

**PROVING RACIAL PROFILING:
PERSPECTIVES FOR CIVIL CASES**

M^e Michèle Turenne, legal counsel
Research and planning division

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Jacinthe Gagnon
Secretary of the Commission

Text processing

Chantal Légaré, secretary
Research and planning division

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GENERAL INTRODUCTION

Like several other major international texts¹ on human rights, the preamble to the Québec *Charter of human rights and freedoms* proclaims that “[...] all human beings are equal in worth and dignity, and are entitled to equal protection of the law.”²

Section 10 of the Québec *Charter* provides explicit protection against discrimination:³

“Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.”

Section 15 of the *Canadian Charter of Rights and Freedoms*⁴ is similar in effect:

“15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

Racial profiling is a form of discrimination. The Commission des droits de la personne et des droits de la jeunesse,⁵ which is required to promote and uphold, by every appropriate measure, the principles enunciated in the Québec *Charter*, and whose responsibilities include making a non-adversary investigation into any situation which appears to the Commission to be a case of discrimination,⁶ adopted the following definition of racial profiling in June 2005:⁷

¹ See: *Universal Declaration of Human Rights*, United Nations, G.A. Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, U.N. Doc. A/810 at 71 (1948); *International Covenant on Civil and Political Rights*, G.A. Res. 2200 A (XXI) dated 16 December 1966; *International Convention on the Elimination of All Forms of Racial Discrimination*, G.A. Res. 2106 (XX) dated 21 December 1965.

² Preamble to the *Charter of human rights and freedoms*, R.S.Q., c. C-12, hereinafter referred to as the Québec *Charter*.

³ See also section 10.1: “No one may harass a person on the basis of any ground mentioned in section 10.”

⁴ Enacted as Schedule B to the *Canada Act*, 1982 (U.K.), 1982, c. 11, hereinafter referred to as the *Canadian Charter*.

⁵ Hereinafter referred to as the Commission.

⁶ Section 71, Québec *Charter*.

⁷ COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Racial Profiling: Context and Definition*, Michèle Turenne, (Cat. 2.120-1.25.1) 2005, p. 18. This document reviews the underlying factors for racial profiling and the main definitions found in the doctrine and case law. [On line] <http://www.cdpcj.qc.ca>

See also “*Profilage racial*” *tour d’horizon*, Michèle Turenne, advocate, with Noël Saint-Pierre, advocate, (Cat. 2.500.114), a paper read on June 4, 2004, at the cultural communities workshop at the annual congress of the Bar Association. *Deuxième version, juillet 2004*. [On line] www.cdpcj.qc.ca

“Racial profiling is any action taken by one or more people in authority with respect to a person or group of persons, for reasons of safety, security or public order, that is based on actual or presumed membership in a group defined by race, colour, ethnic or national origin or religion, without factual grounds or reasonable suspicion, that results in the person or group being exposed to differential treatment or scrutiny.

Racial profiling includes any action by a person in a situation of authority who applies a measure in a disproportionate way to certain segments of the population on the basis, in particular, of their racial, ethnic, national or religious background, whether actual or presumed.”

In general, racial discrimination is not expressed openly, making it difficult to gather enough relevant evidence to lead to a conviction.⁸ More often than not, racial discrimination is found in a more subtle, insidious form.⁹ The behaviour involved may be conscious or unconscious, and may be based on the “stereotyping” and “racializing” of individuals:¹⁰

“One of the most obvious ways in which people experience racial discrimination is through stereotyping. Stereotyping can be described as a process by which people use social categories such as race, colour, ethnic origin, place of origin, religion, etc. in acquiring, processing and recalling information about others. Stereotyping typically involves attributing the same characteristics to all members of a group, regardless of their individual differences. It is often based on misconceptions, incomplete information and/or false generalizations. Practical experience and psychology both confirm that anyone can stereotype, even those who are well meaning and not overtly biased. While it may be somewhat natural for humans to engage in racial stereotyping it is nevertheless unacceptable.”¹¹

A discriminatory type of behaviour that resembles racial profiling may be an isolated event, or it may reflect a situation of systemic or institutionalized discrimination, in other words “[translation]

⁸ See: Bill BLACK, “Le processus des droits de la personne et les plaintes de discrimination raciale” (Fall 2004), 3:3 *Diversité canadienne*. [On line] www.ohrc.on.ca/french/consultations/race-policy-dialogue-paper-bb.pdf

COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Pauvreté et droit au logement en toute égalité : une approche systémique*, Muriel Garon, (Cat. 2.122.17.1), 1997.

⁹ See *Raheja v. Newfoundland (Human Rights Commission)* (1997), 155 Nfld. & P.E.I.R. 38, par. 32.

¹⁰ The use of the term “racialized” is increasingly common in the social sciences: “[translation] [...] the idea that socio-economic, cultural and political differences between human groups may be partly or entirely based on biological and genetic disparities has been largely dismissed by most researchers in the social sciences. On the other hand, although biological race has no explanatory value in sociological terms, the same cannot be said of “social race”, in other words race as a social construct. In addition, prejudice and discrimination based on race, as well as the resulting inequalities, remind us that race, although originally an ideological fiction, still has discernable social effects that researchers cannot afford to ignore. [...] This is why many researchers prefer to refer to “racialization” and “racialized groups” rather than to race and racial groups [...]” Daniel DUCHARME and Paul EID, “La notion de race dans les sciences et l’imaginaire raciste : la rupture est-elle consommée?”, in *L’observatoire de la génétique*, no. 24 – September-November 2005, p. 4. [Online] www.ircm.qc.ca/bioethique/obsgenetique/cadrages/cadr2005/c_no24_05/c_no24_05_02.html

¹¹ ONTARIO HUMAN RIGHTS COMMISSION, *Policy and Guidelines on Racism and Racial Discrimination*, 2005, p. 18. [On line] www.ohrc.on.ca/english/publications/racism-and-racial-discrimination-policy.pdf

resulting from the interaction of practices, decisions or behaviour patterns, whether individual or institutional, that have a prejudicial effects, intentionally or unintentionally, on the members of groups covered by section 10 of the *Charter* [...].”¹² As the Commission on Systemic Racism in the Ontario Criminal Justice System noted in its report, “Racialization may produce racial inequality in social systems, which are organized processes for delivering services.”¹³

