A Wrench in the Social Justice Toolbox: Assessing the Constitutional Class Action as a Tool for Addressing Racial Discrimination

Elizabeth Emery

ABSTRACT: Racial profiling is a form of racial discrimination exemplified by police when they target individuals because of their race or ethnicity, as opposed to their engagement in criminal behaviour. Canadian courts have recognized that racial profiling constitutes a breach of *Charter* rights. This is important because bringing a claim for *Charter* damages is one of the few options available to victims of racial profiling for pursuing compensation. Unfortunately, this remedy is seldom pursued due to financial, social, and psychological barriers. This paper discusses the utility of the class proceeding as a tool for increasing the accessibility of *Charter* damages for victims of racial profiling.

Part A provides an introduction to racial profiling. Part B highlights the consequences of racial profiling and its recognition by Canadian courts. Part C discusses the availability and importance of *Charter* damages and the complementary nature of the legal frameworks for racial profiling and *Charter* damages. Part D canvasses the two leading Canadian cases on the certification of *Charter* damages claims and discusses the uncertainty that persists in the current legal landscape. Part E advocates for the use of class actions to address the inaccessibility of *Charter* damages and reviews the recent certification of a racial profiling claim in Quebec to support the viability of such claims. Finally, Part F concludes that certification of *Charter* damages class actions is possible and that further clarification of the legal framework should be pursued to increase access to justice for victims of racial profiling.

A WRENCH IN THE SOCIAL JUSTICE TOOLBOX: ASSESSING THE CONSTITUTIONAL CLASS ACTION AS A TOOL FOR ADDRESSING RACIAL DISCRIMINATION

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> *The Canadian Charter of Rights and Freedoms is now more than thirty years in the making, yet, to borrow from Martin Luther King, many of its potential beneficiaries are still standing outside the "palace of justice" waiting to be let in. At the heart of this access-to-justice crisis are largely pragmatic reasons: Charter grievances are prohibitively costly to lodge, are unreasonably time-consuming, and offer so little (if any) financial relief that it takes a very "economically irrational" applicant to even venture to bring a claim.*
>
> —Iryna Ponomarenko

A. INTRODUCTION

The *Canadian Charter of Rights and Freedoms*[1] guarantees a number of rights that form part of Canada's fundamental law.[2] Upholding these

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

2 *Constitution Act, 1982*, s 52(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act*].

rights, and recognizing when they have been breached, is vital both to the individuals whose rights have been breached and to Canadian society as a whole.[3]

As is the case with any discrimination, racial discrimination can result in a breach of *Charter* rights, and racial profiling is a pertinent form of racial discrimination in the twenty-first century. In the context of police activity, racial profiling is a form of criminal profiling[4] exemplified when the police target racialized individuals because of their race, ethnicity, or Indigeneity, as opposed to any engagement in criminal behaviour.[5] When this type of profiling occurs, the police use race or ethnicity as an indicator of criminality for an entire racialized group[6] and that racialized group then faces heightened scrutiny by law enforcement.[7]

Though police officers are not the only people who employ racial profiling, it is commonly seen among people in positions of power.[8] One possible explanation for this is that such positions are typically highly discretionary, and thus the opportunity to engage in racial profiling is greater.[9] Racial discrimination is systemic and often expressed and perpetuated unconsciously, which makes it particularly difficult to address.[10] Because it is based on stereotypes, and because stereotyping is often an unconscious process, people engage in it constantly and unintentionally, and are generally oblivious to its occurrence.[11]

In the context of policing, racial profiling is used frequently by police officers who use their discretionary power to make pretext vehicle stops.[12] This is especially problematic because racial profiling is not a reliable investigatory tool.[13]

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

4 Morris Manning, "Profiling and the Charter: Criminal, Racial and Constitutional Torts" (2005) 19 *National Journal of Constitutional Law* 321 at 326.

5 Hieu Van Ngo et al, "The Experience of Ethno-Cultural Members with Racial Profiling" (2018) 27:3 *Journal of Ethnic & Cultural Diversity in Social Work* 253 at 254.

6 Manning, above note 4 at 326.

7 Van Ngo et al, above note 5 at 254.

8 Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* (Toronto: Ontario Human Rights Commission) at 6 [*OHRC Inquiry*].

9 *Ibid.*

10 *OHRC Inquiry*, above note 8.

11 *Ibid.*

12 David M Tanovich, "Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention" (2002) 40:2 *Osgoode Hall Law Journal* 145 at 149 [Tanovich, "Using the Charter to Stop Racial Profiling"].

13 *Ibid* at 164

I highlight racial discrimination, and specifically racial profiling, as the impetus for the breach of *Charter* rights because racial discrimination does not typically afford its victims many legal remedies. In Canada, there is no tort of racial profiling or racial discrimination.[14] Thus, an award of *Charter* damages, pursuant to section 24(1) of the *Charter*, is critically important in the context of racial discrimination and racial profiling by police. However, despite the existence of *Charter* damages, these damages are not widely accessible, given the relatively small monetary awards and the high costs of bringing and litigating such claims. The inaccessibility of *Charter* damages is heightened in the context of racial profiling by police, given that victims of racial discrimination are often subject not only to financial barriers, but to unique social and psychological barriers as well.[15]

I argue that the class action has the potential to overcome these barriers for victims of racial profiling in the pursuit of a claim for *Charter* damages. However, while that potential exists, it has not yet been realized. It is therefore worth asking whether class actions are a suitable mechanism for recognizing *Charter* breaches and facilitating an award of constitutional damages. More specifically, the crucial question is whether class actions are a viable tool for addressing racial discrimination by police. I argue that they are.

I will begin by discussing the concept of racial profiling, its consequences, and its recognition by Canadian courts. Next, I will address section 24(1) of the *Charter* and the availability and importance of *Charter* damages in order to highlight the complementary nature of claims based on racial profiling and the legal framework for *Charter* damages. I will then canvass the legal framework for certification of class actions, as well as the caselaw pertaining to certification of *Charter* damage claims more specifically, in order to demonstrate the uncertainty of the current legal landscape. Finally, I will explain why Canadian courts should clarify that uncertainty, with reference to the three goals of class actions. In doing so, I will analyze the recent certification of a racial profiling case in Quebec in order to assess the viability of certification elsewhere in Canada

14 Ranjan Agarwal & Joseph Marcus, "Where There Is No Remedy, There Is No Right: Using Charter Damages to Compensate Victims of Racial Profiling" (2015) 34 *National Journal of Constitutional Law* 75 at 80; *Fabrikant v AG Canada*, 2020 ONSC 7799 at para 26.

15 Ontario Law Reform Commission, *Report on Class Actions*, vol 1 (Ontario: Ministry of the Attorney General, 1982) [*OLRC Report on Class Actions*].

and I will review a racial discrimination claim that has since been filed pursuant to federal class proceeding legislation. Ultimately, I argue that claims for *Charter* breaches and damages resulting from racial profiling have much to gain from the class action as a procedural vehicle. Lawyers and members of the judiciary should take this opportunity to clarify the inconsistencies that exist in the application of the legal framework in order to realize the full potential of the class proceeding as a tool for social justice.

B. RACIAL PROFILING

1) The Existence of Racial Profiling

While the fact that racialized groups are stopped and searched at "disproportionately high rates" is well-documented, academics have historically debated whether this is caused by higher rates of criminal activity or whether it is racialized identity itself that leads to heightened scrutiny by police.[16] However, there is now ample research from Canada that confirms the existence and use of racial profiling by police. For example, one study revealed conclusively that Black youth in Toronto are more likely than White youth to be stopped and searched by police.[17] This study controlled for variables such as gang affiliation, drug and alcohol use, socio-economic status, gender, neighbourhood, criminal activity, and others, thereby undermining the argument that Black youths are stopped more frequently due to their behaviour[18] or involvement in crime.[19] The authors of this study concluded that "[e]ven among those who never engage in criminal activity, black race serves as a master status that increases the probability of being stopped and searched by police."[20] The authors concluded that the Toronto Police Force "systematically engages in racial profiling."[21]

Survey research conducted with racialized respondents in Calgary similarly revealed that 84 percent of respondents had personally experienced

16 Steven Hayle, Scot Wortley, & Julian Tanner, "Race, Street Life, and Policing: Implications for Racial Profiling" (2016) 58:3 *Canadian Journal of Criminology and Criminal Justice* 322 at 323.

