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**DIVERSITY**

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# Racial profiling and human rights



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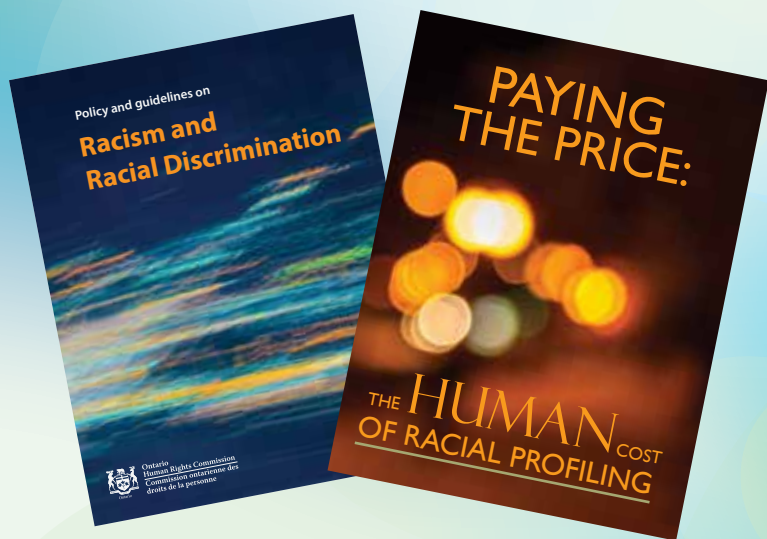
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## LETTERS

**Comments on this edition of Canadian Diversity?  
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*Your letters may be edited for length and clarity.*

# INTRODUCTION

**SHAHEEN AZMI** is Director of Policy, Education, Monitoring, & Outreach at the Ontario Human Rights Commission. He has led the OHRC's efforts to address human rights and racism concerns in policing over the last decade.

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**LESLEY JACOBS** is Professor of Law & Society and Political Science and the Director of the Institute for Social Research at York University in Toronto. He has held a variety of visiting appointments including ones at the Harvard Law School, Oxford University, Law Commission of Canada, and Waseda Law School in Tokyo.

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Over the past two decades, issues of racial profiling as part of police practices in Canada have come into the public spotlight. Complaints about racial profiling and racial bias are increasingly being brought to Canadian courts and human rights tribunals. Allegations of “driving while black” and “flying while brown” have become common place. Public controversy currently surrounds issues regarding practices such as “carding,” “stop-and-search” procedures and “policing at borders” have raised serious questions about the scope of police powers. Significantly, racial profiling is also an issue in other public institutions such as health care and education. These complaints involve allegations that racialized and First Nations peoples are being treated unfairly in the context of Emergency Departments, school disciplinary processes, and customs searches. These concerns have been driving the need for new policies that address racial profiling. Yet, unlike for example the United States or the United Kingdom, a relative lack of scholarly research has prevented a detailed portrait of the extent to which racial profiling is a systemic problem in

Canada, and has inhibited the development of sound public policy solutions.

In February 2016, the Ontario Human Rights Commission in partnership with the York University Centre for Human Rights, the York University School of Public Policy and Administration, and the York University Institute for Social Research hosted *The Racial Profiling Policy Dialogue* which sought to learn more about people's experiences of racial profiling, and effective measures to address and prevent it. The policy dialogue event engaged a diverse audience of community members, academics, human rights lawyers and practitioners, and organizational representatives from a wide range of sectors – including affected Indigenous, racialized and Muslim individuals and communities, as well as organizations like police, school boards and child welfare agencies among others.

The dialogue event was designed to produce the first compre-

hensive and collective examination of racial profiling triangulated from multiple lenses on racial disparities in treatment undertaken for enforcement of ostensibly legal purposes in different social environments including, education, the workplace, and the service sectors, not just police. The vision for the policy dialogue was to provide a measured approach to the understanding of racial profiling, by bringing a diverse range of leading stakeholders together for rational dialogue and meaningful engagement, while helping to inform the development of new OHRC policy guidance on racial profiling. To these ends, the policy dialogue consisted of a series of sessions organized around five major themes, including 1) the social and historical context and experience of racial profiling, 2) definitions of racial profiling, 3) types of racial profiling, 4) new, emerging or contested forms of racial profiling, and 5) preventing and responding to issues of racial profiling.

The essays in this special issue of *Canadian Diversity* are the product of *The Racial Profiling Policy Dialogue*. All of the contributors were participants in the policy dialogue and offered substantial insights into the nature and consequences of racial profiling, and how to move the discussion forward in the framing of a policy in Ontario and elsewhere in Canada for the elimination of racial profiling.

We would like to acknowledge the work of Ontario Human Rights Commission staff especially Remi Warner who planned and organized the policy dialogue. We would also like to acknowledge the financial support of the York University, Faculty of Liberal Arts and Professional Studies and the Dean's Office; as well as the support of the Vice-President Academic & Provost. Lastly, we would like to thank Noel Badiou and the staff from the Centre for Human Rights at York University for their remarkable event planning skills.

# PREFACE

For more than a decade, we have been working with many community partners to identify and eradicate racial profiling in all of its forms. As our work continues, we have developed a clearer picture of racial profiling as a unique form of racial discrimination, and one that the average Indigenous or racialized person experiences all too often.

Racial profiling often begins in childhood, and the cumulative damage of profiling throughout one's life can be devastating. That damage often includes facing systemic barriers and discrimination when coming into contact with a child welfare agency, or facing harsher discipline in school. As a young adult, it might involve facing more scrutiny from police and even from security at the local mall. The damage continues as racialized and Indigenous people are investigated and charged by the police more often than other people. And ultimately, we see disproportionate numbers of Indigenous and racialized prisoners in our jails and correctional centres. In short, racial profiling can be an insidious cycle that lasts a lifetime.

The OHRC is working on new policy guidelines that will help service providers identify racial profiling and take concrete steps to eliminate it. This work can only succeed if we link academic knowledge and expertise with understanding of the lived reality of people who experience racial profiling.

At the Ontario Human Rights Commission, we envision an inclusive society where everyone takes responsibility for promoting and protecting human rights; where everyone is valued and treated with equal dignity and respect; and where everyone's human rights are a lived reality. And in this vision, there is no place for racial profiling.

I thank all of the contributors for sharing their insights, their expertise and their personal experiences – this knowledge will guide us as we work towards our goal of eliminating racial profiling in all its forms. This job is vital. The future of this generation – and generations to come – depends on us getting it right.

**RENU MANDHANE, B.A., J.D., LL.M**  
Chief Commissioner  
Ontario Human Rights Commission

# THE HUMAN RIGHTS APPROACH TO ADDRESSING RACIAL PROFILING: THE ACTIVITY OF THE ONTARIO HUMAN RIGHTS COMMISSION

**SHAHEEN AZMI** is Director of Policy, Education, Monitoring & Outreach at the Ontario Human Rights Commission. He has led the OHRC's efforts to address human rights and racism concerns in policing over the last decade.

The following article is a study of the exhaustive work on racial profiling done by the Ontario Human Rights Commission over the course of several years. It identifies the lingering concerns related to racial profiling in policing and other sectors.

In 2015 the Ontario Human Rights Commission (OHRC) embarked on the development of a new policy and guidelines on preventing racial profiling. This commitment comes in the shadow of more than a decade of activities aimed at curbing and preventing racial profiling and growing recognition of new shapes and forms of racial profiling in various multiple sectors and settings.

## BACKGROUND TO CURRENT POLICY DEVELOPMENT

The Ontario Human Rights Commission has been directly involved in responding to racial profiling employing multiple approaches since 2002. Racial profiling has long been understood as a type of racism but its framing as a type of legal discrimination in violation of human rights legislation was not significantly developed in Canada prior to the OHRC's work.

In 2002 a series of articles by *The Toronto Star* on race and policing in Toronto provided fresh evidence of the reality of racial bias in police activity by the Toronto Police Service.<sup>1</sup> In direct response to the controversy raised by *Toronto Star* articles, the OHRC announced that it would conduct an inquiry into the effects of racial profiling. Racial profiling was defined for the purposes of the Inquiry as:

... any action undertaken for reasons of safety, security or public protection that relies on stereotypes about race, colour, ethnicity, ancestry, religion, or place of origin rather than on reasonable suspicion, to single out an individual for greater scrutiny or different treatment.<sup>2</sup>

The definition clearly framed racial profiling as a type of racial discrimination, which notably was not restricted to policing but to any context in which "safety, security, or public protection" was operative. The purpose of the inquiry was to "raise

1 Jim Rankin et al, "Singled Out; Star Analysis of Police Crime Data Shows Justice Is Different for Blacks and Whites" *The Toronto Star* (October 19, 2002).

2 Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling: Inquiry Report* (Toronto: OHRC, 2003) at 6 [Inquiry Report].



public awareness about racial profiling, to mobilize public action, to put an end to it and to bridge the divide between those who deny the existence of racial profiling on the one hand, and the communities who have long held that they are targets of racial profiling on the other.”<sup>3</sup>

Although the immediate response from most police and political leaders was hostile, the OHRC Inquiry Report titled: “Paying the Price: The Human Cost of Racial Profiling”<sup>4</sup>, contributed to opening the door to a broad discussion that was previously limited in Ontario. In the Inquiry Report, the OHRC committed to hold anyone engaging in racial profiling accountable in accordance with the Ontario Human Rights Code. Towards this end the OHRC committed itself to develop a new public policy on racial discrimination and to engage in activity to further this discussion and acceptance of racial profiling as a concern among police.

Following upon its commitment in the racial profiling Inquiry Report the OHRC released its Policy and Guidelines on Racism and Racial Discrimination in 2005.<sup>5</sup> The Policy provided clearer guidance on the nature of racism as a feeder to racial discrimination and detailed different types of racial discrimination including racial profiling. It reiterated the definition of racial profiling first developed in the OHRC’s Inquiry activity. The Policy also identified an onus to collect race-based data where there is reason to believe that racial discrimination may be present. It argued that detecting some forms of racial discrimination including racial profiling may only be confirmed through collecting race-based data. The emphasis on data collection was in significant part related to calls from racialized community groups for police to collect stop data based on race in order to address racial profiling. To support the Policy’s call for race-based data collection and provide concrete guidance on how to do this, the OHRC later developed and released in 2009 its guidebook *Count Me In: Collecting Human Rights-Based Data*.<sup>6</sup>

The OHRC’s efforts to address racial profiling have included litigation that aimed at clarifying and promoting the legal interpretation of racial profiling. The OHRC’s litigation activity contributed to several significant settlements and decisions that have advanced the legal understanding of racial profiling and police activity in response to it.<sup>7</sup>

In the context of litigation activity, the most significant public interest remedy obtained by the OHRC was a human rights complaint settlement of a case alleging racial profiling with the Ottawa Police Service in May 2012 that required the collection of race-related police traffic stop data by the Ottawa Police Service for a two year period. This data collection represents the first multi year police stop data collection initiative established by a Canadian police service to monitor for concerns of racial profiling.

The OHRC has also been involved in several organizational development and training initiatives in the policing sector with have included a focus on human rights and racial profiling. In this regard notable partnerships have been undertaken with the Ontario Police College, the Toronto Police Service, and Windsor Police Service.

## LINGERING AND NEW CONCERNS OF RACIAL PROFILING

Despite the many years of OHRC activity concerns of racial profiling continue to be prevalent in Ontario. In the policing context concerns of racial profiling in street checks or the related practice of carding arose as a major new area of concern over the last few years.<sup>8</sup> This development highlighted the contention that racial profiling in police work extends to many realms beyond the customary focus on traffic stop activity. Beyond police street checks there is concern that racial profiling is likely a factor in all areas of policing activity including surveillance, searches, charges, arrests, recruitment, and data retention.

While initial OHRC inquiry work uncovered racial profiling in sectors other than policing such as customs and security guard work, there is increasing and new concern of racial profiling in sectors including child welfare, education, health and intelligence work where decisions and actions are undertaken for reasons of ‘safety and security and public protection’ on a daily basis, and in which there have been raised many concerns that racialized stereotypes often influence decisions to scrutinize and pursue some more than others.

In addition, to growing concerns in key sectors of society there is a growing appreciation that racial profiling can be

3 Ibid at 67.

4 Ibid.

5 Ontario Human Rights Commission, Policy and Guidelines on Racism and Racial Discrimination (June 9, 2005) at 4 [Policy], online: OHRC [www.ohrc.on.ca/sites/default/files/attachments/Policy\\_and\\_guidelines\\_on\\_racism\\_and\\_racial\\_discrimination.pdf](http://www.ohrc.on.ca/sites/default/files/attachments/Policy_and_guidelines_on_racism_and_racial_discrimination.pdf).

6 Ontario Human Rights Commission, *Count Me In: Collecting Human Rights-Based Data* (Toronto: OHRC, 2009), online: OHRC [www.ohrc.on.ca/sites/default/files/attachments/Count\\_me\\_in!\\_Collecting\\_human\\_rights\\_based\\_data.pdf](http://www.ohrc.on.ca/sites/default/files/attachments/Count_me_in!_Collecting_human_rights_based_data.pdf).

7 See for example *Nassiah v Peel* (Regional Municipality Services Board), 2007 OHRT 14; *Phipps v. Toronto Police Services Board*, [2009] HRTO; *Maynard v. Toronto Police Services Board*, 2012 HRTO 1220.

8 Jim Rankin et al. “As criticism piles up, so do the police cards”, *Toronto Star* (February 27, 2013)

manifest in many every day settings such as stores or malls or even at libraries. The Peel Law Association v. Pieters case highlights a situation where an African Canadian Lawyer was aggressively scrutinized as he entered into a law association library.<sup>9</sup> The Court's decision in this case shows that racial profiling can be a form of every-day racism. It is a phenomenon that is widespread in our society, and has many faces.

## CONCLUSION

The OHRC believes that a new specific policy and guidelines on preventing racial profiling is needed. Such a policy promises a fresh look at the definition of racial profiling as a type of racial discrimination and to uncover forms of racial profiling that have been largely neglected. The aim of such a policy would be to provide more detailed and specific guidance to organizations engaged in "safety, security, and public protection" activity to ensure that racial profiling is prevented and monitored for effectively, particularly in key sectors of society like policing, education, child welfare, and health care.

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9 Peel Law Association v. Pieters, 2013 ONCA 396

# A REVIEW OF RACIAL PROFILING JURISPRUDENCE

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This paper outlines significant legal developments in racial profiling jurisprudence in the ten years prior to February, 2016 that may have an impact on, or be relevant to, interpreting and applying the *Ontario Human Rights Code*. Much fruit has been borne in the jurisprudence during this period; the right to be free from racial profiling has grown and expanded significantly. However, there are still barriers preventing full realization.

In the ten years prior to February, 2016, there have been several decisions across Canada dealing with racial profiling, both under the Canadian *Charter of Rights and Freedoms* (*Charter*) and various provincial human rights statutes. However, significant legal developments in racial profiling jurisprudence during this period that may have an impact on, or be relevant to, interpreting and applying the *Ontario Human Rights Code* (*Code*) are the focus of this paper.

The discussion of the law in this paper represents the OHRC's views on racial profiling jurisprudence. However, it is not legal advice.

A review of the case law indicates that the right to be free from racial profiling has grown and expanded significantly.

Much fruit has been borne in the jurisprudence, but there are still barriers preventing full realization. The case law demonstrates that, among other things:

- The OHRC's definition of racial profiling<sup>1</sup> and a similar definition advanced by the Québec Commission des droits de la personne et des droits de la jeunesse were recently confirmed by the Supreme Court of Canada in *Bombardier*.<sup>2</sup>
- Racial profiling may be the product of stereotypes about Indigenous peoples, African Canadians<sup>4</sup> and Arabs and Muslims<sup>5</sup> in addition to stereotypes about criminality.

