings. One of Justice Zinn's most striking conclusions was that the existence of an ongoing *Charter* breach "impose[d] on Canada a duty to intervene by diplomatic or other means to cure the breach if possible and, if it is not possible to cure it, to attempt to ameliorate it."⁵⁵⁴ Justice Zinn found that the 2010 SCC declaration gave Khadr a legitimate expectation⁵⁵⁵ that Canada would do something to cure the breach. Khadr was entitled to receive a degree of procedural fairness and natural justice as the executive branch determined what action to take.⁵⁵⁶ In granting a stay of Justice Zinn's decision, the Federal Court of Appeal found that he exceeded his discretion in an area "where the Supreme Court has recognized its limited role".⁵⁵⁷

Given the Federal Court of Appeal's decision to stay Justice Zinn's judgment, it is questionable whether a court hearing Khadr's civil claim would find that the lack of meaningful action taken by the government after *Khadr SCC 2010* triggered another violation of the *Charter*. Although the state left an existing *Charter* breach unremedied, it did not defy a court order or misrepresent itself. *Khadr SCC 2010* showed considerable deference toward the executive branch's discretion over foreign affairs and the government was not compelled to take specific action. It is critical to note, however, that Canada's inaction presumably influenced Khadr's decision-making as his military commission trial proceeded. His receptiveness to a guilty plea (and an eight year prison sentence) was likely coloured by Canada's behaviour.⁵⁵⁸ At the very least, Canada's conduct aggravated harm Khadr experienced from an ongoing

⁵⁵² *Khadr SCC 2010*, *supra* note 25 at para 47.

⁵⁵³ *Khadr FC 2010*, *supra* note 413 at paras 25-26.

⁵⁵⁴ *Ibid* at para 69.

⁵⁵⁵ In determining whether a claimant was afforded procedural fairness by a decision-maker, the claimant's legitimate expectations are relevant to a court's analysis. In *Baker v Canada*, [1999] 2 SCR 817 at 840, 174 DLR (4th) 193, the SCC commented that the doctrine of legitimate expectation "is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights."

⁵⁵⁶ *Khadr FC 2010*, *supra* note 413 at paras 70-71.

⁵⁵⁷ *Khadr FCA 2010*, *supra* note 418 at para 19.

⁵⁵⁸ Macfarlane, *supra* note 484 at 177-78.

Charter violation that was never remedied. This should influence the quantification of vindication and deterrence-based *Charter* damages, which evaluate the seriousness of the state conduct and its impact on the claimant.

The Delay in Implementing Khadr's Transfer to Canada

The transfer portion of Khadr's plea deal suffered from many delays. Even though he was eligible for transfer to Canada in November 2011, Khadr was not repatriated until September 2012. In July 2012, Khadr's Canadian legal team applied for judicial review of Public Safety Minister Vic Toews's delay in processing Khadr's transfer application.⁵⁵⁹ The government's responding affidavit in September 2012 provided two reasons for the delay: first, the transfer was not approved by the US until April 2012; and second, Toews had requested sealed videos of psychiatric assessments done on Khadr.⁵⁶⁰ Although Khadr's transfer had been processed by the Canadian Correctional Service and the file was sent to Toews in November 2011, it was not accepted by the minister's office at that time. This was based on a policy that transfer applications from prisoners in the US were not considered until the US had indicated its approval.⁵⁶¹

Khadr's transfer to Canada took place under the *International Transfer of Offenders Act*⁵⁶² ("ITOA"). The ITOA requires that the detainee, the detaining country, and the receiving country consent to the transfer.⁵⁶³ The statute does not appear to prevent the receiving country from beginning to process the transfer until consent from the detaining state is given. The US's consent should not have been in doubt given the terms of the plea agreement. Upon taking office in January 2009, former US President Barack Obama issued an executive order requiring the closure of Guantánamo. Although this goal was hindered by many factors (including congressional opposition and difficulty persuading foreign states to accept detainee resettlement plans), the Guantánamo inmate population dropped from 240 to 45 by the end of Obama's second term.⁵⁶⁴

Once Toews received the completed transfer application from the US in April 2012, it still took five months to repatriate Khadr back to Canada. As stated above, Toews was preoccupied with viewing

⁵⁵⁹ Colin Perkel, "Canada blames U.S. for delay in transferring Omar Khadr", *The Globe and Mail* (13 September 2012), online: <<https://www.theglobeandmail.com/news/national/canada-blames-us-for-delay-in-transferring-omar-khadr/article4541447/>>.

⁵⁶⁰ *Ibid.*

⁵⁶¹ *Ibid.*

⁵⁶² ITOA, *supra* note 45.

⁵⁶³ *Ibid* at ss 8(1).

⁵⁶⁴ Arun Rath, "Trump Inherits Guantanamo's Remaining Detainees", *National Public Radio* (19 January 2017), online: <<https://www.npr.org/2017/01/19/510448989/trump-inherits-guantanamos-remaining-detainees>>.

psychiatric assessments of Khadr which were conducted on behalf of the military commission prosecution in 2010. Toews believed these assessments would help him determine if Khadr posed a threat to Canadian national security.⁵⁶⁵ The videos were sealed and therefore difficult to obtain, but Toews insisted that unedited versions of the footage were necessary.⁵⁶⁶ Toews did not receive the videos until early September 2012, adding several months to the delayed repatriation timeline.

Although Khadr's legal team challenged Toews's handling of the transfer in 2012, no decision appears to have been made with respect to that judicial review application. It was likely abandoned after Khadr was repatriated to Canada in September 2012. If no final decision was made on this issue, a court hearing Khadr's civil claim could make findings about the delay and whether it was reasonable.⁵⁶⁷ To find a breach of the *Charter*, the state's delay must have caused prejudice or harm to the claimant.⁵⁶⁸

There are no facts pleaded in Khadr's civil claim suggesting that he suffered particular harm while his transfer was being processed. The torment of continued detention, however, (and its impact on Khadr's mental and physical health) persisted. The delay also meant that Khadr spent more time incarcerated without access to appropriate rehabilitation. In July 2012, the United Nations Special Representative for Children and Armed Conflict insisted that the transfer be implemented so Khadr could return to Canada for "proper reintegration".⁵⁶⁹ Even though the US was at least partially responsible for the delay,⁵⁷⁰ the US was not the party tasked with remedying the breach of Khadr's *Charter* rights. Canada's role in prolonging Khadr's Guantánamo ordeal in the face of a constitutional violation intensified the continuing harmful effects of his detention. It is open to a court to find that this delay constituted a further *Charter* breach.

Khadr's Experience with Solitary Confinement in Canada

Ryan Liss explained that, when Khadr was ultimately repatriated to Canada in September 2012, Canada's obligation under the *Optional Protocol* to "provide appropriate assistance to ensure the recovery and reintegration of former child soldiers within its jurisdiction"⁵⁷¹ was triggered. Sniderman argued that,

⁵⁶⁵ Colin Perkel, "U.S. hands over Omar Khadr material; Toews urged to make transfer decision", *The Globe and Mail* (5 September 2012), online: <<https://www.theglobeandmail.com/news/politics/us-hands-over-omar-khadr-material-toews-urged-to-make-transfer-decision/article4521822/>>.

⁵⁶⁶ Chase, "Ottawa throws wrench", *supra* note 426.

⁵⁶⁷ See Khadr Civil Claim, *supra* note 3 at paras 50-53 where the delayed repatriation issue is discussed.

⁵⁶⁸ See *Blencoe v British Columbia Human Rights Commission*, 2000 SCC 44 at para 60, [2000] 2 SCR 307.

⁵⁶⁹ UN News, "UN envoy calls for repatriation of last child soldier held in Guantánamo" (27 July 2012), *United Nations* online: <<https://news.un.org/en/story/2012/07/416582>>.

⁵⁷⁰ The US did not fully process Khadr's transfer application and send it to Canada until April 2012, despite Khadr being eligible for transfer in November 2011 and having submitted his request for transfer in May 2011.

⁵⁷¹ Ryan Liss, "The Abuse of Ambiguity: The Uncertain Status of Omar Khadr under International Law" (2012) 50 Can YB Intl Law 95 at 153-54. Article 6(3) of the *Optional Protocol*, *supra* note 451, provides that "States Parties

once Khadr was under Canadian control, the government could have remedied the 2010 *Charter* breach by “annul[ing] Khadr’s conviction”.⁵⁷² Although controversial, this decision “would have terminated the connection between unconstitutionally obtained evidence and Khadr’s section 7 rights violation.”⁵⁷³ Instead, Canada housed Khadr in a maximum security facility where he spent months in segregation.⁵⁷⁴ This decision was based on a flawed reading of the ITOA and Khadr’s inmate status.

Section 20 of the ITOA stipulates that an offender who was a youth at the time he or she committed the offence, whose foreign sentence could have been a youth sentence in Canada, and who was at least twenty years old at the time of the transfer, is to be detained in a provincial jail.⁵⁷⁵ The Canadian government treated Khadr’s eight year sentence for multiple crimes as consecutive sentences, which justified his detention in a federal institution. Khadr’s lawyers fought the government’s determination, arguing that the ITOA required his sentence to be served in a provincial facility. In 2014, the Alberta Court of Appeal found Canada’s interpretation of the ITOA was “wrong in law”⁵⁷⁶ and the Court granted Khadr’s *habeas corpus* application to be transferred to a provincial facility. This decision was upheld by the Supreme Court of Canada in 2015.⁵⁷⁷

In a statement to the media, Khadr’s lawyer explained that Khadr spent the first seven months of his incarceration in Canada in solitary confinement.⁵⁷⁸ He was allegedly placed in solitary confinement due to threats from another inmate.⁵⁷⁹ Khadr could argue that the government’s erroneous decision threatened his physical and psychological security, causing further harm. Khadr’s civil claim mentioned his previous exposure to isolation and solitary confinement in Guantánamo.⁵⁸⁰ The use of these practices at Guantánamo is well documented.⁵⁸¹

shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.”

⁵⁷² Sniderman, *supra* note 431 at 189.

⁵⁷³ *Ibid.*

⁵⁷⁴ Colin Perkel, “Omar Khadr moved to Edmonton prison after months in solitary confinement”, *The Globe and Mail* (29 May 2013), online: <<https://www.theglobeandmail.com/news/national/omar-khadr-moved-to-edmonton-prison-after-months-in-solitary-confinement/article12226347/>> [Perkel, “Omar Khadr moved”].

⁵⁷⁵ See ITOA, *supra* note 45 at ss 20(a)(ii).

⁵⁷⁶ *Khadr ABCA 2014*, *supra* note 46 at para 124.

⁵⁷⁷ See *Khadr SCC 2015*, *supra* note 44.

⁵⁷⁸ Canadian Press, “Omar Khadr should have been serving youth sentence, will be transferred to provincial jail, court rules”, *National Post* (8 July 2014), online: <<https://nationalpost.com/news/canada/alberta-court-rules-omar-khadr-should-be-transferred-to-provincial-jail>>.

⁵⁷⁹ Perkel, “Omar Khadr moved”, *supra* note 574.

⁵⁸⁰ *Khadr Civil Claim*, *supra* note 3 at para 25.

⁵⁸¹ A June 2008 report from Human Rights Watch explained that many Guantánamo inmates experienced “extreme social isolation” due to their being confined for twenty-two hours a day in single cells with very limited human

Recent judicial decisions struck down sections of federal corrections legislation which authorized administrative segregation,⁵⁸² a practice akin to solitary confinement. Inmates subjected to this treatment were entitled to *Charter* damages awards in the *Brazeau*⁵⁸³ and *Reddock*⁵⁸⁴ class actions. It is clear from these cases that the profoundly damaging effects of solitary confinement are being acknowledged. The Ontario Court of Appeal recognized that “[t]he distinguishing feature of solitary confinement is the elimination of meaningful social interaction or stimulus. It has the potential to cause serious harm which could be permanent.”⁵⁸⁵ The Canadian government’s decision to place Khadr in a maximum security facility with dangerous inmates, despite his history of torture and mistreatment, was highly questionable. The decision was even more striking given that breaches of Khadr’s constitutional rights were left unremedied.

To trigger a breach of the *Charter*, Khadr would have to show that the government’s decision to incarcerate him in maximum security facilities violated his section 7 rights to liberty and/or security of the person. Given the recent developments in the solitary confinement case law, Khadr has a foothold to argue that his exposure to solitary confinement in Canada caused further harm to his already fragile mental state. Although it does not appear that Khadr was diagnosed with a psychological condition at the time of his repatriation, it can be presumed that ten years of indefinite detention and abuse would have exacted a toll on his mental health. Further, Khadr can argue that, based on a proper interpretation of his sentence and the ITOA, he should not have been placed in a maximum security facility in the first place. A causal link is present between the government’s decision-making and the further harm Khadr suffered.

Khadr satisfies the first step of the *Ward* framework. *Charter* breaches were established in 2008 and 2010 and although remedies were ordered (disclosure of records in 2008 and a declaration of unconstitutionality in 2010), the full extent of Canada’s role in violating Khadr’s rights was never

interaction. See Human Rights Watch, “Locked Up Alone: Detention Conditions and Mental Health at Guantanamo”, *Human Rights Watch* (9 June 2008), online: <<https://www.hrw.org/report/2008/06/09/locked-alone/detention-conditions-and-mental-health-guantanamo>>.

⁵⁸² See *Canadian Civil Liberties Association v Canada (Attorney General)*, 2019 ONCA 243, 144 OR (3d) 641 [*Canadian Civil Liberties Association*], leave to appeal to SCC requested, and *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228, 2019 BCCA 228 (CanLII), varied 2019 BCCA 233, 2019 BCCA 233 (CanLII), leave to appeal to SCC requested. The Government of Canada has amended the *Corrections and Conditional Release Act* to develop structured intervention units to replace administrative segregation. See *An Act to amend the Corrections and Conditional Release Act and Another Act*, SC 2019, c 27.

⁵⁸³ *Brazeau*, *supra* note 16. The section 7 *Charter* rights of a class of mentally ill inmates were violated by imposing administrative segregation without adequate review mechanisms, justifying a \$20 million vindication and deterrence-based *Charter* damages award.

⁵⁸⁴ *Reddock*, *supra* note 16. A class of inmates subjected to more than fifteen consecutive days of administrative segregation were awarded \$20 million in compensatory, vindictory, and deterrence-based *Charter* damages for violations of sections 7 and 12 of the *Charter*.

⁵⁸⁵ *Canadian Civil Liberties Association*, *supra* note 582 at para 1.

meaningfully addressed. The SCC's analyses in 2008 and 2010 were confined to disclosure and repatriation. Further, the discussion in the preceding paragraphs shows that a court could find additional breaches of Khadr's rights after the 2010 SCC decision depending on how far the court is willing to take the analysis.

It is probable that the government's conduct following *Khadr SCC 2010* would be discussed in any fault analysis that could take place at the countervailing factors stage of the *Ward* inquiry. The lack of meaningful steps taken to remedy a serious constitutional breach, the delay in repatriating Khadr, and Khadr's exposure to further solitary confinement in Canadian prison show that the state disregarded Khadr's *Charter* rights and the importance of protecting those rights. This behaviour should also support a higher vindication and deterrence-based damages award at the quantification stage. In the following section, I move on to the second step of the *Ward* framework: showing that compensation, vindication, and deterrence-based *Charter* damages are functionally justified.

PART II: THE FUNCTIONAL JUSTIFICATION FOR CHARTER DAMAGES

After a *Charter* breach has been established, the second step of the *Ward* framework requires that the claimant demonstrate why *Charter* damages are functionally justified.⁵⁸⁶ The damages award must serve a purpose: to compensate the claimant, vindicate *Charter* rights, and/or deter offensive state conduct.⁵⁸⁷ There are compelling justifications for damages based on all three objectives in the Khadr case.

Compensation

The SCC emphasized in *Ward* that compensation is “usually the most prominent function”⁵⁸⁸ of *Charter* damages designed to remedy personal loss stemming from the *Charter* breach. The loss does not have to be physical or pecuniary; psychological harm is included.⁵⁸⁹ The Court noted that distinct harms caused by *Charter* breaches, such as “distress, humiliation, embarrassment, and anxiety”⁵⁹⁰ should be evaluated. The goal of compensatory damages is corrective: to restore the claimant to the position he or she enjoyed prior to the *Charter* breach.⁵⁹¹ Though this is difficult to do for Khadr, compensatory damages should still be ordered to acknowledge and address his personal suffering.

Khadr experienced life-altering personal losses during his imprisonment at Guantánamo. He was

⁵⁸⁶ *Ward*, *supra* note 4 at para 24.

⁵⁸⁷ *Ibid* at para 25.

⁵⁸⁸ *Ibid*.

⁵⁸⁹ *Ibid* at para 27.

⁵⁹⁰ *Ibid*.

⁵⁹¹ *Ibid*.

deprived of his liberty for over ten years and denied access to counsel, education, employment, socialization, and family. He alleged he was tortured on multiple occasions, mistreated, and routinely interrogated. Although he ultimately pleaded guilty to war crimes in 2010, Khadr insisted that this decision was made under duress because it was the only way to secure his eventual release.⁵⁹² The physical and psychological harm resulting from these experiences and lost opportunities is immense. If the Khadr civil claim had not settled in 2017, Khadr would not have received any form of compensation from the Government of Canada for its role in his ordeal.

To award compensatory *Charter* damages, a causal link must be present between the *Charter* violation and the claimant's loss.⁵⁹³ The typical causal standard used in private law injury cases is the 'but for' test. Applied in the context of *Charter* damages, this test would require that the plaintiff's harm would not have occurred *but for* the violative state conduct.⁵⁹⁴ Although the SCC majority endorsed this standard for *Charter* damages claims relating to wrongful non-disclosure in *Henry SCC*, the Court noted that the test could "be modified in situations involving multiple alleged wrongdoers."⁵⁹⁵ The majority used an example where a wrongful conviction could stem from failures by police and the Crown. This situation would only require the claimant to prove that the conduct at issue "materially contributed to the harm suffered".⁵⁹⁶

In 1984, Pilkington suggested that strict application of private law standards of causation could compromise a court's ability to provide appropriate constitutional remedies to claimants.⁵⁹⁷ She argued that

Tests of causation, designed to achieve the compensatory purposes of common law tort, should not be applied to constitutional wrongs without assessing their efficacy as a means of effectuating constitutional policy.⁵⁹⁸

The root of Pilkington's concern was that applying causation requirements to determine the extent of compensatory relief could obscure the necessity of providing redress for the constitutional infringement. Her underlying view was that the profound effect of the *Charter* breach itself was deserving of compensation regardless of any corresponding loss.⁵⁹⁹ Adourian advanced a similar view, arguing that "[r]equiring elements of harm and causation shifts the focus from the constitutional injury to meandering

⁵⁹² Khadr Civil Claim, *supra* note 3 at para 43.

⁵⁹³ *Henry SCC*, *supra* note 252 at para 118, McLachlin CJC and Karakatsanis J.

⁵⁹⁴ *Ibid* at para 95, Moldaver J.

⁵⁹⁵ *Ibid* at para 98, Moldaver J.

⁵⁹⁶ *Ibid*.

⁵⁹⁷ Pilkington, "Damages as a Remedy", *supra* note 58 at 550.

⁵⁹⁸ *Ibid*.