17 *Ibid* at 326.

18 David M Tanovich, "The Further Erasure of Race in *Charter* Cases" (2006) 38 CR (6th).

19 Hayle, Wortley, & Tanner, above note 16 at 342.

20 *Ibid* at 340.

21 *Ibid* at 343.

racial profiling at least once in the preceding year and 82 percent of respondents reported knowing at least one other person in the community who had been subject to racial profiling.[22] Further survey research revealed that Black individuals in Canada had experienced, on average, 1.6 police stops in the preceding two years, compared to 0.5 stops for white individuals, and that 12 percent of Black male respondents had been searched by the police in the preceding two years, in comparison to 3 percent of white male respondents.[23] This study controlled for demographic variables including age, education level, household income, frequency of driving, alcohol and drug use, and criminal history — allowing the researchers to conclude that "black racial background remains a strong predictor of police stop and search activities."[24]

2) The Consequences of Racial Profiling

Research indicates that racial profiling and perceptions of racial profiling can lead to a multitude of negative consequences for racialized individuals. First and foremost, there is a direct relationship between increased police monitoring and a higher likelihood of those being monitored getting caught engaging in criminal behaviour.[25] This relationship helps explain how police stop and search practices that use racial profiling contribute to the overrepresentation of certain racialized groups in the Canadian criminal justice system.[26] This overrepresentation then carries the negative consequence of perpetuating the belief that there is a link between race and crime.[27]

Further consequences of racial profiling include a negative impact on the wellbeing of racialized individuals,[28] a decreased sense of self-confidence,[29] verbal and physical violence,[30] an increased distrust of institutions,[31] embarrassment and shame when an incident of racial profiling

22 Van Ngo, above note 5 at 265.
23 Scot Wortley & Akwaski Owusu-Bempah, "The Usual Suspects: Police Stop and Search Practices in Canada" (2011) 21:4 *Policing & Society* 395 at 397.
24 *Ibid* at 399.
25 *Ibid* at 403.
26 *Ibid.*
27 Tanovich, "Using the Charter to Stop Racial Profiling," above note 12 at 161.
28 Van Ngo et al, above note 5 at 254.
29 *Ibid* at 257.
30 *Ibid.*
31 *Ibid.*

occurs in public in front of friends or co-workers,[32] psychological harm (including fear, anxiety, and feelings of hopelessness),[33] alienation,[34] the breakdown of social networks,[35] exclusion from the labour market,[36] and a distrust of institutions including the criminal justice system.[37] This final consequence is of particular significance, as a lack of trust can lead to a lack of cooperation and ultimately to "civil unrest."[38] A lack of trust can also result in a lack of faith in the very processes and bodies designed to receive complaints against the police.[39] Moreover, racialized individuals are more likely than White individuals to negatively interpret police stops.[40] These perceptions of bias held by racialized individuals further perpetuate distrust of the police, and this distrust can negatively affect subsequent interactions with police. This can then lead to less respectful treatment by police and reinforce the initial perceptions of bias.[41]

Finally, racial profiling influences society as a whole by perpetuating racist attitudes and systemic racism.[42]

3) Court Recognition of Racial Profiling by the Courts

a) Recognition of Racial Profiling

In 1993, the Ontario Court of Appeal (ONCA) recognized that a significant segment of the community holds "overtly racist views," that an even larger segment "subconsciously operates on the basis of negative racial stereotypes," and that "institutions, including the criminal justice system reflect and perpetuate those negative stereotypes."[43] In 1997, the Supreme Court of Canada (SCC) held that the court may take judicial notice of "actual racism known to exist in a particular society."[44] In 1998, the SCC

32 *OHRC Inquiry*, above note 8 at 43.
33 *Ibid* at 47.
34 David M Tanovich, "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008) 40 SCLR 655 at 661 [Tanovich, "The Charter of Whiteness"].
35 *Ibid.*
36 *Ibid.*
37 Tanovich, "Using the Charter to Stop Racial Profiling," above note 12 at 164.
38 *OHRC Inquiry*, above note 8 at 12.
39 *Ibid* at 26.
40 Wortley & Owusu-Bempah, above note 23 at 403.
41 *Ibid.*
42 *OHRC Inquiry*, above note 8 at 17.
43 *R v Parks*, [1993] OJ No 2157, 15 OR (3d) 324 at para 54 (CA).
44 *R v S (RD)*, [1997] 3 SCR 484, 151 DLR (4th) 193 at para 47.

held that racism against Indigenous peoples includes stereotypes pertaining to "credibility, worthiness and criminal propensity."[45] Furthermore, in 2003, the ONCA recognized that "[t]he attitude underlying racial profiling is one that may be consciously or unconsciously held."[46] In 2006, the ONCA echoed that sentiment, stating that "explicit and institutional racism can affect the way that the police see and treat black persons and the way black persons react to the police"[47] and that "police misconduct can be racially motivated, even if the officer does not consciously appreciate that motivation."[48]

b) Racial Profiling and the Charter

Canadian courts have recognized that racial profiling can result in a breach of *Charter* rights. In *R v Wilson*,[49] the SCC set out the articulable cause test, which seeks to determine whether section 9 *Charter* rights have been breached by a police officer. The test considers whether the police officer had articulable cause, or a clearly expressed and reasonable ground, for stopping a motorist. In *Brown v Regional Municipality of Durham Police Service Board*,[50] the ONCA clarified that it is improper for a police officer to stop a person based on their skin colour, or any other discriminatory ground, and that doing so fails to meet the articulable cause test, thereby resulting in a breach of the section 9 *Charter* right. In *R v Brown*,[51] the ONCA held that racial profiling can be proven, in the context of a stop by police, where the "evidence shows that the circumstances relating to a detention correspond to the phenomenon of racial profiling and provide a basis for the court to infer that the police officer is lying about why he or she singled out the accused person for attention."[52]

Racial profiling can also result in a breach of section 8 *Charter* rights if the search or seizure in question is incidental to an unlawful arrest,[53] or a breach of section 7 *Charter* rights if the profiling plays a role in referring an individual to a secondary customs inspection when crossing the

45 *R v Williams*, [1998] 1 SCR 1128, 159 DLR (4th) 493 at para 58.

46 *R v Brown*, [2003] OJ No 1251, 64 OR (3d) 161 at para 8 (CA).

47 *Peart v Peel Regional Police Services*, [2006] OJ No 4457, 217 OAC 269 at para 42 (CA).

48 *Ibid.*

49 *R v Wilson*, [1990] 1 SCR 1291.

50 *Brown v Regional Municipality of Durham Police Service Board*, [1998] OJ No 5274, 43 OR (3d) 223 (CA).

51 *R v Brown*, [2003] OJ No 1251, 64 OR (3d) 161 (CA).

52 *Ibid* at para 45.

53 *R v Golden*, 2001 SCC 83 [*Golden*].

border.[54] Similarly, a racialized individual's section 7 and 11(d) *Charter* rights may be breached if that individual becomes a suspect in a criminal investigation because of unconscious bias.[55]

c) Limits

Despite the courts' clear recognition of the existence of racial profiling, and the courts' recognition of a relationship between racial profiling and a breach of various *Charter* rights, few victims of racial profiling actually seek a remedy in court.[56] One potential reason for this is the lack of separate tort of racial discrimination or racial profiling in Canada.[57] The few victims who do pursue a remedy in court often do so within the confines of criminal law,[58] where the focus is typically on the exclusion of evidence under section 24(2) of the *Charter*,[59] and which does not provide the accused with monetary relief. At least until 2010, but arguably up until the present, victims of racial profiling (particularly those who were stopped and searched as a result of racial profiling where no criminal proceeding ensued) had very few options for obtaining compensation for injury suffered as a result of racial discrimination. This is despite the existence of a legal framework pertaining to racial profiling and racial discrimination.

C. SECTION 24(1) *CHARTER* DAMAGES

Damages awarded under section 24(1) of the *Charter* are of particular significance in the context of racial profiling because, unlike section 52(1) of the *Constitution*, which renders unconstitutional laws of no force or effect, section 24(1) allows for a remedy in response to unconstitutional governmental acts that are not necessarily connected to or authorized by an unconstitutional law.[60] It is important to recognize that an action for section 24(1) *Charter* damages cannot be combined with an action seeking a declaration of invalidity pursuant to section 52(1).[61]

54 *R v Smith*, [2004] OJ No 4979, 26 CR (6th) 375 (SCJ).