The report went on to state as follows:

“Decision-making inserts racialization into systems when the standards or criteria for making decisions reflect or permit bias against racialized people. Standards and criteria are part of a system’s operating norms and may be formal and explicit in laws, policies and procedures. Or they may be informal, arising from accepted ways of doing things.”¹⁴

The individual representations of agents in a position of authority are not generated spontaneously. They feed from a collective “pool” of stereotypical social representations. According to lawyer Noël Saint-Pierre, “[translation] [...] the perceptions held by the forces of order with regard to a given social group result from experience, often misunderstood or poorly assimilated, but nevertheless anchored in the realities faced by the agents of the forces of order, at least as much as they result from openly racist attitudes among the agents.”¹⁵

In *R. v. Brown*, the Ontario Court of Appeal points out that racial profiling is not always based on a conscious process:

“The attitude underlying racial profiling is one that may be consciously or unconsciously held. That is, the police officer need not be an overt racist. His or her conduct may be based on subconscious racial stereotyping.”¹⁶

It is important to remember that, as established by the case law, there is no need to show intent in a case of discrimination, since the discriminatory effects of the act in question are sufficient.¹⁷

¹² Marie-Thérèse CHICHA, *Discrimination systémique – fondement et méthodologie des programmes d’accès à l’égalité*, Cowansville, Éditions Yvon Blais, 1989, p. 85.

¹³ *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, Toronto, Queen’s Printer for Ontario, 1995, p. 51 (co-chairs: D. Cole and M. Gittens).

¹⁴ *Op. cit.*, p. 56.

¹⁵ “Le “profilage” racial devant les tribunaux”, in Service de la formation permanente, Barreau du Québec, vol. 211, *Développements récents en droit criminel (2004)*, Cowansville, Éditions Yvon Blais, p. 75, 78. This documents deals with various aspects of the administration of justice in criminal cases involving racial profiling.

¹⁶ *R. v. Brown* (2003-04-16) ONCA C37818, par. 8.
[On line] www.ontariocourts.on.ca/decisions/2003/april/brownC37818.pdf

¹⁷ See: *Ont. Human Rights Comm. v. Simpsons-Sears* [1985] 2 S.C.R. 536.
[On line] www.lexum.umontreal.ca/csc-scc/en/pub/1985/vol2/html/1985scr2_0536.html
Andrews c. Law Society of British Columbia, [1989] 1 S.C.R. 143.
[On line] www.lexum.umontreal.ca/csc-scc/en/pub/1989/vol1/html/1989scr1_0143.html

In a case of racial profiling, the treatment of the victim is different from the treatment generally accorded a member of a “non racialized” group. This comparison is often necessary but the comparative elements are seldom available, making it difficult to show that racial profiling has occurred, as pointed out by the Ontario Court of Appeal in *Brown*:

“A racial profiling claim could rarely be proven by direct evidence. This would involve an admission by a police officer that he or she was influenced by racial stereotypes in the exercise of his or her discretion to stop a motorist. Accordingly, if racial profiling is to be proven it must be done by inference drawn from circumstantial evidence.”¹⁸

Starting from this observation, and in light of the definition of racial profiling established by the Commission and the doctrine and case law in this area, this document sets out the elements that can be used to prove racial profiling, especially in cases where a civil remedy is sought. The guidelines given are not definitive; they may well change as new situations occur.

¹⁸ *Op. cit.*, note 16, par. 44.

PART ONE

**PROVING DISCRIMINATION AND RACIAL PROFILING IN CIVIL CASES¹⁹:
IDENTIFYING FACTS AND CIRCUMSTANTIAL EVIDENCE**

PREMISE

First, to allege racial profiling based on the definition set out by the Commission, it must be shown that the respondent or respondents were acting in a situation of authority.

Since this form of discrimination is generally based on grounds of discrimination that are clearly apparent,²⁰ such as race, colour, ethnic or national origin or religion, it must also be shown that the person in a situation of authority was able to make a link between the victim and the actual or presumed reason for the discrimination.

Once this framework is established, it is important to note that the “racialized” groups traditionally most likely to encounter racial profiling in North America, because of the stereotypes associated with those groups, are Blacks, Latin Americans and Natives. However, with the expansion of the fight against international terrorism, these especially vulnerable groups have been joined by individuals of Arab origin or of the Muslim faith.²¹

¹⁹ In some cases, the evidence may lead to the conclusion that there was discrimination under section 10 of the Québec *Charter* without necessarily linking the facts and events to the definition given for racial profiling.

²⁰ In some cases, the name or dress of a person is enough to link the person to a prohibited ground for discrimination.

²¹ SEE: David M. TANOVICH, *The Colour of Justice : Policing Race in Canada*, Toronto, Irwin Law ed., 2006; *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, *op. cit.*, note 13.

The *Anti-Terrorist Act* (S.C. 2001, c. 41), may, in the opinion of many people, lead to discrimination.

See: ONTARIO HUMAN RIGHTS COMMISSION, *op. cit.*, note 11, p. 8:

“A contemporary and emerging form of racism in Canada has been termed “Islamophobia”. Islamophobia can be described as stereotypes, bias or acts of hostility towards individual Muslims or followers of Islam in general. In addition to individual acts of intolerance and racial profiling, Islamophobia leads to viewing Muslims as a greater security threat on an institutional, systemic and societal level.”;

Emerson DOUYON, “L’impact du 11 septembre sur les communautés ethnoculturelles au Canada”, in *Terrorisme, droit et démocratie. Comment le Canada est-il changé après le 11 septembre?*, Institut canadien d’administration de la justice, Éditions Thémis, 2002, p. 193-197;

Denise HELLY, “Are Muslims discriminated against in Canada Since September 2001?”, in *Journal of Canadian Ethnic Studies*, Fall 2004;

LIGUE DES DROITS ET LIBERTÉS, *Nous ne sommes pas en sécurité; nous sommes moins libres*, January 2004;

Selwyn A. PIETERS, “Expanding the Boundaries of Human Rights Litigation – Post 9/11, Racial-Profiling and the Impact of the Pieters Settlement”, Paper prepared for the Spinlaw Conference (Faculty of Law, University of Toronto, and Osgoode Hall Law School, March 08, 2003).