⁵⁹⁹ Pilkington, "Monetary Redress", *supra* note 99 at 314.

inquiries about compensable harm.”⁶⁰⁰

Applying the but for test to assess compensatory *Charter* damages in the Khadr case is inappropriate. It would be very difficult for Khadr to prove that the harm he suffered from prolonged detention would not have occurred without Canada’s breaches of the *Charter*. The SCC’s description of the US as the “primary source”⁶⁰¹ of Khadr’s deprivation in 2010 illustrates the complexity of this issue. Applying the but for standard to the Khadr case could produce the result Pilkington described above: focusing too much on clear causal connections at the expense of addressing a serious breach of constitutional rights. A more fitting causal standard for the Khadr case would be the material contribution test mentioned by the majority in *Henry SCC*. This reflects the reality that two state actors were involved in Khadr’s detention and mistreatment.

Based on the findings in *Khadr SCC 2010*, a court hearing Khadr’s civil claim should have no difficulty concluding that Canada’s actions materially contributed to the harm Khadr suffered. Canadian liability under the *Charter* was triggered by the 2003 and 2004 interviews, which were required to be taped and shared with the US. The Court noted in *Khadr SCC 2010* that “[t]he record suggests that the interviews conducted by CSIS and DFAIT provided significant evidence in relation to [the] charges.”⁶⁰² Canada did not attempt to control how this information would be used by the US. The Court inferred “that the statements taken by Canadian officials [were] contributing to the continued detention of Mr. Khadr, thereby impacting his liberty and security interests.”⁶⁰³

Although Canada was not the party directly responsible for inflicting harm on Khadr at Guantánamo, the Canadian government was inextricably linked to Khadr’s suffering because of its conscious decision to become involved in his Guantánamo prosecution, which ended in a guilty plea. Any kind of participatory role in the indefinite detention and abuse of a youth prisoner (in a regime widely viewed as illegal under international law) should satisfy the material contribution test and provide functional justification for compensatory *Charter* damages.

As outlined in Part I of this chapter, Canada’s actions following *Khadr SCC 2010* should be addressed by a court hearing Khadr’s civil claim. A court could find that further *Charter* breaches resulted from the Canadian government’s lack of response to the SCC declaration in 2010, the delay in repatriating

⁶⁰⁰ Adourian, *supra* note 56 at 60.

⁶⁰¹ *Khadr SCC 2010*, *supra* note 25 at para 19.

⁶⁰² *Ibid* at para 20.

⁶⁰³ *Ibid* at para 21.

Khadr to Canada, and the decision to hold him in maximum security facilities. The causal link between Canada's actions and the continued harm Khadr likely suffered is more direct in these instances, especially after Khadr was transferred back to Canada in 2012. If a court found that additional violations of the *Charter* occurred after 2010, further compensatory damages would be functionally justified.

Vindication

The SCC described the vindication objective of *Charter* damages as “affirming constitutional values”⁶⁰⁴ and “focus[ing] on the harm the infringement causes society.”⁶⁰⁵ Vindication is not concerned solely with the impact of the breach on the claimant; it attempts to remedy a loss of public confidence in the effectiveness of constitutional guarantees.⁶⁰⁶

Roach noted that the influence of causation on vindication or deterrence-based *Charter* damages is less clear.⁶⁰⁷ The concurring judgment of Chief Justice McLachlin (as she then was) and Justice Karakatsanis in *Henry SCC* concluded that the *Ward* framework did not require a causal connection to award vindication or deterrence-based damages.⁶⁰⁸ Roach argued that a causation requirement for vindication and deterrence was inappropriate “because the purposes of Charter damages go beyond the task of attempting to restore applicants to the position that they would have occupied but for the Charter violation”.⁶⁰⁹ Vindication or deterrence-based damages “are concerned with vindicating the Charter as supreme law and deterring its violation.”⁶¹⁰ The infringement itself causes harm. The vindication and deterrence objectives focus on the impact of the constitutional breach on Canadian society; the analysis shifts from the claimant to broader concerns. Imposing any kind of causation requirement for vindication or deterrence-based damages would therefore be improper.

The *Charter* breaches in Khadr's case arose from section 7, which is a core guarantee protecting fundamental entitlements to life, liberty, and security of the person. State interference with these rights is significant. The section 7 breaches of Khadr's rights stemmed from conduct that would be considered appalling if it occurred in Canada:

⁶⁰⁴ *Ward*, *supra* note 4 at para 28.

⁶⁰⁵ *Ibid.*

⁶⁰⁶ *Ibid.*, citing the comments of the South African Constitutional Court in *Fose v Minister of Safety and Security*, [1997] ZACC 6 at para 82, 1997 (3) SA 786 (S Afr Const Ct).

⁶⁰⁷ Roach, *Constitutional Remedies in Canada*, *supra* note 17 at para 11.702.

⁶⁰⁸ *Henry SCC*, *supra* note 252 at para 117, McLachlin CJC and Karakatsanis J, citing *Ward*, *supra* note 4 at para 30.

⁶⁰⁹ Roach, *Constitutional Remedies in Canada*, *supra* note 17 at para 11.702.

⁶¹⁰ *Ibid.*

Canadian officials questioned Mr. Khadr on matters that may have provided important evidence relating to his criminal proceedings, in circumstances where they knew that Mr. Khadr was being indefinitely detained, was a young person and was alone during the interrogations. Further, the March 2004 interview, where Mr. Khadr refused to answer questions, was conducted knowing that Mr. Khadr had been subjected to three weeks of scheduled sleep deprivation, a measure described by the U.S. Military Commission...as designed to “make [detainees] more compliant and break down their resistance to interrogation”.⁶¹¹

Canada’s decisions to interrogate a youth suspect detained under extremely controversial conditions – and share the fruits of that interrogation – inflicted harm on the integrity of *Charter* guarantees. The advocacy efforts discussed in Chapter Three are evidence of the domestic backlash that ensued in response to Canada’s behaviour.

In *Brazeau*, the Ontario Superior Court commented on the federal government’s failure to acknowledge decades of research and recommendations that had been made with regard to ending solitary confinement for prisoners suffering from mental illness.⁶¹² This intransigence helped justify *Charter* damages to vindicate the rights of the claimants.⁶¹³ In the Khadr case, Canada adopted an unwavering stance of non-intervention even after the SCC found it had breached Khadr’s *Charter* rights. Canada’s refusal to publicly recognize valid arguments about Khadr’s status as a child soldier (and his need for protection and rehabilitation) provides further support for a vindication-based damages award. The federal government’s attitude of indifference implied that it was unwilling to defend *Charter* guarantees and give meaning to *Charter* remedies. A “collective lack of concern”⁶¹⁴ for a claimant’s *Charter* rights justified vindication and deterrence-based damages in *Carr v Ottawa Police Services Board*.⁶¹⁵

Awarding vindication-based *Charter* damages would further support the notion that *Charter* guarantees must be upheld when they are engaged by Canada’s actions in foreign countries. It is important to emphasize that the existing breaches of Khadr’s *Charter* rights were triggered by interviews that took place outside of Canada. The *Charter* has been interpreted to apply only within Canada, subject to narrow exceptions.⁶¹⁶ The SCC found that the *Charter* applied to Canadian officials in Cuba in 2008 and 2010

⁶¹¹ *Khadr* SCC 2010, *supra* note 25 at para 24.

⁶¹² *Brazeau*, *supra* note 16 at para 424.

⁶¹³ *Ibid.*

⁶¹⁴ *Carr*, *supra* note 330 at para 243.

⁶¹⁵ *Ibid.*

⁶¹⁶ See *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292, which held that the *Charter* generally does not apply outside of Canada due to principles of state sovereignty and comity. The limited exception where the *Charter* may have extraterritorial application is in situations where Canada has participated in foreign activities which would violate its international human rights commitments.

because of their active participation in an illegal regime.⁶¹⁷ The state could not evade its constitutional responsibilities just because the activities in question occurred outside Canada. Vindication-based *Charter* damages would affirm that the state will be held to constitutional account where *Charter*-protected interests are violated, regardless of territorial boundaries.

Deterrence

A deterrence-based *Charter* damages award “seeks to regulate government behaviour...in order to achieve compliance with the Constitution.”⁶¹⁸ The deterrence function is forward-looking, targeting future state action. It is similar to the vindication objective because it is also concerned with “public faith in the efficacy of constitutional protection.”⁶¹⁹ Due to this connection, vindication and deterrence are sometimes discussed together in the *Charter* damages jurisprudence.

Deterrence-based damages serve powerful functions in the Khadr case. The Canadian government chose to become involved in an illegal process that violated a minor’s human rights. Despite its contributory role in Khadr’s continuing detention, Canada steadfastly refused to intervene on his behalf. Canadians also interviewed Khadr in 2004 with knowledge that he had been subjected to extensive sleep deprivation.⁶²⁰ Khadr was seventeen years old at the time of this interview, which meant that he was still classified as a child under the CRC.⁶²¹ Although the Court did not refer to sleep deprivation as torture in 2010, the practice meets the definition of torture laid out in the CAT.⁶²² Canada’s behaviour effectively condoned this exercise, which provides strong justification for deterrence-based damages.

A deterrence-based damages award would also address the government’s unresponsiveness to what the Court described as a continuing *Charter* violation in *Khadr SCC 2010*.⁶²³ This inaction signalled that the government felt it was unnecessary to work toward implementing a meaningful remedy. The

⁶¹⁷ See *Khadr SCC 2008*, *supra* note 32 at para 26 and *Khadr SCC 2010*, *supra* note 25 at para 21.

⁶¹⁸ *Ward*, *supra* note 4 at para 29.

⁶¹⁹ See Charles, *supra* note 14 at 85.

⁶²⁰ *Khadr SCC 2010*, *supra* note 25 at para 24.

⁶²¹ *CRC*, *supra* note 451, art 1.

⁶²² *CAT*, *supra* note 451, art 1: “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” See also Macklin, “Comment on Khadr”, *supra* note 343 at 295 and Stephanie Carvin, “Yes, sleep deprivation is torture”, *Macleans* (14 July 2017), online: <<https://www.macleans.ca/opinion/yes-sleep-deprivation-is-torture/>>. Carvin argued that the sleep deprivation Khadr experienced met the definition of torture in the *CAT* and violated the prohibition on torture outlined in the Canadian Armed Forces Law of Armed Conflict Manual.

⁶²³ *Khadr SCC 2010*, *supra* note 25 at para 30.

government's indifference to a declaration from Canada's highest court was worrisome, raising legitimate concerns about the rule of law and the effectiveness of *Charter* remedies. A deterrence-based damages award would show that judicial declarations of unconstitutionality must always be taken seriously by the state and that inaction is not an appropriate response.

As I discuss the third step of the *Ward* framework in Part III, the evidentiary burden shifts from the claimant to the state. The government is given the opportunity to show why *Charter* damages are inappropriate at the countervailing factors stage. The following section demonstrates that there are potentially significant countervailing considerations at play in the Khadr case. I work through these issues and ultimately argue that none of them are powerful enough to outweigh the compelling functional justifications outlined above.

PART III: THE INFLUENCE OF COUNTERVAILING FACTORS

The third stage of the *Ward* framework gives the state the ability to defeat a *Charter* damages claim or limit a claimant's entitlement to damages. *Ward* outlined two countervailing factors that could affect the damages award: "the existence of alternative remedies and concerns for good governance."⁶²⁴ The discussion of alternative remedies is rooted in functionalism. The Court wanted to avoid the prospect of awarding damages in tort and under the *Charter* if the latter award would be duplicative. If the state can show private law damages or some other remedial option (like a declaration) accomplish compensatory, vindictory, or deterrent functions, *Charter* damages may be deemed unnecessary.⁶²⁵

Good governance is a more nebulous concept. The concern behind this countervailing factor is that *Charter* damages could negatively affect the proper functioning of government, unduly constrain the actions of state officials, or hinder the development of certain programs or policies. These consequences are commonly referred to as the potential "chilling effect"⁶²⁶ of *Charter* damages. If the government can show that a *Charter* damages award would produce this result, it could defeat the claim.

The state can also argue that, where compelling good governance issues are raised, it should only be held liable for conduct that "meets a minimum threshold of gravity."⁶²⁷ This permits the creation of new defences or immunities to *Charter* damages claims (similar to *Mackin*) which impose a certain fault

⁶²⁴ *Ward*, *supra* note 4 at para 33.

⁶²⁵ *Ibid* at para 34.

⁶²⁶ *Ibid* at para 38.

⁶²⁷ *Ibid* at para 39.

requirement. *Ward* did not offer much guidance on this issue. The Court stated that the applicable fault threshold would vary depending on the nature of the claim.⁶²⁸

The SCC devoted considerable time to the countervailing factors analysis in *Henry SCC* and *Ernst*. The Court was fractured in these decisions as it defined the parameters of state liability for *Charter* damages in two specific contexts. The majority decisions have been criticized for complicating the *Ward* framework and potentially discouraging reliance on the *Charter* damages remedy.⁶²⁹ The Court was heavily influenced by good governance concerns in both cases, which led to the imposition of a high threshold fault requirement for *Charter* damages claims relating to prosecutorial misconduct in *Henry SCC* and the creation of an absolute immunity for *Charter* damages claims against a regulatory board in *Ernst*.

The majority decision in *Henry SCC* described good governance as “a compendious term for the policy factors that will justify restricting the state’s exposure to civil liability.”⁶³⁰ The majority was concerned that a low fault threshold for *Charter* damages in the area of prosecutorial misconduct could affect “the ability of prosecutors to discharge their important public duties”,⁶³¹ causing “adverse consequences for the administration of justice.”⁶³² Specifically, the majority feared that a tidal wave of *Charter* damages claims could be brought for improper disclosure if the fault standard were too low.⁶³³ Further, a low standard could result in “defensive lawyering”,⁶³⁴ where prosecutors would face constant fear of liability. These concerns justified the majority’s decision to modify the *Ward* framework by requiring the claimant to prove a high degree of fault at the first stage of the test.⁶³⁵

In a concurring opinion, Chief Justice McLachlin (as she then was) and Justice Karakatsanis focused on disclosure as a legal obligation under the *Charter* rather than a matter of prosecutorial discretion.⁶³⁶ Consequently, there was no need to impose a fault requirement in this area.⁶³⁷ The majority’s

⁶²⁸ *Ibid* at para 43.

⁶²⁹ See *supra* note 254.

⁶³⁰ *Henry SCC*, *supra* note 252 at para 39, Moldaver J.

⁶³¹ *Ibid*.

⁶³² *Ibid*.

⁶³³ *Ibid* at para 70, Moldaver J.

⁶³⁴ *Ibid* at para 73, Moldaver J.

⁶³⁵ The test required the claimant to prove that “(1) the prosecutor intentionally withheld information; (2) the prosecutor knew or ought reasonably to have known that the information was material to the defence and that the failure to disclose would likely impinge on his or her ability to make full answer and defence; (3) withholding the information violated his or her *Charter* rights; and (4) he or she suffered harm as a result.” See *Henry SCC*, *supra* note 252 at para 85, Moldaver J.

⁶³⁶ *Ibid* at para 131, McLachlin CJC and Karakatsanis J.

⁶³⁷ *Ibid* at para 133, McLachlin CJC and Karakatsanis J.

preoccupation with countervailing factors did not resonate with the concurring justices, who found that allowing Henry's claim to proceed was the just outcome. The concurring justices noted that Henry could be denied a remedy for a profound violation of his constitutional rights if the *Charter* damages claim was not allowed to continue.⁶³⁸ The concurrence stressed that Henry only needed to show a *Charter* breach was present (step one of *Ward*) and that *Charter* damages were functionally justified (step two).⁶³⁹

Henry SCC showed how good governance concerns can overshadow a meritorious claim. Brooke Mackenzie argued that the majority decision "veered off track...when it allowed policy concerns to steer it away from the *Ward* framework, rather than addressing those policy considerations within the framework."⁶⁴⁰ The majority relied on good governance arguments to modify *Ward* and require claimants alleging prosecutorial misconduct "to pre-emptively refute a possible countervailing consideration by showing the Crown's conduct was sufficiently serious".⁶⁴¹ By imposing a threshold fault requirement, the Court inexplicably shifted what should be the state's burden (at step three of *Ward*) to the claimant.⁶⁴² Although the *Henry SCC* fault requirement was tailored to *Charter* damages cases involving Crown disclosure, the judgment showed that the *Ward* framework was subject to revision and good governance concerns could wield considerable influence.

Given that the state conduct at issue in the Khadr case was discretionary and it was afforded considerable deference by the SCC in 2010, it is important to analyze whether Khadr's *Charter* damages claim would be limited by countervailing factors. In Part A of the following section, I discuss possible alternative remedies available to Khadr. I then review potential good governance concerns that could threaten the success of the *Charter* damages claim in Part B. Finally, I analyze in Part C whether good governance concerns are sufficiently serious to warrant creation of a new immunity.

(A) Alternative Remedies

The SCC emphasized in *Ward* that an alternative remedy must "adequately meet the need for compensation, vindication, and/or deterrence".⁶⁴³ An alternative remedy will not be sufficient unless it fulfills the required functional objectives. It is possible that private law damages might fulfill a compensatory objective while *Charter* damages are still needed to vindicate *Charter* rights or deter

⁶³⁸ *Ibid* at para 134, McLachlin CJC and Karakatsanis J.

⁶³⁹ *Ibid* at para 108, McLachlin CJC and Karakatsanis J.

⁶⁴⁰ Mackenzie, *supra* note 254 at 371.

⁶⁴¹ *Ibid* at 372.

⁶⁴² Adourian, *supra* note 56 at 51.

⁶⁴³ *Ward*, *supra* note 4 at para 34.

egregious state conduct. A court is permitted to order tort and *Charter* damages if they are not duplicative.⁶⁴⁴

Other Remedial Options Under the Charter

Khadr sought a declaration in his civil claim in addition to tort and constitutional damages.⁶⁴⁵ The state could argue that declaratory relief under subsection 24(1) of the *Charter* is the most appropriate remedy due to the discretionary nature of executive decision-making in the Khadr case. This argument should not succeed, however, because the 2010 declaration issued by the SCC did not facilitate any kind of meaningful remedial action. It was unresponsive and ineffective. Khadr was not repatriated until 2012, and only after he pleaded guilty to war crimes.

Further, the SCC noted in *Ward* that declaratory relief is most appropriate in situations “where the claimant has suffered no personal damage.”⁶⁴⁶ Khadr suffered profound harm during his detention and a declaration would not provide proper compensation, vindication, or deterrence. As discussed above, the Canadian government’s actions toward Khadr undermined the integrity of the *Charter*. The rule of law was also threatened by behaviour that implied the executive was beyond the reach of the judiciary. The government largely ignored the 2010 declaration, so it clearly did not influence state behaviour. A truly adequate remedy for Omar Khadr needs to be robust and impactful.

Private Law Damages

Khadr claimed that the Canadian government was liable for damages resulting from the torts of negligent investigation, conspiracy, and misfeasance of public office.⁶⁴⁷ While Khadr could make some convincing arguments to support his allegations, he faced considerable difficulty proving many of the constituent elements.