1 The OHRC defines racial profiling as "any action undertaken for reasons of safety, security or public protection that relies on stereotypes about race, colour, ethnicity, ancestry, religion or place of origin rather than on reasonable suspicion, to single out an individual for greater scrutiny or different treatment"; Ontario Human Rights Commission, *Policy and guidelines on racism and racial discrimination* (2005) at 19, online: Ontario Human Rights Commission: [www.ohrc.on.ca/sites/default/files/attachments/Policy\\_and\\_guidelines\\_on\\_racism\\_and\\_racial\\_discrimination.pdf](http://www.ohrc.on.ca/sites/default/files/attachments/Policy_and_guidelines_on_racism_and_racial_discrimination.pdf) [*Policy on racism*].

2 *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para. 33 [*Bombardier*].

3 *McKay v. Toronto Police Services Board*, 2011 HRTO 499 (CanLII) at paras. 103, 128 and 129 [*McKay*]; *Radek v. Henderson Development (Canada) Ltd.*, 2005 BCHRT 302 (CanLII) at para. 132 [*Radek*].

4 *Sinclair v. London (City)*, 2008 HRTO 48 (CanLII) at paras. 16 and 17; *Nassiah v. Peel (Regional Municipality) Police Services Board*, 2007 HRTO 14 (CanLII) at paras. 129 and 166 [*Nassiah*]; *Johnson v. Halifax (Regional Municipality) Police Service*, [2003] N.S.H.R.B.I.D. No. 2 at paras. 11-43; *R. v. Khan*, [2004] O.J. No. 3819 at para. 68 (S.C.J.); *R. v. Brown*, [2003] O.J. No. 1251 at paras. 42-29 (C.A.) [*Brown*]; *Phipps v. Toronto Police Services Board*, 2009 HRTO 877 (CanLII) at para. 21; aff'd *Shaw v. Phipps*, 2012 ONCA 155 (CanLII).

5 *R. v. Neyazi*, 2014 ONSC 6838 (CanLII) at para. 204.

- Racial profiling is not limited to the law enforcement context; it is a form of everyday racism. For example, it can occur in a law association lounge<sup>6</sup>, school discipline<sup>7</sup>, an investigation by a children’s aid society<sup>8</sup>, employment<sup>9</sup>, an assessment of health and safety risks associated with accommodating creed<sup>10</sup>, and while shopping.<sup>11</sup> However, an absence or lack of case-law in specific sectors, such as child welfare, does not mean that racial profiling cannot and does not occur therein.<sup>12</sup>
- Racial profiling is a systemic problem in policing.<sup>13</sup> More broadly speaking, there is also recognition of systemic discrimination faced by African Canadians and Indigenous peoples in the criminal justice system.<sup>14</sup>
- Race only needs to be a factor in the adverse treatment to constitute racial discrimination.<sup>15</sup>
- Intention to discriminate is not necessary.<sup>16</sup>
- Racial stereotyping will usually be the result of unconscious beliefs, biases and prejudices.<sup>17</sup> However, this proposition cannot act as a substitute for adjudicative facts (“who,” “what,” “why,” “when,” and “where”).<sup>18</sup>
- Racial discrimination and profiling can rarely be identified through direct evidence; they will more often be proven by circumstantial evidence and inference.<sup>19</sup>
  - Testimony from individuals affected by racial discrimination or profiling may not be required to establish a *prima facie* case of discrimination; expert and other circumstantial evidence may be sufficient.<sup>20</sup>
  - In effect, the Supreme Court’s decision in *Bombardier* may be viewed as having set a high bar for the circumstantial evidence required to establish a *prima facie* case of racial discrimination. However, the parties agreed that Bombardier’s decision to deny pilot training to Mr. Latif under his Canadian license was based solely on the refusal of U.S. authorities to allow him to train under his U.S. license.<sup>21</sup> This may explain why the Supreme Court placed little or no weight on the circumstantial evidence regarding Bombardier’s conduct.
  - It can be helpful to hypothesize how events would have unfolded if the person who was the recipient of adverse treatment was White.<sup>22</sup>

6 *Peel Law Association v. Pieters*, 2013 ONCA 396 [Pieters].

7 Expert evidence on racial disparities and stereotypes in school discipline was presented in *B.C. v. Durham Catholic District School Board*, 2014 HRTO 42 (CanLII). However, discrimination was not found.

8 There are no decisions of the Child and Family Services Review Board (CFSRB) or Human Rights Tribunal of Ontario assessing whether there was racial profiling in specific investigations of children’s aid societies. However, in *D.B. v. Children’s Aid Society of Oxford County and Family and Children’s Services of Guelph and Wellington County*, 2013 CFSRB 41 (CanLII), the CFSRB assessed whether the applicant’s rights under the *Child and Family Services Act* to be heard and given reasons were provided by the Children’s Aid Society of Oxford County (Oxford Society), as informed by the Code and jurisprudence on racial discrimination.

9 *Adams v. Knoll North America Corp.*, 2009 HRTO 1381 (CanLII); aff’d 2010 ONSC 3005 (CanLII); *Yousuf v. Toronto Police Services Board*, 2009 HRTO 351 (CanLII).

10 *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256.

11 *McCarthy v. Kenny Tan Pharmacy*, 2015 HRTO 1303 (CanLII); See also *Radek*, *supra* note 3

12 See for example Québec Commission des droits de la personne et des droits de la jeunesse, *Racial profiling and systemic discrimination of racialized youth: Report of the consultation on racial profiling and its consequences* (2011): online Québec Commission des droits de la personne et des droits de la jeunesse [http://www.cdpcj.qc.ca/publications/Profiling\\_final\\_EN.pdf](http://www.cdpcj.qc.ca/publications/Profiling_final_EN.pdf).

13 *Nassiah*, *supra* note 4 at para. 113; *Peart v. Peel Regional Police Services Board*, [2006] O.J. No. 4457 at para. 94 (C.A.) [Peart].

14 *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at para. 46 [R.D.S.]; *R. v. Spence*, 2005 SCC 71 at para. 31 [Spence]; *R. v. Parks*, [1993] O.J. No. 2157 at para. 54. (C.A.) [Parks]; *R. v. Williams*, [1998] 1 S.C.R. 1128 at para. 58; *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 61.

15 *Phipps v. Toronto Police Services Board*, 2009 HRTO 877 (CanLII) at para. 16; *Shaw v. Phipps*, 2010 ONSC 3884 (CanLII) at paras. 11-15 and 76; aff’d in *Shaw v. Phipps*, 2012 ONCA 155; *Pieters*, *supra* note 6 at paras. 53-62 and 111-125; *Adams v. Knoll North America*, 2009 HRTO 1381 (CanLII) at para. 44; aff’d *Knoll North America Corp. v. Adams*, 2010 ONSC 3005 (CanLII); *Maynard v. Toronto Police Services Board*, 2012 HRTO 1220 (CanLII) at para. 150 [Maynard]; *Peart*, *supra* note 13 at para. 91; *Bombardier*, *supra* note 2 at paras. 47-51.

16 *Bombardier*, *supra* note 2 at paras. 40, 41 and 49; *Shaw v. Phipps*, 2010 ONSC 3884 (CanLII) at para. 76; aff’d in *Shaw v. Phipps*, 2012 ONCA 155; *Pieters*, *supra* note 6 at para. 60; *Maynard*, *supra* note 15 at para. 150.

17 *Pieters*, *supra* note 6 at paras. 111-115; *Parks*, *supra* note 14 at para. 54; *Peart*, *supra* note 13 at para. 93; *R.D.S.*, *supra* note 14 at para. 46; *Spence*, *supra* note 14 at paras. 31-33; *Briggs v. Durham Regional Police Services*, 2015 HRTO 1712 (CanLII) at para. 283 [Briggs].

18 *Pieters*, *supra* note 6 at paras. 111-115; *Peart*, *supra* note 13 at para. 96; *Bombardier*, *supra* note 2 at paras. 87 and 88.

19 *Brown*, *supra* note 4 at para. 44; *Shaw v. Phipps*, 2012 ONCA 155 (CanLII) at para. 34; *McKay*, *supra* note 3 at para. 125; *Pieters*, *supra* note 6 at para. 72; *Peart*, *supra* note 13 at para. 95.

20 *Vancouver Area Network of Drug Users v. British Columbia Human Rights Tribunal*, 2015 BCSC 534 (CanLII).

21 *Bombardier*, *supra* note 2 at paras. 15 and 74.

22 *Abbott v. Toronto Police Services Board*, 2009 HRTO 1909 (CanLII) at paras. 43 and 44 [Abbott]; reconsideration denied 2010 HRTO 1314 (CanLII); *Maynard*, *supra* note 15 at para. 176.

- The HRTO may order a respondent to produce race-based data in a racial profiling case. Race-based data may (or may not) reveal a pattern of racial disparities and therefore be relevant to the question of whether an individual was racially profiled.<sup>23</sup>
- A person may face racial profiling based on multiple aspects of his or her identity that intersect in a socially significant way.<sup>24</sup>
- Racial profiling of Indigenous peoples may be exhibited through over-policing. Over-policing causes Indigenous peoples to have disproportionately more frequent contact with police, often for less serious matters, and perpetuates negative police attitudes about them.<sup>25</sup>
- Racial discrimination and profiling often involve the inappropriate exercise of power.<sup>26</sup>
- People who believe they are being racially profiled can be expected to find the experience upsetting. They might react in an angry and verbally aggressive way. A person's use of abusive language requires reasonable tolerance and tact, and cannot form the basis of further differential treatment.<sup>27</sup>
- The police cannot cast their investigative net widely on racialized individuals when dealing with a vague suspect description involving race.<sup>28</sup>
- Racial profiling is not limited to police decisions to stop, question or detain someone. It can occur prior to a stop<sup>29</sup> and affect how an officer continues to deal with an individual after an initial encounter.<sup>30</sup> For example, it can occur in a check of a license plate,<sup>31</sup> searches,<sup>32</sup> arrest decisions,<sup>33</sup> and incidents involving use of force.<sup>34</sup>
- A hunch based entirely on intuition gained by experience cannot suffice as a credible non-discriminatory explanation for adverse treatment.<sup>35</sup>
- The ends do not justify the means. The results that racial profiling produces cannot be used as an *ex post facto*, or after the fact, justification for engaging in the discriminatory practice.<sup>36</sup>
- There have been civil and criminal court cases in Ontario involving officers filling out contact cards,<sup>37</sup> but in these cases, racial profiling allegations have either not been raised<sup>38</sup> or findings of racial profiling have not been made.<sup>39</sup> There does not appear to be any HRTO decisions specifically addressing contact cards, but the HRTO has made findings of racial profiling in incidents involving officer requests for identification and subsequent checks of personal information.<sup>40</sup>

23 *B.C. v. Durham Catholic District School Board*, 2011 HRTO 2062 (CanLII); *Pivot Legal Society v. Downtown Vancouver Business Improvement Assn.*, 2010 BCHRT 86 (CanLII).

24 *Radek*, *supra* note 3 at paras. 463-465; *Maynard*, *supra* note 15 at para. 4.

25 *McKay*, *supra* note 3 at paras. 103 and 128.

26 *Abbott*, *supra* note 22 at paras. 42 and 43.

27 *Maynard*, *supra* note 15 at para. 154; *Johnson v. Halifax Regional Police Service* (2003), 48 C.H.R.R. D/307 at para. 51 (N.S. Bd.Inq.).

28 *Maynard*, *supra* note 15.

29 *Briggs*, *supra* note 17 at paras. 197-230.

30 *Nassiah*, *supra* note 4 at para. 134; *Pieters*, *supra* note 6 at paras. 118-123; *McKay*, *supra* note 3; *Abbott*, *supra* note 22 at para. 46; *Maynard*, *supra* note 15.

31 *Briggs*, *supra* note 17 at paras. 197-230.

32 *Nassiah*, *supra* note 4 at paras. 124 and 166; *McKay*, *supra* note 3 at paras. 143-149 and 159.

33 *McKay*, *supra* note 3 at paras. 150-153; *Abbott*, *supra* note 22 at para. 46.

34 *Maynard*, *supra* note 15 at paras. 177-190.

35 *R. c. Campbell*, [2005] Q.J. No. 394 at para. 70 (Court of Québec); *McKay*, *supra* note 3 at paras. 110 and 148; *R. v. Simpson*, [1993] O.J. No. 308 at para. 61 (C.A.).

36 *R. v. Beepath*, [2011] O.J. No. 3189 at para. 67 (S.C.J.); *Heath v. Toronto Police Services Board*, 2012 HRTO 2364 at para. 18.

37 In *Elmardy v. Toronto Police Services Board*, 2015 ONSC 2952 (CanLII) [Elmardy], the Ontario Superior Court of Justice described “208 cards” as “intelligence gathering forms providing details of contacts between the police and members of the public.”

In *R. v. Ferdinand*, [2004] O.J. No. 3209 [Ferdinand], the Ontario Superior Court of Justice stated:

*A 208 card is approximately 3" by 5" and is printed on both sides, commencing with the words, "Person Investigated." It records information obtained from a person who is stopped by the police that includes information such as, "name, aliases, date of birth, colour, address, and contact location including the time." On the back it has entries for things such as: "associates" and "associated with: gang, motorcycle club, Drug Treatment Court." The police then input the information from the completed 208 cards into a police computer database for their future reference.*

38 *R. v. A.K.*, [2014] O.J. No. 3908 (Ont. C.J.); *Ferdinand*, *supra* note 37; *R. v. Fountain*, 2013 ONCJ 434.

39 *R. v. Bramwell-Cole*, [2010] O.J. No. 5838 (S.C.J.); note 37.

40 *Phipps v. Toronto Police Services Board*, 2009 HRTO 877 (CanLII); *Shaw v. Phipps*, 2010 ONSC 3884 (CanLII); *aff'd in Shaw v. Phipps*, 2012 ONCA 155; *McKay*, *supra* note 3.

- There have been relatively few or no HRTO racial profiling decisions dealing with the following groups protected by the *Code*, which suggests that racial profiling of these groups is under-litigated:
  - Arabs and Muslims
  - Racialized and Indigenous women and
  - Indigenous Peoples.
- Individual monetary remedies in racial profiling cases before the HRTO have ranged from \$5,000<sup>41</sup> to \$40,000.<sup>42</sup>
- Despite the fact that an individual's situation may have been resolved at the conclusion of a successful racial profiling case, public interest remedies to prevent racial profiling against others may be necessary.<sup>43</sup>
- When racial profiling is found in a traffic stop, the HRTO has the jurisdiction to order race-based data collection in both traffic and pedestrian stops as a public interest remedy.<sup>44</sup>
- Public interest remedies ordered by the HRTO to ensure future compliance with the *Code*'s prohibition on racial profiling have included:<sup>45</sup>
  - The development of racial profiling policy with the assistance of an expert, and
  - The development of racial profiling training with the assistance of an expert, which includes a discussion of the policy, the social science literature on racial profiling, and the current case-law.

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<sup>41</sup> *Abbott*, *supra* note 22 at paras. 53-59.

<sup>42</sup> *Maynard*, *supra* note 15 at paras. 193-200.

<sup>43</sup> *Bombardier*, *supra* note 2 at paras. 101-105.

<sup>44</sup> *Aiken v. Ottawa Police Services Board*, 2015 ONSC 3793 (CanLII) at paras. 38-40

<sup>45</sup> *Nassiah*, *supra* note 4 at paras. 210-212.

# DEFINING THE CONCEPT OF RACIAL PROFILING: A DISCUSSION

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This paper reviews the definitions of racial profiling in selected published academic and government publications in Canada and the U.S. between 1990 and 2015. The review aims to delineate the central conceptual issues on racial profiling and is not intended to be exhaustive. This paper highlights seven components in the definitions of racial profiling and concludes that there is no consensus on what constitutes racial profiling. Lack of common theoretical grounds, inconclusive empirical evidence, and competing values make it difficult for arriving at a consensus.