Other grounds on which discrimination is prohibited under section 10 of the Québec *Charter* can be a contributing factor in cases of discrimination, especially where racial profiling is involved. This “multifactoral” discrimination will be analyzed using an “intersectional” approach.²²

For example, in *Radek*,²³ the British Columbia Human Rights Tribunal ruled that the physical disability of the complainant, an Aboriginal woman, and her social standing were contributing factors in the racial profiling. Similarly, a young, poor Black male cumulates several risk factors: age, gender, ethnic or racial background, and social standing.²⁴

However, the social standing factor is easily eclipsed by the factor of ethnic or racial background.²⁵ Canada’s first woman Muslim senator, Mobina Jaffer, has spoken eloquently about his point, recounting²⁶ how her husband was subjected to a stringent check at Ottawa airport because he matched the “post 9/11” security profile as a man with an Arab- or Muslim-sounding name. Similarly, a young, Black man from a wealthy background is a potential victim of racial profiling, depending on circumstance or place. Dress, the possession of a luxury car, presence in a wealthy neighbourhood or in a place considered to be “high risk” (a crime scene or a high-crime area, a border point, etc.) are all factors that could lead to the racial profiling of an individual belonging to a “racialized” group.²⁷

1 MAIN TYPES OF EVIDENCE

In this section, we will present illustrations drawn from the case law and situations that provide guides for the identification of evidence that can be used to prove racial profiling. The facts may come from either civil, or from criminal or penal, cases since, in both types of proceedings, evidence to prove discrimination²⁸ is assessed using the balance of probabilities;²⁹ in other

²² In other words, an accumulation of grounds for discrimination that interweave and reinforce each other. ONTARIO HUMAN RIGHTS COMMISSION, *An intersectional approach to discrimination addressing multiple grounds in human rights claims (Discussion Paper)*, 2001. [On line] www.ohrc.on.ca

²³ *Radek v. Henderson Development (Canada) Ltd. and Securiguard Services (No. 3)*, 2005 BCHRT 302.

²⁴ *R. c. Campbell*, C.Q. Montréal, n° 500-01-004657-042-001, 27 January 2005, Westmoreland-Traoré j. [On line] www.canlii.org/qc/cas/qccq/2005/2005qccq10506.html

²⁵ See David HARRIS, “Driving While Black: Racial Profiling on our Nation’s Highways”, *An ACLU Special Report* (June 1999), USA.

²⁶ At a brunch lecture organized by the Centre de recherche-action sur les relations raciales (CRARR), held on November 30, 2003 in Montréal.

²⁷ *Règlement Pieters v. Department of National Revenue Ruling 1*, 2001, TCDP. [On line] www.chrt-tcdp.gc.ca/search/view_html.asp?doid=353&lg=_e&isruling=1

Johnson v. Nova Scotia Human Rights Commission, (2003); 48, C.H.R.R. D/307. [476]. p. 82 [On line] www.gov.ns.ca/humanrights/publications/KJdecision.pdf

R. v. Khan [2004] O.J. No. 3819 (Ont. C.J.); *Brown*, *op. cit.*, note 16;

D. HARRIS, *op. cit.*, note 25; Scot WORTLEY, “The Good, the Bad and the Profiled: Race, Deviant Activity and Police Stop and Search Practices”, Centre of Criminology, University of Toronto, Annual Woodsworth College Public Lecture, November 7, 2002.

²⁸ Discrimination is a “civil” act.

(... suite)

words the complainant³⁰ “must prove that the existence of a fact is more probable than its non-existence.”³¹

1.1 Grounds for the intervention, interception or arrest

Evidence must be found to show that the intervention, interception or arrest was based on the “racial” background (physical appearance, name, or clothing linked to one or more factors for discrimination listed in the definition of racial profiling) of the persons apprehended.

- In *Brown*,³² for example, the question of racial profiling is dealt with as follows by the Ontario Court of Appeal:

“There was only one issue raised at the ensuing trial: what was the reason for the officer stopping the respondent on the Don Valley Parkway? Was it because the respondent was speeding and had twice crossed out of and back into the lane in which he was travelling, as testified to by the officer, or was it because he was a young black male driving an expensive car?”³³

In other criminal trials, for example *R. v. Khan*³⁴, *R. v. Campbell, Alexer*³⁵, it was decided that on the balance of probabilities, the race of the person intercepted had played a determining role in the police officer’s decision to intervene.

- In *Khan*, the Ontario Superior Court of Justice, after concluding that a violation of sections 8 and 9 of the *Canadian Charter* had led to the finding of incriminating evidence of cocaine in the vehicle of the accused, and that use of the evidence would be likely to bring the administration of justice into disrepute under section 24(2) of the *Canadian Charter*³⁶, explains:

“[...] Why did they single out Mr. Khan on Marlee Avenue at about noon on a Monday in October and decide to search his car? Because he was a young black

A criminal act must be proved “beyond any reasonable doubt” under the principle of presumption of innocence enshrined by the *Canadian Charter* (section 11(d)).

²⁹ Article 2804 C.C.Q. (*Civil Code of Québec*, S.Q. 1991, c. 64).

³⁰ For a proper understanding of this text, it is important to note that in criminal cases, the accused may allege racial profiling as a defence. The burden of proof (on a balance of probabilities) is placed on the accused, who from this point of view is the complainant. In a civil case, the victim of discrimination is also the complainant.

³¹ Jean-Claude ROYER, *La preuve civile*, 3^e éd., Cowansville, Éditions Yvon Blais, 2003, p. 113.

³² *Op. cit.*, note 16.

³³ *Id.*, par. 5.

³⁴ *Op. cit.*, note 27.

³⁵ *Op. cit.*, note 24.