(i) *Negligent Investigation*

A successful claim for negligent investigation must show that the actions of police caused compensable damage to the plaintiff which was causally connected to a breach of the duty of care that exists between investigating police officers and suspects.⁶⁴⁸ The appropriate standard of care used to evaluate the claim is based on “a reasonable police officer in similar circumstances.”⁶⁴⁹ For Khadr to succeed, a court

⁶⁴⁴ *Ibid* at para 36.

⁶⁴⁵ Khadr Civil Claim, *supra* note 3 at para 1(b).

⁶⁴⁶ *Ward*, *supra* note 4 at para 37.

⁶⁴⁷ Khadr Civil Claim, *supra* note 3 at para 1(a).

⁶⁴⁸ See *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at paras 90-93, [2007] 3 SCR 129.

⁶⁴⁹ *Ibid* at para 73.

hearing his claim would have to find that CSIS and DFAIT agents owed him a duty of care. Although Canadian officials were engaged in a national security investigation when they interviewed Khadr, it is not clear whether diplomatic or intelligence officials would be equated with police officers for the tort of negligent investigation. The SCC emphasized in *Khadr SCC 2010* that the purpose of the CSIS and DFAIT interviews “was for intelligence gathering and not criminal investigation.”⁶⁵⁰

In a 2014 decision which granted Khadr leave to proceed with amendments to his civil statement of claim,⁶⁵¹ (“*Khadr FC 2014*”) the Federal Court acknowledged that determining whether a novel duty of care exists between intelligence and diplomatic officers and terrorist suspects was a “live issue.”⁶⁵² The Court also noted that identifying the applicable standard to assess the behaviour of these officials could be difficult, requiring “complex evidence to determine what amounts to reasonable conduct for diplomatic and intelligence officers working on national security matters with foreign colleagues.”⁶⁵³

(ii) *Conspiracy*

Conspiracy is a complicated tort to prove in Canada. The Court noted in *Khadr FC 2014* that two types of conspiracy exist in Canada: predominant purpose conspiracy and unlawful means conspiracy.⁶⁵⁴ The former requires that

(1) the defendant entered into an agreement with one or more other parties; (2) the defendant committed actions (either lawful or unlawful in themselves) pursuant to that agreement, with the predominant purpose of causing injury to the plaintiff; and (3) the plaintiff did in fact suffer loss caused by the defendant's conduct.⁶⁵⁵

Unlawful means conspiracy has two requirements which separate it from predominant purpose conspiracy: (a) the defendant's conduct must be unlawful; and (b) the defendant “knew or should have known that injury to the plaintiff was likely to result”.⁶⁵⁶ Khadr pleaded both types of conspiracy in his civil claim.⁶⁵⁷

The conspiracy claims rest on the notion that Canada worked with the US to mine Khadr for intelligence and keep him detained rather than provide protection in line with domestic and international

⁶⁵⁰ *Khadr SCC 2010*, *supra* note 25 at para 24.

⁶⁵¹ *Khadr v Canada*, 2014 FC 1001, 2014 FC 1001 (CanLII) [*Khadr FC 2014*].

⁶⁵² *Ibid* at para 22.

⁶⁵³ *Ibid* at para 23.

⁶⁵⁴ *Khadr FC 2014*, *supra* note 651 at para 19.

⁶⁵⁵ *Ibid*, summarizing the test developed in *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 at para 74, [2013] 3 SCR 477.

⁶⁵⁶ *Khadr FC 2014*, *supra* note 651 at para 20.

⁶⁵⁷ *Khadr Civil Claim*, *supra* note 3 at paras 3, 5.

obligations. As such, the claim alleged a conspiracy between states, which a Canadian court had not recognized.⁶⁵⁸ Given that Canada's goal in conducting the Guantánamo interviews was to gather intelligence, it would be difficult for Khadr to prove that the predominant purpose of Canada's actions pursuant to the alleged conspiracy was to cause him injury.⁶⁵⁹

Khadr may have had stronger arguments with respect to the alleged unlawful means conspiracy, although it was still very difficult to prove. Khadr could have relied on the 2008 and 2010 SCC findings to establish that Canada's participation in an illegal US regime was unlawful because it triggered violations of the *Charter*. If a court hearing Khadr's civil claim found that Canada was complicit in torture, this could add another dimension to Khadr's arguments. Given that Canadian officials knew Khadr had been indefinitely detained and mistreated by the US yet chose to go ahead with intelligence-gathering interviews, it is possible that a court could find Canada had the requisite knowledge that its unconstitutional actions were likely to harm Khadr. Proving the existence of a conspiratorial agreement between Canada and the US – the bedrock of the conspiracy claim – would, however, be quite challenging.

(iii) *Misfeasance of Public Office*

To prove misfeasance of public office, a claimant must show that

(1) the defendant is a public official or a public body exercising its public functions; (2) the defendant deliberately engaged in unlawful conduct in the exercise of those functions; (3) the defendant acted either with the actual intention of harming the plaintiff or with the constructive intention of harming the plaintiff (the public officer must have been aware that the conduct was unlawful and that it was likely to harm the plaintiff); and (4) the plaintiff suffered loss caused by the defendant's conduct...⁶⁶⁰

The tort clearly requires that the public official have some form of intent to injure the plaintiff. To succeed with a misfeasance claim, the plaintiff must prove that the official “deliberately engage[d] in conduct that he or she [knew] to be inconsistent with the obligations of the office.”⁶⁶¹ Further, the plaintiff must prove that the impugned conduct caused harm. As with *Charter* claims, a causal nexus is required.⁶⁶²

⁶⁵⁸ *Khadr FC 2014*, *supra* note 651 at para 11.

⁶⁵⁹ The Ontario Court of Appeal commented on the predominant purpose requirement in *Harris v GlaxoSmithKline Inc. et al*, 2010 ONCA 872 at para 39, 106 OR (3d) 661, leave to appeal to SCC refused, 34111 (14 July 2011): “...the defendant's predominant purpose must be to inflict harm on the plaintiff. It is not enough if harm is the collateral result of acts pursued predominantly out of self-interest. The focus is on the actual intent of the defendants and not on the consequences that the defendants either realized or should have realized would follow.”

⁶⁶⁰ *Khadr FC 2014*, *supra* note 651 at para 24, citing the test outlined in *Odhavji Estate v Woodhouse*, 2003 SCC 69 at paras 22-23, [2003] 3 SCR 263 [*Odhavji*].

⁶⁶¹ *Odhavji*, *supra* note 660 at para 28.

⁶⁶² *Ibid* at para 29.

Khadr could have encountered difficulty proving that Canadian officials knew their actions were unlawful and designed to cause harm. It is not always clear when the *Charter* will apply in foreign countries and Canadian agents may have viewed themselves as visitors subject to US law. Further, it was common for Canada to share intelligence information with the US in the post-9/11 environment and Canada was required to do so in order to access Khadr at Guantánamo.

Despite some cogent arguments that could be made, Khadr faced considerable difficulty meeting the high thresholds required to prove the negligent investigation, conspiracy, and misfeasance allegations. Even if he had been successful with these tort claims, I argue in the next section that private law damages (on their own) would be insufficient to properly remedy the distinct type of harm Khadr experienced.

The Suitability of Private Law Damages

If Khadr were successful with one or more tort claims, a court must question whether private law damages would adequately promote the compelling functional justifications for *Charter* damages in Khadr's case. I contend that private law damages are inadequate to fulfil the distinctive functions that *Charter* damages would serve for Omar Khadr, the *Charter*, and Canadian society. It is possible that aggravated and/or punitive damages could serve vindictory and deterrent functions, but these types of damages are only awarded in exceptional cases for egregious conduct. Aggravated damages, a type of compensatory award, can be made to address behaviour that is "particularly high-handed or oppressive"⁶⁶³ that added to the plaintiff's injury. Punitive damages, designed solely to punish the defendant, can be ordered when the conduct is "so malicious, oppressive and high-handed that it offends the court's sense of decency."⁶⁶⁴ The standards for awarding these types of damages are high.

As shown above, Khadr faced significant challenges proving the tort allegations in his civil claim. Novel issues were raised by the claims which would have expanded state liability and stretched the existing boundaries of certain torts. This would have been the case for the conspiracy claim (arising between two states) and the negligent investigation claim (requiring the creation of a duty of care between intelligence and diplomatic personnel and suspects accused of terrorism). Further, issues with proving causation and meeting high fault thresholds could have posed additional problems.⁶⁶⁵

⁶⁶³ See *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at 1205, 126 DLR (4th) 129.

⁶⁶⁴ *Ibid* at 1208.

⁶⁶⁵ Different levels of fault are required for the various tort allegations advanced in Khadr's civil claim. Meeting private law standards of fault could be challenging (especially for the misfeasance and conspiracy claims) because proof of state of mind or knowledge that certain actions would likely cause harm is required.

It must be remembered that private law damages and constitutional damages serve distinct purposes. Private law damages are designed to provide redress for the plaintiff's harm that can be causally attributed to the defendant. These damages are not concerned with enforcing constitutional guarantees or "vindicating the social harm of the violation".⁶⁶⁶ Although *Ward* emphasized that the dominant function of *Charter* damages is to provide compensation,⁶⁶⁷ the Court's acknowledgement of the vindication and deterrence objectives should not be downplayed. The vindication and deterrence functions underscore the *public* character of the *Charter* damages remedy. The harm caused by a serious *Charter* breach is not confined to just the claimant. The vindication and deterrence objectives acknowledge that the violation affects society, the constitutional framework, and the rule of law. It is therefore difficult to accept that private law damages – focused squarely on the claimant and limited by causal standards, fault requirements, and caps⁶⁶⁸ – would adequately address all of the different objectives damages should serve in one of the most compelling constitutional cases of the last two decades.

As I argued in Chapter Two, *Charter* damages send a clear message when they are awarded. A court can hold the state accountable for constitutional breaches using the framework of the *Charter*. Imposing a constitutional remedy for a constitutional violation is symbolic, showing that the remedial mechanism of the *Charter* is responsive and effective.⁶⁶⁹ Using only private law damages to remedy conduct that has public consequences risks diluting the purpose and importance of subsection 24(1) of the *Charter*. If private law damages are consistently ordered to provide redress for constitutional violations, the legitimacy of the *Charter* damages remedy is threatened. Consequently, tort law may never provide a complete remedy where serious constitutional infringements are present. Private law damages were not created to respond to the kind of individual and societal harm that arises from constitutional wrongs; this is why *Ward* acknowledged three broad remedial objectives that animate the *Charter* damages remedy.

The circumstances of the Khadr case – involving multiple constitutional breaches and a pattern of neglect toward a vulnerable youth detainee – require a constitutional remedy to address the many forms of harm that resulted from Canadian actions: to Khadr, to the *Charter*, and to Canadian society. Although it

⁶⁶⁶ See Roach, *Constitutional Remedies in Canada*, *supra* note 17 at para 11.80.

⁶⁶⁷ *Ward*, *supra* note 4 at para 27.

⁶⁶⁸ A cap was established on private law non-pecuniary damages by what is referred to as the damages trilogy: *Andrews v Grand & Toy*, [1978] 2 SCR 229, 83 DLR (3d) 452 [*Andrews* cited to SCR]; *Arnold v Teno*, [1978] 2 SCR 287, 83 DLR (3d) 609; and *Thornton v Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 SCR 267, 83 DLR (3d) 480. Non-pecuniary damages are designed to remedy losses that are more difficult to quantify, such as pain and suffering or psychological trauma. Although originally set at \$100,000, the cap continues to be adjusted for inflation. I discuss this cap further in Chapter Five.

⁶⁶⁹ See *Doucet-Boudreau SCC*, *supra* note 72 at para 25, where the SCC emphasized that a remedy under subsection 24(1) of the *Charter* must be responsive and effective to satisfy a purposive approach.

might be possible for Khadr to receive adequate personal compensation through private law damages, the compelling vindicatory and deterrent functions should be addressed by a public law remedy focused specifically on those goals.

(B) Good Governance Issues

As outlined in Chapters Two and Three, there are potential good governance issues that could be raised by the state during the countervailing factors analysis. First, the influence of Crown prerogative must be addressed. The state could argue that ordering *Charter* damages to remedy decision-making in the foreign affairs sphere would chill the exercise of government discretion on matters of foreign policy and diplomacy or trigger an influx of claims brought by Canadians detained abroad. Further, the state could argue that, based on *Khadr SCC 2010* and the follow-up litigation, ordering a large damages award in this area would exceed a court's institutional competence. Second, the government could raise concerns about causation issues in the Khadr case. The state could argue that, because the US was the direct cause of Khadr's detention and mistreatment, Canada should not bear the sole responsibility of providing remedial compensation. Finally, if a court hearing Khadr's civil claim found that the state raised significant good governance concerns, it could create a new limited immunity. The state would only become liable for conduct rising above a certain fault threshold. These issues are analyzed below.

The Influence of Crown Prerogative

Much of the federal government's decision-making in the Khadr case fell under the foreign affairs prerogative because it concerned Canada's relations with another state. This area has been afforded historic deference based on the notion that it is inappropriate for the judiciary to review the substance of foreign policy decisions or matters of diplomacy. In her concurring opinion in *Operation Dismantle* (the foundational case establishing that prerogative decisions were reviewable by courts in limited circumstances), Justice Wilson affirmed that it is improper for the judiciary to "second guess the executive".⁶⁷⁰ It was entirely appropriate, however, for a court to determine whether executive decision-making amounted to a constitutional breach.⁶⁷¹ Justice Wilson referred to subsection 24(1) of the *Charter*, acknowledging that the remedial provision compelled a competent court to address this issue.⁶⁷²

Although courts can review decisions made under Crown prerogative for compliance with the *Charter*, *Khadr SCC 2010* demonstrated that courts adopt a cautious approach to remedies. The SCC was

⁶⁷⁰ *Operation Dismantle*, *supra* note 41 at 472, Wilson J.

⁶⁷¹ *Ibid.*

⁶⁷² *Ibid.*

concerned about its institutional competence to order the executive to exercise the prerogative power in a particular way. Declaratory relief was much less intrusive than ordering the executive to seek Khadr's repatriation. In the follow-up litigation, Justice Zinn of the Federal Court attempted to hold the Harper government to task for its failure to take remedial action in response to the SCC declaration. The judgment was stayed by the Federal Court of Appeal on the basis that it strayed beyond the court's institutional role.

Crown prerogative is in tension with fundamental principles of modern government. Jennifer Klinck noted that the prerogative power "sits uncomfortably with contemporary conceptions of democratic legitimacy and the rule of law."⁶⁷³ Similarly, Lorne Sossin commented that arbitrary decision-making "for which a public official cannot be held accountable represents an important erosion of some of the most basic and fundamental tenets of our legal and political systems."⁶⁷⁴ Philippe Lagassé argued that, while prerogative powers may seem like a vestige of history, they have endured in Canada due to ambivalence that exists between the three branches of government.⁶⁷⁵ In his view, the ambivalence is revealed through imprecise parliamentary statute drafting and insistence from the SCC that explicit statutory wording is necessary to displace or limit a prerogative power.⁶⁷⁶ Ambivalence is also apparent in the way courts have approached remedies in this area. Lagassé argued that judicial remedies affecting prerogative powers have been "cautious and sparse",⁶⁷⁷ with *Khadr SCC 2010* signalling that deference and ambivalence have become more profound.⁶⁷⁸

It is expected that Crown prerogative would have some influence over the adjudication of Khadr's civil claim. *Khadr SCC 2010* looms in the background as a reminder that courts should tread lightly in this area. It is crucial to note, however, that the focus of a court's remedial analysis in Khadr's civil claim would be on damages, not repatriation. This is a critical distinction. A court would not be second guessing policy choices or ordering the government to perform a specific prerogative function; it would be requiring the state to pay money based on the effects of decisions it already made. This should reduce a court's reticence to order an impactful remedy for an unconstitutional exercise of prerogative power.

Lawrence David's research shows, however, that a new set of concerns emerge when courts

⁶⁷³ Klinck, *supra* note 40 at 999.

⁶⁷⁴ Lorne Sossin, "The Rule of Law and the Justiciability of Prerogative Powers: A Comment on *Black v. Chretien*" (2003) 47 McGill LJ 435 at 456.

⁶⁷⁵ Philippe Lagassé, "Parliamentary and judicial ambivalence toward executive prerogative powers in Canada" (2012) 55:2 Can Pub Admin 157 at 163.

⁶⁷⁶ *Ibid* at 170.

⁶⁷⁷ *Ibid* at 171.

⁶⁷⁸ *Ibid*.

consider whether to order remedies that involve public funds. David argued that deference was built in to the *Ward* framework at the countervailing factors and quantification stages “precisely because resource allocation will often be involved.”⁶⁷⁹ David believed that a court’s discretion “will be tempered by deference”⁶⁸⁰ in cases where a claimant seeks a large damages award. The uninspiring state of the *Charter* damages remedy, save for exceptional cases, lends support to David’s conclusion. I revisit this issue in the fourth step of the *Ward* analysis – quantification of damages – in Chapter Five.

The federal government could argue that a large *Charter* damages award to remedy *Charter*-infringing conduct in the foreign affairs sphere would chill the exercise of executive discretion. The majority in *Henry SCC* was fearful that a *Charter* damages award could compromise the ability of prosecutors to perform their duties. It could also threaten the public interest if prosecutors were constantly fearful of triggering civil liability.⁶⁸¹ The majority acknowledged that *Charter* damages were awarded against the state (not individuals), but this did not alleviate the good governance concerns.⁶⁸²

To limit Khadr’s *Charter* damages claim, the state could rely on *Henry SCC* to argue that similar concerns would arise in the foreign affairs sphere. The government would likely stress that discretion is essential in an area as delicate as state-to-state relations; that is why the foreign affairs prerogative continues to exist. A large *Charter* damages award could affect or alter the way public officials perform certain functions in this sensitive area, amounting to excessive interference with prerogative decision-making. The strength of these arguments is diminished, however, by the existence of two previous SCC decisions that established violations of a minor’s constitutional rights.⁶⁸³

Even though Crown prerogative is still protected by courts, it is unlikely to pose an insurmountable hurdle to Khadr’s *Charter* damages entitlement. A court hearing Khadr’s civil claim would not be compelling the government to exercise a prerogative power in a particular way nor would it be replacing a government decision with a more suitable alternative. These were the issues that plagued the SCC in *Khadr SCC 2010*. The question at this stage of the countervailing factors analysis is: what exactly is at risk of being chilled by a large *Charter* damages award? In *Mackin*, the SCC was concerned that public officials would become fearful of liability for performing duties under what was, at the time, valid legislation. This

⁶⁷⁹ David, *supra* note 57 at 60.

⁶⁸⁰ *Ibid.*

⁶⁸¹ *Henry SCC*, *supra* note 252 at para 73, Moldaver J.

⁶⁸² *Ibid* at para 80, Moldaver J.

⁶⁸³ See *Khadr SCC 2008*, *supra* note 32 and *Khadr SCC 2010*, *supra* note 25.

fear could then jeopardize the manner in which officials carried out their duties.⁶⁸⁴ Part of the majority's concern about good governance in *Henry SCC* was that a flurry of inconsequential *Charter* damages claims could result from a fault standard that was set too low. This would divert prosecutors from their core responsibilities and turn their focus to defending themselves against lawsuits.⁶⁸⁵

The number of potential claims that could be brought by Canadians in similar circumstances to Khadr is much lower than potential claims relating to the effects of unconstitutional legislation (the concern in *Mackin*) or Crown disclosure (the concern in *Henry SCC*). Fortunately, cases like Khadr's are uncommon and a *Charter* damages award would not encourage a deluge of similar claims to come forward. Although there are many examples where Canadians have been detained abroad by a foreign regime, there are few cases where the Canadian government actively breached the *Charter* rights of individuals held in foreign detention. It is unlikely that a *Charter* damages award would trigger a serious shift in the behaviour of public officials based on fear of prospective liability, nor would it prompt a diversion of focus resulting from a tidal wave of potential claims.