## CONCEPTUAL ISSUES

This paper identifies seven components in definitions on racial profiling:

- Social domains
- Grounds
- Activities
- Formal Rationales and justifications
- Triggers
- Psychological focus
- Adverse impacts

Not all reviewed definitions have all of these components. Most have only some of them. This review concludes that there is a divergence of ideas among these definitions.

## SOCIAL DOMAINS

“Social domains” refers to social institutions and their agents. The term racial profiling has been adopted in an expanding

range of social domains. In the 1990s and early 2000s, the term racial profiling was limited mostly to police services. In the mid-2000s and 2010s, the notion of racial profiling has extended from police services to the entire law enforcement field. In addition, the notion of racial profiling has been spread to other fields: clinical medicine and health care fields; retail sector; and property insurance industry. In the 2010s, the term racial profiling has begun to be used in a very broad context covering all people in authority positions irrespective of their social domains.

Key issue: How specific should social domains be when the notion of racial profiling is applied?

## GROUND

“Grounds” means the scope of prohibited grounds under human rights legislation. In the 1990s, the term racial profiling focused specifically on “race”, with occasional mentioning of “ethnicity”. As time progresses, more grounds are covered in the definition: national origin and religion. Ontario Human

Rights Commission (2003: 6) expanded the range of grounds to include “colour”, “ancestry”, “religion”, and “place of origin”, over and above “race” and “ethnicity”. Tanovich (2006: 13) expanded the list of grounds further to include “Aboriginality”, although it is not technically a prohibited ground.

Key issue: Should the notion of racial profiling covers more than “race” as a prohibited ground?

## ACTIVITIES

“Activities” refers to formal or informal actions or reactions by agents working in specific social domains. Some definitions have very specific activities designated as racial profiling activities (such as “traffic stops”, “search”, “cite”, “arrest”, or “search practices”), and others have generic descriptions of activities (such as “surveillance”, “treatment” or “law enforcement practices”).

Key issue: How broad or specific racial profiling activities should be?

## FORMAL RATIONALES AND JUSTIFICATIONS

“Formal rationales and justifications” refers to official reasons for activities conducted at work. Most definitions of racial profile do not mention any formal rationales for profiling activities. Justifications, such as “reasonable suspicion” or “factual grounds”, have been mentioned as legitimate grounds for racial profiling.

Key issue: How important should formal rationales and justifications be included in the definition of racial profiling?

## TRIGGERS

“Triggers” means galvanizing factors which initiate activities related to racial profiling. Some definitions are silenced on the triggers of racial profiling. However, for those definitions which have a formal statement on triggers, there are three camps. The first camp believes that race is the only factor in triggering police actions; the second camp believes that race is the major factor, among others; and the third camp believes that race is only one of the many factors. The second and third camps believe that there are non-racial factors which also trigger police actions. All camps wrestle with the issue of finding the factors which impact on the decision-making process of police officers before they take their actions.

Key Issue: How clear should the triggering role of “race” be in the definition of racial profiling?

## PSYCHOLOGICAL FACTORS

“Psychological focus” refers to the centrality of psychology in explaining human actions. Some definitions have an explicit statement on the importance of stereotypes in racial profiling. This mindset of associating minorities with criminality is considered to be the driving force behind traffic or pedestrian stops, searches, and other police actions.

However, there are also definitions of racial profiling which do not have an explicit statement on psychological components. They either do not view psychological components as the “causes” of racial profiling, or view non-psychological factors (such as methods of governance or police deployment strategies) as “causing” police actions.

Key Issue: How necessary is the psychological focus in racial profiling?

## ADVERSE IMPACTS

“Adverse impacts” denotes results which are harmful or disadvantageous to people physically, psychologically, socially, or economically. These negative results often spilled over from individuals to communities.

There are authors who believe that the important factor in racial profiling is its adverse impacts on racial minority groups, not the “causes” of police actions (be they psychological or non-psychological). The Ontario Human Rights Commission did not include adverse impacts of racial profiling in its definition of racial profiling, but its publications on the same topic clearly illustrate the adverse impacts. The issue of adverse impacts is the least mentioned feature in all the American and Canadian definitions under review.

Key Issue: How important is adverse impacts in racial profiling?

## OBSERVATIONS

This review of the definitions of racial profiling suggests that the concept has been evolving, not so much in a linear progression, but more like in different directions competing for dominance. The concept acquired various components as it evolved making it even more difficult to reach a consensus.

Most definitions of racial profiling have three basic components: social domains, grounds, and activities. Some are silenced in rationales and justifications, triggers, psychological focus, or adverse impacts. There are historical changes and variations in the ways they deal with the seven components. Psychological focus remains one of the stronger theme,



and adverse impact is one of the least adopted in definitions. Such diversity in the conceptualization of racial profiling illustrates that the concept remains multi-faceted and fluid. Three factors seemed to contribute to the lack of consensus on what racial profiling is and how it works: a) Lack of common theoretical grounds; b) Inconclusive empirical evidence; and c) Competing values of “law and order” and “democracy and freedom”.

As noted, there are unresolved competing issues in each of the seven components, and these issues are not disappearing any time soon. As a concept, racial profiling is therefore expected to be fluid in the near future.

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# WHY POLICE SHOULD COLLECT RACIAL DATA

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This paper argues that gathering racial data regarding police practices is an important step forward to address concerns about racial profiling and racial bias, and the growing tensions today between racialized minorities and the police. Hence, the commitment to race data collection is essential if police are to retain public support and legitimacy in minority communities, and fully contribute to an inclusive society as well as a safe one.

## INTRODUCTION

Over the past two decades, issues of racial profiling and racial bias as part of police practices in Canada have come to the forefront of public attention. Allegations of “driving while black” are common place among racialized communities. In fact, the problem is now frequently characterized as a systemic one for Canadian police services. Indeed, complaints about racial profiling are generally framed as systemic when they are heard by Canadian courts and human rights tribunals. Often, however, concerns about racial profiling are dismissed by defenders of the police as anecdotal and an indicator of an occasional bad apple and in no sense a part of everyday policing in Canada.

Yet, unlike in for example the United States or the United Kingdom, Canadian police services have no history of collecting racial data about who they serve or stop or why (Foster & Jacobs 2015). Without this data, it is difficult, if not impossible, to evaluate seriously the extent, if at all, to which racial profiling is a systemic problem among Canadian police services. In other human rights areas such as employment discrimination and housing discrimination, Canada has been a pioneer in gath-

ering publicly accessible relevant data to assess allegations of systemic bias. Our argument here is that an important step forward to address concerns about racial profiling and racial bias is to also gather racial data regarding police practices.

## WHAT KIND OF RACIAL DATA SHOULD BE COLLECTED BY THE POLICE?

Canadian police services gather and retain an immense amount of micro- and meta-data, which shows that they are well positioned to also gather racial data. The police also provide a tremendous number of diverse services for the community. Only some of these typically raise concerns about racial profiling and racial bias, in particular, those that involve safety and security. The police practices that are especially subject to scrutiny concern arrests and detentions, traffic stops, pedestrian stops, and criminal investigations. Our view is that racial data should eventually be collected for all of these aspects of policing.

There are many different sorts of information that might be gathered for the purposes of addressing concerns about racial profiling and racial bias. Our view is that there should be three

basic categories of information gathered. One category is the demographics of those stopped. These demographics should include at minimum race, sex and age. The second category is the reason or the context for police activity. For example, in the case of a traffic stop, the relevant information is the reason for the stop. The third category of information is the outcome for the person stopped, whether for example he or she was charged with a crime or given a ticket.

The precise fields of information, especially with regard to race, may well be calibrated for different communities. There is no one-size-fits-all for gathering racial data relevant to policing. In some communities, it is especially important to focus on whether or not the person subject to police activity was black or indigenous, in a different community the focus may be on whether or not the police officer perceives the person as Middle Eastern or south Asian. The decisions about racial categories should reflect the concerns of racialized minority communities about police activities. Racial data should not be gathered to assess the behavior of racialized communities in Canada.

It is important to acknowledge the police who will be gathering this information about themselves. Canadian police services have a long history of gathering data in a professional manner. Collecting racial data to make them accountable should simply be another part of their job. Canadian police research suggests that data suppression and the lack of data transparency in areas of police performance and impact is the result of a deeply entrenched police subculture which loathes observation by outsiders (Wortley, 1999; Owusu-Bempah & Millar, 2010). The racial data collected must be made public in order to inform debate over the extent to which racial profiling and racial bias is systemic.

## WHY SHOULD A LAW ENFORCEMENT AGENCY BEGIN TO COLLECT AND PUBLISH RACE-BASED STATISTICS?

Early research in the United States found that collecting race-based statistics does help to address community concerns about the activities of the police and ascertain the scope and magnitude of racial profiling and racial bias (Lamberth *et. al.*, 2005).

The systematic collection of information regarding law enforcement performance can support community policing by building trust and respect for the police in the community. By providing information about the nature, characteristics, and demographics of police enforcement patterns, these data collection efforts have the potential for shifting the rhetoric surrounding racial profiling from accusations, anecdotal stories, and stereotypes to a more rational discussion about the appropriate allocation of police resources (Ramirez, McDevitt and Farrell, 2000).

Data collection for law enforcement is fundamental to a comprehensive early warning system that alerts management to problems of police misconduct (Ramirez, McDevitt and Farrell, 2000). By detecting and addressing instances of disproportionate treatment of persons of colour by the police, law enforcement organizations may be able to prevent the development of a systemic pattern of discriminatory practice.

Implementing a data collection system also sends a clear message to the entire police community, as well as to the larger community, that racial profiling is inconsistent with effective policing and equal protection and that the police have nothing to hide (Lamberth *et. al.*, 2005).

## BENEFITS OF DATA COLLECTION

The implementation of data collection systems have resulted in significant benefits for police services and communities in other countries with diverse populations. Studies conducted in both the United States and England have found that data collection processes can:

- Avoid rhetoric and accusation and promote more rational dialogue about appropriate policing strategies.
- Send a strong message to the community that the department is against racial profiling and that racial profiling is inconsistent with effective policing and equal protection.
- Build trust and respect for the police in the communities they serve through increased transparency and public accountability.
- Provide departments with information about the types of stops being made by officers, the proportion of police time spent on high-discretion stops, and the results of such stops.
- Help shape and develop training programs to educate officers about racial profiling and interactions with the community.
- Enable the development of police and community dialogue to assess the quality and quantity of police-citizen encounters.
- Alleviate community concerns about the activities of police.
- Identify potential police misconduct and deter it, when implemented as part of a comprehensive early warning system.

- Retain autonomous officer discretion and allow for flexible responses in different situations (Ramirez, McDevitt, Farrell, 2000).

- Racial data on its own does not answer definitely whether racial profiling is systemic or not (Ramirez, McDevitt, Farrell, 2000).

## BENEFITS OF GOOD DATA

Race data collection efforts are an attempt to provide the tangible numbers that will enable police and community leaders to better understand their policing activities.

- Good data can help identify and verify issues, theories and perceptions.
- Good data can help to proactively address issues, measure progress and capitalize on opportunities.
- Good data can gain trust, develop effective, respectful consultations, and secure the support of key decision-makers and stakeholders.
- Good data can reduce exposure to possible legal action and human rights complaints. (OHRC, 2010).

## CHALLENGES OF DATA COLLECTION

While jurisdictions can derive many benefits from implementing data collection systems, they also face several potential challenges. Such challenges may include the following:

- Concerns about extra-budgetary expenditures associated with collecting data
- Developing a robust benchmark against which the data can be compared.
- The potential burden an improved data collection procedure will have on individual officers in the course of a normal shift.
- The potential for police disengagement from their duties, which may lead to officers scaling back on the number of legitimate stops.
- The challenge of ensuring that officers will fully comply with a directive to collect stop data.
- Ensuring that data is recorded on all stops made, and that the data collected is correct.
- The difficulty of determining the race or ethnicity of the persons stopped.

There have been many experiences of data collection with police developed internationally and now in Ottawa, and there is clear evidence that these many challenges can be addressed.

## CONCLUSION

It is only with the collection of racial data by police that it will be possible to determine if racial profiling is a systemic problem for Canadian police services. In a diverse country like Canada with its deep commitment to human rights, that issue can no longer be ignored or avoided.

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# “SINGLED OUT”: BEING BLACK IN THE SUBURBS

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“Singled out” was how one young man described his experience living in Toronto’s outer-suburbs. His parents, like other Caribbean immigrants, had moved to the suburbs which for them represented upward social mobility, safety (from violence), and opportunities for their children to have a “better” life – with better schooling, and respectable social networks. The youth reported that their experiences in the community was marked by stereotyping/racial profiling, the burden of expectations to be “good Blacks,” schools that were unresponsive to their educational needs and interests, and a sense of being “singled out” in the community even as they tried to “fit in.”

## RACIAL PROFILING IN THE SUBURBS

For the parents – mostly first and second generation Canadians – the move into a fairly affluent neighbourhood represented upward social mobility sustained by a belief that they were providing their children better schooling opportunities, an environment suited to the cultivation of a suitable social network, and a safe neighbourhood far from the violence of the city. As one parent said: “Parents live here because it’s safe; it’s a nice place to raise kids [...] It’s quiet and away from the hectic life of Toronto [...]” But despite their parents’ desire and social appeal of the community, the young people never felt welcomed, hence as one questioned: “If I’m truly part of this community, why am I being singled out?”

Many of the youth talked of being treated differently and of their efforts to come to terms with reactions to their “colour.” They reported that as they journeyed through the neighbourhood people would watch them in wonder. In the words of one youth: “All of a sudden colour matters. People look at me.

They do a double take, like: ‘Is that a Black person?’” They took this reaction to mean that they were out of place and did not belong in that community as a Black person.

The youth told stories of teachers’ perception of them as academically limited – “you are not smart” – and hence likely to be educational failures. For this reason, one said: “You always have to show that you are not the stereotypical Black.” Another suggested that the first thing [the teacher] thinks is: “so it reads” [...] this guy is going to fail; his marks are not going to be as high as the others.[...] They don’t think we are smart [because of] the way we dress or the way we act [...]. We just have to show we are smart [...].”

And there were the storeowners and security officers whose surveillance of them with which they had to contend. One youth recalled that he had to ask a corner storeowner – who demanded that he make his purchase and leave the store while others were allowed to browse – to leave him alone because he was “really a good kid.”

For many of the youth, racial profiling by police officers was considered a significant disadvantage to living in the community. One young man talked of instances when he was unnecessarily stopped, “rudely” questioned, and threatened to be “beaten” by police. He said that he was asked to present his driver’s license although he was not driving, but the two White females with whom he was travelling were never questioned.

Another young man described an instance when he was walking home from work with his co-worker friend when two police cars stopped and the officers “interrogated” them, saying that they “fit the description of two Black youth who had robbed a convenience store earlier.” Noting that they were wearing their fast food restaurant uniforms when they were stopped, the youth indicated that he tried to reason with the officers saying that their attire should be a signal that they were innocent of such offence; furthermore, “why would I be walking towards the scene of the crime if I had robbed the store?”

The officer, he said, responded saying, “That’s a really good question” and let them go. But before reaching home, he was stopped again by police for the same reason. However, as he noted, except for race, the apprehended alleged robbers looked “nothing” like him and his friend.