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

56 Agarwal & Marcus, above note 14 at 80.

57 *Ibid.*

58 *Ibid.*

59 Jamieson, above note 55 at 76.

60 *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 38 BCLR (3d) 1.

61 *Schacter v Canada*, [1992] 2 SCR 679, 93 DLR (4th) 1.

1) *Vancouver (City) v Ward*

In 2010, the SCC released its decision in *Vancouver (City) v Ward*.[62] In that case, Alan Cameron Ward brought an action for a breach of his *Charter* rights against the City of Vancouver, the province of British Columbia, and the individual officers who were responsible for his arrest. The arrest had taken place at an event in Vancouver, which was attended by the Prime Minister of Canada. The police had been information that someone at the event planned to throw a pie at the Prime Minister, and subsequently detained Ward based on suspicion that he was the individual in question. Upon detention, Ward created a disturbance and was thus arrested for breach of the peace. He was taken to the Vancouver jail, where he was subjected to a strip search before being released without charges.

Prior to *Ward*, the availability of monetary damages under section 24(1) of the *Charter* had not been expressly affirmed and there was uncertainty about whether damages were available as a remedy for the breach of a *Charter* right.[63] It had also been unclear whether such damages could be awarded in the absence of bad faith or malice on the part of the state defendant.[64] For example, in *Mills v The Queen*,[65] the Court stated that it was possible for an unconstitutional delay arising from policy or operational decisions of the Crown to give rise to damages, but emphasized that malice needed to be proved by the claimant.[66]

The SCC held that Ward's section 8 *Charter* rights were violated by the strip search, based on *Golden*,[67] despite finding that the government officials who had conducted the search had acted in good faith. The SCC then found that damages under section 24(1) were both just and appropriate in the circumstances, and set forth a four-part test for making that determination. First, the plaintiff must prove that their *Charter* right was breached.[68] Second, the plaintiff must provide a functional justification for the damage award. This entails consideration of whether the award furthers the goals of compensation, vindication, and deterrence.[69] Third, the evidentiary burden shifts to the state to establish any countervailing

62 *Ward*, above note 3.
63 Agarwal & Marcus, above note 14 at 87.
64 *Ibid.*
65 *Mills v The Queen*, [1986] 1 SCR 863, 58 OR (2d) 543.
66 *Ibid* at para 241.
67 *Golden*, above note 53.
68 *Ward*, above note 3 at para 23.
69 *Ibid* at paras 24–25.

factors that militate against an award of *Charter* damages.[70] These can include the existence of alternative remedies and concerns for good governance. Finally, if the state fails to meet that burden, the quantum of damages will be assessed.[71]

The SCC upheld an award of $5,000 for the breach of Ward's section 8 *Charter* rights. What is particularly significant about this decision is that it addresses the appropriateness of constitutional damages in the absence of a challenge to legislation itself, thereby clarifying that a claimant can receive *Charter* damages for state conduct that is best described as operational, or engaged in pursuant to a policy rather than pursuant to allegedly unconstitutional legislation.[72]

2) The Importance of Section 24(1) Damages

The purpose of an award for constitutional damages is to: (1) compensate an individual in circumstances where that individual's constitutional rights have been breached; (2) vindicate that right; and (3) deter future breaches.[73] The quantum of damages should reflect a consideration of each of these goals, the seriousness of the state conduct that resulted in the breach, and the impact of the breach on the affected individual.[74]

It has been argued that *Charter* litigation serves the even broader function of acting as both an educator and an ombudsperson,[75] in the sense that, in Canada, "we are heavily reliant on individual citizens to initiate and prosecute personal constitutional claims so that the law benefits from ongoing, regular consideration and application by judges."[76] In this way, claims for *Charter* damages provide a means of both clarifying and protecting *Charter* rights.

It is vital to remember that *Charter* damages are available against governments and not individuals.[77] This is important because the state is a party that holds a lot of power. While that power can unfortunately often

70 *Ibid* at para 33.

71 *Ibid* at 46.

72 Bryant A Mackey, "Developments in the Law of Constitutional Damages Awards in Canada," Human Rights Conference (Vancouver: Continuing Legal Education Society of BC, November 2015) at 16–17.

73 *Ward*, above note 3, at para 4.

74 *Ibid* at para 57.

75 Mackey, above note 72 at 30.

76 *Ibid.*

77 *Ward*, above note 3 at para 22.

be used to perpetuate systemic problems, actions that are successfully brought against it can target and bring to light the practices that aid in this perpetuation. The resultant changes in behaviour could have much greater remedial effects than would be the case if such actions were brought against individual defendants or small corporations. When *Charter* damages are awarded, the state must take responsibility for unconstitutional behaviour and therefore these damages can provide victims of racial discrimination the opportunity to pursue actual institutional change.[78]

Specifically in regard to racial discrimination, section 24(1) of the *Charter* not only provides a basis for action where one might not otherwise exist,[79] but it also allows victims of racial discrimination to bring these constitutional wrongs to the attention of those who continue to practice and perpetuate them.[80] In other words, the availability of section 24(1) damages provides victims of racial discrimination with a means of holding those who participate in that perpetuation accountable. This, in turn, has the potential to prompt systemic changes, while also providing victims with financial relief.[81]

The ability of *Charter* damages to actually address systemic racial discrimination has been questioned,[82] which is understandable given the generally modest awards that tend to flow from section 24(1).[83] However, as I will illustrate below, the capacity for a claim for *Charter* damages to effect institutional change in regard to racial discrimination could benefit significantly from the use of class proceedings. Below, I will discuss the compatibility of the *Ward* framework for *Charter* damages and racial discrimination claims and how bringing such a claim on a class-wide basis pursuant to provincial or federal class proceeding legislation can further each of the three goals of class actions, and in turn enhance the potential of a *Charter* damages claim to meet its own goals of deterrence, vindication, and compensation.

78 Jamieson, above note 55 at 80.
79 *Ibid* at 77.
80 *Ibid.*
81 *Ibid* at 77 and 96.
82 *Ibid* at 78.
83 See, for example, *Bérubé c Quebec (Ville de)*, 2014 QCCQ 8967 at paras 129–32.

3) The Natural Fit between the *Ward* Framework and Claims for Racial Discrimination Leading to a *Charter* Violation

As canvassed above, the *Ward* test for *Charter* damages consists of four steps: (1) establishing a *Charter* breach; (2) determining whether a damage award is just and appropriate on the basis of the award's ability to compensate, vindicate and deter; (3) considering countervailing factors raised by the defendant; and (4) assessing quantum if *Charter* damages are determined to be appropriate.[84] Below, I will outline how a claim based on racial discrimination fits within this legal framework.

With regards to the first step of the *Ward* test, a victim of racial profiling who brings a claim for section 24(1) damages must show that the discrimination violated one of their *Charter* rights.[85] Since *R v Brown*, courts "have become more willing to take racial discrimination seriously in the context of *Charter* violations."[86] Regarding racial profiling, such a claim can arise out of sections 7, 8, 9, 11(d), 12, or 15 of the *Charter.*[87] I argue that sections 8 and 9 are generally the most relevant in the context of racial profiling by police, given that racial profiling is commonly expressed through the practice of pretext vehicle stops.[88] Because the resulting *Charter* breach stems from state action alone, an action for section 24(1) damages based on racial profiling completely avoids the issue that claims for damages under that section are incompatible with claims for declarations of invalidity under section 52(1) of the *Constitution Act.* In comparison, in other circumstances an individual who has suffered a breach of a *Charter* right might first have to challenge the constitutionality of a law itself before seeking damages for that breach.

In regard to the second step of the *Ward* test: for a court to consider *Charter* damages to be just and appropriate, the award needs to satisfy one of the following purposes: compensation, vindication, or deterrence.[89] Not only will a damages award for racial profiling meet this bar, but it is quite likely that a victim of racial profiling will seek an award that is compatible with all three of these purposes. Compensation is relevant because the individual will have suffered a personal harm as a result of the discrimination, whether that is humiliation, embarrassment, anger, anxiety, etc.