Charter damages would *promote* good governance in Khadr's case rather than pose any kind of threat. A robust damages award would accomplish all of *Ward's* objectives and it would send a strong message about the necessity of *Charter* compliance. The SCC noted in *Ward* that adherence to the *Charter* "is a foundational principle of good governance."⁶⁸⁶ Interpreting this quote, Adourian maintained that "good governance is a reason to comply with the *Charter*, not an excuse to breach it."⁶⁸⁷ Even if a large *Charter* damages award affected the behaviour of public officials in the foreign affairs sphere, it should not be assumed that the effect would be negative. Damages could trigger a change in the way certain detainee cases are handled, especially when the individual is a youth. The award would also emphasize that no constitutional infringement, regardless of the realm in which it arises, should evade the remedial arm of the *Charter*.

Causation

Throughout the Khadr litigation, the federal government repeatedly relied on causation issues to limit its liability. Khadr was apprehended by the US, detained by the US, and abused by the US. The SCC recognized in 2010 that the US was "the primary source of the deprivation of Mr. Khadr's liberty and

⁶⁸⁴ See *Ward*, *supra* note 4 at para 41.

⁶⁸⁵ *Henry SCC*, *supra* note 252 at para 72, Moldaver J.

⁶⁸⁶ *Ward*, *supra* note 4 at para 38.

⁶⁸⁷ Adourian, *supra* note 56 at 93.

security of the person.”⁶⁸⁸ Canada could argue that, based on this finding, it should not be held liable for damages resulting from actions taken by another state. Although the Court only defined two countervailing factors in *Ward*, it acknowledged that these factors would develop along with the *Charter* damages case law.⁶⁸⁹ It is therefore possible that a court hearing Khadr’s civil claim could treat causation as a countervailing factor unique to this case.

The influence of causation is largely dependent on the *Charter* breaches relied on by a court hearing Khadr’s claim. If a court confined itself to remedying the previous *Charter* breaches established by the SCC in 2008 and 2010, causation could play a role. Although the SCC found *Charter* violations on two occasions, the scope of government liability was relatively narrow. Canadian participation in an unlawful American regime was what triggered the *Charter* and satisfied the required causal connection.⁶⁹⁰ Even though Canadians interviewed Khadr under extremely controversial circumstances and shared intelligence with the US, Canada could argue that it should not be held financially responsible to remedy harm that was inflicted by the US. If a court found further *Charter* breaches relating to Canada’s conduct after *Khadr SCC 2010*, causation is less relevant because Canada had more direct control over Khadr.

Although it is possible that the Canadian government would try to exploit some causal issues in the Khadr case to minimize its liability, it is unlikely that these arguments would threaten Khadr’s *Charter* damages claim. The government’s involvement in Khadr’s case violated the *Charter* on at least two occasions and it showed complete disregard for Khadr’s status as a minor. Canada agreed to play by US rules to gain access to Khadr, effectively endorsing the illegal practices used at Guantánamo. Canadian officials made informed choices to visit Guantánamo, interview Khadr, and share intelligence with their US counterparts. These were not passive decisions. It is inappropriate for Canada to rely on causation arguments to shield itself from liability at the countervailing factors stage when it willingly participated in the violation of a teenager’s fundamental rights.

(C) Good Governance, Fault, and the Creation of an Immunity

As described in Chapters Two and Three, fault is a complicated part of the *Charter* damages analysis after *Ward*. The SCC did not state that fault was required in *Ward* and the Court acknowledged that the *Charter* breach was “the wrong on which the claim for damages is based.”⁶⁹¹ Notably, however, the Court did not uphold the \$100 *Charter* damages award compensating Ward for the seizure of his car

⁶⁸⁸ See *Khadr SCC 2010*, *supra* note 25 at para 19.

⁶⁸⁹ *Ward*, *supra* note 4 at para 33.

⁶⁹⁰ *Khadr SCC 2010*, *supra* note 25 at para 21.

⁶⁹¹ *Ward*, *supra* note 4 at para 23.

because no injury or loss occurred.⁶⁹² The Court could have awarded \$100 for non-compensatory reasons to remedy the section 8 *Charter* violation, but a declaration was deemed sufficient to vindicate the right at issue and deter future illegal car seizures.⁶⁹³ Roach explained that some post-*Ward* decisions treat the SCC's rejection of the *per se* theory of *Charter* damages as evidence that 'something more' is required.⁶⁹⁴ The 'something more' usually involves the imposition of a fault requirement such as bad faith or malice and this typically occurs in cases involving police. Roach argued that this is an incorrect application of the *Ward* framework; all a claimant must do under *Ward* is establish that damages are functionally justified.⁶⁹⁵

Despite the SCC's recognition in *Ward* that the *Charter* breach was the legal wrong committed by the state, the Court noted that fault requirements might be necessary in cases where the state raises valid concerns about good governance. The Court offered the following guidance:

By analogy to *Mackin* and the private law, where the state establishes that s. 24(1) damages raise governance concerns, it would seem a minimum threshold, such as clear disregard for the claimant's *Charter* rights, may be appropriate. Different situations may call for different thresholds, as is the case at private law.⁶⁹⁶

As discussed in the previous section, the Government of Canada could have raised good governance concerns. The most prominent would likely relate to Crown prerogative. Arguments were advanced throughout the Khadr litigation that government decisions made under Crown prerogative should be afforded deference.⁶⁹⁷

It is possible that a fault requirement could have been imposed on Khadr's *Charter* damages claim given the type of governmental decision-making at issue. Crown prerogative still commands considerable deference in Canadian law, particularly when it involves foreign affairs. If a court hearing Khadr's claim found that Canada's good governance arguments had merit, it could create a new immunity similar to the way *Mackin* operates. This would mean that the state could only become liable for *Charter* damages in cases involving decisions made under the foreign affairs prerogative if a certain level of fault is present. An

⁶⁹² *Ibid* at para 77.

⁶⁹³ *Ibid* at para 78.

⁶⁹⁴ Roach, *Constitutional Remedies in Canada*, *supra* note 17 at para 11.671. Charney and Hunter also argued that a closer reading of *Ward* indicated that 'something more' was needed to justify a *Charter* damages award. See Charney & Hunter, "Tort Lite?", *supra* note 231 at 395.

⁶⁹⁵ Roach, *Constitutional Remedies in Canada*, *supra* note 17 at para 11.671.

⁶⁹⁶ *Ward*, *supra* note 4 at para 43.

⁶⁹⁷ The state argued that the foreign affairs prerogative was "of the utmost importance to [Canada's] constitutional order". See *Prime Minister of Canada, et al. v Omar Ahmed Khadr*, 33289, Factum of the Appellant Prime Minister of Canada at para 3, online: <<https://www.scc-csc.ca/case-dossier/info/af-ma-eng.aspx?cas=33289>>.

immunity is designed to provide limited protection to the state “when it is performing certain legislative and policy-making functions that only the state can perform.”⁶⁹⁸

It is unknown how profound good governance concerns must be to trigger the creation of a limited immunity. Relatively few immunities exist, so it is assumed that the threats to good governance must be significant. As shown above, the possible good governance concerns relating to Crown prerogative raised in the Khadr case are not particularly worrisome. A *Charter* damages award is much more likely to promote good governance in this case than it is to hinder discretionary policy-making functions. A court ordering a monetary remedy is not directing the government to exercise a prerogative power in a certain way nor is it reviewing the soundness of a prerogative decision and substituting a superior one. The purpose of a *Charter* damages award in the Khadr case is straightforward: to remedy conduct that violated *Charter* rights.

If an immunity were carved out for *Charter* damages claims relating to Crown prerogative, it would be difficult to predict the standard of fault that would be required. A court hearing Khadr’s civil claim could have followed the SCC’s guidance in *Ward* and imposed the ‘clear disregard for the claimant’s *Charter* rights’ standard. This is a relatively low bar, especially for the Khadr case. Khadr should have had no difficulty demonstrating that CSIS and DFAIT officials (and successive Canadian governments) disregarded his *Charter*-protected interests. CSIS conducted interviews at a time when practices used at Guantánamo were subject to international scrutiny. The 2009 SIRC Report, which reviewed the actions of CSIS in the Khadr matter, found that the agency failed to consider and appreciate Khadr’s potential mistreatment and his youth status.⁶⁹⁹ Further, the 2004 DFAIT interview occurred with knowledge that Khadr had been subjected to intensive sleep deprivation.

A court could also take guidance from *Hinse v Canada (Attorney General)*⁷⁰⁰ (“*Hinse*”). In this case, the SCC had to determine the appropriate standard of fault that applied to the federal Minister of Justice’s discretion to exercise the prerogative power of mercy. The power was being examined at a period in history where no procedural framework was available to guide the processing of mercy applications.⁷⁰¹

⁶⁹⁸ Charles, *supra* note 14 at 88.

⁶⁹⁹ *SIRC Report*, *supra* note 365.

⁷⁰⁰ 2015 SCC 35, [2015] 2 SCR 621 [*Hinse*]. *Hinse* had been wrongfully convicted of armed robbery and paid \$5.5 million in compensation by a municipality and the Attorney General of Québec. He argued that he was entitled to further compensation because federal ministers who reviewed his applications for mercy were at fault. The Québec Superior Court found that simple fault (referred to as “institutional inertia” or “institutional indifference”) was the proper standard. Nearly \$5.8 million in private law damages was ordered. The Québec Court of Appeal allowed the appeal, finding that the minister was protected by a limited immunity similar to that which would apply to a prosecutor in malicious prosecution claims. The SCC dismissed the appeal.

⁷⁰¹ *Ibid* at para 62, Wagner and Gascon JJ.

The Court concluded that the exercise of this power at the time “was a true policy decision”⁷⁰² that triggered a qualified immunity. The minister would only be civilly liable if his or her actions amounted to a breach of the duty to meaningfully review the mercy application, which would amount to bad faith or serious recklessness.⁷⁰³ The Court stated that

The fact that the Minister's power derives from the royal prerogative of mercy attests to the broad discretion that is conferred on him or her. Although the fact that a decision is discretionary is not on its own sufficient to justify finding that a public law immunity applies, it is nonetheless a helpful criterion.⁷⁰⁴

The *MacRae* and *Naqvi* cases, both involving *Charter* damages claims, could also be used to support a higher fault requirement being imposed. Both of these judgments show that highly discretionary decisions may attract fault requirements on a higher standard of bad faith or improper purpose.⁷⁰⁵ It is possible that a court hearing Khadr’s claim could be influenced by these cases because of the delicate nature of decisions made under the foreign affairs prerogative.

Critically, neither *MacRae* or *Naqvi* involved the exercise of prerogative powers. Further, neither decision dealt with serious *Charter* breaches that had already been established. There is no case that is truly analogous to Khadr’s circumstances involving a *Charter* damages claim for an unconstitutional exercise of a prerogative power involving a minor. Although *Hinse* suggested that discretionary policy decisions should benefit from a limited immunity, *Hinse* did not involve a claim for *Charter* damages; it concerned Québec civil law and it examined a different prerogative power. Even if a court followed *Hinse* and imposed a higher standard of fault (such as bad faith), I argue that Khadr could meet that threshold.

As I explained earlier in the section discussing Khadr’s tort claims, it can be difficult to prove that government decision-makers acted with improper intent. Canada would likely argue that its behaviour never rose to the level of bad faith, improper purpose, or recklessness because it provided the minimum level of consular assistance to Khadr.⁷⁰⁶ The Canadian government sent diplomatic notes when Khadr was first detained to prevent his transfer to Guantánamo, sought assurances that the death penalty would not be requested in his military commission proceedings, conducted welfare visits, fulfilled its disclosure

⁷⁰² *Ibid* at para 4, Wagner and Gascon JJ.

⁷⁰³ *Ibid*.

⁷⁰⁴ *Ibid* at para 31, Wagner and Gascon JJ.

⁷⁰⁵ See *MacRae*, *supra* note 306 at paras 12-13 and *Naqvi*, *supra* note 311 at paras 33-34. *MacRae* involved a decision by police whether to investigate and prosecute while *Naqvi* involved the decision of a visa officer to deny Naqvi’s sponsorship application.

⁷⁰⁶ For a review of Canadian actions taken toward Khadr, see the dissenting opinion of Justice Nadon in *Khadr FCA 2009*, *supra* note 38 beginning at para 88.

obligation in 2008, and ultimately repatriated Khadr in 2012.

Although true, this chronology of Canadian actions obscures critical incidents which could trigger a finding of bad faith. The most glaring example is the decision to conduct the 2004 interview with Khadr despite having knowledge that he was subjected to prolonged sleep deprivation. It is reasonable to conclude that Foreign Affairs personnel ought to appreciate that interviewing someone who has been tortured – and then sharing information about that interview – is entirely inappropriate. Second, the Harper government did not take meaningful steps to remedy a declaration from Canada’s highest court in 2010. The diplomatic note sent by Canada to the US after *Khadr SCC 2010* did not secure any kind of remedy. It is likely that Canada’s indifference to the continuing rights violation influenced Khadr’s decision to plead guilty to war crimes.⁷⁰⁷ Third, the delay in processing Khadr’s transfer application and Canada’s decision to hold him in maximum security facilities (which was a statutory misinterpretation) could be viewed as further examples of bad faith designed to stigmatize Khadr and exacerbate his suffering.⁷⁰⁸

A further concern associated with the creation of a new immunity for prerogative decision-making relates to how these decisions are already treated by courts. Decisions made under the foreign affairs power already attract a significant level of deference from the judiciary when they are being reviewed. This deference functions similarly to an immunity: it is only when decisions threaten the rights or legitimate expectations of a claimant that they become reviewable and the state can be held liable.⁷⁰⁹ When a decision made under the foreign affairs prerogative leads to a serious constitutional infringement, that should be enough to trigger state liability. There is no need to impose a fault requirement such as bad faith to protect the exercise of state discretion in this area. Decision-making with respect to foreign affairs already has a layer of insulation because it takes place under a prerogative power.

Creating new immunities that allow the state to mount further defences to *Charter* damages claims is a dangerous possibility. Justice Linden cautioned that Canada “must be careful not to follow the U.S. jurisprudence where various immunities have greatly weakened the impact of their constitutional torts over the years.”⁷¹⁰ Although immunities arguably serve a purpose in the private law realm, their applicability is

⁷⁰⁷ See Macfarlane, *supra* note 484 at 178: “...it is likely that Khadr only agreed to the plea deal upon realizing he was not going to get any assistance from the Canadian government. In this respect, the plea bargain itself is merely the final fruit of a poisonous tree, tainted by the events and processes that necessitated it in the first place.”

⁷⁰⁸ When Khadr was ultimately repatriated to Canada in September 2012, Public Safety Minister Vic Toews saw fit to publicly remind Canadians that Khadr was an al Qaeda supporter and convicted war criminal. See Shephard, “Omar Khadr repatriated to Canada”, *supra* note 428.

⁷⁰⁹ See *Black*, *supra* note 41 at para 51.

⁷¹⁰ Linden, *supra* note 13 at 438.

more difficult to justify in the *Charter* damages context where the objective is to provide a remedy for a proven constitutional violation. The *Charter* damages remedy is struggling to define itself and become a reliable source of redress for aggrieved claimants. Imposing further restraints will tilt the balance that *Ward* attempts to strike even more toward the state.

CONCLUSION

The analysis in this chapter demonstrated that *Charter* damages are functionally justified in the Khadr case to promote powerful compensatory, vindictory, and deterrent goals. Although there are potential countervailing factors, they are not serious enough to defeat Khadr's claim or render *Charter* damages inappropriate. Khadr would have faced considerable difficulty proving the tort allegations contained in his civil claim. Even if he were successful and a court determined that he would be properly compensated through private law damages, I contend that *Charter* damages are still necessary to promote the compelling vindictory and deterrent functions outlined in Part II. Canada believed it did not have to meaningfully respond to the declaration issued by the SCC in 2010. This stance sent the message that Khadr's *Charter* rights were not worthy of protection and that a judicial declaration of unconstitutionality could largely be ignored. Constitutional damages are needed to vindicate the importance of *Charter* guarantees and to deter the state from behaving in a similar fashion in the future.

It is undisputed that decisions made under Crown prerogative attract deference from Canadian courts. When a citizen's rights have been infringed and a monetary remedy is the subject of the judicial analysis, however, the reasons to justify deference become weaker. Historically, courts have shied away from ordering the executive to take specific action under a prerogative power because it would challenge the separation of powers. A court hearing Khadr's civil claim would not be ordering the executive to exercise a prerogative power in a certain way, which was described as excessive in *Khadr SCC 2010* and the follow-up litigation. Instead, a court would be providing a constitutional remedy well within its sphere of institutional authority to promote government accountability and the rule of law.

In the next chapter, I assess the fourth and final step of the *Ward* framework: how a court should quantify *Charter* damages in the Khadr case. I emphasize that a large damages award is necessary to promote *Ward's* objectives and increase reliance on the remedy. Locating relevant precedents to assist with quantification of damages for Omar Khadr is, however, a challenging endeavour. *Charter* damages case law is developing at a rather slow pace and the most similar cases are found in wrongful conviction jurisprudence and previous government settlements with Canadians who were detained and tortured abroad.

It is unlikely that Khadr would be treated as a victim of wrongful conviction by a Canadian court. Although Khadr is challenging his 2010 guilty plea in the US (and there are many reasons to doubt its legitimacy),⁷¹¹ he remains a convicted war criminal. He has not been exonerated through any judicial process. Although previous federal government settlements with detainees tortured in foreign countries are highly relevant, they are not binding on a court hearing Khadr's civil claim. Despite their limitations, I rely on these authorities together with private and public law cases to map out how damages should be quantified in such a novel case.

⁷¹¹ Leaked classified material cast doubt on the US military's version of events involving Khadr's role in the death of Sgt. Speer – see *supra* note 21. Further, controversy surrounded the decision of Khadr's military commission judge to allow the prosecution to submit evidence at trial of confessions and statements given by Khadr that were allegedly obtained through torture and threats. See Anna Mehler Paperny, "Khadr's confessions admissible, military judge rules", *The Globe and Mail* (9 August 2010), online: <<https://www.theglobeandmail.com/news/world/khadr-confessions-admissible-military-judge-rules/article1376518/>>.

CHAPTER FIVE: THE QUANTIFICATION OF CHARTER DAMAGES FOR OMAR KHADR

INTRODUCTION

Chapter Four demonstrated that, although Khadr encountered obstacles at the countervailing factors stage of the *Ward* inquiry, the functional justification for his *Charter* damages claim was strong enough to proceed to quantification. Attempting to quantify *Charter* damages for an unconstitutional exercise of a prerogative power is a novel endeavour. This involves calculating the monetary value of harm stemming from Canada's active participation in the violation of a minor's human rights. I advance a normative argument in this chapter, focusing on what the *Charter* damages quantification analysis should look like in the Khadr case and in the broader *Charter* damages jurisprudence. To provide the most comprehensive assessment, I proceed on the assumption that Khadr would have been unable to prove any of the tort allegations he advanced in his civil claim. As shown in the previous chapter, Khadr faced considerable difficulty meeting the thresholds required to succeed with these claims.