As I argue elsewhere (James, forthcoming), the presence of Black bodies in the suburbs serve to disrupt the often taken for granted the mostly white middle class homogeneous population and as such are rendered “out of place.” Faced with proving the legitimacy of their presence in such areas, Black youth, like their parents, are left to navigate, the classist and racist discourses – and concomitantly discrimination – which permeate these suburban spaces. Therefore, despite the financial and social “sacrifices” that parents make in moving to outer- suburban communities, the experiences of their children in those communities are marked by stereotyping/racial profiling, the burden of expectations to be “good Blacks,” schools that are unresponsive to their educational needs and interests, and a sense of being “singled out” in the community even as they try to “fit in.” Similar experiences and perceptions were noted in a recent investigation of the social well-being of Black youth in Peel Region (James & Turner 2015). While some youth felt a sense of satisfaction living in Peel, many felt unwanted and devalued. They attributed this to the everyday racism directed at Black youth, especially males, through racial profiling in school, the media and police. In what follows, I discuss the youth’s experiences with and perceptions of educators and police – significant individuals who have much to do with their social and educational situation and outcomes.

Similar to the youth in the earlier study, those in Peel reported their life in the area was a constant struggle against the profile

of them belonging to a group of people who are uninterested in education, more athletically-talented, hence likely to be underachievers; as well they are antisocial and disruptive in that they persistently incite trouble hence need to be continuously policed (see James, 2012). Of their experiences in school and with teachers, the youth said:

I think we have to fight an uphill battle in almost everything we do, especially school. I’ve had teachers tell me straight up that they don’t believe my group of people could do certain things.

Schools don’t take Black kids seriously. Teachers just think we are there to just chill and we are not serious.

If males miss a day of school then [the stereotype is that] they’re automatically not interested in having an education and are probably out looking for trouble. [...] [The stereotype is that] Black girls only come to school for friends and not to learn; [...] [and] only want certain jobs such as nursing or hairstyling [...].

Additionally, police, they said, tended to target them – a practice which made them feel fearful and unsafe because of possible criminalization and incarceration for “years for something I did not commit.”

In Peel, you’re already a target if you’re Black. If you live in a certain area, or if you wear certain clothing you are a target of police. If something goes wrong you’re automatically a suspect.

Law enforcement also stereotypes us and assumes because we are Black we all partake in drugs etc. They also assume that all Black youth live in poverty and are struggling which is not true. People in the stores assume I am going to steal which is not true. I go out of my way to try not to look [like a] suspect. People are always staring at me thinking I am a thief.

[...] Everywhere we go, we are a target. I want freedom. Before I came here, [...] I was told Canada was a place I could be free. But it is not that at all. An incident happened at school where all kinds of kids were involved. I only saw the police handcuffing the Black students, and many of those students were not even involved. Anytime there is violence, it is assumed us Black youth have committed it.

It is understandable that these youth would be calling out for “freedom” from the omnipresent stereotyping of them as educational failures, misfits, delinquents, and potential criminals. They despaired that they might fail at having people come to see them as hard-working and not threatening; hence there is no need for people to be suspicious of them.

## CONCLUSION

The practices toward Black youth are part of a societal cultural structure that places them at a disadvantage in school and in society where preconceived ideas, educational routines, and policing measures – supported by an inequitable socio-political structure – contribute to a web of stereotypes and racial profiling from which it is difficult for the youth to escape. What needs to be done is for teachers and police – as well as members of society generally – to come to understand and repudiate the ways in which through racial profiling, educational and justice institutions undermine the educational achievement, law-abiding living, and well-being of Black suburban youth.

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# SEEING GENDER DIFFERENTLY IN RACIAL PROFILING

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While the research and literature on racial profiling has grown substantially over the years, with strong evidence pointing toward systemic racism embedded within the police force and the criminal justice system, the experiences of racialized women, Black women in particular, have yet to be explored. Much of the academic scholarship in Canada on racial profiling focuses on the experiences of young racialized males as the targets and victims of police violence and brutality. However, Black women have also been, and continue to be, subject to racial profiling. The paper cites a number of incidences in which Black women were unjustly targeted and their rights violated by police officers.

While the literature and research on racial profiling has grown substantially over the years, with strong evidence of systemic racism embedded within policing and the criminal justice system in general, the experience of women of colour, Black women in particular, has yet to be fully explored. With the exception of a few, much of the literature in Canada on racial profiling focuses on the experiences of young Black men as the targets and victims of police misconduct. National attention surrounding incidents of police misconduct against women view them as isolated deviations from the policing norm. However, there is growing evidence that women of colour are uniquely subjected to racial profiling. The piece focuses on the marginalized experiences of women of colour in the discourse on racial profiling. While racial profiling is one of the most controversial topics in the criminal justice system, it illustrates the ways in which a dominant ideology can operate to exclude the narratives of women.

If the typical subjects of racial profiling are men, what happens to our common sense notions of police misconduct and, in turn, the community demands for accountability in law enforcement when we shift the center of focus on a group that has rarely been seen as targets of racial profiling? Research in the United States has shown that women, particularly women of colour, are sexually assaulted, brutally strip searched, shot and killed by law enforcement officers resulting in racialized women “experiencing many of the same forms of law enforcement violence as men of color, as well as gender-and-race specific forms of police misconduct and abuse” (Ritchie, 2006,139). Though the experiences of women of colour have not been entirely absent from racial profiling discourse in Canada, one finds that the few studies that analyze the experiences of racially profiled women and how women are profiled generally reveal that women are profiled in gender-specific ways, for example, as suspected drug users, drug couriers and sex workers (Lawrence & Williams,



2006; Martin & Kuszelewski, 1997; Tanovich, 2011). However, there is little data that attests specifically to the experiences of Black women in the law enforcement practice of racial profiling.

By challenging the ways in which racial profiling has been understood, this piece questions why women have only been discussed in very limited ways in the dominant discourse on racial profiling, usually only to be heard as the voices offering support on behalf of their male counterparts. This is not to suggest, as data shows, that men are not more vulnerable to police stops, questioning, arbitrary detentions and illegal searches, rather by including the female experiences in a meaningful way one can gain a clearer picture of the impact of racial profiling, better understand the unique positioning of women as targets of gendered and racialized violence as well as the challenges of sexism and racism in the justice system in general.

Black women's narratives of law enforcement's practice of racial profiling have been the subject of discourse or organizing. There are a number of Ontario cases that have demonstrated the experiences of racially profiled women. For example, the 1993 incident involving Audrey Smith, a 37-year-old Jamaican tourist who was publicly stripped and searched in downtown Toronto, contributed to the heightened tensions between Black communities and Toronto police in the early 1990s. Smith was accused of having drugs in her possession and was immediately handcuffed and placed in a police cruiser. After being detained and her assertion of innocence being ignored by the police officers, Smith thought her only option was consent to a search, presumably at the police station. Instead, Smith was publicly strip searched on the busy streets of Parkdale. No drugs were found. In 1995, a three-person panel of inquiry cleared the three police officers of the discreditable misconduct charged.

In 2007, the Ontario Human Rights Tribunal ruled that a Black woman from Mississauga was the victim of racial profiling when she was subjected to an intense, verbal interrogation even after evidence revealed she had been wrongly accused. Jacqueline Nassiah was shopping for a bra at a Sears store in 2003 when she was stopped by a security guard and accused of stealing an item worth less than 10 dollars. The Tribunal found that a Peel Regional Police Constable assumed Nassiah did not speak English, ignored the videotape evidence exonerating her, and called for a body search when did not find the allegedly stolen items. After the second body search confirmed that she did not have the item, the investigation continued, lasting over two hours. Nassiah was subjected to verbal abuse when as the officer called her a "fucking foreigner" and threatened to take her to jail if she did not produce the item.

In 2008, Stacy Bonds, a 27-year old make-up artist with no criminal record, was questioned by two male officers (one who was White, the other Hispanic) on Rideau Street in Ottawa.

One of the officers testified that he had seen Bonds with a beer bottle, speaking to occupants of a van. After checking her name and date of birth, the officers let Bonds go. Bonds asked the officers why they had stopped and questioned her. The officers told her to go home. When Bonds insisted on an answer, one of the officers placed her under arrest for public intoxication. After her street arrest and pat down search, Bonds was taken into custody.

Once in custody, Bonds was violently kneeed twice in the back, had her hair pulled and was forced to the floor with a plastic riot shield in the police department's booking room. She was then strip searched in the presence of three male officers, a hand was shoved down her pants and she had her shirt and bra cut off. She was then left in a jail cell for a period of three hours partially clad and having soiled her pants. These events were captured on police station videotape. Justice Lajoie of the Ontario Court of Justice found "no reasonable explanation for the violent strip search of Bonds." In *R.v. Bonds*, the court held that the treatment of Bonds was "an indignity towards a human being" and "should be denounced."

In *Abbott v. Toronto Police Services Board*, the complainant, Sharon Abbott, a Black newspaper delivery woman was out delivering newspapers to a west Toronto neighbourhood when her erratic driving caught the attention of a police officer. Abbott alleged that she was followed by a Toronto police sergeant who acted aggressively toward her, pinned her to a police car, handcuffed her and held her for 45 minutes before issuing 7 tickets and releasing her.

Early one morning in 2007, Abbott was out on her route. At around 3:15 a.m., she parked her car by an apartment building on Glenlake Avenue in Toronto and went into the building to deliver papers. A Toronto police Sergeant was out on patrol that morning and passed Abbott's car. By this time, Abbott had exited the building and returned her car. The officer took down the license plate, and observed Abbott drive away. It was the officer's evidence that Abbott was not wearing her seat belt and did not signal when making a left turn. Aware that Abbott was a newspaper delivery person; the officer got out of his car and indicated that he wanted to speak to her. Abbott testified that, concerned that she might be the victim of an assault by someone impersonating a police officer, she started to call her husband. The officer repeatedly asked her for her driver's license and insurance. She advised the officer that she would not speak to him until she had a witness on the phone. The officer attempted to place Abbott under the arrest. A struggle commenced as he tried to handcuff her. According to the officer, they fell to the ground as they lost their balance. Crying out for help, Abbott maintained that the officer pinned her in order to handcuff her and that he grabbed her belt at her rear of her pants in order to get her back on her feet. During the struggle, both parties sustained minor injuries. Abbott sustained an abrasion over her left eye and cuts on the inside of her upper lip, as well as bruising from the handcuffs. Abbott

would be charged with seven offences under the *Highway Traffic Act*. She was acquitted of six of those charges.

In *Abbott*, the Ontario Human Rights Commission concluded that her race and/or gender played a role in Sergeant's "failure to take steps to try to de-escalate the situation":

Racial discrimination, whether on its own or in combination with gender, involves the inappropriate exercise of power by a member of the dominant racial group over a member of what is perceived as a subordinate racial group. There is no doubt that the exercise of power is inherent in the interaction between a police officer and any member of the public, given the powers that are granted to a police officer by statute. But this imbalance of power can be inappropriately exacerbated when it is layered on top of racial and gender dynamic.

In this case, I have tried to hypothesize White women out delivering papers in early morning having fairly routine traffic matters escalate into an arrest. I have been unable to do so.

These cases represent a persistent dilemma that confronts Black women's multiple identities as it illustrates the race and gender dynamic in an officer's decision to not stop, detain and ultimately arrest some of these women, but also to humiliate them. The gendered and racial stereotypes at play made these women more vulnerable to the police misconduct. This requires a more complicated analysis of racial profiling.

While racialized women's experiences with various forms of racial profiling has been brought to the public attention - such as the recent case of Mary McCarthy - these experiences are not well framed by the critical discourse that racial profiling has been built on. Why does the female experience in racial profiling matter? Silencing the gender-and-race specific forms of police misconduct reinforces the inequities in the entire justice system. When examining race and crime, the criminal justice process rarely considers how compounded identities such as gender (class and sexuality), might complicate matters and create distinct and varied experiences for those marginalized. The narratives of racial profiling illustrates that an intersectional critique is warranted. As David Tanovich points out, "the issue of gendered violence against racialized and Aboriginal women by police officers is an under-studied and litigated area in Canada" (2011, 149). These are some of the challenges facing researchers and advocates who seek to ask where the female experiences are in racial profiling discourse. Until mainstream discourse on racial profiling integrates the realities of women of colour's interaction with law enforcement, voices of the most marginalized will continue to be silenced and their stories hidden. We cannot seek to provide answers to the impact of racial profiling on women through the lens of racism alone.

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# RACIAL AND MENTAL HEALTH PROFILING IN ONTARIO: EXPLORING THE LINKS

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The Canadian Mental Health Association (CMHA) works toward a single mission: to make mental health possible for all. The vision of CMHA Ontario is a society that believes mental health is the key to well-being. CMHA Ontario works closely with 31 local branches in communities across the province to ensure the quality delivery of services in the areas of mental health, addictions, dual diagnosis and concurrent disorders. Through policy formulation, analysis and implementation, agenda setting, research, evaluation and knowledge exchange, we work to improve the lives of people with mental health and addictions conditions and their families.

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In this exploratory paper, we identify areas at the intersection of racial profiling and mental health, including key settings within the health care and justice systems. People often experience both mental health issues and additional inequities, such as poverty, racialization, or homophobia, simultaneously. Intersectionality creates unique experiences of inequity that pose added challenges at the individual, community and systems levels. We examine the distinct negative implications of mental health and racial profiling in these settings, and make recommendations for further research on this intersection.

## RACIAL PROFILING AND MENTAL HEALTH

Racial profiling both reproduces and is a product of racialization, the social construction of races as real, biological, fixed and unequal. Two dimensions of the relationship between racial profiling and mental health require attention:

### 1. RACIAL PROFILING NEGATIVELY IMPACTS ON THE MENTAL HEALTH OF RACIALIZED INDIVIDUALS

In 2002, the OHRC conducted an inquiry into the effects of racial profiling on individuals and communities in Ontario. In its report (2003),<sup>i</sup> it identified mental health related impacts of racial profiling on individuals as well as on broader society, including post-traumatic stress disorder and other stress-related disorders.

These findings are consistent with CMHA Ontario's understanding of how inequities impact on marginalized individuals and communities. Due to decreased access to the social determinants of health, marginalized communities are more likely to experience poor mental health and in some cases mental health conditions (CMHA 2014).

### 2. RACIALIZED PEOPLE WITH LIVED EXPERIENCE OF MENTAL HEALTH ISSUES (PWLE) MAY EXPERIENCE BOTH RACIAL AND MENTAL HEALTH PROFILING

The OHRC defines mental health profiling as “an action taken for reasons of safety, security or public protection that relies on stereotypes about a person's mental health and addiction instead of on reasonable grounds, to single out a person for greater scrutiny or different treatment” (Fact Sheet).

A common assumption made during mental health profiling is the individual will be violent, despite evidence that PWLE are no more likely to engage in violent behaviour than the general population and actually are more likely to be victimized (CMHA 2011). Recent data from Statistics Canada (2015) has identified that Canadians with mental health disabilities or who report poor or fair mental health experience four times the rate of violent victimization compared to people who report good to excellent mental health. These misperceptions about the relationship between mental health and violence contribute significantly to the stigma, discrimination and social exclusion faced by PWLE, which poses barriers when accessing housing, employment, education, justice and further contribute to poor mental health (CMHA 2011).

Intersecting identities create unique experiences of inequity. Racialized PWLE may experience both mental health profiling and racial profiling simultaneously or at different times in different contexts. It may be difficult or impossible to determine whether just racial profiling or mental health profiling or both are at play. As noted above, however, experiences of racial and mental health profiling can contribute to poor mental health or mental health conditions for racialized PWLE, but they can also pose challenges in accessing much needed social determinants of health. This dynamic can further entrench the cycle of marginalization.

## KEY SETTINGS

Healthcare and justice settings are identified because they are critical junctures where racialized people with mental health disabilities are most vulnerable and there is a risk of short- and long-term negative outcomes.

## THE HEALTHCARE SYSTEM

The healthcare system is a significant setting for PWLE. Having access to a continuum of safe, effective and equitable mental health services and supports is essential for recovery.

It is critical to better understand if and how racial and mental health profiling occurs within the healthcare system. In an article featured in the *Canadian Journal of Psychiatry*, Layla Dabby *et al.* (2015) found that Canadian psychiatrists and residents have relatively negative attitudes towards patients with schizophrenia. More research is needed to identify whether and how these attitudes could impact on service delivery, including whether profiling occurs, and how it intersects with other forms of identity such as race.