84 Jamieson, above note 55.

85 *Ibid.*

86 *Ibid* at 84.

87 *Ibid* at 82.

88 Tanovich, "Using the Charter to Stop Racial Profiling," above note 12 at 149.

89 Jamieson, above note 55 at 86.

Moreover, vindication is relevant because "[v]indication recognizes that constitutional violations not only harm the claimant involved, but also society as a whole."[90] The damages awarded under section 24(1) for racial discrimination are relevant beyond the personal, individual level of the claimant because they can work toward "[rebuilding] public confidence in the rule of law."[91] Finally, deterrence is relevant because the damages can go toward "[regulating] government behaviour in order to secure state compliance with the *Charter* in the future."[92] Awarding damages for a *Charter* breach on the basis of deterrence serves to bring problematic practices to the attention of officers who might otherwise continue to perpetuate racial discrimination, given that racial profiling is often an unconscious process. Put differently, "general deterrence can encourage governments to implement better training or policies to counteract the effects of discriminatory acts throughout the criminal justice system."[93]

In regard to the third step of the *Ward* test: although the state defendant can attempt to defeat an award of *Charter* damages by bringing alternative remedies or concerns relating to effective governance to the attention of the court,[94] the possibility of this defeating a claim based on racial discrimination appears unlikely. First, as previously discussed, alternative remedies for racial profiling are scarce. Second, arguments relating to effective governance are likely unpersuasive in the context of *Charter* damages. Effective governance may be of some concern in a claim for racial profiling given that racial profiling is generally a product of police discretion,[95] and limiting that discretion could potentially prevent effective governance. For example, in *Ward*, the SCC expressed concern that large damages awards "may serve little functional purpose in terms of the claimant's needs and may be inappropriate or unjust from the public perspective,"[96] but ultimately discounted that concern on the basis that "insofar as s 24(1) damages deter *Charter* breaches, they promote good governance."[97] These comments suggest that a court will not be especially sympathetic towards the position of the state defendant

90 *Ibid* at 87.
91 *Ibid.*
92 *Ward*, above note 3 at para 29.
93 Jamieson, above note 55 at 88.
94 *Ward*, above note 3 at para 33.
95 *R v Ladouceur*, [1990] 1 SCR 1257, 73 OR (2d) 736.
96 *Ward*, above note 3 at para 53.
97 *Ibid* at para 38.

who has been found, under the previous steps of the *Ward* test, to have breached a *Charter* right.

If such analysis reveals that there has indeed been a *Charter* breach and that damages for that breach would be just and appropriate, and if the defendant is unable to convince the court that such damages should not be awarded on the basis of countervailing factors, then the quantum of damages will be assessed. For the reasons I have summarized above, the *Ward* framework is not incompatible with claims for racial profiling and has the potential to be of great value to such claims. In some circumstances, this framework provides the only means of pursuing damages to recognize such *Charter* breaches.

D. CERTIFICATION OF CLASS ACTIONS FOR *CHARTER* DAMAGES

While *Ward* represents a significant progression in that it gives racialized individuals a means of obtaining monetary recognition for harm suffered as a result of racial profiling, the caselaw has been less clear about whether such claims can succeed as class actions. Below, I will canvass the requirements for certification of an action as a class proceeding, as well as the conflicting decisions dealing with the certification of claims for constitutional damages, in order to determine the current state of the legal landscape for bringing such claims.

1) Certification Requirements

In British Columbia, the requirements for certification of an action as a class proceeding are provided by the *Class Proceedings Act*.[98] Those requirements, set out in section 4(1), include that the pleadings disclose a cause of action, that there is an identifiable class of two or more persons, that the claims of the class members raise common issues, that a class proceeding would be the preferable procedure for the resolution of the common issues, and that there is a representative plaintiff who can fairly and adequately represent the interests of the class who has produced a plan for both the proceeding and notification of class members, and who does not have a conflict of interest with other class members. In Ontario, the requirements for certification are set out in section 5 of the

98 *Class Proceedings Act*, RSBC 1996, c 50 [BC *CPA*].

Class Proceedings Act, 1992[99] and consist of the same five requirements as the British Columbia *CPA.* These are also mirrored by the certification requirements set out in section 334.16 of the *Federal Courts Rules.*[100] These statutory requirements are similar to the Canadian common law requirements for certification, which the courts use in the absence of provincial class proceeding legislation.[101] The requirements that are necessary for all Canadian class actions, despite any differences between the common law and statutory regimes, include that the class must be capable of clear definition, that there are issues common to all class members, that success for one member must mean success for all, and that the proposed representative plaintiff adequately represents the class.[102]

When certification requirements are met, a class proceeding is said to offer the advantages of improving access to justice, increasing judicial economy, and promoting behaviour modification by "making economical the prosecution of claims that would otherwise be too costly to prosecute individually,"[103] freeing up judicial resources by avoiding duplicative legal analysis and fact-finding exercises,[104] and ensuring that those who cause "widespread but individually minimal harm" are made to consider the costs of their conduct,[105] respectively.

The fact that monetary damages may require individual assessment should not bar certification.[106] Similarly, nor should the fact that different class members seek different remedies, that the number of class members is unknown, or that the class includes subgroups that have claims not common to all members of the class.[107] For each of the statutory requirements canvassed above, excluding the requirement that the pleadings disclose a cause of action, the standard of proof upon certification is only that there is some basis in fact.[108] I specifically note each of these details relating to certification in order to show that the test for certification is focused on the action's suitably to proceed as a class action, rather than

99 *Class Proceedings Act, 1992*, SO 1992, c 6.
100 *Federal Courts Rules*, SOR/98-106.
101 *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 [*Dutton*].
102 *Ibid*, at paras 38–41.
103 *Ibid* at para 28.
104 *Ibid* at para 27.
105 *Ibid* at para 29.
106 *Ibid* at para 43.
107 *Ibid.*
108 *Hollick v Toronto (City)*, 2001 SCC 68 at para 25 [*Hollick*].

on the merits of the action itself. By extension, the standard of proof at this stage is not stringent or onerous.

In Quebec, the test for certification differs. It is referred to as authorization, rather than certification, and the requirements are provided by Article 575 of the *Quebec Code of Civil Procedure*.[109] Article 575 stipulates that the court authorizes the exercise of a collective action if: (1) the claims of members raise identical, similar or related questions of law or fact; (2) the facts alleged seem to justify the conclusions sought; (3) the composition of the proposed class makes joinder of the proceedings either difficult or impractical; and (4) the proposed representative plaintiff is able to ensure adequate representation of the class members. As is the case in British Columbia, Ontario, and the federal court, the court should avoid ruling on the merits of the dispute at this stage.[110] Moreover, the standard of proof is that the case is arguable.[111] The SCC has acknowledged that the threshold for authorization in Quebec is lower than in other provinces.[112]

The leading cases relating to certification of actions for *Charter* damages have emerged from British Columbia and Ontario. Moreover, the Quebec Superior Court recently certified a class action based on allegations of racial profiling against the Montreal police. I will review that decision in Part E. Since that decision, several proposed class proceedings have been commenced for *Charter* damages based on racial discrimination. One of those proposed class proceedings has been brought pursuant to federal class proceeding legislation and is based on allegations of racial harassment and racial discrimination against the Royal Canadian Mounted Police, which I will also review below in Part E. First, I will review the British Columbia and Ontario decisions relating to certification of actions for *Charter* damages in order to clarify the current legal landscape in Canada.

2) *Thorburn v British Columbia*

In *Thorburn v British Columbia* (*Public Safety and Solicitor General*),[113] the plaintiffs sought to certify an action for *Charter* damages, based on *Ward*,

109 *Quebec Code of Civil Procedure*, CQLR c C-25.01 [*CCP*].

110 *Guimond v Quebec* (*Attorney General*), [1996] 3 SCR 347, 138 DLR (4th) 647.

111 *Ibid.*

112 *Vivendi Canada Inc v Dell'Aniello*, 2014 SCC 1.