³⁶ *Canadian Charter*, section 8: “Everyone has the right to be secure against unreasonable search or seizure.”; section 9: “Everyone has the right not to be arbitrarily detained or imprisoned.”; section 24 (2): “Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.”

male driving an expensive Mercedes [...] Having concluded that the officers in this case fabricated their evidence in respect of the search of Mr. Khan's car, I cannot find their evidence to be at all reliable with respect to the events leading up to the stop [...] I accept his evidence that he did nothing to cause the officers to stop him. In any event, even if there had been some minor thing about his driving, I do not believe that was the real reason he was stopped. The police stopped him for an improper purpose. Mr. Khan was targeted for this stop because of racial profiling, because he was a black man with an expensive car."³⁷

- In *Campbell*, Westmoreland-Traoré J. observes that there were no reasonable grounds for pursuing the accused and searching him after his arrest. Referring to *Simpson*, a decision by the Court of Appeal for Ontario,³⁸ the judge explains:

"[...] detention can only be justified if the officer has some articulable cause or a constellation of objectively discernable facts which provide a reasonable basis to suspect that the person detained is criminally implicated in the activity under investigation. Simple intuition is insufficient, as is past experience or a hunch [...]"³⁹

At the time of detention and subsequent arrest, the officers did not verify the nature of the conditions imposed on the accused nor their subsistence. They did not check on their computer. The Court has already found the information from his colleague not to be sufficiently reliable. He did not have objective grounds for his belief that reasonable grounds existed to detain the accused nor that reasonable and probable grounds existed to arrest him. The officer was required to have objective as well as subjective grounds for his belief."⁴⁰

After analyzing various other cases involving racial profiling,⁴¹ arbitrary detention or unreasonable searches,⁴² the judge commented:

"[...] Socio-economic status is a bifurcated indicator. Young black males are the object of racial profiling if they are well to do and driving expensive cars; they are also the object of racial profiling when they are poor. In this case, no indicators place Alexer Campbell within the economically well to do category. [...]"⁴³

³⁷ *Khan*, *op. cit.*, note 27, par. 68.

³⁸ *R. v. Simpson* [1993] O.J. No. 308 (Ont. C.A.).

³⁹ *Campbell*, *op. cit.*, note 24, par. 70.

⁴⁰ *Id.*, par. 92.

⁴¹ *Brown*, *op. cit.*, note 16, *Khan*, *op. cit.*, note 27.

⁴² *R. v. Calderon and Stalas* 2004 (Ont. C.A.).

[On line] www.ontariocourts.on.ca/decisions/2004/august/C38499.pdf

R. c. Ferdinand, 2004 Can LII 5854 (ON S.C.)

[On line] www.canlii.org/on/cas/onsc/2004/2004onsc11794.html

R. c. Mann [2004] 3 S.C.R. 59

[On line] www.lexum.umontreal.ca/csc-scc/en/pub/2004/vol3/html/2004scr3_0059.html

⁴³ *Campbell*, *op. cit.*, note 24, par. 81.

Whereas in *Brown* and *Khan* the accused individuals were driving luxury cars, Alexer Campbell was driving in a taxi through a poor neighbourhood. In any case, the stereotype with which the accused individuals were associated was one attributed to Black people, namely a propensity to conduct illicit activities in certain circumstances.

In *Campbell*, as in *Khan*, the credibility of the witnesses at the trial was crucial, and a determining element.⁴⁴ After concluding that sections 8 and 9 of the *Canadian Charter*⁴⁵ had been violated, the incriminating evidence (in *Campbell*, the possession of marijuana) was excluded under section 24 (2) of the *Charter*.⁴⁶

- With regard to analyzing evidence of racial profiling in a civil case, we will look at *Johnson*. In this case, the Board of Inquiry of the Nova Scotia Human Rights Commission concluded that the interception of the complainant's vehicle for a routine check was motivated primarily by the occupants' race (they were Black), and was discriminatory because based on racial profiling.⁴⁷

Briefly, the events were as follows. Two Black men in a sports car registered in Texas were driving on a highway near Halifax, Nova Scotia, at a time when the road was quiet. Two police officers driving in the opposite direction, noticing a sports car with foreign registration, turned around to follow it. They issued tickets for driving without proof of insurance and proof of Registration, and ordered the vehicle to be towed. In fact, the police officers were unfamiliar with the Texas documentation presented, and did not take the time needed to understand the argument of the vehicle's owner that the documentation was valid. The next day, another police officer concluded that the seizure of the vehicle was an administrative error, and returned it to its owner, Mr. Johnson, a well-known boxer from Nova Scotia. Mr. Johnson filed a complaint for discrimination with the Nova Scotia Human Rights Commission. During the hearing, he testified that he had been stopped 28 times by the police without valid reason⁴⁸ between 1993 and 1998 while visiting the region with his car.

The Board of Inquiry found that the race of the car's occupants was the determining element in the police officers' decision to intervene. They key passage states as follows:

"I infer that once Constable Sanford was aware of the race of the occupants of the vehicle, this fact confirmed his suspicions that something was amiss. It was an operative element in his decision-making, though mixed in with other legitimate factors. I am not required to find whether this resulted from a conscious deci-

⁴⁴ *Id.*, par. 70.

⁴⁵ Cited above, note 36.

⁴⁶ Cited above, note 36.

⁴⁷ *Johnson, op. cit.*, note 27. The Board of Inquiry ordered the Halifax Regional Police Service to pay the plaintiff damages of over \$10,000. The decision of the Board of Inquiry also included detailed orders to correct systemic discrimination and racial profiling within the police service (p. 36 and following).

⁴⁸ Even though the decision concerned a single incident, for which the complaint was filed with the Nova Scotia Human Rights Commission, the previous incidents tended to show the existence of racial profiling practices within the Police Service.

sion on his part or resulted from a subconscious stereotype. Either way it was still a violation of the Nova Scotia *Human Rights Act*.⁴⁹

- In the field of disciplinary proceedings, the Comité de déontologie policière du Québec (the Québec police ethics committee) recently issued a decision involving racial profiling.

The case involved a black women⁵⁰ driving in a mini-van with her two 17-year-old twin sons, who was pulled over by Québec City municipal police officers under section 636 of the *Highway Safety Code*, which allows motorists to be stopped at random.

The committee, relying in particular on recent decisions and doctrine in the area of racial profiling, rejected the argument of the respondent that the complainant was stopped under a legislative provision.⁵¹ It found that because there was no valid ground for the intervention,⁵² the complainant's vehicle was stopped and her identify was verified simply because of the race of the vehicle's occupants,⁵³ in breach of section 5 of the *Code of ethics of Québec police officers*,⁵⁴ which authorizes police officers to act "[translation] only in performing their duty to control road traffic" or, as the Supreme Court has stated, only if acting in accordance with the law.

⁴⁹ *Johnson, op. cit.*, note 27, p. 16.