In 2013, CMHA Ontario participated in an initiative to better understand how racialized PWLE use hospital emergency

departments. Consultations with racialized PWLE found that use of force by hospital security staff was a significant concern. Consultation participants were often unable to distinguish between hospital security or police services, and felt that both racialization and mental health status played significant roles in the interactions (Wong *et al.* 2014). Consultations with service providers also raised additional issues to further investigate, including discretion around the use of physical and chemical restraints (Wong *et al.* 2014).

## THE JUSTICE SYSTEM

Police, by virtue of their role as emergency responders, are often first on the scene to support someone experiencing a mental health crisis. These interactions can have a significant and lasting impact on people's lives. How mental health factors into racial profiling has been less investigated and may be difficult to measure due to the complexity of intersecting identities. The research that does exist in this area points to the need for further investigation. A 2005 Montreal-based study found that even while controlling for age, gender, marital status, and number of psychotic symptoms, being African-Canadian was independently and positively associated with police or ambulance referral to emergency services. The study concluded that African-Canadians admitted to the hospital with psychosis are overrepresented in police and ambulance referrals to emergency psychiatric services (Jarvis *et al.* 2005).

## INTERSECTION OF HEALTH AND JUSTICE

Determinations of consent and capacity (whether an individual has the legal capacity to make decisions) happen at the intersection of the healthcare and justice systems. These determinations are often informed by psychiatric diagnosis. Stereotypes, assumptions or misunderstandings by psychiatrists can significantly impact on this process. In her analysis of decisions made by the Consent and Capacity Board of Ontario, Ruby Dhand, a professor of law at Thompson Rivers University explains that stereotypes about race can lead to errors in diagnosis. For example, Dhand quotes a psychiatrist as saying:

“If African patients are uttering to the sky, we may diagnose them as being psychotic, but really they may be chanting. In these cases, we over-diagnose. With Chinese patients who are very quiet and don't say much. They are totally psychotic in their head and they don't tell you. And we think okay – they can go home.” (Dhand 2011).

In this quote, the psychiatrist acknowledges the need to understand how racialization impacts on mental health, but also makes assumptions or stereotypes about racialized people.

## NEXT STEPS

As the OHRC moves to further respond to racial profiling, it is imperative to consider intersections with mental health. This paper explores why this work is needed and key settings to examine. Three recommendations emerge from this discussion:

- More research is needed on the intersection of racial- and mental health profiling
- Consistent and effective collection of socio-demographic information, including about race and mental health disability, in the areas of policing, justice and healthcare service provision. For example, the OHRC recommends that data collection about the circumstances related to police use of force be expanded province-wide and include collecting data about use of force in scenarios where the police are interacting with persons who have, or who are perceived to have, mental health issues or addictions.
- Engage all relevant sectors and stakeholders – including PWLE, policing, justice and healthcare system stakeholders – to identify key priorities and develop a shared commitment to build evidence and action for change.

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# CLARIFYING THE CONCEPT OF RACIAL PROFILING IN CANADA

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To successfully reduce racial profiling requires a clear understanding of the term, its origins and use, and how it differs from the police practice of criminal profiling. The current absence of conceptual clarification among police personnel, coupled with the lack of systematic race-based data on police-initiated encounters with citizens, has undermined efforts to better understand and address the problem of racial bias in policing. These issues are compounded by the dearth of empirical research on police decision making in encounters in the community, which would help to identify the cognitive and operational factors that influence the decisions of officers.

## INTRODUCTION

Racial profiling is a key issue in Canadian policing and has significant implications for individuals, communities, police services, and governments. To successfully develop policies and initiatives to address and reduce racial profiling requires a clear understanding of the term, its origins and use, and how it differs from the police practice of criminal profiling. Similarly, how racial profiling and criminal profiling are defined, and by whom, significantly affects the focus of research studies as well as how the findings of those studies are interpreted. It

also affects the assessment of whether a police service or an individual police officer has or does engage in racial profiling.

The identification of a police decision as racial profiling is complicated by the vast amount of discretion that officers have and the challenges and implications of imposing, a priori, guidelines on decision making. Efforts to structure and confine police discretion have been made, generally without success, over the past four decades. Most successful have been specific policies designed to limit the discretion of police officers in specific instances, such as in cases of domestic violence. Whether and the extent to which similar limits may be imposed to

reduce racial profiling remains to be seen, and is complicated by a blurring of definitional boundaries between different types of profiling.

## **CRIMINAL PROFILING AND RACIAL PROFILING: CONNOTATIONS AND CONFLATION**

Criminal and racial profiling are two concepts that are generally viewed to be mutually exclusive spheres of decision making by police practitioners. In reality, however, a “pervasive ambiguity” surrounds the very meaning of each of these concepts which, in the absence of clarification, can (and does) lead to their conflation on the frontline and in discussions of racial profiling and policies designed to address it.

Criminal profiling has a long history in policing, and involves the identification of behavioural and physical “indicators” that are intended to assist in the detection of potential or actual criminality (Canter, 2010; Kocsis, 2006). Proponents of criminal profiling insist that ‘race’ and ethnicity do not, on their own, constitute risk indicators, and that it is ‘behaviour’ and the situational context rather than ‘people’ (that is, particular segments of the population) that receive greater scrutiny.

Although research on the efficacy of criminal profiling has produced widely divergent results, with a considerable amount of evidence to suggest that some forms do not constitute effective investigatory tools, the practice has gained considerable institutional legitimacy among policing agencies. Indeed, for many police personnel, the term “profiling” is associated with the detection of criminality and is utilized based on strategies learned in training and applied in the field.

The term “racial profiling”, in contrast, has negative connotations and is associated with discriminatory policing practices that involve overt displays of racial bias by officers in their encounters with citizens. In many communities of colour the very term “profile” (similar to the term “carding” which, in most jurisdictions in Canada, is called “street checks”) is synonymous with racially-biased policing practices that are discriminatory against individuals and communities, reflecting historical antecedents and unequal power relations.

However, while criminal profiling and racial profiling are theoretically distinct, these concepts often fuse in practice and in dialogue such that stereotypes that link certain segments of the population with heightened criminal propensity can shape police decision making in very problematic ways.

To be sure, any one decision that is made by a police officer may involve a myriad of factors: political, organizational, and individual, as well as the situational context within which the decision is made. Police services may be under pressure

from municipal councils, the media, and the community to address the high rates of crime and disorder in certain areas of a given jurisdiction. This may have been precipitated by a series of criminal incidents, one high profile criminal event, or be a consequence of long-standing issues. Police officers can report feeling caught in the middle between the expectations of their organization, the requirements of the law, and the perceptions of community residents. As such, the “performance culture” of policing, and the pressures officers may feel to accrue “hits” may actually promote the practice of racial profiling (Cashmore, 2001). The operational focus that equates officer efficacy with enforcement activities has also created an organizational culture wherein police officers view themselves primarily as “law enforcers” instead of public servants, which only serves to exacerbate the problem.

## **A CALL FOR CANADIAN RESEARCH**

The current absence of conceptual clarification among police personnel (which is due in part to police training protocol), coupled with the lack of systematic race-based data on police-initiated encounters with citizens, has undermined efforts to unpack the conflation between criminal and racial profiling (to the extent that this is possible), and to better understand and address the problem of racial bias in policing. These issues are compounded by the dearth of empirical research on police decision making in encounters in the community, which would help to identify the cognitive and operational factors that influence the decisions of officers. This, in turn, would facilitate a determination of the nature and extent of biased policing in a police service, and allow for delineation of situations of racial profiling vs. criminal profiling, so that officers can better understand the demarcation between these two practices. Critical to this research would be an exploration of the perspectives of both the police and community residents on what would constitute racial profiling in a particular case, and why.

A constructive dialogue on racial profiling and criminal profiling and the development of strategies to address the former is also hindered by an absence of structures and processes to facilitate funding, collaboration, the dissemination of research findings, and the implementation of research-informed police policies and strategies. Canadian police boards have traditionally not had the capacity to conduct independent research, but have instead relied on information provided from research conducted outside of the Canadian context (which raises important issues of generalizability), or is more anecdotal and not based on empirical field research.

In the absence of research that will facilitate a clear delineation between racial profiling and criminal profiling, it is likely that the relationship between police services and communities will continue to be characterized by conflict and a lack of productive

communication. By clarifying the dialogue on criminal profiling and racial profiling, police organizations and communities can begin to create relationships of trust and mutual understanding, which will in turn increase the safety and security of community residents and their equal treatment under the law.

Finally, though racial profiling is among the most visible, acknowledged, and quantifiable examples of bias in policing, there are myriad other, often less obvious examples of racial bias and disproportionality in the criminal justice system that warrant equal attention on the part of scholars, practitioners and policy makers. These include (but are not limited to) discrimination and disparity in other areas of policing, as well as at the pre-trial, sentencing, probation and parole stages.

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# “CAN I HELP YOU?”

## TAKING SERIOUSLY CONSUMER RACIAL PROFILING IN ONTARIO'S RETAIL SECTOR

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Consumer racial profiling (CRP) is a discriminatory practice grounded in conscious/unconscious biases, and negative stereotypes held by some security guards and employees about a consumer's identities including race, colour, sex, age and religion. These negative perceptions have led to some consumers being denied services. To explore consumer racial profiling in Ontario's retail sector, this paper will focus on the definition of consumer racial; examine CRP by drawing on Human Rights Tribunal of Ontario decisions, *McCarthy v Kenny Tan Pharmacy Inc* and *Nassiah v Peel (Regional Municipal) Services*; lastly, focus on Ontario's private security guards, and offer two recommendations.

### INTRODUCTION

In Ontario's retail sector and in other consumer services, consumer racial profiling (CRP) is a practice where racialized and Indigenous consumers are perceived to be 'security threats,' untrustworthy, and suspicious, by some private arbiters (e.g. security guards, frontline employees, management, business owners, and representatives of organizations). These perceptions are grounded in conscious and unconscious biases, and stereotypes held by these private arbiters about a consumer's race, skin colour, ethnicity, as well as, their other identities (e.g. sex, age, gender expression, (dis) abilities, language, religion), and whether or not they have the ability to pay or legitimate right to be on the premises. These perceptions have led to arbitrary applications of organizational policies, loss prevention strategies, and enforcement of laws (e.g. the Trespass to Property Act). As a practice, consumer racial profiling infringes upon rights protected under section 1 of the Ontario Human Rights Code, which states that

“[e]very person has a right to equal treatment with respect to services, goods and facilities without discrimination because of race...place of origin, colour, ethnic origin,...creed, sex, sexual orientation,...gender expression, age.”

This paper is divided into three parts. Part I focuses on the definition of consumer racial profiling. Part II examines the manifestation of CRP through a study of two recent Human Rights Tribunal of Ontario decisions. Lastly, Part III provides some recommendations for curtailing CRP by Ontario's private security guards.

### PART I: “CONSUMER RACIAL PROFILING” DEFINED

Consumer racial profiling is generally defined as “... store employees target[ing] a shopper or shoppers for discrimina-

tory treatment based on their race or ethnicity,” Gabbidon *et al.*, 2008, p. 1). These definitions of CRP tend to focus on the retail sector. Others, however, such as Harris (2003, p. 4) have sought to expand the definition to include “any type of treatment of consumers in the marketplace based on race or ethnicity that constitutes a denial or degradation in the product or service offered to the consumer.” It is my view that CRP should be broadened further to recognize the differential impact of this phenomenon on consumers depending on the intersections of their identities, including but not limited to their race, skin colour, indigeneity, socio-economic status, geographical location, religion, gender expression, gender, sexual orientation, immigration status, (dis)abilities, ethnicity, nationality, and language.

Although CRP is complex and occurs primarily in retail environments as part of transactional relationships between consumers and business owners or their representatives, my approach reflects that CRP also occurs in other consumer service settings (e.g. libraries, healthcare offices, secondary and post-secondary institutions, and online). An expansion of the definition provides researchers, adversely impacted communities, and private arbiters seeking to develop and implement remedial measures, with a more nuanced definition to address the complexities of consumer racial profiling.

## PART II: CONSUMER RACIAL PROFILING IN ONTARIO'S RETAIL SECTOR

The jurisprudence on consumer racial profiling in Ontario's retail sector is limited, and successfully litigated complaints at the Human Rights Tribunal of Ontario (HRTO) are the exception rather than the rule. This reality is due in part to the often subtle ways CRP operates, as well as the evidentiary requirements placed upon complainants to prove discrimination on a balance of probabilities. The cases of *Nassiah v. Peel (Regional Municipal) Services* (2007) and *McCarthy v. Kenny Tan Pharmacy Inc.* (2015) both demonstrate this exception.

In *Nassiah*, the applicant, Ms. Jacqueline Nassiah was a 40 year-old, Trinidadian-Canadian Black single mother with a small child, and an accent. The consumer racial profiling incident took place on 18 February 2003 at a Sears Outlet store in Dixie Mall, Mississauga. This incident involved a Peel Regional Services Police Officer R. Elkington, and an older White male security guard. The guard and the store were not named as respondents. In 2007, the Tribunal found Ms. Nassiah had been discriminated against on the basis of race by the police officer while in the “provision of a service” because he called her ‘f...ing foreigner,’ ‘asked if she spoke English,’ subjected her to a second body ‘strip’ search despite video evidence clearing her of wrongdoing, and ‘threatened to take her to jail if she did not produce the bra’ because she was Black.

This decision is insightful for two reasons. First, the HRTO

found that the security guard had engaged in consumer racial profiling practices. He had not checked Ms. Nassiah's bags or receipt upon initially detaining her, he had subjected her to a body search by a female employee where no bra was found, told her to shut up, denied her permission to call her babysitter, and called the Peel Regional Police Services. The HRTO noted the security guard had “made a serious mistake apprehending Ms. Nassiah” and subjecting her to unlawful detention despite having no evidence of wrongdoing. In fact, these findings were taken into account during the Tribunal's damages award assessment. Second, the cumulative harm caused to Ms. Nassiah, as she described in a press conference “the fear [had] changed [her] life” (Cotroneo, *Toronto Star*, May 18 2007) is an excellent example of what researchers refer to as psychological effects and racism-related stress of consumer racial profiling. These findings highlight why researchers and human rights practitioners need to consider harm when critically analyzing this phenomenon.

In *McCarthy*, the applicant, Ms. Mary McCarthy, a Black woman in her mid-50s was a regular customer at Shopper's Drug Mart, and lived close to Kenny Tan Pharmacy, a Shopper's Drug Mart franchisee. On 22 May 2011, Ms. McCarthy was subjected to an arbitrary search of her backpack in the dental aisle by a Ms. Balachandra, a South Asian woman, a five-year employee, and night supervisor at Tan Pharmacy (the Respondent). In October 2015, the Tribunal found “objectively, the racial profiling and discrimination that the applicant experienced, which included being rudely approached... being falsely accused of trying to shoplift and having her backpack searched...and not being apologized to because she is Black, was an extremely serious violation of the Code... [the Tribunal had] no doubt that she w[ould] feel the negative effects of it for the rest of her life.”

This decision contains two key insights. First, consumer racial profiling occurs on intra-group levels between diverse racialized store employees and racialized consumers. With this knowledge, researchers and employers have to use an intersectional approach to inform their understanding and responses to consumer racial profiling. Second, it supports existing scholarly research on the social exclusion of racialized consumer groups in retail settings where service providers adversely treat these groups as criminals based on conscious or unconscious biases and stereotypes.

## PART III: PRIVATE SECURITY GUARDS AND ADDRESSING CONSUMER RACIAL PROFILING

Private security guards are often viewed as important actors in CRP as evident in the HRTO cases reviewed above. Most of Ontario's 34,985 security guards are governed by the *Private Security and Investigative Services Act* (the Act) (2005).

