Annex 2 - Chart of Post-*Henry* Cases

Case	Facts	Violation(s)	Damages
Duperré c Durette, 2016 QCCS 1653	In 2004, the plaintiff, a lawyer, was charged with a five-count information pursuant to the *Bankruptcy and Insolvency Act*. He was discharged at the conclusion of the preliminary inquiry in 2006. The plaintiff filed a civil suit alleging a violation of his constitutional rights.	Police officers deliberately withheld continuation reports and did not inform the Crown prosecutor of their existence. The reports were not disclosed to the defence.	The Court rejected the claim. The claimant failed to establish that the information which was not disclosed was material to the defence and that the failure to disclose had undermined the accused's ability to make full answer and defence or caused a prejudice.
Henry v. British Columbia, 2016 BCSC 1038	Application of the SCC decision in *Henry*	Crown Counsel's wrongful non-disclosure seriously infringed Mr. Henry's right to a fair trial, and demonstrates a shocking disregard for his rights under ss. 7 and 11 (d) of the *Charter*.	An award of damages under s. 24(1) of the *Charter* is a just and appropriate remedy in this case. The court concluded that Mr. Henry was entitled to compensatory damages in the amount of $530,000 under s. 24(1) of the Charter, special damages in the amount of $56,691.80 (unrelated to the *Charter* violation); and damages in the amount of $7,500,000 to serve both the vindication and deterrence functions of s. 24(1) of the *Charter* for a total of $8,086,691.80. The trial court refused to impart liability on the federal crown, for its role in the review of the case, and the police, for its investigation. On this point, it concluded that Crown Counsel's failure to disclose the information to which Mr. Henry was entitled negates any fault on the part of the

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			Vancouver Police Department for any failings that might be attributed to them in their investigation of the offences at issue and in their treatment of Mr. Henry. The court refused to non-pecuniary damages in light of the award of damages to vindicate Mr. Henry's breached *Charter* rights.
Hyra v Manitoba et al., 2015 MBCA 55	The appellant was convicted of criminal harassment and his appeal was dismissed. The appellant unsuccessfully pursued an application for a ministerial review of his conviction pursuant to s. 696.1 of the *Criminal Code*. The appellant commenced an action alleging, among other things, negligence on the part of the prosecutor and the prosecution service as well as violations of the *Charter*.	The underlying theme of the action was that, during criminal proceedings, the Crown prosecutor breached the plaintiff's right to disclosure regarding certain information held by the Winnipeg Police Service (WPS) and the Crown. The information held by the Crown related to their file regarding the appellant on another criminal harassment allegation involving the same complainant with which the Crown did not proceed.	Interesting review of the *Henry* principles. The appeal was dismissed because the claim did not meet the criteria established by *Henry*. The appellant was aware of the information in the possession of the WPS and the Crown, the information was never requested to be disclosed either prior to the criminal trial or the appeal.

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	The totality of his claim was struck by the master and, on appeal, by the motion judge. The plaintiff appealed.		
MacRae v Feeney, 2016 ABCA 343	The appellant was charged for an assault against his ex-wife. Moreover, he had made a complaint against the police for its handling of a separate file involving his ex-wife and her sister.	The appellant sued the police for negligent investigation and for infringing his *Charter* rights (to be free from arbitrary detention and the right to equal protection without discrimination on the basis of sex).	The judge dismissed the claim. The court rejected the claim based on the *Charter* violations because Mr. MacRae had failed to proffer evidence of bad faith. On appeal, Mr. McRae argued that the SCC decision in *Henry* was authority for the proposition that claims such as his do not require proof of bad faith. The Court of appeal rejected that argument: "The judgment of the Supreme Court in *Henry v. British Columbia* is not as far reaching an authority as Mr. MacRae maintains. In fact, the Court took great pains to emphasize that its pronouncement that "malice" does not offer a useful liability threshold is confined to claims of wrongful non-disclosure by prosecutors." (para. 11) The appeal was dismissed.
Payne v Mak, 2017 ONSC 243	The plaintiffs were charged with arson by negligence pursuant to s.436 of the *Criminal Code*. The charges were ultimately stayed or dismissed.	The plaintiffs alleged violation of s. 7 of the *Charter* as a result of proceeding with charges without reasonable and probable grounds and for arbitrary state action based on a law that is vague.	The plaintiffs argued that there was no need to establish an absence of malice following the decision in *Henry*. The argument was rejected. "In my view, the plaintiffs are attempting to advance a malicious prosecution claim in the guise of a s.24 *Charter* claim, in an effort to get around the clear requirement that malice be proven." (para. 91)