113 *Thorburn v British Columbia* (*Public Safety and Solicitor General*), 2013 BCCA 480 [*Thorburn*].

for routine strip searches of detained individuals at the Vancouver jail. The impugned searches were carried out pursuant to a policy that mandated routine strip searches of new arrivals, and only identified two exceptions to the otherwise routine searches: individuals arrested for being intoxicated in public and individuals arrested for bylaw or traffic violations.[114] The plaintiffs argued that this policy was in contravention of the SCC's decision in *Golden.*[115] Specifically, the plaintiffs claimed that the routine strip searches constituted a breach of their section 8 *Charter* rights.

The British Columbia Supreme Court (BCSC) dismissed the plaintiffs' application for certification, finding that only one of the five requirements (identifiable class) for certification under section 4(1) of the British Columbia *CPA* had been met.[116] First, the court found the proposed class action failed to satisfy the cause of action requirement. While the court noted that this requirement could potentially be met by amending the causes of action, it accepted and emphasized the defendants' submission that the plaintiffs' claim "appear[ed] to presume that the policy in place at that time, by not conforming to the decision in *Golden*, was presumptively in breach of the *Charter*."[117] Instead, the court emphasized that it is the lawfulness of the individual strip searches, and not the policy under which they were carried out, that must be considered.[118] In so deciding, the court cited *Golden*, where the SCC had distinguished between strip searches incidental to arrest and strip searches incidental to safety issues once the detainee was in a custodial setting and specifically stated that concerns relating to strip searches incidental to arrest "must be addressed on a case-by-case basis."[119]

This emphasis on the individual nature of the *Charter* claims permeated the remainder of the BCSC's analysis. With regards to the proposed common issues generally, while the BCSC recognized that the British Columbia *CPA* "expressly precludes the predominance of common issues over individual issues as a factor for consideration in determining the common issues criterion,"[120] it nevertheless accepted the defendants'

114 *Ibid* at para 5.

115 *Golden*, above note 53.

116 *Thorburn v British Columbia* (*Public Safety and Solicitor General*), 2012 BCSC 1585 [*Thorburn* BCSC].

117 *Ibid* at para 76.

118 *Ibid.*

119 *Golden*, above note 53 at para 97.

120 *Thorburn* BCSC, above note 116 at para 100.

argument that the proposed common issues lacked commonality because their resolution would require consideration of the unique circumstances of each individual class member. With regards to the proposed common issues relating to *Charter* breaches and damages, the court emphasized that the need for individual analysis was inherent in the legal test pertaining to the constitutionality of the strip searches,[121] that there was a policy change during the proposed class period, and that "hundreds of employees made individual assessments as to whether a strip search was appropriate in a particular case."[122] Each of these factors militated against finding that the proposed common issues met the statutory requirements.

The court's emphasis on the individual nature of the claims at the common issues stage informed its preferability analysis. The plaintiffs argued that other means of resolving the claims would be impractical, less efficient, and would present access to justice issues, considering the fact that the proposed class included many members who suffered from homelessness and mental illness. However, the BCSC held that a class action would not be the preferable procedure because "the court would be required to hear evidence from the individual class members in relation to a number of features of their experience at the Jail."[123]

The British Columbia Court of Appeal (BCCA) ultimately denied the appeal but disagreed with the BCSC about which of the certification requirements had been met. Specifically, the BCCA held that the action failed to satisfy the commonality and preferable procedure requirements. Regarding common issues, the BCCA emphasized that the plaintiffs could not rely on the claim that the policy pursuant to which the routine strip searches were carried out was unreasonable, and arguably extended the individuality concerns of the BCSC even further by stating not only that "[i]ndividual assessments would be necessary to determine if reasonable grounds existed (based on the objectively-justifiable subjective belief of the arresting officer or staff member conducting the search) for the arrest and the search incidental to the arrest of each class member," but that "a *Charter* right is individual in nature."[124] Similarly, informed by its finding regarding commonality, the BCCA held that a class action would not be the preferable procedure for the resolution of the class members' claims because the "core issue of each class member's cause

121 *Ibid* at para 102.

122 *Ibid.*

123 *Ibid* at para 120.

124 *Thorburn*, above note 113 at para 41.

of action, (whether the strip search of that class member was reasonable in all of the circumstances), can only be resolved by individual trials."[125] Thus, the BCCA not only upheld the BCSC's denial of certification, but stretched the BCSC's findings even further by connecting the individuality concerns to *Charter* damages claims more generally, rather than limiting those concerns to the legal test for unconstitutional strip searches established in *Golden.*

3) *Good v Toronto Police Services Board*

Several months prior to the BCCA's decision in *Thorburn*, the Ontario Superior Court (ONSC) rendered its decision in *Good v Toronto Police Services Board.*[126] In that case, the ONSC similarly refused to certify a class action seeking *Charter* damages. The claim before the ONSC arose out of arrests and detentions made by Toronto police during the G20 Summit in June 2010. Specifically, the proposed class consisted of individuals in Toronto who were arrested or subject to mass detention by police during the G20 Summit, and who were either released without charge or imprisoned in the Eastern Avenue Detention Centre.[127] The plaintiff argued that the arrests and detentions were unlawful because they occurred as a result of an unlawful command order (the order did not consider whether each individual had committed an offence). The ONSC denied certification on the basis that the plaintiffs had failed to meet the identifiable class, the common issues, the preferable procedure, and the representative plaintiff requirements.

The plaintiff had proposed multiple subclasses to capture the different locations at which the arrests and detentions had occurred. The plaintiff also alleged a variety of different *Charter* breaches in relation to each subclass. This use of multiple subclasses contributed to the court's finding that the identifiable class requirement had not been met. Further, the court held that a proposed common issue relating to the section 9 *Charter* breach was unable to advance the litigation for the group because the core issue in the ensuing analysis was whether an *individual* had been unlawfully detained or arrested,[128] which in turn required an assessment

125 *Ibid* at para 53.
126 *Good v Toronto Police Services Board*, 2013 ONSC 3026.
127 *Ibid* at para 4.
128 *Ibid* at para 198.

of the individual conduct of protestors.[129] The court rejected the plaintiff's argument focusing on the commonality of the command order, which led it to find that a class action would not be the preferable procedure because the proposed class members had the ability to bring individual lawsuits or human rights complaints. Moreover, there was already a system for complaints relating to police actions during the G20 Summit. Ultimately, the ONSC's reasoning in this case parallels the BCCA's reasoning in *Thorburn*.

The decision was appealed to Ontario's Divisional Court (ONDC).[130] However, the proposed class action before the ONDC differed significantly from the action that had been analyzed by the ONSC.[131] The ONDC found that the identifiable class requirement had now been met and overturned the ONSC's finding that the Ontario *CPA* prohibited the use of subclasses. The class definition focused on individuals being subject to "a single sweeping order."[132] That focus informed the court's subsequent analysis of the common issues. Unlike the ONSC, the ONDC found that the proposed common issue of whether the members of the class were arbitrarily detained or arrested in contravention of section 9 of the *Charter* would "be both the beginning and the end of the liability analysis for the entire class."[133] The ONDC's finding is especially significant when considered in conjunction with *Thorburn*, where the BCCA found that the individual circumstances inherent in the *Golden* test impeded certification. *Good* similarly involved a consideration of individual circumstances, in the sense that the claim was that the command order, as well as the arrests and detentions that followed, were unlawful because they failed to consider the conduct of each individual. However, unlike in *Thorburn*, this was not a bar to certification. Instead, the ONDC focused on the fact that individual circumstances had been ignored by police, which was something that all class members had in common.

The court also rejected the argument that the proposed common issue pertaining to damages could not properly be considered a common issue because the issue of damages requires individual examination. It explained that "[i]t does not require an individual assessment of each person's situation to determine that, if anyone is unlawfully detained in

129 *Ibid* at para 206.

130 *Good v Toronto Police Services Board*, 2014 ONSC 4583 [*Good* ONSC].

131 *Ibid* at para 13.

132 *Ibid* at para 37.