The Act requires them to complete a mandatory minimum 40-hour basic security guard training course, pass a written licence test, and comply with a Code of Conduct. Under loss prevention protocols, security guards are often the first or second point of contact for consumers suspected of wrong doing or shoplifting in retail settings.

Based on the foregoing I recommend that:

- a mandatory anti-consumer racial profiling training be added to the security guard training syllabus developed by the Ministry of Community Safety and Correctional Services, Private Security and Investigative Branch. This training would provide security guards with alternative observational strategies when interacting with racialized and Indigenous consumers.
- the collection of demographic data from consumer contacts done by security guards and staff in order to assess whether or not workplace policies are being followed, and to determine if particular groups of consumers are being targeted for differential treatment.

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# CONTEXTS AND CONSEQUENCES OF RACIAL PROFILING ON WOMEN: RESULTS FROM A COMMUNITY SAMPLE

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This paper presents data from interviews with racialized women in Toronto who have experienced racial profiling in a variety of contexts. Women recount the impact that racial profiling has had on them individually, the impact of such practices on the community more broadly, and their thoughts on how to confront the practices.

In the past decades, we have seen narratives on racial profiling move beyond simply documenting such practices to those which emphasize the institutional, legal and political contexts which enable and sustain them. While these have provided critical frameworks for understanding the nature and extent of profiling practices, limitations implicit in these frameworks persist. In particular, narratives reflect the widespread assumptions that the targets of racial profiling are almost exclusively men, and the agents of racial profiling are primarily state security workers. Women's experiences with racial profiling, and the impact of profiling practices have on them, are rarely part of those narratives.

In this paper I describe results from an interview study of women's experiences with racial profiling. From this data, we can see the importance of dismantling the gender-free analysis of profiling practices in order to accommodate the routine and regularized ways in which women experience them.

## THE CURRENT STUDY

This research was conducted with the support of the African Canadian Legal Clinic (ACLC), a provincially-funded legal clinic with the mandate to address anti-black racism in Canada (<http://www.aclc.net/>). Women who self-identified as racialized, and who had experienced racial profiling participated in a confidential, private, face-to-face interview. For the purposes of this study, racial profiling was defined as "being subject to additional scrutiny or surveillance or closer examination because you are a racialized woman". Women were asked about their experiences with racial profiling across a variety of contexts - by public police, at border crossings, by private security, by social, income support and child welfare workers, in the education system and any other context in which it may have occurred in their lives. Women were also asked about how they responded in each specific situation,

the impact of racial profiling on them individually as well as on their community more broadly. Finally, women were asked about strategies for moving forward, and dealing with the realities of racial profiling.

Twenty-three self-identified racialized women were interviewed for this study. They ranged in age from 16 to 62 years old, with an average age of 33. All were residents of Toronto or a community nearby. 70% of the women had children and a third of the women had a spouse. 74% had some college or university, and 9% went to graduate school. 70% of the women were working either full-time or part-time. Three were receiving disability benefits and two were receiving general social benefits. All of the women were Canadian citizens or permanent residents; indeed, two thirds were Canadian born. Fifteen women self-identified as African Canadian, Afro-Canadian, Black, Afro-Caribbean or of Caribbean descent, one woman self-identified as Japanese Canadian, one woman self-identified as South Asian, one woman as “mixed Arab and White”, one as Chinese and one as “mixed”.

## THE CONTEXTS FOR RACIAL PROFILING OF WOMEN

Analysis of the geographic and social spaces in which women reported being racially profiled suggest that the pretext of “security” is inadequate for capturing the full range of women’s experiences. Four women recounted experiences of being racially profiled by the police while driving. Six women spoke of being racially profiled by police in their own neighbourhoods. Ten women recounted experiences of being racially profiled while trying to cross the border, either at the airport or at a land crossing. Women recounted having their children’s diaper checked when trying to enter Jamaica, being pulled aside at the border because the family has a very traditional Middle Eastern name or, for another woman, because she and her boyfriend both had dread locks.

At the same time, the most frequently recounted experiences by the women in this study occurred by private security workers. Over half of the women interviewed reported being regularly racially profiled in retail stores. Indeed, for racialized women, these experiences are routine, even routinized and are rarely about violence, disorder or threats to public safety. Whether women are directly approached under the guise of “helping” them, or closely monitored from the minute they enter an establishment, they know that their racialized status means they are inherently suspect.

Three women reported being racially profiled by income support workers. That is, when making an application to receive social benefits, or when checking in with their benefits worker, they were not seen as being truthful about their financial need or their educational achievements. One of the women was racially profiled by child welfare authorities,

whom she believed acted hastily and without proper grounds when they permanently removed her son from her home. In her experience, this is a frequent occurrence.

Women had experiences with racist practices and racial profiling in the education system, both when they were children and as adult learners, as well as with respect to their own children. In some cases, the profiling was linked to presumed limited abilities of racialized children, or over-reacting to the behaviour of racialized children for being “disruptive”.

## IMPACTS OF RACIAL PROFILING ON WOMEN

The impact of these experience on these women is profound. Repeated incidents have widespread, long-term personal effects on racialized women. Women identified how racial profiling negatively shapes their self-esteem. “You’re still human right but sometimes people don’t see you as human just because of your colour.” One respondent, who is attending graduate school, felt less confident in presenting her ideas to her peers, while another woman noted that “you start to accept a lower standard of living than you should.” Some women did not feel like they could be themselves, or had to negotiate a public persona, in order to manage the inevitability of being racially profiled, and to negotiate entrenched stereotypes of racialized women, as “the angry black woman”.

Women spoke of how repeated experiences marginalized them, “othered” them, made them feel “out of place in some way” and made it difficult for them to feel fully engaged in society, as individuals, on their own terms. “So I sort of do live in that perpetual state of being aware that I’m not like everyone else.”

Perhaps most troubling is that some women do not themselves feel protected by those very agencies that suspect and mistreat them. Such routine and negative experiences undermine their confidence that they could turn to policing authorities, either public or private, when in need themselves. Incredibly, one participant who was a university student at the time of the interview, felt that the priorities of campus security did not include racialized women during heightened concerns over sexual assaults on campus when she was told that “you don’t need to be protected, like, they’re not going to go after you.”

## RESPONDING TO RACIAL PROFILING

Women offered a range of strategies to confront racial profiling both in the moment, as well as a general approach to challenging the practices. Some women indicated that they adopt a general strategy of compliance in order to make themselves “as acceptable and as non-threatening as possible”, regardless of the context.

While racial profiling by private security is the most common experience reported by the women in this study, it is also, in some ways, the situation in which the women expressed feeling the most freedom to resist, often by taking their business elsewhere. Action, organizing and educating future generations were seen as some of the more hopeful courses of action, regardless of the context.

## CONCLUSIONS

This research gives voice to women's experiences and confirm that these experiences are embedded in women's everyday lives in routine ways. The profoundly negative impact of even a single incident of racial profiling rings loud and clear. This sample of women is fully engaged in the community – virtually all had post-secondary education, most worked, and many volunteered in various capacities in the community. Yet they feel excluded from civic life, “othered” by everyday encounters with both state and non-state authorities, and are often not confident that they would be protected in a time of need. As confident as they are that the source of the problem is elsewhere, they were, at the same time, profoundly aware of the consequences of resisting or challenging in the moment. While they acknowledge an arsenal of strategies, experience tempers them.

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# RACIAL PROFILING IN THE INFORMATION AGE

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The internet disrupts democracy and turns Canada into a totalitarian dictatorship run by the secret police. This enables human rights violations on a massive scale. Computerized tools build racism into the heart of this new system. Predictive policing and sentencing algorithms automate racism. Government hacking and mass surveillance destroy democracy and concentrate power in the hands of Canada's state-sponsored terrorists — CSIS, CSE, and the covert branch of the RCMP.

Racial profiling is not hard to identify in meatspace. When police engage in carding or suspicionless stop-and-frisk in the street, for example, we as a society can perceive racial profiling at work. Awareness of the problem makes a public conversation possible, and puts solutions within reach.

But what about on the internet? We used to say we lived “in the real world” and went online. But in a very real sense, we now live online. Even if we never touch a computer, our world is built on computers. And the rules are different here. Power in the cyber domain changes the equation, and makes possible new forms of racial profiling that are far less obvious.

The Ontario Human Rights Commission (OHRC) currently defines racial profiling as

“any action undertaken for reasons of safety, security or public protection that relies on stereotypes about race, colour, ethnicity, ancestry, religion, or place of origin rather than on reasonable suspicion, to single out an individual for greater scrutiny or different treatment.” The OHRC adds that “profiling can occur because of

a combination of the above factors and that age and/or gender can influence the experience of profiling.”<sup>1</sup>

This paper will examine the ways in which racial profiling may ultimately reproduce itself in the cyber domain through the following mechanisms: 1) predictive policing, 2) sentencing algorithms, 3) targeted hacking tools, and 4) mass surveillance.

## PREDICTIVE POLICING

Predictive policing is an attempt to prevent crime by predicting where crime will happen next. Algorithms analyze large quantities of data to identify crime hot spots, rate citizens with a “heat score” that indicates their likelihood of committing a crime, and help deploy police resources more efficiently.<sup>2</sup>

But for these algorithms to work, they must be implemented impartially (that is, without a built-in racial profiling bias), and they must be trained on impartial data.

1 Ontario Human Rights Commission Inquiry Report, *Paying the Price: The Human Cost of Racial Profiling* (21 October 2003) at 6. Also available online: <http://www.ohrc.on.ca/en/paying-price-human-cost-racial-profiling/what-racial-profiling>. Emphasis in the original.

2 <http://www.theverge.com/2014/2/19/5419854/the-minority-report-this-computer-predicts-crime-but-is-it-racist>

On both counts predictive policing fails.

As Ronald Bailey wrote for *Reason*, “The accuracy of predictive policing programs depends on the accuracy of the information they are fed.”<sup>3</sup>

The ACLU of Massachusetts explains, “If an algorithm is only fed unjust arrest data, it will simply repeat the injustice by advising the police to send yet more officers to patrol the black area. In that way, predictive policing creates a feedback loop of injustice.”<sup>4</sup>

In other words, if past policing data skews heavily towards policing certain neighborhoods for certain types of offenses, then the predictive policing algorithm will do no more than “predict the past.”

Further, these algorithms are designed by private companies and their methodology is opaque to the public being policed. How does the algorithm work? Is there built-in bias — either conscious, or unconscious?

Shouldn't this kind of “pre-crime” policing be accompanied by full and open disclosure about how the system works?

If that weren't enough to seriously question the wisdom of predictive policing, an investigation by the *San Francisco Weekly* concluded that there is no public evidence that predictive policing is effective, writing, “The future of policing looks a lot like good branding.”<sup>5</sup>

The *Toronto Star* reports that predictive policing is already being deployed in Canada.<sup>6</sup> This does not bode well for Ontario and other provinces where information on “street-checks” or carding reveal that African Canadians and other racialized people already receive a disproportionate amount of attention from police services.

## SENTENCING ALGORITHMS

When judges hand down sentences in criminal courts across the United States, in many cases courts are now using a sentencing algorithm that rates each convict on the likelihood of recidivism.

However, an investigation by ProPublica found that the sentencing algorithm was biased against black convicts.<sup>7</sup>

Even the former US attorney general had concerns about the use of sentencing algorithms. ProPublica reports that in 2014 Eric Holder “warned that the risk scores might be injecting bias into the courts. He called for the U.S. Sentencing Commission to study their use. ‘Although these measures were crafted with the best of intentions, I am concerned that they inadvertently undermine our efforts to ensure individualized and equal justice,’ he said, adding, “they may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society.”<sup>8</sup>

The ProPublica investigation concluded that:

In forecasting who would re-offend, the algorithm made mistakes with black and white defendants at roughly the same rate but in very different ways.

- The formula was particularly likely to falsely flag black defendants as future criminals, wrongly labeling them this way at almost twice the rate as white defendants.
- White defendants were mislabeled as low risk more often than black defendants.

Machine learning is automated bureaucracy. Bureaucrats bring their personal biases and prejudices to their work, often unconsciously. The programmers who designed and build these kinds of algorithms do too.

Decisions that deprive citizens of their liberty are not improved by automating prejudice and then hiding behind the mysterious workings of an opaque computer program.

Are sentencing algorithms employed in sentencing convicts in Canadian courts? If they are, is it even possible to avoid the role that racial profiling plays within this kind of system?

## TARGETED HACKING TOOLS

Suspicionless searches by police based on race, creed, or country of origin violate Ontario's *Human Rights Code* (Code) — both online and off.

Police departments around the world now routinely hack into suspects' smartphones, laptops, tablets, even internet-connected home devices, like an Amazon Echo, in order to listen in using

3 <https://reason.com/archives/2012/07/10/predictive-policing-criminals-crime>

4 <https://privacysos.org/predictive>

5 <http://www.sfweekly.com/sanfrancisco/all-tomorrows-crimes-the-future-of-policing-looks-a-lot-like-good-branding/Content?oid=2827968>

6 <https://www.thestar.com/news/gta/2016/05/10/surveillance-and-predictive-policing-welcome-to-the-safety-state-of-tomorrow.html>

7 <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>

8 *Ibid.*



the device microphones, or watch using the device camera.<sup>9</sup> In June, 2016, a US appeals court ruled that police do not need a warrant to hack into a suspect's device.<sup>10</sup>

Suspicionless hacking “stop-and-frisk” of our smartphones and other devices is becoming a norm around the world. Such suspicionless searches disproportionately affect racialized groups, since, in this new world, smartphone security has become a luxury good that leaves the poor vulnerable to criminals and police abuse. Case in point, while Apple's iPhone has been widely recognized as one of the most secure computing devices that money can buy, Google's Android operating system, by contrast, although generally more affordable, is widely condemned for its poor security. This puts users at risk not only of financially-motivated malware, but makes it easy for police to hack into their phones. Android's poor security posture leaves the door open for racial profiling by police engaged in warrantless hacking of cell phones.

If not in use already, it appears that Canadian police forces are very interested in acquiring hacking tools. What rules then ultimately govern its use by police forces, such as the Toronto Police Services?<sup>11</sup> What prevents police services across all jurisdictions from hacking internet-connected devices based on racial profiling?

## MASS SURVEILLANCE

In 2013, leaks about the National Security Agency (NSA) in the U.S. by whistleblower and former Central Intelligence Agency employee Edward Snowden revealed that mass surveillance is an extensive and prominent feature not only of America's security apparatus, but also of Canada's. Specifically, private communications by virtually all citizens are being collected, stored, and analyzed without their knowledge or authorization.

The NSA pools this data with communications collected by the other members of the Five Eyes (FVEYES) spying alliance, which includes the spying agencies of the US, UK, Canada, Australia, and New Zealand.

Analyzing the vast amount of data collected requires these spying agencies to use algorithms to automate the process. As I have previously reported, the NSA used a machine learning algorithm to rate each citizen on their likelihood of engaging in terrorist activity.<sup>12</sup> An entire country's cell phone traffic was analyzed to rate people on their “terroristiness.” This NSA

SKYNET algorithm turned out to be flawed and mislabeled thousands of innocent Pakistanis as terrorists, who may have been droned to death as a result.

Although such revelations have not been divulged with respect to any security agency in Canada, it is not beyond the realm of possibility that a similar machine learning algorithm could be used to score Canadian citizens and residents on their likelihood of committing a terrorist or criminal act. This would certainly open the door to validating the kinds of racial profiling that are all too pervasive in our society.

## CONCLUSION

The struggle to defend human rights has moved online. In many ways, information technology enables human rights violations on a global scale. Hacking tools and mass surveillance used by spy agencies and police services subvert the rule of law and violate our human rights. The use of predictive policing and sentencing algorithms are increasingly being viewed as acceptable, despite clear examples of the role that racial profiling play in its function.