⁵⁰ *C.D.P. c. Pelletier et Caron*, 1^{er} février 2006, C-2005-3275-2
[On line] www.deontologie-policiere.gouv.qc.ca/decisions_rendues/C-2005-3275-f.pdf
www.jugements.qc.ca/php/decision.php?liste=14026199&doc=4553435E02521D02
hereinafter referred to as *Lacquerre*, from the name of the complainant.

⁵¹ The respondent's defence was based on the decision *Ladouceur*, in which the Supreme Court established that "[...] It might well be that since these stops lack any organized structure, they should be treated as constitutionally more suspect than stops conducted under an organized program. Nonetheless, so long as the police officer making the stop is acting lawfully within the scope of a statute, the random stops can, in my view, be justifiably conducted in accordance with the *Charter*." *R. v. Ladouceur* [1990] 1 S.C.R. 1276

[On line] www.lexum.umontreal.ca/csc-scc/en/pub/1990/vol1/html/1990scr1_1257.html, cited in the Committee's decision, par. 75 (emphasis added). The conclusions of the decision are coming under increasing criticism with the development of racial profiling. See David M. TANOVICH, "Using the Charter to Stop Racial Profiling: the Development of an Equality Based Conception of Arbitrary Detention", (2002) 40 *Osgoode Hall Law Journal* 152; D. TANOVICH, *op. cit.*, note 21, p. 141-143.

⁵² In addition, the fact that the vehicle was a "vehicle of interest" because it was "easy to steal" was not a matter for the *Highway Code*, but rather for the *Criminal Code*, under which specifies that a police officer must have reasonable grounds to act, par. 81.

⁵³ The police officers did not only check the complainant's identity but also that of her sons, on the pretext that young Black men had been involved in the juvenile prostitution right in Québec City, par. 98 of the decision.

⁵⁴ R.R.Q., 0-8.1, r. 1: "5. A police officer must act in such a manner as to preserve the confidence and consideration that his duties require.

A police officer must not:

[...]

(4) commit acts or use injurious language based on race, colour, sex, sexual orientation, religion, political convictions, language, age, social condition, civil status, pregnancy, ethnic or national origin, a handicap or a means to compensate for a handicap;".

The penalty imposed by the committee on the police officers concerned is not yet known.

It is clearly of crucial importance to find evidence that shows the “primary” motivation for the intervention by the police officers. They are often guided by conscious or unconscious stereotyping, and there is no need to show “racist” or discriminatory intent. As soon as the treatment meted out differs from the customary standards or trends, and there is no other reasonable justification for the treatment other than racial background, it is appropriate to consider the possibility of racial discrimination or racial profiling.

Suspect actions include pursuit, arrest, detention and search without valid reason; statements of offence given for an unreasonable or unusual cause; situations in which law enforcement officers overstep their powers, for example by stopping a vehicle under the *Highway Safety Code* and using the opportunity to pursue a criminal investigation with regard to the passengers, for no valid reason.

1.2 Inappropriate investigations as part of a crime prevention policy

Under some neighbourhood policing or crime prevention policies, law enforcement officers can approach a person and ask for certain specific information, provided they inform the person of his or her constitutional rights. However, in some cases this power is overstepped in a way that may constitute racial profiling if it leads to inappropriate or unwarranted investigations.

This category also includes the arbitrary interception, detention or arrest of a person belonging to a certain group for the purposes of an ongoing investigation, not justified by a detailed description of the suspect.⁵⁵

- The *Ferdinand* decision of the Ontario Superior Court of Justice warns of the use of this type of “pro-active” approach by the police, since it can lead to discriminatory conduct similar to racial profiling:

“Although I do not dispute that 208 cards⁵⁶ might well be a useful and proper investigative tool for the police; in my view the manner in which the police currently use them makes them somewhat menacing. These cards are currently being used by the police to track the movements – in some cases on a daily basis – of persons who must include innocent law-abiding residents.

One reasonable – although very unfortunate – impression that one could draw from the information sought on these 208 cards – along with the current manner in which they are being used – is that they could be a tool utilized for racial profiling.

⁵⁵ For example, information that a young Black man has just committed a robbery in a given zone does not authorize police officers to stop any young Black man in the absence of other detailed, precise information, such as height, approximate age, hair colour and length, clothing colour and style, eyeglasses, the make and colour of the suspect’s vehicle, etc. See D. M. TANOVICH, *op. cit.*, note 21, p. 151-169.

⁵⁶ Police officers use these cards in their “proactive” investigations and prevention activities. They contain information on the individuals approached, such as their name, address and racial group, and the place where contact was made. (See par. 10 of the judgment).

While I am not at all deciding that this is the case – and it is not necessary for me to do so – I make my observations only to express a profound note of caution. If the manner in which these 208 cards are currently being used continues; there will be serious consequences ahead. They are but another means whereby subjective assessments based upon race – or some other irrelevant factor – can be used to mask discriminatory conduct. If this is someday made out – this court for one will not tolerate it.”⁵⁷

The Court specifies that a “hunch or instinct” cannot justify an intrusive investigation:

“I agree with and adopt the findings and conclusion of Lederman J. in *R. v. Burghe*⁵⁸ where states that:

Subjecting pedestrians to unlawful arrest and the potential consequences of being handcuffed, searched and incarcerated or placed under bail conditions solely on the basis of a hunch and instinct is so serious an infringement of liberty that to receive evidence arising therefrom in such cases on a regular basis would have grave consequences over the long-term for the administration of justice.”⁵⁹

- In the *Campbell* decision of the Court of Québec, Westmoreland-Traoré J. explains that reasonable grounds must be shown to legitimize certain actions taken by law enforcement agencies, such as arbitrary detention or unwarranted searches carried out as part of a proactive policing approach:

“In proactive policing, as in this case, investigative detention has been very important. In analyzing the impact of this practice, although articulable cause is required, it has been noted that it is vulnerable to the abuse of discretionary power [...] “the potential for abuse inherent in such low-visibility exercises of discretionary power are all pressing reasons why the Court must exercise its custodial role.” [at par. 18, as cited in TANOVICH, David, “The Colourless World of *Mann*”, 21 C.R. (6th) 47, at p. 3.]”⁶⁰

The judge points out that the police officers had few grounds to justify the legitimacy of their actions:

“Officer Ransom testified that he recognized the accused when he drove up beside him, however, he did not speak to him at that point, nor call out to him. He told his partner, Officer Dumas, that the accused had conditions; Officer Ransom doesn’t remember if he told his partner the name of the accused. The evidence reveals that Officer Dumas didn’t call the name of the accused. When the accused began to run, he had not been intercepted. Before running, he was

⁵⁷ *Op. cit.*, note 42, par. 18-20. In this case, Mr. Ferdinand was chased and searched without valid reason, in violation in particular of sections 8, 9 and 10 of the *Canadian Charter*. The incriminatory evidence against him was excluded in this case under section 24 (2) of the *Canadian Charter*.