133 *Ibid* at para 44.

breach of their rights at common law or under section 9 of the *Charter*, a minimum award of damages in a certain amount is justified."[134] Further, the court recognized that, in such a situation, a court is able to award increased damages to individual class members if warranted.[135]

Given its finding regarding commonality, the ONDC went on to find that a class action would, contrary to the finding of the ONSC, indeed be the preferable procedure for the determination of the issues. The ONDC held that judicial economy would be served, as it would be "the antithesis of judicial economy" to determine, for all members of each subclass, on what basis each detention or arrest was made.[136] Moreover, the court explained that access to justice would be increased, as many class members would be unlikely to individually bring claims.[137] Finally, the court held that behaviour modification would be encouraged because "[i]f the appellant's central allegation is proven, the conduct of the police violated a basic tenet of how police in a free and democratic society are expected to conduct themselves" and "an award of damages to the individual citizens affected may be the most telling and lasting expression that such conduct should never be tolerated."[138]

Certification was upheld by the Ontario Court of Appeal.[139] The ONCA held that, in the face of a single command order, the ONSC's focus on individual conduct was an "error in principle."[140] The ONCA further commented that "to the extent that the motion judge concluded that street-level officers had discretion in arresting or detaining protesters . . . she impermissibly strayed into an assessment of the merits."[141] As was the case at the ONDC, the ONCA's decision differed significantly from that of the ONSC because it focused on the command order and its commonality between all class members. Regarding preferability, the ONCA found that the complaint process made available in relation to police conduct during the G20 Summit, which the defendants had argued to be an adequate alternative remedy, would only result in non-binding recommendations.

134 *Ibid* at para 73.
135 *Ibid* at para 74.
136 *Ibid* at para 92.
137 *Ibid* at para 93.
138 *Ibid* at para 95.
139 *Good v Toronto Police Services Board*, 2016 ONCA 250 [*Good*].
140 *Ibid* at para 66.
141 *Ibid* at para 71.

Therefore the *Charter* damages sought on behalf of the class members "would be stronger instruments of behaviour modification."[142]

4) The Current Legal Landscape

While *Thorburn* and *Good* each dealt with different *Charter* rights (sections 8 and 9 of the *Charter*, respectively), this is arguably a distinction without a difference in the context of a certification analysis, as both these sections entail analyses that are "individual in nature."[143] In light of this, what can explain the disparity between the court's willingness to certify *Good* despite the individual analysis aspect and its inability to do so in *Thorburn*?

Thorburn and *Good* diverged in their analyses of commonality, which affected the subsequent preferability analyses. This divergence is perhaps unsurprising given that "[c]ommonality tests have been a source of confusion in the courts."[144] In *Thorburn*, the BCCA was deterred from certifying the action on the basis that *Charter* rights are individual in nature, thereby suggesting that *Charter* breaches (and claims for *Charter* damages) are inherently incompatible with class proceedings.[145] Contrastingly, in *Good*, the ONDC and the ONCA painted a different picture of the commonality requirement, and therefore did not allow the individuality of *Charter* rights to stand in the way of certification.[146] Specifically, the ONDC stated that a proposed class action, for the purposes of commonality, "does not have to resolve all issues that may exist in terms of establishing liability."[147] Similarly, the ONCA emphasized that the alleged command order had grounded the impugned arrests and detentions in sufficient commonality.

The ONDC and ONCA's approach in *Good* more closely accords with the approach found elsewhere in the certification caselaw, not dealing specifically with *Charter* damages.[148] For example, in *Rumley v British*

142 *Ibid* at para 87.

143 Iryna Ponomarenko, "The Devil is in the Scale: Revisiting the Commonality Requirement in *Charter* Class Actions" (2019) 57 *Alberta Law Review* 69 at 87.

144 *Dutton*, above note 101 at para 39.

145 Ponomarenko, above note 143 at 92.

146 *Ibid.*

147 *Good* ONSC, above note 130 at para 45.

148 Joseph J Arvay, "Class Actions and the Charter" *Suing and Defending the Crown 2018* (Vancouver: Continuing Legal Education Society of BC, September 2018) at 15.

Columbia,[149] a negligence case involving the certification of claims for physical and sexual abuse at a provincial residential school between 1950 and 1992, the SCC upheld the BCCA's decision to certify the action. In doing so, the SCC rejected the defendant's argument that certification should be barred because the standard of care would need to be assessed in regard to the unique circumstances of each claimant, and that the BCCA had framed the commonality between class members too generally.[150] Instead, the SCC upheld the BCCA's commonality finding, emphasizing that the systemic nature of the alleged negligence and the lack of policies in place at the time were common between all class members.[151]

Regarding preferability, the court was undeterred by the fact that individual proceedings were required in regard to injury and causation. Instead, the SCC used certification as an opportunity to move the claims forward more efficiently, as many of the issues relating to the policies at the school, the training of staff, and the conditions at the school were likely common to all class members' claims.[152]

Despite the fact that *Rumley* pre-dated *Thorburn*, the BCCA in *Thorburn* refused to allow the claimants a chance to benefit from the class proceeding as a procedural vehicle. The BCCA had the decision in *Rumley* at their disposal, yet treated the fact that the class members' claims were based on impugned conduct that occurred over a certain period of time, authorized by different policies, and at the hands of multiple defendants as incompatible with certification. As commentators have mentioned in reference to these cases, constitutionality and commonality (as opposed to individuality) are not are not mutually exclusive considerations.[153]

The ONCA's reasoning in *Good* suggests that *Thorburn* could have been certified as a class proceeding. Specifically, in *Thorburn*, certification could have been successful if the strip search policy itself had been emphasized as the foundation of commonality. Commentators have suggested that the BCCA in *Thorburn* erred in over-emphasizing the need for individual fact-finding, because the analysis, properly conducted, would have revealed scant need for individual inquiry on the facts of that case[154] (given the fact that the impugned strip searches stemmed from a common

149 *Rumley v British Columbia*, 2001 SCC 69 [*Rumley*].
150 *Ibid* at para 28.
151 *Ibid* at para 30.
152 *Ibid* at para 37.
153 Arvay, above note 148 at 16.
154 Ponomarenko, above note 143 at 71–72.

policy). Further, the common issues trial could have been followed by individual trials[155] and, in any event, the predominance of individual issues should not bar a finding of commonality.[156] While the predominance of individual issues over common issues may inform the preferability analysis,[157] the commonality and preferability analyses are so closely intertwined that a finding of commonality will likely have a positive influence on the court's subsequent preferability analysis.

At present, both *Thorburn* and *Good* remain valid precedents.[158] Unfortunately, given the drastic differences between the two appellate-level decisions, the future of *Charter* class actions cannot be determined with any level of certainty.[159] I argue that a lack of uniformity in the understanding of commonality and preferability, in particular, is unnecessarily preventing the class action from being used to achieve justice for victims of *Charter* breaches. This is unnecessary because, for the purposes of finding commonality, class members' claims must only share "a substantial common ingredient"[160] and, for the purposes of preferability, "class actions will be allowable even where there are substantial individual issues."[161] Thus, I argue that the current uncertainty can and should be resolved in order to revive and rebrand the class action as a tool for advancing *Charter* damages claims.

E. AN UNDERRECOGNIZED TOOL? ANALYZING THE DISCONNECT BETWEEN *CHARTER* DAMAGES CLAIMS AND CERTIFICATION

I invite the reader to pause here to consider the implications of the preceding sections, when considered in totality. The following question may assist in this reflection: "Has the *Charter* given any hope to Aboriginal and racialized communities that fundamental justice is possible?"[162] While *Ward* set the stage for *Charter* damages and provided necessary judicial

155 *Ibid.*

156 BC *CPA*, above note 98 s 4(1)(c); *Cloud v Canada (Attorney General)*, 73 OR (3d) 401, [2004] OJ No 4924 at para 65 (CA).

157 *Ibid* s 4(2)(a).

158 Ponomarenko, above note 143 at 92.

159 *Ibid.*

160 *Dutton*, above note 101 at para 39.

161 *Hollick*, above note 108 at para 30.

162 Tanovich, "The Charter of Whiteness," above note 34 at 656.

clarification regarding the court's ability to award them, the above discussion demonstrates that the legal framework for *Charter* claims does not fit neatly into the legal framework for certification. Below, I will discuss why this is problematic and why, going forward, efforts should be made to make the class proceeding more amenable to claims for damages based on *Charter* breaches.

1) Why a Class Proceeding?