Defending human rights, as embodied by the *Code*, requires us to examine abuses not just “in the real world,” but also online.

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9 <https://motherboard.vice.com/read/here-are-all-the-sketchy-government-agencies-buying-hacking-teams-spy-tech>

10 <https://www.eff.org/deeplinks/2016/06/federal-court-fourth-amendment-does-not-protect-your-home-computer>

11 <https://news.vice.com/article/canadian-police-spies-eyed-hacking-team-tech-and-the-law-now-makes-it-easier-to-acquire>

12 <http://arstechnica.co.uk/security/2016/02/the-nsas-skynet-program-may-be-killing-thousands-of-innocent-people>

# HOW TO ERADICATE RACIAL PROFILING?

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The purpose of this paper is to present a model of organizational changes in law enforcement agencies to end racial profiling. The paper begins with a brief discussion on the prevalence of racial profiling and why ending it is critical. It is then followed by a presentation of the model with four pillars: strategic leadership; research; human resource management; and stakeholder engagement. In each of these pillars, components with high potentials to end racial profiling will be discussed.

## PREVALENCE OF RACIAL PROFILING

Disproportionate minority contacts by the law enforcement officers have been noted in the U.S., Australia and European countries. (Fitzgerald and Carrington, 2011: 451) In Canada, human rights commissions including the Alberta Human Rights Commission (2012) and the Ontario Human Rights Commission (2003, 2014) reported allegations of racial profiling (such as police stops, unreasonable questioning, requests for identification, retaining personal information) and Ontario court cases.

- Is an ineffective law enforcement strategy (Bourgue, *et al.*, 2009: 5-9, 80-81)
- Heightens racial tensions and destabilizes society (Wortley and Owusu-Bempah, 2009)
- Has adverse impact on racialized minorities (Ontario Human Rights Commission, 2003, 2014)

## WHY RACIAL PROFILING SHOULD END?

Racial profiling must end because it:

- Violates human rights legislation (Ontario Human Rights Commission, 2003: 1, 3)
- Is offensive to civil liberty (Bahdi, Parson and Sandborn, 2010)

## ENDING RACIAL PROFILING

This paper proposes a model for bias-free policing and focuses on what police services can do at their organizational level. The model is supported by recommendations from experts, police associations and governments, as well as concrete examples of what had already been put in place in the law enforcement sector.

The model has four pillars which aim at ending racial profiling in a multi-pronged manner:

- Strategic leadership
- Research
- Human resources management
- Stakeholder engagement

Key components in each of these pillars will be highlighted to illustrate how they can drive police services to a bias-free policing level, thus ending racial profiling simultaneously. These components are not meant to be exhaustive or complete, but they are considered pivotal in making policing bias-free.

## PILLAR 1: STRATEGIC LEADERSHIP

Strategic leaders are committed to create a conducive organizational environment for the success of a bias-free policing strategy; planning and carrying out the strategic changes based on evidence-based information; engaging people and mobilizing resources to execute the strategy; and ensuring the sustainability of a systemic approach to bias-free services. (Leach, 2006: 167)

Strategic leaders effect change in three priority areas — corporate value, policy and culture — in fostering a fertile environment for ending racial profiling.

- Value of accountability — “Accountability means holding officers responsible for their conduct”, making sure that their behavior advances the departmental goals, and making the actions of the officers and the leaders answerable to the wider community”. (McDevitt, Farrell, and Wolff, 2008: 7)
- Anti-racial profiling policy — Law enforcement leaders are responsible for developing a policy framework prohibiting the practice of racial profiling. (Leah, 2006: 153-191) This policy respects people’s right and procedural justice, protection of civil liberty, and alignment with legal standards.
- Culture of guardianship — Leaders are responsible to change the police culture from warriors to guardianship. There is a need to shift the fighting mindset (based on “we” versus “them” mentality and a “compliance to rules” model) to one of guarding democracy, building accountability, trust and legitimacy.

These areas of change have been recommended by governments and associations of police chiefs, and had been put in practice by police services in Canada and the U.S. Anti-racial profiling policy is now commonplace in most law enforcement agencies in the U.S. (Leach, 2006: 159)

## PILLAR 2: RESEARCH

There are three priority areas for examining racial profiling: police actions; police workforce and human resources management; and policing strategies. Appropriate solutions for ending racial profiling have to be evidence-based.

- Police actions — Interventions such as traffic and pedestrian stops could be studied by collecting quantitative data on who got stopped and qualitative information on the nature of complaints and public perception. Quantitative data may be compared with external benchmarks and/or internal benchmarks over time. Qualitative information on issues related to treatment, dispositions, and circumstances may be reviewed.
- Police workforce and human resource management — data based on analyses of the racial composition of police workforce, and reviews of strategies and methods of recruitment, selection, hiring, promotion, training, development, professional standards, succession planning and performance management are needed for verifying allegations, community dialogues, and finding solutions.
- Policing strategies — resources allocation and deployment strategies of police officers, or community policing strategies (as in confliction resolution and liaison) could be studied for their contribution to community perception and social impacts.

Both governments and police chiefs highly recommended research data as a base for problem-solving, planning, and community dialogues. Research on racial profiling is already a common practice in many police services in the U.S. As an example, more than 1,000 police services in Texas and nearly 1,000 police services in Illinois had already collected and analyzed traffic stop data back in 2004. (Hussey, 2006: 209-212, 216-230; Leach, 2006: 160, 167)

## PILLAR 3: HUMAN RESOURCE MANAGEMENT

In ending racial profiling, several human resource activities are useful in enabling employees to achieve the organizational goal of bias-free policing. They are staffing, training, and performance management.

- Staffing — The historical distrust that simmered through time between racialized minority communities and police services may be reduced through an equitable representation in the police workforce. (McDevitt, Farrell, and Wolff, 2008:15) While having more racial minorities in the police workforce does not automatically end racial profiling, it provides a neces-

sary step in restore community trust and legitimacy.

- Training — When the policing sector determines to eliminate racial profiling in its activities, the focus on bias-free community policing is in order. Accordingly, the roles of police officers have to be changed from traditional law enforcement to peacekeeping and community service in addition to the traditional ones. To accomplish this, the training approach, contents and skills development priorities have to be changed. (Meese, 1993: 2, 6-7)
- Performance management — A performance management model which focuses on the principles of community policing and procedural justice is critical for ending racial profiling because it enables supervisors to provide feedback to officers on their performance, detect their biases, develop measures to improve their performance, and/or empower them to adopt a value-guided approach in community policing. Its success is also based on the prevalence of internal procedural justice in police services, an early intervention system (which provides early warnings about racial profiling patterns), and an encouragement system (which rewards bias-free community policing behaviours).

Both governments and associations of police chiefs highly recommended a diverse police workforce and bias-free police training. Numerous police services in the U.S. and Canada have already put them in practice. Performance management based on the principles of community policing and procedural justice has only been recently recommended by the U.S. government, and several police services in the U.S. have started putting it in practice. Only a few police services in the U.S. have put in place the early intervention system to detect officers' racial profiling tendency. No data on the adoption of an encouragement system is available.

## PILLAR 4: STAKEHOLDER ENGAGEMENT

The purposes of engaging stakeholder groups are to solicit opinions from them, work together to identify problems and find solutions, foster better accountability, and create an emotional attachment and sense of ownership for all stakeholders. It is considered to be critical in ending racial profiling. (Bayley, Davis and Davis, 2015: 9-10).

- Community engagement - community engagement means a shift in the current policing culture from one that focuses on fighting against criminals to “engaging with communities”. The onus is on police services to keep community members about their work. Community members have an obligation to voice their concerns and put forward their suggestions. (Leach, 2006: 153-191)

- Employee engagement - In order to ensure that police officers are aligned with organizational priority in addressing the issue of racial profiling, they need to be involved in all stages of anti-racial profiling initiatives. Civilians working in police organizations responsible for communication, public liaison, legal issues, data system and technology have to also be on board on anti-racial profiling issues.

Governments and associations of police chiefs are very supportive of community engagement as a way to build bias-free police services. They, along with numerous police services, established joint-partnerships in driving bias-free policing.

## CONCLUSION

The four pillars of the model — strategic leadership, research, human resource management, and stakeholder engagement — have to be supportive of each other so as to maximize its impact on ending racial profiling.

Police services in Canada and the U.S. have been developing policies, programs and initiatives to end racial profiling and to promote bias-free policing. There is a growing momentum of pushing for change in that direction from the community and an increased acknowledgement from the governments and the policing sector that bias-free policing is the way to go.

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# COMMUNITY ENGAGEMENT AS A TOOL FOR COMBATING RACIAL PROFILING

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This paper argues that community engagement can be an effective way to combat racial profiling, both in terms of listening to the concerns of racialized Canadians and as a strategy to help police officers better understand and address those concerns. Such a strategy can strengthen community-police relations, add more coherence to police service operations, and contribute to a more dynamic approach to professional policing in a diverse society.

## INTRODUCTION

Racial profiling by police has emerged as one of the most pressing concerns for members of racialized communities across Canada. Police services are struggling to respond to these concerns, seeking to balance, on the one hand, uneasiness about admitting that these concerns are genuine and the culpability implications for their members, and, on the other hand, taking seriously the rights of racialized Canadians in a context where the mandate of these services is to serve and protect all citizens.

This paper advances the idea that community engagement can be an effective way to combat racial profiling, both in terms of listening to the concerns of racialized Canadians and as a strategy to help police officers to better understand those concerns. Community engagement theory recognizes the importance of involving all stakeholders, including the marginalized and voiceless, in the development process of police practices and initiatives (Duraiappah, Pumulo & Parry, 2005). Community engagement has been principally used by police for crime control and order maintenance — the enforcement side of policing. Using community engagement to combat

racial profiling requires extending it to the service delivery side of policing. Doing so can enhance community empowerment, add more coherence to police service operations, and contribute to a more dynamic understanding of professional policing in a diverse society.

## OTTAWA'S TRAFFIC STOP RACE DATA COLLECTION PROJECT

A model for this type of community engagement is provided by the Ottawa Police Service (OPS) in the case of their recent Traffic Stop Race Data Collection Project (TSRDGP). This project stems from a settlement with the Ontario Human Rights Commission in 2013 in a case involving a racial profiling complaint against the OPS by a young black man (<http://www.ottawapolice.ca/en/news-and-community/Traffic-Stop-Race-Data-Collection-ProjectTSRDGP.asp>). The authors both led the expert research team that designed and undertook the project.

Community engagement relies on police-community partnerships. Prior police studies suggest the two common and important goals of police-community partnerships are 1) to

create mutual understanding between police and the community about racial profiling; and 2) to provide a forum for each group to listen to the other's concerns. If the partnership is successful, then a third goal can be achieved: to develop working relationships that will arrive at joint solutions (Lamberth, *et. al.* 2005; Foster & Jacobs, 2016).

In order to achieve the three levels of police-community partnerships, the OPS has developed over the past decade the Partnership in Action (PIA) as the fundamental framework for strategic community engagement and partnerships. PIA aims to identify and build upon community involvement and engagement within policing. Beyond the mobilization of particular communities, the PIA is concerned with how to link micro-assets to the macro-environment for sustainable community-driven development.

PIA is a practical application of the concept of social capital in police work. Social capital refers to features of social organizations such as networks, norms, and trust which increase a society's productive potential (Putnam, 2000). It is built on a web of relationships that exist within any given community that allows people to succeed or advance through associating together. Social capital is present in the networks, norms, and social trust inherent in associations whose members work together in concerted collaborative action. In a literal sense, social capital is the store of good-will and obligations generated by social relations. As a police lever, it is a strategy directed towards expanding police organizational capabilities by engaging the rest of the community in policing solutions.

The TSRDCP formed a Community Police Advisory Committee (CPAC), comprised of sworn police officers and community members. The CPAC community advisors are for the most part select members from the long-standing Ottawa Police Service Community Police Action Committee known as COMPAC, which in turn is comprised of a coalition of active ethno-racial community member who have regularly consulted and worked with the OPS on other community-policing initiatives. The launching of CPAC leveraged the existing relationships between the community and the OPS, and empowered the advisory committee to serve as a mediator between members of racialized communities concerned about racial profiling and the police.

CPAC helped establish the research focus of the TSRDCP, the shape the research design strategy – down to the fundamental question of what 'race categories' would be in the data field – and the focus for the final analysis and report of findings. The advisory committee had an impact on every stage of the research project, working together with the researchers to develop and refine the methods to be used for data collection, and consult in the application and dissemination of research project information. After an initial 'feeling out' process marked by cautious communications, police and citizen members came to share experiences and ideas, challenge one

another's perspectives on the police and the community side, and ultimately deepen the discussion about race relations and racial profiling issues in the City of Ottawa.

## EFFECTIVE COMMUNITY ENGAGEMENT

Actualizing effective community engagement requires communication and consultation. The TSRDCP approach included the following issues for consideration:

- Identify any conflict of interest.
- Make sure that facilitators and scribes used at focus groups and workshops are clear about their role and have been briefed and/or trained.
- Ensure that the venues for the consultation sessions allow maximum participation, by assessing the location for access by people with disabilities and by public transport.
- Ensure that privacy and confidentiality guidelines are adhered to in relation to comments collected during the consultation.
- Anticipate and plan for any specific support that may be needed to enable some groups to participate in the consultation.

The range of engagement methods to empower citizens included:

- Project Web Page Updates: [ottawapolice.ca/race](http://ottawapolice.ca/race)
- Project Intranet/Wiki Page Updates for OPS members
- Project Email Box Monitoring: [racedata@ottawapolice.ca](mailto:racedata@ottawapolice.ca)
- Project Phone Line Monitoring:
- Project Updates to Stakeholders & Partners
- Project Updates/Reminders to OPS Members
- Ride-Alongs with Community and Media
- Questionnaires
- Community Sessions/Forums/Dialogues
- Project Update Reports to the Police Services Board
- Feedback & Focus Group Sessions

- Co-host a Focus Group
- Sign-ups for a Ride Along with Traffic Police
- Project Updates with Feedback/Survey Mechanisms
- Community Participation in Quality Assurance Reviews
- Project Update Reports to the Police Board
- COMPAC & CPAC Meetings
- Surveys & Questionnaires
- OPA-OPS Sessions for Members
- Social Media Forums
- Project Presentations

The TSRDCP and the research team sought to encourage a sense of community ownership over the race data project in part to ensure confidence in Ottawa's racialized community about the reliability of the research process and the data collected so as to strengthen the validity of the findings. Important steps to facilitate a sense of community ownership were put in place.

- Defining clearly the aims and parameters of the consultation.
- Engaging with the key participants and stakeholders in the consultation.
- Choosing the appropriate range of methods to engage all stakeholders in the consultation.
- Using strategies that maximize people's ability to participate.
- Ensuring coordination and avoid duplication.
- Providing regular updates on project progress.
- Informing people about opportunities to provide input and feedback.
- Providing feedback on the outcome of the consultation and resulting decisions to all participants, and to groups with an interest.

These steps enabled the TSRDCP internal management and the researchers to capitalize on the relationships developed with CPAC members to raise the profile of the project, build and maintain interest, raise awareness, and stimulate dialogue on the issues. In effect, data collection and analysis in the TSRDCP provided a structure for the OPS to work col-

laboratively with communities to combat racial profiling, and contribute to the non-bias policing goals of the Service.

## CONCLUSIONS

What differentiates the TSRDCP from other OPS community engagement initiatives lies in the cross-over from crime control into service integrity. The TSRDCP extended the vision of community engagement and strategic partnerships beyond the usual parameters of effective law enforcement into areas of quality service delivery and policing integrity; adding more nuance and breadth to the community engagement model. OPS community engagement initiatives before the TSRDCP have had a significant impact on various aspects of community development – in areas such as victim assistance, youth issues, gang problems, and so on. Community engagement in the race data study turns the lens back on the OPS and provides an opportunity for a kind of institutional self-examination; and genuine commitment to progressive organizational change. The result has been that community engagement not only benefited the TSRDCP, it has also generated an important broader discussion about race, race-based data collection and bias-free policing in Ottawa.