I present two general arguments in this chapter. First, I emphasize that courts should draw from all relevant sources in developing a quantification model for *Charter* damages claims. In Khadr's case, the most relevant sources are settlements with wrongfully convicted persons and individuals who were detained and tortured in foreign countries. Although these settlements do not have precedential authority, they should serve as guides for the quantification of vindication and deterrence-based damages. The second argument I make is that the remedial timidity exhibited in many post-*Ward* cases needs to be challenged. Despite there being legitimate reasons to limit damages awards in some cases (where the infringement is minor and harm to the claimant was minimal), sizeable awards should be ordered on a more consistent basis to truly vindicate rights, promote state accountability, and encourage reliance on the remedy.

I do not attempt to calculate the damages Khadr would have been awarded if his civil claim proceeded to trial. This is impossible given the unknown evidence. Instead, I discuss issues that could arise at different stages of the quantification process. I argue that a court should not be unduly influenced by private law principles. Further, a court should not be constrained by the sluggish evolution of the *Charter* damages remedy and *Ward's* discouragement of large damages awards. Although cases like *Henry BCSC*, *Brazeau*, and *Reddock* are exceptional in the *Charter* damages jurisprudence, they are examples of courts pushing the boundaries of the *Ward* framework to provide meaningful redress in circumstances where claimants suffered distinct kinds of harm. These progressive decisions should encourage a court to order a substantial damages award in Khadr's case.

I separate the discussion into compensation-based *Charter* damages and vindication and deterrence-based *Charter* damages (because different concerns animate both areas). In Part I, I discuss how Khadr’s pecuniary and non-pecuniary compensatory damages ought to have been assessed. I argue that certain private law principles, such as strict causal standards and damages caps, should not be applied because of the extraordinary circumstances of the case.

In Part II, I examine past *Charter* damages cases where vindication and deterrence-based damages were ordered. These decisions do not provide much guidance, so I consult sources outside the public law realm. I discuss wrongful conviction settlements and previous Government of Canada settlements with individuals who were detained and tortured abroad. The detainee settlement cases share the greatest similarity to Khadr’s experience in terms of harm suffered. Notwithstanding key distinctions, I argue that these figures should influence the quantification of Khadr’s vindication and deterrence-based *Charter* damages. Finally, I address whether Khadr may have been entitled to punitive damages, which are rarely awarded together with *Charter* damages.

In Part III, I revisit the issue I describe as remedial timidity in the post-*Ward* case law. I examine why judges might feel reticent to award large damages awards, focusing on institutional competence and the separation of powers. I discuss how *Ward* gave courts the latitude to order robust damages awards, yet effectively circumscribed this power by discouraging large awards and classifying a \$5,000 award as “moderate”.⁷¹² While judges must be cautious to avoid draining the public purse to remedy fleeting *Charter* breaches that had minimal impact, they should not feel restricted to order large damages awards where they are required to meaningfully achieve *Ward*’s objectives – especially when the rule of law is threatened.

PART I: COMPENSATION-BASED CHARTER DAMAGES

Compensatory *Charter* damages are focused on corrective justice: “to restore the claimant to the position she would have been in had the breach not been committed”.⁷¹³ The SCC was clear in *Ward* that compensatory *Charter* damages will not be awarded unless the claimant can show proof of physical, psychological, or financial loss.⁷¹⁴ This is why the \$100 damages award given to Ward at trial for an unreasonable seizure of his car was not upheld by the SCC. Ward never suffered compensable loss relating to the impoundment; he was driven to pick up his car after being released by police.⁷¹⁵ The SCC found that

⁷¹² *Ward*, *supra* note 4 at para 71.

⁷¹³ *Ibid* at para 48.

⁷¹⁴ *Ibid* at paras 48-49.

⁷¹⁵ *Ibid* at para 77.

a damages award did not serve any functional objectives and was unnecessary. With these principles in mind, I discuss how pecuniary and non-pecuniary compensatory damages should have been quantified in the Khadr case.

Pecuniary Damages

Pecuniary losses involve money and are typically easier to quantify than non-pecuniary losses. Examples include loss of income and costs the plaintiff incurred relating to the incident in question. Khadr alleged in his civil claim that he suffered damages relating to lost educational opportunities, loss of income, and loss of opportunity for future income.⁷¹⁶ In *Ward*, the Court commented that “prolonged detention may result in loss of earnings.”⁷¹⁷ It is presumed that the Court was referencing the plight of a wrongfully convicted individual or someone who had been detained and then ultimately released.⁷¹⁸ The SCC determined in *British Columbia v Zastowny*⁷¹⁹ (“*Zastowny*”), a private law case, that a person “is not entitled to compensation for periods of unemployment due to incarceration for conduct which the criminal law has determined worthy of punishment”.⁷²⁰ Exceptions to this general rule may be made in extraordinary circumstances, such as wrongfully convicted persons.⁷²¹

In private law, quantification of pecuniary damages for loss of income follows a corrective approach. The claimant is compensated for his or her actual losses which flow from the defendant’s conduct. The impact of the injury is important to the analysis. In *BMG v Nova Scotia (Attorney General)*,⁷²² (“*BMG*”) the Nova Scotia Court of Appeal commented that “decided cases do not provide benchmarks as to an appropriate range of pecuniary damages for loss of past income or income earning capacity.”⁷²³ The award in each case is based on the evidence of financial loss.⁷²⁴ In cases where a claimant was employed prior to an injury, quantifying the loss is a simpler task. In cases where a young person without an employment history suffered abuse that altered the course of his or her life (as in *BMG*), the analysis is more complex.

⁷¹⁶ Khadr Civil Claim, *supra* note 3 at para 60.

⁷¹⁷ *Ward*, *supra* note 4 at para 49.

⁷¹⁸ See Roach, *Constitutional Remedies in Canada*, *supra* note 17 at para 11.700.

⁷¹⁹ 2008 SCC 4, [2008] 1 SCR 27. Zastowny was sexually assaulted by a prison official while he was incarcerated as a teenager. He developed a heroin addiction following his release and spent twelve of the next fifteen years in prison. Zastowny brought an action in tort seeking compensation from the Province of British Columbia for lost wages. He was successful at trial, but the British Columbia Court of Appeal was divided on whether compensation for wage loss ought to be provided for periods of incarceration.

⁷²⁰ *Ibid* at para 3.

⁷²¹ *Ibid*.

⁷²² 2007 NSCA 120, 260 NSR (2d) 257 [*BMG*].

⁷²³ *Ibid* at para 176.

⁷²⁴ *Ibid*.

Ward encouraged reliance on private law to help quantify compensatory *Charter* damages. The more flexible approach used in *BMG* should be applied in the Khadr case to reflect the distinct harm suffered and the claimant's age. In *BMG*, the Court of Appeal upheld the trial judge's decision to order \$500,000 in pecuniary damages for loss of income to an individual who had been sexually assaulted as a teenager by a probation officer. The trial judge noted that the claimant's losses were "not amenable to precise arithmetical calculation."⁷²⁵ Although the judge relied on actuarial figures to help quantify the award, he recognized that "too many imponderables"⁷²⁶ were present.

There are few cases in the *Charter* damages jurisprudence where compensatory awards have been made for loss of earnings. In *Henry BCSC*, Henry was awarded \$530,000 to compensate for loss of income during a twenty-seven year period of incarceration for a wrongful conviction. Henry had been imprisoned prior to his wrongful conviction for different crimes and he was therefore unable to work during certain periods. The Court determined that Henry was likely to re-offend during the period of his wrongful incarceration if he had not been imprisoned. The approximate time Henry would have spent in prison if he re-offended was deemed to be one-third of the twenty-seven year sentence he served.⁷²⁷ Adourian criticized this approach, arguing that the trial judge's application of private law doctrine – particularly with regard to causation – was disturbing.⁷²⁸ Henry's constitutional remedy was reduced based on a purely hypothetical scenario about his potential to re-offend.

In *McTaggart*, the Ontario Superior Court awarded \$10,000 per year over a six year period for loss of income. The plaintiff's section 7 *Charter* right was violated by a police officer's failure to disclose material information. The Court struggled to determine the proper quantum due to the plaintiff's inability "to demonstrate any significant or consistent income prior to [incarceration]".⁷²⁹ *McTaggart* was a singer whose ability to make a living was significantly impacted by his incarcerations and parole restrictions, which related to criminal charges that were eventually withdrawn. The Court was troubled by the lack of a reliable benchmark to help gauge what *McTaggart*'s income would have been during the period in question.

Omar Khadr is not likely to be treated as a victim of wrongful conviction. Although he suffered profound harm as a youth detainee, he ultimately pleaded guilty to war crimes. Even if he had not done so,

⁷²⁵ *BMG v Nova Scotia (Attorney General)*, 2007 NSSC 27 at para 182, 250 NSR (2d) 154 [*BMG NSSC*].

⁷²⁶ *Ibid.*

⁷²⁷ *Henry BCSC*, *supra* note 16 at para 392.

⁷²⁸ Adourian, *supra* note 56 at 62.

⁷²⁹ *McTaggart*, *supra* note 141 at para 194.

the military commission under which he was being tried was poised to issue a forty year prison sentence.⁷³⁰ Given the extraordinary circumstances of Khadr's case, however, a court should acknowledge that his pecuniary losses were – and continue to be – pronounced. Khadr's detention began when he was fifteen years old. He was denied educational opportunities that affected his future earning capacity and he was subjected to prolonged periods of isolation which affected his development. Khadr suggested in his civil claim that he did not receive proper medical attention for his injuries while at Bagram, which led to "severe, chronic pain and rendered him susceptible to painful infections and other health related problems."⁷³¹ Khadr's claim listed a "lack of adequate medical treatment"⁷³² in the description of the mistreatment he suffered. Khadr was subjected to different forms of torture and abuse over a large period of his youth. These experiences leave an indelible mark on a person, undoubtedly influencing his or her ability to lead a normal life.

Canada's active participation in the Guantánamo process played a role in Khadr's continuing detention and it satisfies the material contribution test for causation. A court hearing Khadr's civil claim should find that damages for loss of earnings during periods of his imprisonment are appropriate. It is probable that these damages would only be awarded for time Khadr spent at Guantánamo after the *Charter* breach was triggered in February 2003 (the first interview) up to his guilty plea in October 2010. Awarding damages for time Khadr was incarcerated following his guilty plea could run afoul of the principle in *Zastowny*. A court might be reluctant to award damages for loss of earnings or earning capacity while Khadr was serving a criminal sentence. Arguments can be made, however, to suggest that Canadian involvement set in motion a chain of events that culminated in Khadr's guilty plea, which he maintains was coerced.⁷³³ The charges brought against Khadr and his prosecution by military commission have also been heavily criticized, raising doubts about the legitimacy of his plea and conviction.

One of the main difficulties associated with quantifying a loss of earnings award for such a young claimant is that Khadr had no previous employment history. Estimating his damages award would be entirely speculative and likely based on statistical models. Khadr was a teenager during a significant portion of the relevant assessment period. He was also living outside Canada at the time he was captured and it is unknown what, if any, educational opportunities he would have pursued in the Middle East or in Canada.

⁷³⁰ See Savage, *supra* note 43.

⁷³¹ Khadr Civil Claim, *supra* note 3 at para 17.

⁷³² *Ibid* at para 25.

⁷³³ *Ibid* at para 46.

As I argued above, if private law cases are used as guides to help quantify Khadr's estimated loss of earnings and the damage to his earning capacity, the more flexible approach used in *BMG* is most appropriate. This case showed that the pecuniary losses flowing from life-altering instances of abuse are very difficult to quantify using statistical measurements. The actuarial models relied on by the trial judge in *BMG* "provide[d] only limited insight into BMG's individual circumstances."⁷³⁴ The trial judge also acknowledged the complexity of determining how "negative contingencies such as job loss, unemployment or injury"⁷³⁵ would have affected BMG's earnings. A more holistic approach was used by the trial judge, relying on actuarial calculations as a reference point and focusing on the totality of the evidence to determine what opportunities BMG would have pursued had he not experienced the assault.

Although actuarial analysis and other economic and/or medical evidence can help guide a court to a rough approximation of the claimant's income-related losses, it is important in *Charter* damages cases to appreciate that the claimant's harm stemmed from a constitutional violation. The events that gave rise to income-related losses in Khadr's case were not the result of an accident or negligence, where obvious causal links are apparent between the defendant's conduct and the plaintiff's harm. Khadr's losses were a result of multiple state actors breaching fundamental human rights. Consequently, a court hearing Khadr's claim should not feel constrained by mathematical formulae or strict causation standards when assessing pecuniary damages. Given the distinct harm Khadr suffered (made even worse by his young age), a court is justified in exercising greater discretion to craft an appropriate pecuniary damages award based on the evidence Khadr could provide.

Non-pecuniary Damages

Non-pecuniary loss falls into a more imprecise category, focusing on the intangible losses associated with the claimant's injury. Quantification of non-pecuniary loss involves a degree of theoretical guesswork and "is a philosophical and policy exercise more than a legal or logical one."⁷³⁶ Even though *Ward* has been in existence for nine years, there is no model judgment from the *Charter* damages case law that can guide the quantification of non-pecuniary *Charter* damages. *Ward* recommended that courts look to private law for guidance.⁷³⁷ Although there are some private law principles that are useful to the quantification of non-pecuniary *Charter* damages, others are ill-suited to the constitutional realm. These issues are explored below.

⁷³⁴ *BMG NSSC*, *supra* note 725 at para 185.

⁷³⁵ *Ibid* at para 186.

⁷³⁶ *Andrews*, *supra* note 668 at 261.

⁷³⁷ *Ward*, *supra* note 4 at para 50.

In private law, a non-pecuniary damages award “is determined by placing a particular victim and set of circumstances within a range of conventional and, in a sense, arbitrary awards as determined largely by precedent.”⁷³⁸ Non-pecuniary damages are designed to provide “reasonable solace for [the plaintiff’s] misfortune.”⁷³⁹ Although there are multiple heads of damages that fall under non-pecuniary damages (such as pain and suffering, psychological trauma, and loss of expectation of life), the SCC has instructed courts to “favour a composite award for all non-pecuniary losses.”⁷⁴⁰ A list of factors to consider in the quantification of non-pecuniary damages has developed in the private law jurisprudence. These include the age of the plaintiff, the nature of the injury, the severity and duration of the plaintiff’s pain, the existence of a disability, emotional suffering, loss or impairment of life, impairment of family, marital, and social relationships, impairment of physical and mental abilities, loss of lifestyle, and the plaintiff’s stoicism.⁷⁴¹

Although these factors are relevant and helpful, there is a critical distinction to keep in mind. The unique harm caused by a constitutional violation does not have a tort law equivalent.⁷⁴² Constitutional infringements often involve a profound sense of intrusion because core human rights and freedoms – enshrined in supreme law – have been breached. Pilkington argued that constitutional violations could cause “damage of the most fundamental sort”,⁷⁴³ which justified her conclusion that damages should be awarded for *per se* infringements. Breaching the *Charter* is, on its own, a harmful act. The SCC recognized this in *Ward* when it acknowledged that a breach “is the wrong on which the claim for damages is based.”⁷⁴⁴ There is no formula or model in private law to measure the harm that flows from a constitutional violation. It is the responsibility of courts applying *Ward* to craft a damages model that is responsive to the distinct harms present in constitutional cases, such as a violation of an individual’s security of the person.

One of the issues to confront when assessing constitutional non-pecuniary damages is whether a cap ought to be imposed. There is a cap on the amount of non-pecuniary damages a court can order in personal injury cases.⁷⁴⁵ The cap has fluctuated since its imposition to account for inflation. It was determined to be approximately \$360,000 in *Henry BCSC*.⁷⁴⁶ The SCC did not directly comment on the applicability of the private law damages cap in *Ward* even though the Court encouraged reliance on tort

⁷³⁸ *BMG*, *supra* note 722 at para 176.

⁷³⁹ *Andrews*, *supra* note 668 at 262.

⁷⁴⁰ *Ibid* at 264.

⁷⁴¹ See *Boyd v Harris*, 2004 BCCA 146 at para 42, 237 DLR (4th) 193 and *Stapley v Hejlslet*, 2006 BCCA 34 at para 46, 263 DLR (4th) 19, leave to appeal to SCC refused, 31373 (19 October 2006).

⁷⁴² See Pilkington, “Monetary Redress”, *supra* note 99 at 311.

⁷⁴³ *Ibid* at 314.

⁷⁴⁴ *Ward*, *supra* note 4 at para 23.

⁷⁴⁵ This cap was established by what is referred to as the damages trilogy. See *supra* note 668.

⁷⁴⁶ *Henry BCSC*, *supra* note 16 at para 419.

law during the quantification of compensatory *Charter* damages.⁷⁴⁷ Citing *Andrews v Grand & Toy*⁷⁴⁸ (“*Andrews*”), a foundational negligence case, *Ward* affirmed that *Charter* damages could provide compensation for pain and suffering.⁷⁴⁹ The Court cautioned, however, that this compensation “is fixed at a fairly modest conventional rate, subject to variation for the degree of suffering in the particular case.”⁷⁵⁰

Although the SCC may have indirectly referenced the private law damages cap in *Ward*, no subsequent case has definitively addressed whether the cap should apply to limit compensatory non-pecuniary *Charter* damages. The Court in *Henry BCSC* found that imposing the cap was inappropriate for such an exceptional case.⁷⁵¹ The Court did not, however, award non-pecuniary damages to Henry. It preferred to deal with non-pecuniary issues through vindication-based damages.⁷⁵² The high damages award in *Brazeau* was also based on vindication and deterrence. Although \$9 million in compensatory *Charter* damages was ordered in *Reddock*,⁷⁵³ this case was a class action and the Court did not discuss the damages cap. It is therefore not settled whether the cap should apply to limit non-pecuniary *Charter* damages for individual claimants.

I argue that a non-pecuniary *Charter* damages model should not include a damages cap. As outlined above, *Charter* damages claims are distinct. The purpose of the private law damages cap, articulated in *Andrews*, was to address rising non-pecuniary damages awards and act as a stabilizing measure.⁷⁵⁴ The majority of post-*Ward* *Charter* damages awards are low and there is no trend developing where excessive non-pecuniary awards need to be curtailed. If anything, larger awards are needed in this area to truly provide responsive and effective remedies. Further, it would be difficult to determine an appropriate non-pecuniary damages cap given the relative scarcity of *Charter* damages precedents. The Court in *Andrews* had a deluge of case law from which to draw. If the cap were set too low for non-pecuniary *Charter* damages, it could reduce the likelihood of claimants coming forward to seek redress for constitutional violations.

Conflating non-pecuniary compensatory damages with vindication or deterrence-based damages (the Court’s decision in *Henry BCSC*) should also be avoided. *Ward* explicitly authorized non-pecuniary

⁷⁴⁷ *Ward*, *supra* note 4 at para 50.

⁷⁴⁸ *Supra* note 668.

⁷⁴⁹ *Ward*, *supra* note 4 at para 50.