Although it is possible to bring a *Charter* damages claim for racial discrimination on an individual basis, it is important that the courts clarify the law regarding the certification of such claims as class actions following the opposing decisions in *Thorburn* and *Good.* It has been argued that *Charter* claims and class actions are naturally complementary,[163] but it has also been argued that *Charter* rights are inherently incompatible with class actions.[164] Below, I will advocate for the former position. Specifically, I argue that certification of such claims furthers the goals of access to justice, judicial economy, and behaviour modification, and that claims for *Charter* damages brought on a class-wide basis have the potential to be powerful tools for promoting social change.

a) Access to Justice

One benefit of the class proceeding is that, as a procedural vehicle, it enables claims that would otherwise not be brought as a consequence of economic, social, and psychological barriers.[165] I argue that certification of *Charter* damages claims based on racial discrimination is likely to increase access to justice not just from an economic perspective, but by addressing social and psychological barriers as well.

First, bringing and litigating *Charter* damages claims can be "prohibitively expensive."[166] Such claims often lead to relatively modest damages awards which, when considered alongside the high costs of legal fees, have the potential to make them economically irrational.[167] This issue is compounded by the possibility that the plaintiff could be held responsible for all legal costs in the event that they are unsuccessful.

163 Arvay, above note 148.

164 Ponomarenko, above note 143 at 70.

165 *OLRC Report on Class Actions*, above note 15 at 120–21.

166 Jamieson, above note 55 at 90.

167 *OLRC Report on Class Actions*, above note 15.

Both of these concerns could be addressed if the *Charter* damages claim were brought as a class action. The class action has been described as a "procedural vehicle that helps disenfranchised claimants to enhance a financial utility of their grievances through a plaintiff-friendly statutory regime."[168] For example, the class action minimizes the individual economic concerns with bringing a *Charter* damages claim by having fees distributed between a large group of people. Furthermore, the risk of costs is eliminated if the claim is brought as a class proceeding in a jurisdiction where the class proceeding legislation removes the possibility of the plaintiff being held liable for costs (i.e., British Columbia[169]). I suggest that even in provinces where the class proceeding legislation does not eliminate potential cost consequences for plaintiffs (i.e., Ontario), the deterrent effect of costs and legal fees in general is nevertheless minimized by the potential use of contingency fee agreements. In a class action, the potential damages awards are greater than in individual claims, thus making a contingent fee more attractive for counsel. If claimants are able to pay their legal bills out of their damages awards, then they will be able to pursue claims even if their financial situations would have otherwise prevented them from doing so.

Second, the availability of the class proceeding would encourage claims based on racial discrimination to be brought where otherwise such claims may be barred by social and psychological barriers. These arise out of the general distrust of the judicial system that tends to follow racial profiling, and are exemplified when "claimants fail to take legal action because they are alienated from, or fear involvement in, the legal system."[170] Social and psychological barriers are especially pertinent in regard to potential claims based on racial profiling, because such alienation and fear of the legal system are more likely to be prevalent among persons who "have had continuing negative experiences with the legal system as a result of actions by . . . the police."[171]

In sum, "if the legal system continues to discourage aggregation of *Charter* grievances as part of judicial redress of systemic constitutional wrongs, more often than not the aggrieved individuals would be left with no avenue of recourse at all."[172] Ultimately, the class action is a proced-

168 Ponomarenko, above note 143 at 70.

169 BC *CPA*, above note 98 s 37.

170 *OLRC Report on Class Actions*, above note 15 at 128.

171 *Ibid* at 129.

172 Ponomarenko, above note 143 at 93.

ural tool that is particularly well-suited to address many of the access to justice issues that otherwise plague individual claims for *Charter* damages based on racial discrimination.

b) Judicial Economy

Judicial economy refers to a class action's ability to benefit the judicial system by "diminishing the total amount of litigation — and therefore the total cost — required to settle disputes arising from mass wrongs."[173] As discussed, *Charter* breaches result in widespread, not just individual, harm. Racial profiling, in particular, is not an isolated issue, but is rather a problem that impacts society by perpetuating racism and inequality. The widespread harm that results from *Charter* breaches illustrates why judicial economy would be served if claims for racial profiling could be brought on a class-wide basis. Dating as far back as 1982, it has been recognized that "class actions can achieve judicial economy where all class members have individually recoverable claims."[174] Without the use of a class proceeding, "most of these claims would be litigated individually, leading to duplicative and costly hearings."[175]

As I have established above, victims of racial profiling have individually recoverable claims. Moreover, claims for *Charter* damages cannot be satisfied by provincial courts (as opposed to provincial superior courts), meaning that they cannot be addressed at the same time as the criminal proceeding to which they may be incidental.[176] This is problematic because, in order to pursue relief for breach of a *Charter* right, a victim of racial discrimination who has become the subject of criminal proceedings would have to bring separate proceedings in the province's superior court.[177] Multiple proceedings are not supportive of judicial economy, while allowing the aggregation of claims that stem from breach of a *Charter* right by the same state action would be. Such claims might also otherwise be barred for financial, social, or psychological reasons, and by minimizing any concerns regarding an influx of claims by allowing those claims to be brought on a class-wide basis.

A potential counter argument to the above is that the certification of claims for *Charter* damages based on racial discrimination will hamper

173 *OLRC Report on Class Actions*, above note 15 at 118.
174 *Ibid.*
175 *Ibid.*
176 Jamieson, above note 55 at 78.
177 *Ibid* at 79.

judicial economy by encouraging unnecessary litigation or claims that would be individually non-recoverable.[178] I argue that these concerns are widely unfounded because the law already recognizes that racial profiling can breach *Charter* rights, and *Charter* damages are available under section 24(1). In other words, these claims *are* individually recoverable, save for the economic, social, and psychological barriers that exist in relation to them. Given the importance of *Charter* rights, and thus the importance of section 24(1) damages, I argue that these claims cannot fairly be described as unnecessary litigation. Moreover, the class action cannot fairly be said to be the solution for increasing access to justice for victims of racial profiling while simultaneously being criticized for encouraging a greater number of these claims to be brought. I argue that any increases in litigation that result from encouraging victims of *Charter* breaches to pursue a remedy to which they are legally entitled is offset by the fact that a class proceeding allows these claims to be heard at once.

c) Behaviour Modification

The defendant in a *Charter* damages claim is large and powerful. A class proceeding therefore offers a significant benefit to claimants of *Charter* damages by minimizing what would otherwise be a significant power imbalance. Furthermore, the nature of constitutional violations is such that they result in harm to society generally — especially if the violation goes unchecked.[179] As highlighted in regard to access to justice above, "claim aggregation can easily transform low-value, high-maintenance grievances that cannot otherwise be economically pursued into substantial gains accruing to a great number of individuals."[180] Not only does claim aggregation increase access to justice for individual claimants, it simultaneously increases the power of claims. When the damages award increases due to the aggregation of multiple claims, the consequences for the state defendant also increase. This is known as "cost internalization." Aggregated claims force a defendant to internalize the costs of its wrongful conduct, thereby modifying behaviour in an effort to minimize future harms.[181]

A counter argument is that governments are not typical rational economic actors, given their structure and the extent of their resources.

178 *OLRC Report on Class Actions*, above note 15 at 130.

179 Jamieson, above note 55 at 87.

180 Ponomarenko, above note 143 at 73.

181 *OLRC Report on Class Actions*, above note 15.

However, I argue that state behaviour modification is at least more likely in the face of a larger damages award involving a larger number of claimants than it would otherwise be. Further, some commentators have suggested that higher damages awards lead to better deterrence of future *Charter* breaches.[182] Even if it is not the damage award itself that encourages behaviour modification, I argue that the public attention that accompanies certification encourages behaviour modification through social, rather than financial, pressure.