⁵⁸ [2002] O.J. No. 5316, par. 51.

⁵⁹ *Ferdinand, op. cit.*, note 42, par. 72.

⁶⁰ *Campbell, op. cit.*, note 24, par. 75.

walking along the sidewalk. He began to run when Officer Dumas began to call after him without using his name.

The Court finds that it is more probable than not that Officer Ransom did not in fact know the name of the accused and that the officers arrested him because he ran. They had followed him, not knowing who he was; they had driven up close to him to investigate further. They were suspicious. Until Officer Ransom testified that he recognized the accused, [...].⁶¹

Racial profiling was found to be the motivation for the intervention, interception and search of the accused:

“The accumulation of the factors, as opposed to any one factor, the absence of current, objective and precise information concerning the conditions, and departure from conventional police practice constitute a preponderance of proof that the accused was the object of racial profiling. The weak credibility of the officer, and the lack of detail in his testimony are additional reasons.”⁶²

An analysis of these decisions leads us to the conclusion that any “proactive” investigation, even under an apparently neutral Act or policy, may result in discrimination against “racialized” individuals. Officers in a situation of authority, when exercising certain discretionary powers, may be consciously or unconsciously “guided” by stereotypes or a faulty “instinct”. This type of behaviour is improper and unacceptable. An action, to be legitimate and consistent with the *Charter*, must be based on valid and reasonable grounds; whether or not they are reasonable must, obviously, be decided in light of the facts of the situation.

1.3 Improper behaviour by respondents

Inflexible, suspicious or harassing behaviour, or discriminatory comments by the person in a situation of authority, as well as questions that are inappropriate or groundless in the circumstances, such as “What are you doing in this neighbourhood? Where are you going? Are you a Canadian?” etc.,⁶³ are all elements that can be used to show or corroborate the discriminatory nature of an intervention.

➤ In *Hum c. Royal Canadian Mounted Police*,⁶⁴ the Canadian Human Rights Tribunal notes that:

“Although Mr. Hum was quite legitimately pulled over and asked for his license, registration and insurance slip, there was no warrant for asking him questions about his citizenship and place of birth in circumstances in which a Caucasian

⁶¹ *Id.*, par. 95-96.

⁶² *Id.*, par. 100.

⁶³ See: D. HARRIS, *op. cit.*, note 25; D. M. TANOVICH, “E-Racing Racial Profiling” (2004) 41 *Alta. L. Rev.* 905-933.

⁶⁴ (1986), 8 C.H.R.R. D/3748 (C.H.R.T.), par. 29697.

exhibiting the some conduct and speaking and dressed in the some x/way would not have been so challenged.”

➤ The *Johnson* decision clearly supports this:

“Deviations from normal practice and evidence of discourtesy or intransigence are grounds for finding differential treatment. I find it difficult to imagine that these events would have unfolded the same way if a white driver from Texas had been involved in this stop. The lack of courtesy towards Mr. Johnson, and the failure to make any attempt at all to investigate what the legal requirements were in an unfamiliar jurisdiction, whether through conversation with Mr. Johnson or otherwise, are examples of unprofessional behaviour from which I am entitled to infer differential treatment, and I find that this differential treatment was based principally on Mr. Johnson’s race.”⁶⁵

➤ In *Radek*, evidence was presented to show the harassing and vexatious behaviour of the security guard towards the complainant, a disabled Aboriginal woman from a poor background, at a shopping mall.

In addition to following her around, she was regularly asked questions such as “Where are you going? What are you doing here?” On the day of the incident that prompted the complaint heard by the Tribunal, fed up with the situation, she protested against the unfair treatment by raising her voice, which led to her being ordered to leave the premises for causing trouble.

Commenting on the differential treatment, the tribunal, referring to the *Johnson* decision, wrote

“I find it difficult to imagine that events would have unfolded in the same way if Ms. Radek had been white. It is worthwhile noting that when Ms. Radek spoke to Constable Bellia that day, that was her expressed opinion: “this would not be happening to me if I was white.” The discourtesy and the intransigence of the security guards she dealt with are grounds for finding differential treatment. Indeed, the evidence in this case was clear that not all persons attempting to enter the mall were subjected to the harsh and intrusive questioning which Ms. Radek and Ms. Wolfe endured, not only on May 10, but on many previous occasions. A shopping mall whose security staff did treat all customers and potential customers in this way would soon be out of business.”⁶⁶

These cases show how disrespectful behaviour or offensive language may sometimes suffice to show the discriminatory nature of the intervention. In other cases, it can show that the primary motivation of the respondents was discriminatory. The decisions analyzed above highlight the importance of seeking points of comparison to make a judgment concerning the behaviour of the law enforcement officers involved in a suspect intervention. Often, a comparison with the

⁶⁵ *Johnson, op. cit.*, note 27, p. 22.

⁶⁶ *Radek, op. cit.*, note 23, par. 471. The tribunal ordered the respondents to pay Mrs. Radek \$15,000 in damages, and issued orders to correct the discriminatory policies and behaviour patterns observed (par. 667).

treatment normally reserved for individuals from a traditionally “non-profiled” group can be used to draw a conclusion about the discriminatory nature of the actions involved.

1.4 Unusual decisions by officers in a situation of authority

Unusual decisions by officers in a situation of authority that contrast with normal practice, such as overstepping their rights or powers, the application of excessive force or a request for backup without valid grounds can be used to show differential treatment.