⁷⁵⁰ *Ibid.*

⁷⁵¹ *Henry BCSC*, *supra* note 16 at para 421.

⁷⁵² *Ibid* at para 408.

⁷⁵³ The \$9 million award was designed to compensate class members for mental suffering and “the assault on their *Charter* rights.” See *Reddock*, *supra* note 16 at para 396.

⁷⁵⁴ *Andrews*, *supra* note 668 at 264.

damages awards.⁷⁵⁵ The SCC stated that courts should not shy away from ordering these damages just because they are difficult to quantify.⁷⁵⁶ In *Henry BCSC*, the Court determined that it was duplicative to order non-pecuniary damages and vindication and deterrence-based damages.⁷⁵⁷ The Court relied on comments made in *Andrews* where the SCC cautioned against ordering large non-pecuniary awards in cases where the claimant has already received proper compensation for future expenses.⁷⁵⁸ Although the Court in *Henry BCSC* did not provide detailed reasons why it chose not to order non-pecuniary damages, it is likely the Court believed Henry's non-pecuniary harm would be properly addressed by the \$7.5 million vindication-based award.

Transferring what should be a non-pecuniary award into the vindication or deterrence column is inappropriate based on *Ward's* functional approach. If there is functional justification for non-pecuniary damages, they should be awarded. This type of award acknowledges that the claimant experienced personal suffering as a result of the *Charter* breach. The compensatory objective of *Charter* damages is focused squarely on the claimant. The vindication and deterrence objectives are focused on the integrity of the right itself and broader societal harm. The analysis of non-pecuniary damages should remain separate from the analysis of vindication or deterrence-based damages to ensure the claimant's harm is properly addressed.

Omar Khadr should receive a substantial non-pecuniary damages award. He suffered significant breaches of his liberty and security of the person. CSIS and DFAIT officials interviewed Khadr when he was a teenager detained in extremely controversial conditions without access to a lawyer. The third interview was conducted in 2004 with knowledge that Khadr had been subjected to extensive sleep deprivation, which meets the international definition of torture.⁷⁵⁹ Potential evidence obtained in the interviews was shared with the US, yet Canada refused to disclose this information to Khadr. The SCC determined in 2010 that Canadian intelligence contributed to Khadr's continued detention.⁷⁶⁰ Canada's constitutional breaches are linked to a range of harm Khadr experienced: the psychological ramifications of torture and the prospect of indefinite detention, lack of contact with family, lack of social development, and immense pain and suffering over a prolonged period.

Quantifying Khadr's non-pecuniary damages is a complicated endeavour. This is due, in part, to

⁷⁵⁵ *Ward*, *supra* note 4 at para 50.

⁷⁵⁶ *Ibid.*

⁷⁵⁷ *Henry BCSC*, *supra* note 16 at para 408.

⁷⁵⁸ *Ibid* at para 407, quoting *Andrews*, *supra* note 668 at 261-62.

⁷⁵⁹ *Supra* note 622.

⁷⁶⁰ *Khadr SCC 2010*, *supra* note 25 at para 21.

the relatively small number of *Charter* damages cases that can guide the determination. In *Ward*, the Court effectively endorsed a \$5,000 award to remedy harm resulting from a strip search. The Ontario Superior Court also ordered \$5,000 for an unnecessary strip search in *Lamka*.⁷⁶¹ This was designed to accomplish compensatory, vindictory, and deterrent objectives.⁷⁶² In *McTaggart*, a pre-*Ward* case discussed above, the claimant was awarded \$150,000 in general *Charter* damages for “pain, suffering, loss of dignity, mental anguish, humiliation, and loss of enjoyment of life”.⁷⁶³ This harm stemmed from a section 7 breach caused by a police officer’s failure to disclose material information, which resulted in convictions and twenty months of imprisonment. In *Elliot v Waterloo (Regional Municipality) Police Services*⁷⁶⁴ (“*Elliot*”), the claimant was awarded \$25,000 in general *Charter* damages relating to an unconstitutional search, arrest, and detention. The Ontario Superior Court acknowledged the “pain, suffering, and humiliation”⁷⁶⁵ that the claimant experienced as a result of intrusive police behaviour.

In his comparative analysis of constitutional damages cases from other jurisdictions, Cooper-Stephenson noted that “significant emphasis has been given to the idea that “loss of dignity” is very much at the heart of many constitutional damages claims.”⁷⁶⁶ Justice Grant Hammond, formerly of the New Zealand Court of Appeal, acknowledged that “common experience suggests that the reality of physical and emotional suffering is the very thing that has most concerned victims.”⁷⁶⁷ Attempting to restore dignity should be given more of a focus in the quantification of compensatory *Charter* damages. Constitutional violations – particularly of sections 7 (life, liberty, and security of the person) and 15 (equality) – can profoundly affect a person’s dignity. Regrettably, *Ward* did not discuss the affront to dignity that can result from a *Charter* breach. Although it is difficult to quantify the loss of dignity stemming from a *Charter* infringement, it should be a relevant concern in the analysis of pain and suffering.

Varuhas acknowledged the difficulty with quantifying non-pecuniary damages in cases where human rights have been infringed.⁷⁶⁸ Drawing from what he described as vindictory torts,⁷⁶⁹ Varuhas

⁷⁶¹ *Lamka*, *supra* note 278 at para 89.

⁷⁶² *Ibid* at para 87.

⁷⁶³ *McTaggart*, *supra* note 141 at para 198.

⁷⁶⁴ 2011 ONSC 6889, 2011 ONSC 6889 (CanLII) [*Elliot*].

⁷⁶⁵ *Ibid* at para 82.

⁷⁶⁶ Ken Cooper-Stephenson, *Constitutional Damages Worldwide* (Toronto: Thomson Reuters, 2013) at 245.

⁷⁶⁷ Grant Hammond, “Beyond Dignity?” in Jeff Berryman & Rick Bigwood, eds, *The Law of Remedies: New Directions in the Common Law* (Toronto: Irwin, 2010) at 179.

⁷⁶⁸ Varuhas, *supra* note 214 at 133.

⁷⁶⁹ Varuhas’s overarching argument is that vindictory torts (such as trespass, battery, false imprisonment, and defamation) should be used as a guide to assess damages arising from human rights violations. Varuhas maintained that vindictory torts (which are actionable absent harm to the plaintiff) share similarities with how human rights are

separated non-pecuniary damages into two categories: normative damages and consequential losses.⁷⁷⁰ Normative damage refers to the harm suffered as a result of the underlying interest protected by the right or freedom having been infringed.⁷⁷¹ Varuhas provided an example: “An individual, banned from voting in breach of her right to vote, may actually be relieved at not having to choose...But she ought to receive damages for being denied the most fundamental of democratic rights.”⁷⁷² The overarching concern in assessing normative damages is the severity of the intrusion.⁷⁷³ Varuhas argued that consequential losses flowing from the breach should only be ordered if the but for standard of causation is satisfied.⁷⁷⁴ He noted, however, that “often there will be no hard evidence to verify whether such losses were indeed suffered, and causally connected to the wrong.”⁷⁷⁵ Varuhas recommended the use of “a ‘common sense’ approach...[where] the court draw[s] reasonable inferences from the facts.”⁷⁷⁶

Although Varuhas’s vindictory tort model is persuasive, it must be remembered that injury in the *Charter* context is based on harms flowing from constitutional breaches which may not have a tort law counterpart. Adourian acknowledged the helpfulness of Varuhas’s model, though he noted that “intentional torts may not be able to cover all aspects of *Charter* damages, especially where the facts are dissimilar to intentional torts.”⁷⁷⁷ I share this concern. Although private law is equipped to help quantify Khadr’s non-pecuniary damages for loss of liberty or pain and suffering, there is no tort that captures the distinct harm caused by torture or the trauma associated with the state’s failure to protect a vulnerable minor. It is likely that, out of necessity, the award would be somewhat arbitrary to respond to these harms. Given the lack of available precedents directly on point, a court hearing Khadr’s civil claim would be responsible for crafting an appropriate figure.

Some assistance may be found in Canadian human rights tribunal decisions. Ranjan Agarwal and Joseph Marcus made this suggestion for *Charter* damages cases involving racial profiling.⁷⁷⁸ The authors argued that human rights tribunal damages case law “is well developed”⁷⁷⁹ compared to the slow evolution of *Charter* damages jurisprudence. Although human rights tribunals do not address constitutional

protected in the United Kingdom. Both are concerned with defending basic interests, challenging executive power, and upholding the rule of law. See Varuhas, *supra* note 214 at 76-79.

⁷⁷⁰ Varuhas, *supra* note 214 at 130.

⁷⁷¹ *Ibid* at 131.

⁷⁷² *Ibid*.

⁷⁷³ *Ibid*.

⁷⁷⁴ *Ibid* at 132.

⁷⁷⁵ *Ibid* at 133.

⁷⁷⁶ *Ibid*.

⁷⁷⁷ Adourian, *supra* note 56 at 113.

⁷⁷⁸ Agarwal & Marcus, *supra* note 13 at 95.

⁷⁷⁹ *Ibid*.

violations, they provide remedies for harm resulting from discrimination. Discrimination also has no tort law equivalent⁷⁸⁰ and it causes a distinct type of harm to claimants that can be difficult to quantify. Most human rights tribunals can order damages to compensate claimants for the infringement of their right to be free from discrimination, which includes injury to dignity.⁷⁸¹ There is criticism that human rights tribunal damages are inadequate (particularly for instances of racial profiling), but commentators observed that the ceiling for these general damages awards appears to be rising.⁷⁸²

Writing just after the *Ward* decision was released, Roach expressed concern that the \$5,000 compensatory award could become the yardstick for *Charter* damages claims.⁷⁸³ He argued that, if this occurred, *Charter* damages awards would fall behind damages ordered pursuant to human rights codes.⁷⁸⁴ The Ontario Human Rights Tribunal typically orders between \$5,000 and \$15,000 in general damages, though there is no cap on the award.⁷⁸⁵ The Divisional Court of Ontario acknowledged in *ADGA Group Consultants Inc. v Lane*⁷⁸⁶ that tribunals “must ensure the quantum of general [non-pecuniary] damages is not set too low, since doing so would trivialize the social importance of the Code by effectively creating a “licence fee” to discriminate.”⁷⁸⁷ The Court noted that tribunals should consider the following factors in the quantification analysis: “humiliation; hurt feelings; the loss of self-respect, dignity and confidence by the complainant; the experience of victimization; the vulnerability of the complainant; and the seriousness of the offensive treatment”.⁷⁸⁸

If a court hearing Khadr’s civil claim applied Varuhas’s ‘common sense’ model and assessed the factors described above, it is clear Khadr suffered extensive non-pecuniary harm stemming from Canada’s actions. Canada chose to involve itself in an illegal process that violated basic human rights and it chose to ignore the plight of an extremely vulnerable citizen. It is difficult to imagine a claimant more deserving of personal compensation than a teenager who was tortured, mistreated, indefinitely detained for more than three years, denied access to counsel, subjected to a questionable military prosecution that ended in a guilty plea, and denied protection to which he was entitled under international law. The trauma associated with

⁷⁸⁰ *Ibid* at 93. See also Linden, *supra* note 13 at 435.

⁷⁸¹ For example, section 45.2 of the Ontario *Human Rights Code*, RSO 1990, c H.19, provides that the Tribunal can order “monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.”

⁷⁸² See Agarwal & Marcus, *supra* note 13 at 83.

⁷⁸³ Roach, “A Promising Late Spring”, *supra* note 13 at 154.

⁷⁸⁴ *Ibid* at 154-155.

⁷⁸⁵ Human Rights Legal Support Centre, “What Remedies Are Available to Me at the HRT?”⁷⁸⁵, online: <<https://www.hrlsc.on.ca/en/how-guides/what-remedies-are-available-me-hrto#financial>>.

⁷⁸⁶ (2008), 91 OR (3d) 649, 2008 CanLII 39605 (Div Ct) [*Lane*].

⁷⁸⁷ *Ibid* at para 153.

⁷⁸⁸ *Ibid* at para 154.

these experiences is beyond comprehension or precise quantification, but it is important that Khadr receive non-pecuniary damages to acknowledge the pain, trauma, loss of dignity, and helplessness he experienced.

PART II: VINDICATION AND DETERRENCE-BASED *CHARTER* DAMAGES

Although the SCC emphasized the importance of compensation in *Ward*, the Court acknowledged that “cases may arise where vindication or deterrence play a major and even exclusive role.”⁷⁸⁹ Chapter Four outlined the compelling functional justifications for vindication and deterrence-based damages in the Khadr case. It is critical that *Charter* guarantees are defended and a pattern of objectionable behaviour is denounced.⁷⁹⁰

The SCC commented in *Ward* that private law is “less useful”⁷⁹¹ in helping to quantify vindication and deterrence-based *Charter* damages. The Court noted that the quantification analysis for these objectives would be “an exercise in rationality and proportionality...guided by precedent.”⁷⁹² To assess whether vindication or deterrence-based damages are appropriate, a court must examine the seriousness of the *Charter* violation and its impact on the claimant. The SCC reasoned that severe state misconduct that had a profound effect on the claimant should warrant a higher award, which is logical.⁷⁹³ The Court cautioned, however, that damages awards should be fair to the claimant and the state. Large awards paid out of the public purse “may serve little functional purpose in terms of the claimant’s needs and may be inappropriate or unjust from the public perspective.”⁷⁹⁴ This statement does not acknowledge that a sizeable award may be necessary to resolutely defend the Constitution and deter violative conduct when egregious *Charter* breaches have occurred and the rule of law has been compromised.

Khadr was deeply affected by Canadian actions. Canada chose to interview Khadr, share intelligence about him with the US, and refuse to intervene on his behalf despite his age. These decisions were made with knowledge of the conditions under which Khadr was being held. Khadr looked to Canadians for help and he initially believed Canadian officials would provide assistance, which never

⁷⁸⁹ *Ward*, *supra* note 4 at para 47.

⁷⁹⁰ See Justin Safayeni, “Improving the Effectiveness of the Constitutional Damages Remedy: Vancouver (City) v Ward” (2017) 47 Adv Q 121 at 128: “where state actors adopt a policy, pattern of behaviour or deliberate course of conduct that results in flagrant breaches of *Charter* rights, constitutional damages should represent a “meaningful response” that aims to deter similar misconduct in the future, even if the claimant’s degree of injury is relatively minor.”

⁷⁹¹ *Ward*, *supra* note 4 at para 51.

⁷⁹² *Ibid*.

⁷⁹³ *Ibid* at para 52.

⁷⁹⁴ *Ibid* at para 53.

occurred.⁷⁹⁵ Khadr's delayed repatriation to Canada pursuant to the plea agreement and his exposure to further solitary confinement in Canadian prison aggravated existing harm. Canada's violations were serious infringements of core *Charter* rights that had a destructive impact on the course of Khadr's young life.

In attempting to quantify a vindication or deterrence-based *Charter* damages award for Khadr, a court would review *Charter* damages cases where these types of damages were ordered.⁷⁹⁶ The quantum varies widely and there is currently no model to guide the assessment of these damages. Past vindication and deterrence-based awards show that (a) the presence of bad faith can increase the quantum; (b) the sum will be low where there is no actual loss proven and the perceived impact of the breach on the claimant is minor; and (c) courts are capable of ordering much higher awards – albeit in exceptional circumstances – when egregious violations have occurred.

A sizeable vindication and deterrence-based award is justified in Khadr's case given the impact and severity of Canada's actions. Determining what that quantum should be, however, is difficult to ascertain without comparable cases. The *Charter* damages case that most resembles Khadr's plight is *Henry*, although there are differences between the two. In the following section, I analyze *Henry BCSC* more closely along with its reliance on wrongful conviction settlements. I also examine Government of Canada settlements with individuals who were detained and tortured abroad. Despite key distinctions between these examples and Khadr's experience, I argue that the detainee settlements are the most relevant sources to help guide the quantification of Khadr's vindication and deterrence-based *Charter* damages.

Henry BCSC and Wrongful Conviction Settlements

In *Henry BCSC*, the Court referenced a number of wrongful conviction settlements paid by the federal government, several of which stemmed from public inquiries: Guy Paul Morin (given \$1.25 million for nearly sixteen months in prison); Gregory Parsons (given several payments totalling \$1.5 million for sixty days in prison and seven years of bail restrictions); David Milgaard (given \$10 million for over twenty-two years in prison); Thomas Sophonow (given just over \$2 million for forty-five months in prison); and Steven Truscott (given \$6.5 million for ten years in prison and forty years on parole).⁷⁹⁷ Despite its reliance on these settlements as a guide, the Court noted that they were determined based on “the advice of eminent lawyers and former judges, and were not the result of litigation.”⁷⁹⁸ The settlements held no precedential value and were not binding on the Court.

⁷⁹⁵ Khadr Civil Claim, *supra* note 3 at para 32.

⁷⁹⁶ For a summary of these awards, see *supra* note 16.

⁷⁹⁷ *Henry BCSC*, *supra* note 16 at paras 433-47.

⁷⁹⁸ *Ibid* at para 433.

It is possible that these wrongful conviction cases could influence a court's analysis of Khadr's civil claim because there are clear similarities. Khadr suffered many of the same harms that wrongfully convicted individuals might experience: psychological trauma, post-traumatic stress disorder, impaired social functioning, loss of reputation, and declining physical and mental health.⁷⁹⁹ Further, given the controversy over whether Khadr actually threw the grenade that killed Sgt. Speer (and whether this was a violation of the law of war),⁸⁰⁰ the charges against him have been questioned. Khadr was fifteen years old when he was captured, which rendered him a child under international law.⁸⁰¹ One of Khadr's former Guantánamo lawyers commented that "children who were indoctrinated into war can't be expected to understand the laws of armed conflict."⁸⁰² There are also reasons to question the legitimacy of Khadr's prosecution by the US because of the lax rules of evidence used in military commission procedure. Khan noted that, during Khadr's trial in 2010, the military commission judge allowed evidence that had been "obtained under duress".⁸⁰³ Further, the US did not give any assurances that Canadian information (which would have been unconstitutional under the *Charter*) would not be used as evidence at Khadr's trial.

There is Canadian case law to support the notion that a guilty plea, though informed and voluntary at the time it was made, can be set aside. This can happen when fresh evidence discredits the original evidence that influenced the accused's decision to plead guilty.⁸⁰⁴ In this situation, the guilty plea would "no longer be said to be informed."⁸⁰⁵ Roach commented that Khadr's guilty plea could be compared to guilty pleas in wrongful conviction cases.⁸⁰⁶ Khadr was mistreated and indefinitely detained, which led to psychological fragility and a lack of faith in the judicial process under which he was being tried.⁸⁰⁷ The eight year sentence in the plea deal was a powerful inducement to a vulnerable individual.⁸⁰⁸

Although Khadr might be able to prove his innocence in the future (or establish that he should not have been prosecuted for war crimes),⁸⁰⁹ he has not yet done so. According to historic guidelines developed

⁷⁹⁹ Khadr Civil Claim, *supra* note 3 at para 60.

⁸⁰⁰ See Shephard, *Guantanamo's Child*, *supra* note 20 at 223-25. For a detailed analysis of Khadr's status under international law as an al Qaeda fighter, see Liss, *supra* note 571.