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R v Fercan Developments Inc., 2016 ONCA 269	The Crown made an application to forfeit two properties under s.16 of the *CDSA*. After hearing an application for costs brought by all three respondents, the application judge ordered costs of almost $1 million against the Crown.	The Crown abandoned its application against one of the respondents after 31 days of evidence. After 36 days of evidence, multiple motions, and comprehensive written and oral submissions, the application judge dismissed the Crown's application to forfeit against the two other respondents. The application judge found that the evidence overwhelmingly led to the conclusion that the other two respondents were innocent of any complicity or collusion in relation to the designated-substance offences committed at the properties.	The application judge held that costs are appropriate where there has been a "marked and unacceptable departure from the reasonable standards expected of the prosecution." The Crown argued on appeal that the test applied was only appropriate when awarding costs against the Crown under s. 24(1) of the *Charter* only. The correct standard to apply is narrower and consists in a conduct that is reprehensible, a serious affront to the authority of the court, or serious interference with the administration of justice. The argument was rejected by the Court of appeal of Ontario.
R v Guindon, 2016 ONSC 1140	Mr. Guindon was charged with drug related offences. The Crown stayed the charges.	The applicant sought costs against the Crown pursuant to section 24(1) of the *Charter* as a result of alleged material non-disclosure. The document sought, a report from a police officer referenced in an affidavit, was ultimately provided to the defence.	Is delay in disclosing a document sufficient in and of itself to justify an award of costs against the Crown? "[36] While she (Ms. Weiler, the crown prosecutor) can be expected to have carefully reviewed the affidavit for the purpose of editing it, this does not mean that she memorized its contents. It is quite possible that several months after editing the Reliant affidavit Ms. Weiler had no independent recollection of the brief reference in it to Constable Ebdon's report. Crown counsel normally have carriage of more than one case at a time. As a senior prosecutor, Ms. Weiler likely had a significant workload that extended beyond Project Kingfisher. This is not to suggest that a busy Crown can be less than diligent in fulfilling his or her duties on each case they have responsibility for. Rather, it is a recognition of the reality that absent a photographic memory, a Crown cannot be expected to recall every detail about a document months after reviewing it. There is no evidence that Ms. Weiler had a specific recollection of the reference to Constable Ebdon's report in the Reliant affidavit and deliberately decided not to disclose it.

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			[37] At the highest, the Crown made an error in judgment by not appreciating the potential relevance of Constable Ebdon's report to a section 8 application. This falls at the very low end of the spectrum, described by the court in *Singh* as being an error in judgment about the relevance of certain tangential information. It is far less serious than the omission in *Singh*, which involved a failure to disclosure clearly relevant cellular phone records that the Crown knew were in existence. Consequently, the failure of the Crown to disclose Constable Ebdon's report prior to June of 2015 does not approach the level of misconduct necessary to justify an order for costs." The motion to dismiss the application for costs was granted.
R v Singh, 2016 ONCA 108	The respondents were charged with kidnapping, extortion and assault.	About a month into the trial, the Crown realized it had not disclosed important inculpatory evidence (cell phone records).	The trial judge declared a mistrial and ordered the Crown to pay $580,086.61. The Court of Appeal concluded that the trial judge erred in awarding costs against the Crown (para. 39 ss). The Court of Appeal notes that there was no suggestion of an intentional failure to provide disclosure in a timely fashion. The trial judge expressly found there was no evidence of deliberate misconduct on the part of the Crown. This was not a case where the conduct of the prosecutor was a flagrant or marked departure from the norm. The failure to disclose the evidence was inadvertent and had not been pursued by counsel. Interesting discussion about the import of the civil cost regime into the criminal context (para. 48).

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Whaling v Canada (Attorney General), 2017 FC 121	The plaintiffs brought their respective claims in the form of proposed class actions. The proposed classes of claimants are those federal inmates whose rights to accelerated parole review were removed retrospectively by the coming into force of the *Abolition of Early Parole Act*. The defendant filed a motion to strike.	The plaintiffs claim alleges a breach of s.11 (h) of the *Charter*	The ruling deals with the need for adequate pleadings to support a claim for damages. "The plaintiffs pleaded that the respondents' conduct was "clearly wrong, in bad faith or an abuse of power" – one of the elements typically required in order to found a damages claim under section 24(1) of the Charter – but failed to supply material facts on the question of how the *Regulations* and their enforcement constitute serious error, bad faith or abuse so as to trigger an entitlement to Charter damages. They also fail to give any particulars of any conduct that would support a damages claim." (para. 29) The motion to strike was granted.