- The application of excessive force or a request for backup that appears excessive to the complainant may be justified by reasons of security, depending on the circumstances. This is shown in the *Johnson* decision cited above, which concludes:

“I find that there was little objective justification for the presence of more than three vehicles, but that a variety of reasons aside from the race of the complainant explain the nature of the police response.”⁶⁷

However, the Board of Inquiry considered that in certain cases such practices could be considered discriminatory:

“I would advise, however, that some discussion on the problems inherent in over-response, both practical (escalating the situation) and perceptual (creating a negative public impression), be incorporated in the training on traffic stops currently provided; and that police officers and dispatchers be made aware of the possibility that an excessive response might be considered discriminatory under certain circumstances.”⁶⁸

- To illustrate a case of overstepping rights or authority, we will look at a recent decision by the Comité de la déontologie policière du Québec.⁶⁹

Although the person who filed the complaint with the Commissaire à la déontologie policière (police ethics commissioner), Mr. Joseph, was found guilty⁷⁰ of two offences under municipal by-laws (one for insulting a peace officer, the other for disorderly conduct in a public place) and two criminal offences (mischief in relation to property, and threats to cause death or bodily harm to a police officer), the committee concluded that in performing their duties the peace officers had taken discriminatory action and overstepped their authority in the course of the events that followed the arrest.

The committee noted that the habitual procedure when a person is taken to the police station to be placed in custody was not followed in this case:

⁶⁷ *Johnson, op. cit.*, note 27, p. 30.

⁶⁸ *Id.*

⁶⁹ *C.D.P. c. Bernier, Lambert, Couturier et al.*, 3 février 2006
C-2005-3246-2, C-2005-3247-2, C-2005-3248-2
[On line] www.deontologie-policiere.gouv.qc.ca/decisions_rendues/C-2005-3246-2-f.pdf
www.jugements.qc.ca/php/decision.php?liste=14026233&doc=5D415C5A0455180A
hereinafter referred to as *Joseph*, from the name of the complainant.

⁷⁰ After pleading not guilty.

“[Translation] [...] Unlike what happened in the complainant’s case, the patrol officers normally take the suspect to the search room, where other officers assigned to custody duties take charge of the suspect and, after various procedures, take the suspect into the cell block and place him or her in a cell.

The fact that officers Bernier and Lambert took the complainant to the cell block themselves and placed him directly in a confinement cell is a double exception to the normal procedure [...].

The cell, 6 feet by 6 feet, is completely empty. The floor is cement with a drain in the centre to facilitate cleaning, but there is no sanitation. The room is lighted at all times, and equipped with a video camera in the centre of the ceiling. Unlike an ordinary cell, it has no bars, but instead a wooden door.

Holding a person in a state of complete nakedness is also an exceptional measure.

The police do not claim that a strip search is always necessary before locking a person up, regardless of the alleged offence. Such a claim would, in any case, have been extraordinary.

No witness for the police stated that the complainant was stripped for the purpose of a search, and he had already been summarily searched before being taken to the police station.

The complainant was therefore stripped for the purpose of leaving him naked [...].

It is clear that to lock a person up naked, unless necessary to ensure the safety⁷¹ of the person or the cell block staff, is a cruel and unusual punishment. It constitutes an unjustifiable infringement of his integrity, honour and dignity, all rights respected and protected by the *Charter of human rights and freedoms*. [...] ⁷²

[...] by stripping the complainant completely and leaving him naked in the cell, the officers [...] “went too far” in their dealings with him, and showed a “clear lack of judgment”, “unthinking neglect, resembling gross incompetence” and, last, behaved [...] in a “reprehensible, evil, immoderate and excessive” way, the whole constituting an abuse of authority.”⁷³

The committee also noted that the comments of “fucking nigger” made by an officer in respect of the complainant after his arrest, even in his absence, contravened section 5 of the *Code of ethics of Québec police officers* since they were “pronounced by the officer [...] while on duty,

⁷¹ The video tape showed that the complainant was talkative, but not physically aggressive (par. 24 of the decision).

⁷² *Id.*, par. 84 to 93.

⁷³ *Id.*, par. 128. The actions were found (in paragraph 134) to be contrary to section 6 of the *Code of Ethics of Québec police officers*: “A police officer must avoid any form of abuse of authority in his relations with the public. A police officer must not:

- (1) use greater force than is necessary to accomplish what is required or permitted;
- (2) make threats, intimidate or harass; [...].”

with respect to a member of the public.” The words were considered ““racist” since the word “nigger” constituted a “judgment without appeal” and suggested, at least in appearance, that Black people were considered to be inferior. They were all lumped together, and it was suggested that they all had the defects common to their race.”⁷⁴

The videotape containing the offensive remarks was submitted as evidence since, in the view of the committee, it “not only demonstrated how the words were spoken [...] but also placed them in a specific context”⁷⁵ and allowed the credibility of the testimony given by the respondent officer to be assessed.⁷⁶

In our opinion, even though the committee did not specifically mention racial profiling, the facts of the case and their analysis show that the conduct of the police differed from the habitual standards.⁷⁷ The complainant was detained naked, without reasonable grounds. Would he have been treated in this way had he been of a different race? At the very least, the offensive, racist words used during the intervention reflect a discriminatory mindset. The unusual actions, taken for unlikely reasons of safety, combined with the racist comments, could be used to support a suggestion of racial profiling.

1.5 Organizational policies or practices of doubtful relevance

Policies, established practices or an organizational culture likely to discriminate against or exclude individuals from a “racialized” group for reasons of security can be used to show racial discrimination or racial profiling on a systemic or individual basis.

- In the *Radek* decision,⁷⁸ it was shown that the practices of a security agency in a shopping mall had the effect of excluding aboriginal people. The policy governing the activities of security guards stated that the mall had a zero tolerance policy towards suspicious persons, who had to be refused admittance or taken off the site. Some of the identifying characteristics were given as “dirty clothing, talking to themselves, red eyes, begging for money or cigarettes inside or around the shopping centre, bothering customers, acting intoxicated or stoned, having bad body odour, [...]”⁷⁹

The evidence presented (testimony from experts and from community workers and complainants, security reports of security agency, etc.) showed clearly that the policies and practices concerned were based on a stereotypical view of aboriginal people.

The conclusion was as follows:

“I note that all three Security Occurrence Reports filed with respect to this incident identify the “category” as “trespassing” and the “sub-category” as “sus-

⁷⁴ *Id.*, par. 80-81. See section 5, *Code of Ethics of Québec police officers*, cited above, note 54.

⁷⁵ *Id.*, par. 72.