2) The Future: Putting the Steps in Motion

a) *Ligue des Noirs du Quebec v Ville de Montreal*

The idea that class proceedings have much to offer claims for *Charter* damages based on racial discrimination was recently recognized by the Quebec Superior Court (QSC) in *Ligue des Noirs du Québec v Ville de Montréal*.[183] In 2019, the QSC authorized an action brought by Ligue des Noirs, a non-profit group tasked with defending the rights of the Black community in Quebec, and its representative plaintiff, Alexandre Lamontagne, on behalf of alleged victims of racial profiling. Specifically, the proposed class included any racialized person "who, in Montreal between August 14, 2017 and January 11, 2019 (for those who have suffered bodily injury) or between July 11, 2018 and January 11, 2019 (for those who have not suffered a bodily injury), following a proactive intervention by a City of Montreal police officer, was [questioned], arrested and/or detained without justification and suffered racial profiling."[184] Those time periods reflect the existence under the CCP of a three-year limitation period for claims relating to bodily injury and more limited six-month limitation period otherwise.[185] The defendant was the City of Montreal, the employer of the Montreal Police.[186]

Lamontagne had been arrested by two Montreal police officers in 2017. It was past midnight, and he had been standing on a sidewalk outside of a bar in Montreal, checking messages on his cellphone. There followed an interaction between Lamontagne and two police officers who were situated in their patrol vehicle. One of the officers allegedly asked

182 Arvay, above note 148 at 10–11.
183 *Ligue des Noirs du Québec v Ville de Montréal*, 2019 QCCS 3319 [*Ligue des Noirs*].
184 *Ibid* at para 52.
185 *Ibid* at para 51.
186 *Ibid*.

Lamontagne if he had a question for them, and Lamontagne allegedly approached the vehicle and asked the officer what his problem was. The interaction allegedly deteriorated from there and culminated in Lamontagne's arrest. One year later, the police dropped the charges, which included obstructing police work and intention to resist arrest.[187]

The plaintiff argued that "an 'electroshock' is necessary to put an end to the racial profiling which the police officers of the Service de police de la Ville de Montréal (SPVM) have been using for many years."[188] Writing for the court, Prevost J noted that racial profiling has long been a concern in the City of Montreal, and that steps have been taken by the city to raise awareness among its employees to address the practice. These steps included the adoption by the Montreal Police of the "Strategic Plan on Racial and Social Profiling" and "Listen, Understand, Act," another strategic plan in place prospectively from 2018–21.[189] Significantly, the defendant did not deny the existence of the practice of racial profiling by the police, and acknowledged that Lamontagne likely had a personal claim for damages based on racial profiling.[190] Instead, the defendant argued that a class proceeding would not be an appropriate vehicle for bringing the action. The argument was reminiscent of the BCCA's reasoning in *Thorburn* and the ONSC's reasoning in *Good*; the defendant essentially argued that an action for racial profiling would require case-by-case analysis and thus the commonality requirement could not be satisfied.[191]

The QSC recognized that the practice of racial profiling by the Montreal police is a systemic problem and is not limited to a few cases.[192] Thus, the court held that any question relating to the fault of the defendant arising from the use of racial profiling would be common to the entire class.[193] While the court acknowledged that individual complaints against police officers may require individual analysis and fact-finding, this factor did not prevent the court from concluding that the requirements under Article 575 of the CCP were met.[194]

187 *Ibid* at paras 16 and 18.
188 *Ibid* at para 2.
189 *Ibid* at para 11.
190 *Ibid* at para 25.
191 *Ibid* at paras 3 and 25.
192 *Ibid* at para 32.
193 *Ibid* at para 33.
194 *Ibid* at para 43.

Despite Quebec's comparatively lower threshold for certification, I argue that this case represents a positive shift in the law for victims of racial discrimination seeking *Charter* damages elsewhere in Canada. The QSC's authorization of the racial profiling claim ultimately stemmed from the court's focus on the systemic nature of the issue — an approach largely reminiscent of the SCC's approach in *Rumley*. Thus, it is possible that the claim would be certifiable in other Canadian jurisdictions if those courts are willing to recognize that systemic issues lend themselves to a finding of commonality. With the SCC's decision in *Rumley* at the disposal of courts in every Canadian jurisdiction, this approach is entirely possible.

b) *Meguinis-Martin and Joseph v Her Majesty the Queen*

In July 2020, a proposed class proceeding was filed in the Federal Court on behalf of a class of Indigenous civilians who allege that they have been subjected to racial discrimination, harassment, and assault by members of the RCMP since 1920, when the RCMP was formed.[195] The claims are advanced against Her Majesty the Queen, as the Crown is liable for the acts and omissions of the RCMP and its members. It is alleged in the statement of claim that systemic racism exists within the RCMP and that Indigenous civilians are treated differently and adversely by members of the RCMP, compared to non-Indigenous civilians.

Shirley Meguinis-Martin, one of the proposed representative plaintiffs, claims that in 1977 three male RCMP officers instructed that she and her friend enter the officers' vehicles; the RCMP officers then took Meguinis-Martin and her friend to one of the officers' homes, where Meguinis-Martin was raped. On another occasion, in 1995, Meguinis-Martin was at a wedding when an altercation broke out between her former husband and several other men; Meguinis-Martin was slammed into the gravel by one of these men, who was an RCMP officer, and was violently kicked until she was rendered unconscious. The RCMP did not proceed with an investigation into the assault. Edie Joseph, the other proposed representative plaintiff, was arrested by the RCMP in front of a bar in 2019 for disturbing the peace. It is alleged in the statement of claim that, upon being taken to a cell block, Joseph was physically assaulted, causing her to suffer a concussion and a rib fracture.

195 *Shirley Meguinis-Martin and Edie Joseph v Her Majesty the Queen*, Court File No: T-778-20 [*Meguinis-Martin v HMTQ*].

The statement of claim alleges that the Crown breached the class members' section 7 and 15 *Charter* rights, in addition to claims of systemic negligence and breach of contract. The statement further alleges that the Crown breached these particular *Charter* rights by failing to properly fund RCMP policing services in Indigenous communities, detaining and arresting Indigenous civilians at disproportionately high rates in comparison to non-Indigenous civilians, physically and sexually assaulting Indigenous civilians while in custody or while in their communities, responding inappropriately and inadequately to complaints of domestic violence, and failing to have in place management and operations procedures that would reasonably have prevented systemic racism within the RCMP, ensured that the class members were treated in a manner that was substantially similar to the manner in which non-Indigenous civilians were treated by RCMP members, and reasonably provided Indigenous communities with an enhanced level of service by the RCMP (as specified in the police service agreements that form the basis of the breach of contract claim).

While the fate of this claim remains undetermined, it provides the court with an opportunity to further clarify the legal landscape in the wake of *Good*, *Thorburn*, and now *Ligue des Noirs.* As demonstrated by the reasoning of the SCC in *Rumley*, the ONDC and ONCA in *Good*, and the QSC in *Ligue des Noirs*, it is the systemic nature of the alleged acts and omissions that would allow a court to make a finding of commonality between class members. Given that Canadian courts have recognized that a large segment of the population subconsciously operates on the basis of negative racial stereotypes and holds overtly racist views,[196] that the SCC has held that racism against Indigenous peoples includes stereotypes pertaining to criminal propensity,[197] that the ONCA has recognized that police misconduct can be unconsciously racially motivated,[198] and that racial profiling can result in a breach of *Charter* rights, *Meguinis-Martin v HMTQ* provides an opportunity for the Court to make valuable connections between the foregoing and the class proceeding as a procedural vehicle for positive social and institutional change. *Rumley* shows that this is possible, and the limited options available to victims of racial discrimination and racial profiling to pursue compensation and systemic change show that this is necessary.

196 *R v Parks*, above note 43.
197 *R v Williams*, above note 45.
198 *R v Brown*, above note 46.

F. CONCLUSION

In Canada, claims based on racial discrimination are recognized and there is a legal framework that allows individuals to pursue *Charter* damages, which acknowledge and remedy breaches resulting from that discrimination. The class action is a legal tool that not only complements actions for *Charter* damages for racial discrimination, but also has the potential to make those claims more powerful.

This paper demonstrates that there is a disconnect between these causes of action and this procedural vehicle which, if remedied, would likely be of significant value in the ongoing effort to address racial discrimination. In other words, the class action has the potential to be much more than just a procedural vehicle. While that potential has been recognized as far back as 1982,[199] when the Ontario Law Reform Commission characterized the class proceeding as a "procedural rule that provides a more effective and efficient means of enforcing legal rights,"[200] there are significant disparities in the caselaw. These disparities illustrate that these benefits are not consistently available to victims of *Charter* breaches. A review of statutory requirements and relevant caselaw demonstrates that there exists a possibility to bring *Charter* damages claims as class proceedings. Efforts should therefore be made to clarify and shape the law of certification in this context so that the benefits of a class action are more consistently available to those who have a legal entitlement to *Charter* damages.

199 *OLRC Report on Class Actions*, above note 15.
200 *Ibid* at 102.