⁸⁰¹ See for example the *CRC*, *supra* note 451, art 1.

⁸⁰² Shephard, *Guantanamo's Child*, *supra* note 20 at 224.

⁸⁰³ Khan, *supra* note 18 at 62.

⁸⁰⁴ See *R v Shepherd*, 2016 ONCA 188 at para 20, 2016 ONCA 188 (CanLII).

⁸⁰⁵ *Ibid.*

⁸⁰⁶ Kent Roach, "Defining Miscarriages of Justice in the Context of Post 9/11 Counter Terrorism" (14 August 2017) [unpublished], available at SSRN: <<https://ssrn.com/abstract=3018691>> at 15.

⁸⁰⁷ *Ibid.*

⁸⁰⁸ *Ibid.*

⁸⁰⁹ In September 2019, a US military court appointed a panel to hear Khadr's appeal of his war crimes convictions after years of delays. See Colin Perkel, "U.S. military court appoints panel to hear Omar Khadr's war-crimes appeal",

in the late 1980s,⁸¹⁰ a wrongfully convicted person is required to demonstrate factual innocence to receive compensation in Canada. The Court in *Henry BCSC* noted, however, that these guidelines are not binding law and more recent compensation awards (particularly in the Truscott case) departed from some guideline principles.⁸¹¹ Further, Henry's case for compensation was based on a 2010 British Columbia Court of Appeal decision⁸¹² that quashed his convictions and entered acquittals. Critically, the Court of Appeal did not conclude that Henry was innocent.⁸¹³

I do not recommend that wrongful conviction settlement figures be applied directly to Khadr's case. This is improper because different concerns influenced the quantification of the settlements and they were not awarded as constitutional remedies under the *Charter*. Further, the SCC cautioned against using private wrongful conviction settlements as precedents or models for judicial damages awards. In *Hinse*, the SCC endorsed the Québec Court of Appeal's comments that these settlements "did not result from judicial awards and were based on considerations that are very different from those on which damages are based".⁸¹⁴

I suggest that these settlement figures be used as a reference to show how individuals who suffered egregious deprivations of their liberty have been compensated by the state. It is unwise to ignore these settlements given the lack of resources available to help quantify vindication and deterrence-based damages for Khadr. The Court in *Henry BCSC* was influenced by the figures as it calculated Henry's \$7.5 million vindication-based damages award. The Court noted that, although negotiated settlements between private parties were of limited assistance, government settlements were "of considerably greater assistance, as the factors that are applied in reaching settlement figures by governments are more principled and informed."⁸¹⁵

Canadian Settlements with Detainees Tortured Abroad

Previous Government of Canada settlements with individuals detained and tortured abroad are relevant to the quantification of Khadr's vindication and deterrence-based damages. Like the wrongful conviction settlements discussed above, detainee settlements are not binding authorities. They are

CBC News (25 September 2019), online: <<https://www.cbc.ca/news/canada/edmonton/u-s-military-court-panel-omar-khadr-appeal-1.5297157>>.

⁸¹⁰ See Canada, *Federal/Provincial Guidelines On Compensation for Wrongfully Convicted and Imprisoned Persons* (1988), accessed online: <https://www.justice.gouv.qc.ca/fileadmin/user_upload/contenu/documents/En__Anglais_/centredoc/publications/programmes-services/ej_lignes_directrices-a.pdf>.

⁸¹¹ *Henry BCSC*, *supra* note 16 at para 376, citing *Hinse*, *supra* note 700 at para 85.

⁸¹² *R v Henry*, 2010 BCCA 462, 262 CCC (3d) 307.

⁸¹³ *Ibid* at para 151.

⁸¹⁴ *Hinse*, *supra* note 700 at para 153.

⁸¹⁵ *Henry BCSC*, *supra* note 16 at para 462.

instructive in the Khadr context, however, because of similarities related to the consequences of intelligence sharing. Prominent settlements were given to Maher Arar in 2007 and Muayyed Nureddin, Abdullah Almalki, and Ahmad El Maati in 2017. These cases are examined below.

Maher Arar was detained by US authorities at JFK airport in September 2002, declared inadmissible, and deported to Syria. Arar held dual Canadian and Syrian citizenship. He was jailed in Syria for a year where he was tortured and held in appalling conditions.⁸¹⁶ Arar was released in October 2003.⁸¹⁷ Questions arose about intelligence sharing between Canada and the US and whether Canada played a role in the events. A public inquiry, led by Justice Dennis O'Connor, was commissioned in 2004. The final report was released in September 2006.⁸¹⁸ The report concluded that Arar did not commit an offence nor did he pose a threat to Canada.⁸¹⁹ The inquiry also revealed that Canada shared inaccurate information with the US (which was likely relied on), did not take steps to ascertain whether Syrian intelligence about Arar was extracted through torture, and leaked confidential information to the press to undermine Arar's credibility.⁸²⁰ On January 26, 2007, the Harper government settled Arar's lawsuit for approximately \$11.5 million (including \$1 million in legal fees) and Arar was offered a formal apology.⁸²¹

A second inquiry, led by Justice Frank Iacobucci, began in 2006 to investigate Canada's potential role in the detention and torture of three additional men in Syria. Muayyed Nureddin, Abdullah Almalki, and Ahmad El Maati were separately detained and tortured by Syrian authorities. El Maati spent a total of twenty-six months in detention in Syria and Egypt, Almalki spent twenty-two months in detention in Syria, and Nureddin was detained in Syria for thirty-three days. None of the men were charged with any terrorism-related offence. The inquiry released its final report in October 2008.⁸²² It concluded that Canada's actions likely contributed indirectly to the detention and mistreatment of El Maati and Nureddin, and the

⁸¹⁶ See Banham, *supra* note 338 at 161: "Throughout the first two weeks of his detention, Arar was interrogated and subjected to severe beatings. He was struck with a two-inch thick electric cable all over his body and threatened with various forms of torture. The most intense beating lasted 18 hours. Arar heard other prisoners screaming and being tortured, and was beaten until he urinated on himself and made false confessions."

⁸¹⁷ *Ibid.*

⁸¹⁸ Canada, Commission of Inquiry into the Actions of Canadian Officials Relating to Maher Arar, *Report of the Events Relating to Maher Arar - Analysis and Recommendations* (Ottawa: Public Works and Government Services Canada, 2006), online: <<http://publications.gc.ca/collections/Collection/CP32-88-1-2006E-AR.pdf>>.

⁸¹⁹ *Ibid* at 9.

⁸²⁰ *Ibid* at 13-16.

⁸²¹ Jeff Sallot, "Arar given \$11.5 million in compensation", *The Globe and Mail* (27 January 2007), online: <<https://www.theglobeandmail.com/news/national/arar-given-115-million-in-compensation/article17989806/>>.

⁸²² Canada, *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* (Ottawa: Public Works and Government Services Canada, 2008), online: <<http://publications.gc.ca/site/eng/9.699757/publication.html>> [Iacobucci Inquiry].

mistreatment of Almalki.⁸²³

Examples of Canadian conduct at issue in the report included information sharing with the US and other foreign agencies about suspected terrorist involvement, the RCMP's decision to send questions to Syrian officials which would be posed to El Maati and Almalki while in Syrian custody, and DFAIT's failure to provide proper consular assistance in certain situations and be aware of potential detainee mistreatment.⁸²⁴ Despite the breadth of the Iacobucci Inquiry, the report did not express an opinion on whether Canadian investigation into El Maati, Almalki, and Nureddin was proper. Justice Iacobucci determined that this question was outside his mandate.⁸²⁵ A formal apology was issued to the three men and a \$31 million settlement was negotiated in 2017, though it is unknown how the funds were split.⁸²⁶

Canada played a role in the initial detention of three out of the four men who received compensation. These individuals were tortured and mistreated while in detention. None were ever charged with an offence. There is a clear link between Canadian actions and the harm that befell the detainees in these cases, even where Canadian involvement was indirect. Without Canadian information sharing, it is possible that some of the men who received settlements would never have been detained. The same cannot be said for Omar Khadr. The Canadian government did not play a role in the US's initial detention of Khadr and his subsequent transfer to Guantánamo.

Even though Canadians were not connected to Khadr's capture, Canada's decision-making triggered a sequence of events that helped keep Khadr imprisoned for more than a decade. Khadr was held in detention for much longer than Arar, El Maati, Almalki, or Nureddin, which exacerbated the negative physical and psychological harm he experienced. As a child under international law, Khadr was entitled to protection from his home state.⁸²⁷ Instead, Canadian officials repeatedly interviewed Khadr and shared intelligence with the US while condemnation of Guantánamo intensified. Canada had a close diplomatic relationship with the US and could have taken steps to help Khadr the same way other Western nations secured the repatriation of their nationals from Guantánamo.⁸²⁸

⁸²³ *Ibid* at 35-39.

⁸²⁴ These examples are a general overview of the conduct reviewed in the Iacobucci Inquiry report. For a detailed breakdown of the Inquiry's findings, consult Chapters 11, 12, and 13 of the report.

⁸²⁵ Iacobucci Inquiry, *supra* note 822 at 44.

⁸²⁶ Monique Scotti, "Trudeau: Canadians rightfully angry after Ottawa pays \$31.25M to men falsely imprisoned in Syria", *Global News* (26 October 2017), online: <<https://globalnews.ca/news/3826253/ottawa-pays-settlement-of-31-25m-to-3-men-falsely-imprisoned-in-syria/>>.

⁸²⁷ The Standing Committee on Foreign Affairs and International Development reached this conclusion in its 2008 report. See *supra* note 393 at 4.

⁸²⁸ Macklin, "Comment on Khadr", *supra* note 343 at 322-23.

Although courts have been cautioned to avoid using private settlements as damages precedents,⁸²⁹ I encourage reliance on the detainee settlements in the quantification of Khadr's vindication and deterrence-based damages. There is a lack of relevant judicial decisions and the SCC admitted in *Ward* that private law is less helpful in the vindication and deterrence realm.⁸³⁰ The Khadr case shares similarities with the detainee settlement cases, especially regarding the issue of Canadian complicity in torture. Although the detainee settlements were undoubtedly politicized and influenced by complex sets of factors, they are the closest thing Canada has to guidelines in this area. A court should avail itself of all relevant sources in crafting an appropriate vindication and deterrence-based award in such a novel case.

A vindication and deterrence-based award in the Khadr case should be substantial. Canadian officials interrogated a youth suspect who had been tortured, denied access to counsel and family members, and subjected to indefinite detention. When Canada was called on to intervene in Khadr's case by domestic and international actors, it did not take action. When Canada's highest court determined on two occasions that the government's conduct breached the *Charter*, it still did not trigger a change of course. If a robust vindication and deterrence-based award were made to Omar Khadr, it would be a proper response to the severity of the state conduct and its effect on an extremely vulnerable individual, the *Charter*, and the rule of law. A large award would also be a step toward greater recognition for the *Charter* damages remedy and the goals it can accomplish when given proper credence.

The final area to consider in the quantification analysis is punitive damages, which Khadr sought in his civil claim.⁸³¹ Given the nature of the government's conduct, it is possible that a court could award punitive damages in addition to *Charter* damages. I briefly discuss this possibility in the next section.

Punitive Damages

Punitive damages are designed to punish a defendant for "adventurous wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own."⁸³² The precise relationship between punitive damages and *Charter* damages is still developing in the jurisprudence. In *Ward*, the SCC discussed the "general reluctance in the international community to award purely punitive damages".⁸³³ The Court noted, however, that vindication and deterrence-based *Charter* damages "may assume a punitive

⁸²⁹ See *Hinse*, *supra* note 700 at para 153.

⁸³⁰ *Ward*, *supra* note 4 at para 51.

⁸³¹ Khadr Civil Claim, *supra* note 3 at para 1(c).

⁸³² See *Keays v Honda Canada Inc.*, 2008 SCC 39 at para 62, [2008] 2 SCR 362.

⁸³³ *Ward*, *supra* note 4 at para 56. The Court referred to *Taunoa v Attorney-General*, [2007] NZSC 70, [2008] 1 NZLR 429, wherein a New Zealand court discussed the general inappropriateness of punishment as an ingredient in a constitutional remedy.

aspect.”⁸³⁴ In Charles’s view, the Court’s comments suggested that punitive damages are unnecessary given the new framework developed in *Ward*.⁸³⁵ Charles acknowledged that any need for punitive damages after *Ward* would “now be built into the general damages award as part of the vindication or deterrence function.”⁸³⁶ Finally, Roach stated that the Court’s “disapproving statements in *Ward* about punitive damages will make such awards rare in the future.”⁸³⁷

To date, punitive damages have been awarded (in addition to *Charter* damages) in very few cases. In *Elmardy*, the Ontario Divisional Court raised the punitive damages award from \$18,000 to \$25,000. The Court found that the trial judge erred by using punitive damages to promote vindictory and deterrent functions. This “failed to recognize the important public objectives of *Charter* damages, which are different from the objectives of punitive damages that may be awarded against a private individual.”⁸³⁸ Given the Divisional Court’s finding that the claimant was a victim of racial profiling, a substantial *Charter* damages award (\$50,000) was required to vindicate *Charter* rights and deter the state, not just individual actors.⁸³⁹ Punitive damages were still necessary, however, to punish a police officer’s “high-handed and oppressive”⁸⁴⁰ conduct, which amounted to battery.

Punitive damages were also awarded in *Elliot*, although the quantum was much lower than *Elmardy*. The Ontario Superior Court acknowledged in *Elliot* that punitive damages were “only to be awarded in exceptional cases.”⁸⁴¹ The Court found that the behaviour of the police toward the claimant in this case would have “shock[ed] the community.”⁸⁴² A \$2,500 punitive damages award was ordered along with \$25,000 in *Charter* damages.

In both cases, punitive damages were ordered against police for truly disturbing conduct. Gonsalves and O’Hearn Davies commented that, even though *Charter* damages and punitive damages overlap, punitive damages can still be used for specific deterrence against a particular defendant.⁸⁴³ The punitive

⁸³⁴ *Ward*, *supra* note 4 at para 56.

⁸³⁵ Charles, *supra* note 14 at 92.

⁸³⁶ *Ibid*.

⁸³⁷ Roach, *Constitutional Remedies in Canada*, *supra* note 17 at para 11.830.

⁸³⁸ *Elmardy*, *supra* note 16 at para 30.

⁸³⁹ *Ibid* at para 36.

⁸⁴⁰ *Ibid* at para 35.

⁸⁴¹ *Elliot*, *supra* note 764 at para 83.

⁸⁴² *Ibid*. The police arrested, strip searched, and allegedly humiliated the claimant during his unlawful detention. The claimant’s home also suffered considerable damage during a search due to the overly aggressive tactics used by police.

⁸⁴³ Andrea Gonsalves & Tiffany O’Hearn Davies, “*Ward v Vancouver* and the Availability of Concurrent Private Law Damages and *Charter* Damages in Canada” (Paper delivered at the 16th Annual Charter Conference, Toronto, 2 October 2017) at 15-16 [unpublished].

damages award in *Elmardy* was structured with that goal in mind,⁸⁴⁴ while the *Charter* damages award was designed to promote broader deterrence of racial profiling in Canada. The award in *Elliot*, though quite low, was ordered to send a message to police that their approach in executing a warrant was unjustifiable.⁸⁴⁵ This message could have been sent through vindication or deterrence-based *Charter* damages, but the Court presumably used punitive damages to emphasize the objectionable nature of the conduct at issue.

Despite the seriousness of Canada's actions in the Khadr case, it is unlikely that punitive damages would be awarded. I argued in the preceding section that Khadr's vindication and deterrence-based award should be significant. It is probable that punitive objectives would be subsumed into the deterrent portion of the award. Punitive damages are rarely awarded in conjunction with *Charter* damages and, as shown above, they are often designed to deter specific individuals. If evidence came to light to show that the behaviour of certain officials was particularly egregious toward Khadr, it could justify a separate punitive damages award. It is likely that, based on the known facts of the Khadr case, a large deterrence-based award would properly penalize the state.

Although a substantial *Charter* damages award is necessary in the Khadr case, a quantum in the six or seven figures could raise issues about institutional competence. Despite having the authority to order a robust award, a court could be held back by *Ward's* comments about fairness and its general discouragement of sizeable awards. A court might also be concerned about the perceived legitimacy of such an award given Khadr's controversial status. I explore these issues in the final part of this chapter.

PART III: CHALLENGING REMEDIAL TIMIDITY POST-WARD

Although the SCC commented in *Ward* that *Charter* damages “must represent a meaningful response”⁸⁴⁶ to unconstitutional conduct, the decision encouraged restraint with respect to quantum. This dicta from the SCC, along with the general trend of caution exhibited by post-*Ward* courts, helps explain why most *Charter* damages awards have not been significant. The awards in the jurisprudence also reference and build off one another, so the doctrine of precedent has helped quantum stay relatively low.

Another factor influencing quantification is the potentially uncomfortable reality that public funds are used to pay out the awards. Lawrence David argued that judicial deference will be “presumptively

⁸⁴⁴ The punitive damages award in *Elmardy* was ordered against a specific constable and the police services board.

⁸⁴⁵ *Elliot*, *supra* note 764 at para 87.

⁸⁴⁶ *Ward*, *supra* note 4 at para 54.

involved in any case where remedial action entails the judicial order of public funds.”⁸⁴⁷ A court ordering a large damages award is theoretically in tension with the traditional separation of powers among the three branches of government. Conventionally, courts have refrained from ordering the Crown to spend public money, absent statutory authorization.⁸⁴⁸

Ward clearly established that courts can award *Charter* damages in appropriate cases. There should be no question that the judicial branch has the institutional competence to craft damages awards tailored to the facts of each case. The Court emphasized in *Ward*, however, that an appropriate and just award must be fair to the claimant and the state.⁸⁴⁹ David reasoned that “the concern for judicial competence over resource allocation is most prevalent where the amount sought or required to fully vindicate the breach is elevated.”⁸⁵⁰ I argue that a large *Charter* damages award is necessary in the Khadr case, so concerns related to the separation of powers and institutional competence could emerge. Further, as discussed in Chapter Four, a court hearing Khadr’s civil claim could be apprehensive about its perceived interference with executive prerogative power.

Even though the assessment of countervailing factors occurs at step three of the *Ward* framework, it could infiltrate the quantification analysis at step four. Citing Roach, Adourian argued that countervailing factors not powerful enough to defeat a *Charter* damages claim could re-emerge at the quantification stage to “act as a deductible”.⁸⁵¹ Influential countervailing factors could put pressure on a court to reduce the damages award. Adourian noted that this could lead to excessive deference at the quantification stage “and not enough emphasis on the *Charter* injury.”⁸⁵²

I argued in Chapter Four that the potential countervailing factors relating to Crown prerogative and causation were not strong enough to defeat Khadr’s claim. It is possible, however, that these concerns could resurface at the quantification stage. The perceived tension between a large damages award, institutional competence, and Crown prerogative could result in a reduced award. Further, Khadr is politically divisive and controversial among citizens. To many, the Khadr name is synonymous with terrorism. The legitimacy of a sizeable award, paid using public funds, would inevitably be questioned by segments of Canadian society. There was considerable backlash to the 2017 settlement between Khadr and the Government of

⁸⁴⁷ David, *supra* note 57 at 56.