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# RACIAL PROFILING: THE UNINTENDED OUTCOME OF STREET CHECKS

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This paper argues that, from the perspective of members of the Association of Black Law Enforcers, “Street Checks” as a form of voluntary engagement with the public by police officers to stop and question people to gather information (i.e. intelligence) do not conform to the principles of validity and reliability as a fair and just means to gather intelligence.

Members of the Association of Black Law Enforcers (A.B.L.E.) acknowledge that the vast majority of police officers in our cities, provinces and indeed across Canada perform their sworn duties in an honourable, ethical and professional manner. We believe this to be true because we work with these officers and have witnessed exemplary practices amongst most officers. However, as Black Law Enforcers, we live and work in two worlds that have allowed us to develop unique perspectives. We work in a world that from a power perspective is predominantly non-racialized while, we interact, live and work in the Black community and as such understand the socio-political and justice related issues that can emerge when the issue of racial profiling is tabled.

The definition of racial profiling A.B.L.E. adopts is:

“Investigative or enforcement activity initiated by an individual officer based on his or her subjective stereo-

typical, prejudicial or racist perceptions of who is likely to be involved in wrong doing or criminal activity. This type of police misconduct can be unintentional, but can also be systemically facilitated when there are ineffective policy, training, monitoring and control mechanisms in a system.” (A.B.L.E. October, 2002)

“Street Checks” as a form of voluntary engagement conducted without limits can often be viewed as racial profiling. In Toronto, this police practice referred to as “carding”, involves stopping people on the streets and recording their personal information to input into a police database. In police parlance, carding allows police officers to stop and question people to gather information (i.e. intelligence) that is then stored indefinitely in a secure database. The practice of “Street Checks” is supported by many police services and based on three common themes or narratives. “Street Checks” are regarded as an approach to gather intelligence to prevent crime; protect the public, and to

enter the information into a comparative database with other information that can be used to prevent future crimes from being committed.

There is broad-based support for this police approach to crime prevention which is best illustrated in the May 2015 *CBC News* interview with Toronto Police Chief Mark Saunders who defended the current practice of carding (i.e. Street Checks) by stating that police rely on this practice to keep problems like gang violence in check in the city. According to Hamilton Police Services, they rely on these contacts and conversations, which they claim "...are not done randomly (but used) to proactively lead them to answers on crimes nearby" (Bennett, K. 2015). Currently, there are many other regional police services that have similar "Street Check" policies and practices including Hamilton and Peel region Police Services. The City of Hamilton Police Services report conducting 10 – 15 street checks daily. In terms of effectiveness, police services across the Province have routinely and consistently reported "Street Checks" are an effective information tool that is integral to their ability to maintain public safety and solve crimes.

Critics, particularly members from Toronto's Black Community, believe the practice of carding unfairly targets racial minorities and often, the practice can be considered a contravention of law. Police critics have for some time voiced serious concerns with this technique calling it another form of racial profiling. The stopping of a citizen by police with no articulated reason can also constitute arbitrary detention.

The working hypothesis of police practitioners in justifying the use of Street Checks as a means to prevent crime and solve crime has yet to be proven (OHRC, 2015). To date, our research has not been able to identify any statistical data specifically demonstrating how Street Checks are effective in helping to prevent or solve crimes (OHRC, 2013). A.B.L.E does not support the manner in which police currently pursue the indicated public safety objectives. More specifically, A.B.L.E and other advocates are concerned by the impact of individual officer subjectivity (OHRC, 2013) as it relates to the method in which police make decisions to determine "who" in the community poses a threat or risk, and the rationale provided by police on how these subjects are selected for "voluntary engagement-detention". Although it can be argued that Street Checks is a preventative approach to crime reduction in communities, the fundamental flaw in this argument is that an officer's subjective beliefs and ideas are used to determine if a person on the street potentially has information about crime in general or specific crimes. This subjectivity has led to the racialization of crime based on suspect descriptions.

There is increasing police data which demonstrates "Black youth" are disproportionately engaged and documented (OHRC, 2015) by Toronto and Peel Police at a much higher rate than in any other jurisdiction or population grouping. In the absence of other reasonable and reliable explanations

for this racial disparity, it can be argued the process of Street Checks has unintentionally reinforced racial profiling. This position is further supported by studies and analysis conducted by the *Toronto Star* indicating social factors such as "race, age, gender and where you live" are salient dynamics in determining who gets stopped and engaged (The Leadership Conference, 2011). The *Star*, in their analysis determined when looking at Black and White subjects of all ages, Blacks are three times more likely to be stopped. Black males aged 15-24 are stopped and documented 2.5 times more than White males the same age (Rankin, 2010; 2015). This police approach and activity is consistent with racial profiling. Studies showing disproportionate representation of young Black citizens in Street Check statistics supports A.B.L.E.'s view that Street Checks are a proxy for racial profiling. One MPP has been successful in convincing other provincial legislators to end this practice given the disproportionate representation of personal information in police databases that belong to a large number of Black youth who were neither subject to criminal investigation nor arrest.

The result of media scrutiny and public demands for police accountability in relation to Street Checks indicates claims this practice stops future crime has little to no validity or reliability. It is reasonable therefore to conclude that the absence of randomization in determining which citizens are approached by police, render Street Checks incompatible with the principle of validity and fairness as evidenced in the number of stops conducted and recorded by police involving Black youth.

In response to public outcry, the number of "Street Checks" were reduced and statistics indicate in July 2013, carding in Toronto dropped by (75%) compared to the previous year. This plunge in the number of contact cards documented by police coincided with the introduction of a carding receipt system that required officers to provide a copy of the contact card to each citizen stopped. Carding continued to stay very low in the following months (Rankin, 2014). Of particular interest to A.B.L.E. is that there was no appreciable increase in crime during the same time period despite the reduced number of Street Checks, thus undermining the stated police rationale that Street Checks are effective in catching criminals and preventing future crime!

A.B.L.E takes the position that if Street Checks are to be used as a means to collect private information from citizens, any instrument used to collect such data must be empirically tested and found to be valid, reliable, and legal under the law. In addition the Street Checks must be randomly and justly applied to all citizens in order to prevent any potential infringement of citizen's legal rights guaranteed by the Canadian Charter of Rights and Freedoms (1982). After careful consideration of the information presented in this submission it is clear "Street Checks" do not conform to the principles of validity, reliability, or empirical methods used to argue and or support a position. These principles are essential elements required to reasonably increase public confidence in the

manner police engage citizens in non-investigative or arrest circumstances and to guard against the erosion of public trust toward their police services. The question for the provincial government to consider was whether there is credible evidence to support the continuation of the police practice of “Street Checks.” This question is posed in the context of weighing the risks and rewards offered by this troubling and ineffective practice according to the preponderance of evidence available. Police discretion and its treatment of citizen’s dates back to the concept of the “social contract” which is the implicit agreement between a government and its citizens, developed by philosophers Thomas Hobbes (1588–1679) and John Locke (1632–1704). Racial profiling in the form of Street Checks is not compatible with our vision of police services being administered in a fair, equitable and human rights compliant manner. As an internationally recognized organization, members of A.B.L.E. share a broad base of practical experience that can support the development and maintenance of meaningful.

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# THE OTTAWA TRAFFIC STOP RACE DATA COLLECTION PROJECT

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The Traffic Stop Race Data Collection Project (TSRDCP) is a landmark study we conducted that disaggregated and analyzed two years of race data collected by the Ottawa Police. This paper outlines the results of the study, which have far-reaching policy implications for the elimination of discrimination in Canadian law enforcement and the establishment of race-neutral justice.

The Traffic Stop Race Data Collection Project (TSRDCP) required Ottawa police officers to record their perception of the driver's race, by observation only, for traffic stops over a two-year period from June 27, 2013 to June 26, 2015. Police participated in the study as part of a human rights settlement agreement between the Ottawa Police Service (OPS) and the Ontario Human Rights Commission (OHRC), in regard to the case of 18-year-old Chad Aiken, an African Canadian who said he was taunted and punched by a police officer who pulled him over while driving his mother's Mercedes-Benz. We released a comprehensive report on the findings from the project on October 24, 2016.

The TSRDCP study represents the largest and most comprehensive undertaking of race based data collection in Canadian policing history. A total of 81,902 records of traffic stops were examined. Each record included complete information on race, sex and age, along with complete information on police districts, reasons for traffic stops and outcomes. The

record did not include the time of day or the neighbourhood where the stop occurred. The officers entering the race data reported perceiving the race of the driver prior to the stop in 11.4% of the cases.

This research project addressed three issues:

## INCIDENCES OF TRAFFIC STOPS

Do drivers of different race groups have disproportionately high incidences of traffic stops, when compared with their respective driver populations in Ottawa? Research findings showed that:

- The study examines 81,902 traffic stops where officers recorded their perception of the driver's race: 69.3% White (56,776), 12.3% Middle Easterner (10,066), 8.8%

Black (7,238), 4.7% E. Asian /SE Asian (3,875), 2.7% S. Asian (2,195), 1.9% Other racialized minorities (1,545), and 0.3% Indigenous Peoples (207).

- In Ottawa, Middle Easterner and Black groups, irrespective of their sex and age, are the two race groups with disproportionately high incidences of traffic stops. Middle Easterner Drivers were stopped 10066 times, which constituted about 12.3% of the total stops over the two year period. However, these drivers represent less than 4% of the total driving population in Ottawa. This means that Middle Easterner Drivers were stopped 3.3 times more than what you would expect based on their population. Black Drivers were stopped 7238 times, which constituted about 8.8% of the total stops over the two-year period. However, these drivers represent less than 4% of the total driving population in Ottawa. This means that Black Drivers were stopped 2.3 times more than what you would expect based on their population.
- With the exception of Indigenous peoples, men aged 16-24 of all race groups (including White) have disproportionately high incidences of traffic stops. The disproportionalities ranged from 64.21% (E. Asian/ S.E. Asian) to 1100.39% (Middle Easterner).
- Middle Easterner Male Drivers aged 16-24 were stopped 2302 times, which constituted about 2.8% of the total stops over the two year period. However, these drivers represent less than 0.25% of the total driving population in Ottawa. This means that young Middle Easterner male drivers were stopped 12 times more than what you would expect based on their population. Black Male Drivers aged 16-24 were stopped 1238 times, which constituted about 1.5% of the total stops over the two year period. However, these drivers represent less than 0.2% of the total driving population in Ottawa. This means that young Black male drivers were stopped 8.3 times more than what you would expect based on their population. White Male Drivers aged 16-24 were stopped 6172 times, which constituted about 7.5% of the total stops over the two year period. However, these drivers represent about 4.3% of the total driving population in Ottawa. This means that young White male drivers were stopped 1.7 times more than what you would expect based on their population.

## REASONS FOR TRAFFIC STOPS

Do racialized minority drivers experience disproportionately high incidences of specific reasons for traffic stops when compared with their White counterparts in Ottawa? Research findings showed that:

- The reason most used by police officers in traffic stops is “provincial and municipal offenses”. It was used in 79,603 of the 81, 902 traffic stops (97.19%). Police officers did not utilize “provincial and municipal offenses” for traffic stops in a disproportional manner for any racial minority groups.
- When compared with the White group, “criminal offences” reason has been used disproportionately by police officers for five of the six racialized minority groups. The data is inconclusive about Indigenous peoples with regard to this issue because the number of stops citing “criminal offenses” was too low to draw any conclusions.
- Similarly, “suspicious activities” reason has been used disproportionately by police officers for four racialized minority group - Indigenous peoples (99.37%), Black (148.40%), Middle Easterner (133.70%), and other racialized minorities (132.78%).

## OUTCOMES OF TRAFFIC STOPS

Do racialized minority drivers experience disproportionately high incidences of specific outcome of traffic stops when compared with their White counterparts in Ottawa? Research findings showed that:

- All race groups (including White) have received similar proportions of charges (44.65%) from police officers after traffic stops.
- All race groups (including White) have received similar proportions of warnings (41.29%) from police officers after traffic stops.
- Indigenous peoples (37.77%), Black (47.28%), Middle Easterner (36.84%), and other racialized minorities (28.21%) groups experienced disproportionately high incidences of “final (no action)” outcomes of traffic stops.

## CONCLUSIONS

Traffic stop data have constraints and benefits as a means of measuring whether policing in a jurisdiction is racially biased. The limits of social science preclude researchers from drawing definitive conclusions from the data regarding the existence or lack of racial bias.

However, the TSRDCP in its comprehensiveness and scope provides a significant step forward in providing an evidentiary base for rational understanding and action. The report is

highlighted by the finding that Middle Eastern Drivers were stopped 3.3 times, and Black Drivers were stopped 2.3 times their ratios in the driving population of Ottawa. The factual coherence provided by all of the disaggregated race data can be interpreted as at least prima facie evidence of problematic police-minority relations; and supports the call by racialized minority communities for the Ottawa Police Service to closely examine their policies and practices, and take action to address and prevent racial discrimination.

In this respect, the results can serve as a basis for constructive dialogue between police and residents, which can lead to

1) increased trust and cooperation, and 2) effective action plans for reform.

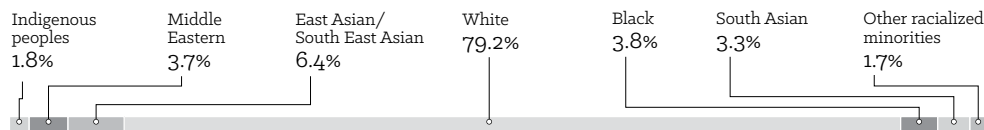
The TSRDCP study should be viewed as a pioneering example and template for how the collection of disaggregated race data can be used as a diagnostic tool to help police services, in concert with community stakeholders, set priorities for addressing the problem or perception of racial profiling in modern Canadian cities. The complete report and all supporting data can be found at: <https://www.ottawapolice.ca/en/news-and-community/Traffic-Stop-Race-Data-Collection-ProjectTSRDCP.asp>

### RACE DATA AND TRAFFIC STOPS IN OTTAWA

Police officers recorded their perception of drivers' race in all traffic stops from June 2013 to June 2015. A total of 81,902 traffic stops were examined, with information on the perceived race, sex and age of the driver, reasons for the stops and what the outcome was.

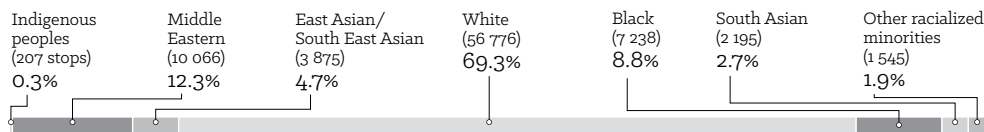
#### RACE OF DRIVER DISTRIBUTION IN OTTAWA

Based on national household survey, 2011



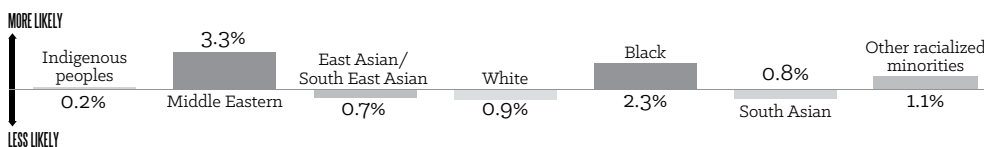
#### RACE OF DRIVER IN TRAFFIC STOPS

Based on officers' perception of drivers' race in 81,902 traffic stops



#### WHO IS MOST LIKELY TO BE STOPPED?

Two racial groups have disproportionately high incidence of being pulled over by Police.



Source: Lorne Foster & Les Jacobs, York University, Ottawa Police Service