⁸⁴⁸ See Micah B. Rankin, “The Improbable Rise and Fall of *Auckland Harbour Board v The King*” (2019) 97 Can Bar Rev 43.

⁸⁴⁹ *Ward*, *supra* note 4 at para 53.

⁸⁵⁰ David, *supra* note 57 at 60.

⁸⁵¹ Adourian, *supra* note 56 at 41, citing Roach, “A Promising Late Spring”, *supra* note 13 at 153.

⁸⁵² Adourian, *supra* note 56 at 41.

Canada. *Ward* briefly touched on the legitimacy issue, noting that large awards “may serve little functional purpose in terms of the claimant’s needs and may be inappropriate or unjust from the public perspective.”⁸⁵³

The idea of holding Canada responsible for US misdeeds in the Khadr case could elicit public concern. A large *Charter* damages award could be viewed as Canada taking the brunt of responsibility for Khadr’s harm. It must be remembered, however, that Canada chose to involve itself in an illegal process. Canada made calculated decisions to repeatedly participate in a regime that detained and abused a sixteen-year-old child. The SCC found that Canada’s actions amounted to a continuing infringement of Khadr’s *Charter* rights.⁸⁵⁴ This was a severe violation that was never remedied. Canada’s steadfast refusal to intervene on Khadr’s behalf compounded the harm he suffered. Arguments about causation should not be used to curtail Canada’s liability under the *Charter* or reduce the quantum of damages. Canada violated the fundamental rights and freedoms of a minor and must be held fully accountable to uphold the rule of law and the integrity of the Canadian Constitution.

As noted above, the SCC stressed in *Ward* that a *Charter* damages award should be fair to the claimant and the state. Although courts must avoid imposing unduly harsh damages awards on the state, they should not be constrained to order robust awards where appropriate. Unique issues are at play in public law cases that justify treating the state differently from private actors who commit wrongs. In *Charter* damages cases, a court is responsible for enforcing Canada’s supreme law. Pilkington argued that constitutional violations “may be qualitatively different from ordinary civil wrongs”⁸⁵⁵ because of the power asymmetry in the state-citizen relationship. The state exercises control and influence over society and it can cause “substantially greater harm than the ordinary person.”⁸⁵⁶ Making significant reductions to a *Charter* damages award in the name of fairness defers to the constitutional wrongdoer, reinforces the power imbalance, and weakens the *Charter*’s enforcement mechanism.

Ward acknowledged that an appropriate and just award must meaningfully respond to serious breaches.⁸⁵⁷ Roach argued that the state “should not be able to make casual and routine claims that damages awards will be costly and disruptive or invoke a rigid rule that damages awards should always be modest.”⁸⁵⁸ This could lead to what is described as ‘conventionalizing’ *Charter* damages awards, which

⁸⁵³ *Ward*, *supra* note 4 at para 53.

⁸⁵⁴ *Khadr SCC 2010*, *supra* note 25 at para 21.

⁸⁵⁵ Pilkington, “Damages as a Remedy”, *supra* note 58 at 536.

⁸⁵⁶ *Ibid.*

⁸⁵⁷ *Ward*, *supra* note 4 at para 54.

⁸⁵⁸ Roach, “A Promising Late Spring”, *supra* note 13 at 153.

involves determining a standard sum to be paid for a breach of each *Charter* right or freedom. Gonsalves and O’Hearn Davies stressed that conventionalizing awards (similar to the way certain bodily harms have been quantified in personal injury cases) is inappropriate because it “risks unduly restricting the discretion of judges”.⁸⁵⁹

Conventionalizing *Charter* damages awards could streamline the quantification analysis and provide predictability to claimants, but the practice is questionable. Although there are similarities between constitutional breaches, they are not created equal. The effect of a violation could range dramatically from case to case. This is likely why *Ward* did not endorse the idea of conventionalizing awards. Roach noted that the Court rejected “a conventional, per se or minimum award for all *Charter* violations.”⁸⁶⁰ The SCC preferred to give judges discretion in this area, recognizing the diversity of potential claims.

Ward’s discouragement of large awards and its emphasis on fairness encouraged subsequent courts to tread lightly with the quantification of *Charter* damages. To move the remedy forward and support its important function, judges must recognize the power they were given by *Ward* and under the constitutional structure. It is the judiciary’s responsibility to provide meaningful remedies for constitutional violations and uphold the rule of law. Pilkington argued that the financial burden of enforcing constitutional guarantees “must be accepted as a cost of the government enterprise conducted for [the taxpayers’] benefit and as a justifiable expenditure in recognition of rights which are, by definition, fundamental.”⁸⁶¹ Ordering a robust *Charter* damages award in the Khadr case would be an important step toward advancing the remedy. If judges begin to award larger, more meaningful damages awards, others might follow suit. The issues at stake – upholding constitutional rights and ensuring that the state is held accountable for violations – are too vital to succumb to ill-founded concerns about deference or institutional competence.

CONCLUSION

This chapter argued for an expansive and flexible approach to quantifying *Charter* damages in the Khadr civil claim. The *Charter* damages remedy is still very much in its infancy; it was only nine years ago that the SCC acknowledged its independent existence from private law and crafted an assessment framework. Although *Ward* contained many positive developments and it has encouraged more claims to come forward, the remedy is not living up to its full potential in the majority of cases. *Ward* instructed

⁸⁵⁹ Gonsalves & O’Hearn Davies, *supra* note 843 at 13.

⁸⁶⁰ Roach, “A Promising Late Spring”, *supra* note 13 at 153.

⁸⁶¹ Pilkington, “Damages as a Remedy”, *supra* note 58 at 576.

judges to rely on private law as a quantification guide and to keep damages awards generally low. To date, only a handful of cases since *Ward* involved damages awards above the four figure range.

Although there will be many cases where a large damages award is inappropriate (when the state's actions do not infringe a core *Charter* right, are not intrusive, and do not have a considerable impact on the claimant), there will be instances where large awards are necessary. Courts should not feel apprehensive to make substantial awards when they are functionally justified. *Ward* confirmed that judges can order *Charter* damages under subsection 24(1); there should be no doubt about a court's institutional competence in this area. Nevertheless, concerns about deferring to the legislative or executive branches of government can surface at the countervailing and quantification stages of the *Ward* inquiry. Although some level of deference might be warranted due to the use of public funds, this should not be used as a justification to limit a robust damages award in cases where clear harm occurred or the rule of law was threatened.

The type of harm Omar Khadr experienced during his detention and imprisonment has never been thoroughly reviewed by a Canadian court. Although the Khadr case presents challenges for the *Ward* framework, a substantial damages award is possible and necessary to provide suitable compensation to Khadr, promote the importance of core human rights enshrined in the *Charter*, and deter inexcusable state behaviour. I did not quantify a precise amount to which Khadr would have been entitled, but an award in the six or seven figures would have been appropriate. The severity of the harm Khadr suffered over such a lengthy period and the impact of Canadian actions on his plight as a vulnerable minor support a large sum.

In the next chapter, I conclude my analysis.

CHAPTER SIX – CONCLUDING REMARKS

This thesis analyzed one of the most politically divisive and legally complex constitutional cases in recent Canadian history. It is difficult to find a more polarizing individual than Omar Khadr. Many Canadians believe that the \$10.5 million settlement between Khadr and the Government of Canada in July 2017 was unfair and excessive. The Khadr story has been subjected to endless spin by those who see him as an unrepentant terrorist. It is impossible for many to look past Khadr's experience fighting for al Qaeda, even though this occurred while he was a child influenced by the philosophies of his father. Some believe that Khadr murdered Sgt. Speer in cold blood, even though there is reason to doubt that he threw the grenade. Finally, those critical of the settlement feel that Canada should not have to pay for harm inflicted by the US, even though Canada actively participated in a process that deprived Khadr of basic human rights.

Few of Khadr's critics understand the degree of harm he suffered for thirteen years. He was tortured and mistreated by his American captors and subjected to a legally dubious military prosecution, which concluded with a questionable guilty plea. Khadr's only hope for assistance was from Canadians, who contributed to his detention and ignored his pleas for help. Instead of criticizing US procedure or intervening on Khadr's behalf to request his repatriation, Canada made two disastrous choices. The first was to send Canadian officials to Guantánamo on three occasions to mine Khadr for intelligence, which was subsequently shared with the US. This implicated Canada in profound breaches of international law and triggered violations of the *Charter*. After an injunction prohibited further questioning of Khadr,⁸⁶² Canada's second regrettable decision was to adopt an unrelenting stance of non-involvement in Khadr's case. This amounted to tacit condonation of the US's highly objectionable practices.

The research in previous chapters demonstrated that Khadr had a strong entitlement to *Charter* damages. I argued that, if his civil claim had progressed to trial (instead of settling), Khadr should have received a sizeable damages award. I did not attempt to calculate the sum a court might have awarded. This is not possible without an assessment of the evidence presented by both parties. Although Khadr received subsection 24(1) remedies in 2008 and 2010, neither the disclosure order nor the declaration of unconstitutionality was effective in curing a serious breach. Neither remedy was a meaningful response to Canada's involvement in an illegal regime and its abandonment of a vulnerable youth detainee. Canada's actions contributed to Khadr's continued detention⁸⁶³ and compounded his feelings of utter helplessness. Macfarlane aptly described Khadr's guilty plea (which resulted in an eight year sentence on top of eight

⁸⁶² See *Khadr FC 2005*, *supra* note 28.

⁸⁶³ *Khadr SCC 2010*, *supra* note 25 at para 48.

years' detention) as "the final fruit of a poisonous tree, tainted by the events and processes that necessitated it in the first place."⁸⁶⁴

Canada's behaviour did not improve after Khadr pleaded guilty to war crimes. Khadr's transfer was delayed and he was held at Guantánamo longer than he should have been. When he finally returned to Canada, he was held in maximum security facilities based on an improper reading of the ITOA and he was subjected to solitary confinement. It is open to a court hearing Khadr's civil claim to determine that these actions amounted to further breaches of the *Charter*.

There is no more fitting remedy to address the harm Khadr suffered than *Charter* damages. This distinct public law remedy can provide compensation to affected claimants and acknowledge the unique type of harm that occurs from a constitutional violation. Examples of this harm include loss of dignity, a profound sense of intrusion, and feelings of victimization or helplessness⁸⁶⁵ because of the power imbalance in the state-citizen relationship. *Charter* damages also address the societal harm resulting from a *Charter* breach. Although the SCC acknowledged in *Ward* that compensation is still the driving force behind the remedy,⁸⁶⁶ I argued that the vindication and deterrence objectives should be given substantial weight. This is critical in cases where state accountability and the rule of law are at issue.

Over the past nine years, *Ward* has produced only a handful of impactful *Charter* damages awards.⁸⁶⁷ Although the *Ward* framework was a positive development and it has encouraged more *Charter* damages claims to come forward,⁸⁶⁸ it suffers from continuing problems. The analysis in Chapters Four and Five discussed potential issues that could negatively affect Khadr's claim, some of which stem from the structure of *Ward* itself. The framework gave the state considerable power to argue against a valid claim at the countervailing factors stage. The loosely defined good governance factor was used to justify a reworking of the *Ward* test in *Henry SCC* and the dismissal of a meritorious claim in *Ernst*. *Ward* also condoned the creation of further immunity defences that could limit *Charter* damages claims in future cases. Finally, the decision discouraged courts from ordering large damages awards in most cases because (a) public funds would be used; and (b) the public could perceive a high award as being inappropriate.⁸⁶⁹

⁸⁶⁴ Macfarlane, *supra* note 484 at 178.

⁸⁶⁵ See Lane, *supra* note 786 at para 154.

⁸⁶⁶ *Ward*, *supra* note 4 at para 25.

⁸⁶⁷ See *supra* note 16.

⁸⁶⁸ Charles, *supra* note 14 at 103.

⁸⁶⁹ *Ward*, *supra* note 4 at para 53.

There are additional pressures and constraints outside the *Ward* framework that would likely affect a court hearing Khadr's claim: Crown prerogative, institutional competence, and public opinion. The government relied on Crown prerogative throughout the Khadr litigation to protect itself from liability. Although the judiciary can review executive decisions made under a prerogative power for compliance with the *Charter*,⁸⁷⁰ courts have been hesitant to order remedies touching on the exercise of this power. In *Khadr SCC 2010*, the Court did not order the government to seek Khadr's repatriation because it amounted to excessive interference with the foreign affairs prerogative.⁸⁷¹ The Court sought to preserve proper institutional separation between the judicial and executive branches. Despite the compelling arguments made in support of the repatriation remedy, ordering the government to exercise a prerogative power in a specific way was viewed as an unjustifiable intrusion into the realm of executive power.

I argued in Chapter Four that ordering damages under the *Charter* would not amount to excessive interference with Crown prerogative. Damages involve a straightforward payment of money to an aggrieved claimant to remedy a proven constitutional violation. Ordering damages is not the same as ordering the executive to take specific action to cure a breach, which was the Court's concern in *Khadr SCC 2010*. The SCC majority emphasized in *Doucet-Boudreau* that a truly purposive approach to subsection 24(1) of the *Charter* will "giv[e] modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy."⁸⁷² That remedy must also be responsive and effective.⁸⁷³ A large *Charter* damages award is responsive to the life-altering harm Khadr experienced and the disturbing sequence of choices made by Canadian officials, which "besmirche[d] the *Charter*".⁸⁷⁴ It is also an effective remedy that compensates the claimant, vindicates the right at issue, and deters unconstitutional conduct. Finally, a large damages award shows the strength of the *Charter's* remedial clause and its critical function as a check on state power. The majority in *Doucet-Boudreau* stressed that the overall purpose of subsection 24(1) must be promoted when a remedy is ordered.⁸⁷⁵

Ward unanimously determined that courts can award damages under subsection 24(1). Although the decision encouraged quantum to stay low, the Court acknowledged that "the more egregious the conduct and the more serious the repercussions on the claimant, the higher the award for vindication or deterrence will be."⁸⁷⁶ Consequently, there should be no concern about a court's institutional competence

⁸⁷⁰ See *Operation Dismantle*, *supra* note 41.

⁸⁷¹ *Khadr SCC 2010*, *supra* note 25 at para 46.

⁸⁷² *Doucet-Boudreau SCC*, *supra* note 72 at para 25, Iacobucci and Arbour JJ.

⁸⁷³ *Ibid.*

⁸⁷⁴ Sniderman, *supra* note 431 at 189.

⁸⁷⁵ *Doucet-Boudreau SCC*, *supra* note 72 at para 25, Iacobucci and Arbour JJ.

⁸⁷⁶ *Ward*, *supra* note 4 at para 52.

to order a large damages award where it is appropriate. Influential decisions in *Henry BCSC*, *Elmardy*, *Brazeau*, and *Reddock* show that courts can make sizeable awards to address harmful conduct that had a profound effect on the claimant.

Finally, public perception is an undeniable factor that could influence a court poised to award *Charter* damages to Khadr. His unpopularity with many Canadians is palpable. Considerable backlash would likely occur if Khadr were given a substantial award. Although *Ward* referred to the public's perception of damages awards as a relevant concern in the quantification analysis,⁸⁷⁷ the Court did not suggest that unpopular claimants should receive smaller sums. It is trite to note that even the most controversial individuals should not be denied a constitutional remedy. The *Charter* exists to protect fundamental rights and freedoms from state encroachment. Although it is possible that a majority of Canadians would not support a sizeable damages award for Khadr, this should not be a valid reason to reduce his entitlement to relief. As shown above, the Khadr case is often misunderstood. Regardless of Khadr's past, Canada made decisions to become involved in an abhorrent regime that tortured, mistreated, and prosecuted a minor.

Ultimately, I argued in Chapter Four that potential countervailing factors in Khadr's case were not powerful enough to defeat or limit his claim. Another declaration of unconstitutionality would not be a responsive or effective alternative remedy. Khadr also faced considerable difficulty proving the three tort claims he advanced, so it is possible *Charter* damages may have been a court's only option to provide redress. With respect to good governance, I argued that a large damages award would not compromise the ability of foreign affairs personnel to perform their duties, nor would it prompt an influx of related claims to come forward. If a court determined, however, that good governance issues were compelling, I discussed how an immunity and a corresponding fault requirement could have been imposed. Even if this occurred, I maintained that Khadr could present valid arguments showing that the state acted in bad faith.

Developing a quantification model for the Khadr case is a difficult endeavour. Part of the quantification problem is the lack of available precedents to guide the analysis. This is undoubtedly why *Ward* encouraged judges to rely on private law principles, particularly for the assessment of compensatory damages. Although some private law principles can help quantify specific types of harm (for example, pain and suffering), I reiterated Pilkington's view that, in some instances, there is no private law equivalent for the distinct harm suffered as a result of a particular constitutional breach.⁸⁷⁸ This is why I encouraged

⁸⁷⁷ *Ibid* at para 53.

⁸⁷⁸ Pilkington, "Monetary Redress", *supra* note 99 at 311.

examination of *all* relevant sources that may be of assistance, not just private law. I confined my recommendations to domestic examples (such as human rights tribunal cases, wrongful conviction settlements, and previous detainee settlements), but further research in this area could examine approaches used in comparable jurisdictions. Examples include the US, the United Kingdom, New Zealand, or South Africa. In *Ward*, the Court referred to judgments from all four countries in its reasoning. Decisions of the European Court of Human Rights could also provide additional insight into quantification practices for specific injuries such as torture.⁸⁷⁹

As the *Charter* damages case law continues to evolve, it is crucial that judges undertake an analysis that appreciates the distinct purpose of the remedy. Constitutional damages are not private law damages and, as such, they should not be bound by the same constraints that operate in the private law realm. Even when private law damages are ordered, courts should conduct a meaningful review of whether *Charter* damages can accomplish different objectives. If courts blindly follow decisions where small *Charter* damages awards were ordered (or none were ordered at all), the legitimacy of the remedy will be threatened. Damages under subsection 24(1) of the *Charter* serve a vital purpose in a democratic society beyond providing compensation to individual claimants. This remedy holds the state accountable for constitutional violations and enforces Canada's supreme law.

Diminishing the strength of the *Charter* damages remedy weakens the constitutional protection afforded to Canadians. Although there are other constitutional remedies available under subsection 24(1), the Khadr case shows that an injunction, disclosure order, or declaration is not enough to fully address the destructive impact of Canada's actions. More is required to meaningfully and effectively compensate, vindicate, and deter. Even though the 2017 settlement was laudable, it did not accomplish the same level of deterrence that would occur in the adjudication of a *Charter* damages claim, where a court exposes and highlights the state's misdeeds.⁸⁸⁰ Failing to provide Khadr with a robust *Charter* damages award would send a dangerous message that Canadian conduct was not particularly objectionable. This could reinforce the mistaken view held by many Canadians that the US was the only actor responsible for Khadr's harm. By ordering a substantial damages award, a court would acknowledge the extent of Canada's role in Khadr's suffering over a thirteen year period. It would also be a powerful affirmation of the remedy's ability to promote the rule of law and serve as a mechanism for state accountability, even in the most controversial circumstances.

⁸⁷⁹ See for example *Husayn (Abu Zubaydah) v Poland*, No 7511/13, [2014] ECHR 834, where the claimant was awarded €100,000 in damages relating to Poland's complicity in detention and torture at US 'black sites'.

⁸⁸⁰ See Jamieson, *supra* note 275 at 96.

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