⁷⁶ *Id.*, par. 73. The sanctions imposed in this case are not yet known.

⁷⁷ See *Johnson* above.

⁷⁸ *Op. cit.*, note 23.

⁷⁹ *Id.*, par. 126.

picious person”. When asked about this categorization in cross-examination, Mr. Clulow said that Ms. Radek was not “suspicious”; she was “causing a disturbance”. I find the fact that all three security guards categorized the incident with Ms. Radek as “suspicious” significant. There was nothing in the appearance or behaviour that day of either Ms. Radek or Ms. Wolfe which could legitimately be described as “suspicious”. This categorization, in the absence of any facts to support it, lends credence to the theory that Aboriginal, and especially disabled Aboriginal people, were likely to be viewed as “suspicious” by the guards at International Village for reasons having to do with their group characteristics, real or assumed, and having nothing to do with their behaviour.”⁸⁰

The facts reported in this decision, the first involving a purely civil case, show how profiling practices may be institutionalized and result from “apparently neutral” written policies. Profiling practices can be demonstrated in many ways, by testimony, expert proof, data on interventions, security reports, etc. Where necessary, they can provide evidence of systemic racial profiling, or corroborate other facts in a specific case.

1.6 Contradictory or unlikely explanations from respondents

Testimony or explanations given by the respondents that contradict the documentary evidence, or explanations that appear unlikely or invented after the fact to legitimize the actions taken, can be used to challenge the actions.

- In *Campbell*, Westmoreland-Traoré J. identifies certain elements that can be used to assess the veracity of the facts reports. Contradictions in the reports or testimony of the respondents are elements that place their credibility in doubt:

“Proof may be constituted in part by proof of errors in police procedures; it may also be revealed by unusual actions such as preparation of additional reports to justify police action. In the case of *Brown*, when the officer learned that the accused was a celebrity basketball player, he prepared an additional report to explain why he stopped the car of the accused which was travelling above the speed limit on an expressway.”⁸¹

- In *Brown*, the Ontario Court of Appeal made the following observations concerning the attempt by the police to justify their intervention “after the fact”:

“[...] the record includes: the respondent’s evidence that the officer looked into his car before following and stopping him; evidence of the second set of notes prepared by the officer to firm up his reasons justifying the stop after he became aware the person under arrest was a wellknown sports figure likely to undertake a defence of the charge against him; a licence check that the officer made before he stopped the respondent; and discrepancies between the times recorded in his notebook and those which he gave to the breathalyser technician.”⁸²

⁸⁰ *Id.*, par. 162.

⁸¹ *Campbell*, *op. cit.*, note 24, par. 36; see also par. 95 to 100.

⁸² *Brown*, *op. cit.*, note, 16, par. 46.

- In *Khan*, the Ontario Superior Court of Justice also concluded that the explanations given by the respondent officers were unlikely and lacked credibility:

“It follows from these conclusions that the officers involved in this case fabricated significant aspects of their evidence. Why did they single out Mr. Khan on Marlee Avenue at about noon on a Monday in October and decide to search his car? Because he was a young black male driving an expensive Mercedes. That is a reasonable inference based on all of the circumstances and the evidence before me. The Ontario Court of Appeal has held that where the “circumstances relating to a stop correspond to the phenomenon of racial profiling and provide a basis for the court to infer that the police officer is lying about why he or she singled out the accused person for attention, the record is then capable of supporting a finding that the stop was based on racial profiling”: *R. v. Brown* at para. 45.”⁸³

- In *Lacquerre*, the Comité de déontologie policière notes contradictory elements in the facts as stated by the respondent officers:

“[Translation] [...] the writing of item P-5 in the moments following the interception constitute an attempt to justify, after the fact, the interception of Madam Laquerre’s vehicle.

The committee notes that item P-5 does not mention a defective rear windscreen wiper or the fact that the car is a “vehicle of interest”. Instead, it states that the car had “tinted, very dirty windows [...]”.⁸⁴

It is obvious to the committee that the true reason for intercepting Madam Laquerre’s vehicle was the race of its occupants.”⁸⁵

It is clear from the above that unlikely explanations, or additional notes written after the fact that contradict those made at the time of the event, may be interpreted by the court or tribunal as an attempt to mask the real reason for a discriminatory intervention.

1.7 Differential treatment for people belonging to “non-racialized” groups

Testimony, facts, data, etc., showing that people belonging to traditionally non-profiled groups are not treated in the same way as people belonging to “racialized” groups in the same circumstances can be used to prove racial profiling.

- In *Radek*, various white people stated that they did not experience the same harassment from the security guards at the shopping mall as aboriginals, in similar circumstances. People who were, or appeared to be, white were free to roam the shopping mall without being bothered, unlike the aboriginal people who testified at the hearing. In addition, the

⁸³ *Khan*, *op. cit.*, note 27, par. 68.

⁸⁴ *Laquerre*, *op. cit.*, note 50, par. 100-101.

⁸⁵ *Id.*, par. 106.

complainant reported that she was “left alone” when she was accompanied by her white friend.⁸⁶

This decision offers a good example of how a “comparative” element can be found to corroborate other facts that tend to show racial profiling. In this case, the demonstration focuses on the differential treatment accorded to other, “non-racialized” individuals.

1.8 Social context

The social context may be taken into account and presented to the court in various ways,⁸⁷ using similar facts, documentary evidence, recorded testimony, scientific research, statistical data, expert testimony, etc., in support of an argument of racial discrimination or racial profiling.

Historically, the social context and statistical data have been used to demonstrate or corroborate systemic or institutional discrimination, especially in the workplace.⁸⁸ The same approach could be more extensively applied in cases of racial profiling.⁸⁹

Several observations should be made at this point.

First, individuals from several cultural communities, and especially Blacks and Aboriginals, are over-represented in the prison system. Blacks make up 6.4% of the offenders under federal responsibility, but only 2.23% of the total population of Canada. The situation of Aboriginal people is even more alarming; they represent 16.1% of the federal prison population, but only 3.29%

⁸⁶ *Radek, op. cit.*, note 23, par. 292 and following.

⁸⁷ See, in particular, *Brown, Johnson, and Radek* above.

⁸⁸ *Action Travail des Femmes v. Canadien National* (1984), 5 C.H.R.R. D/2327 (C.H.R.T.), conf. (1987), 8 C.H.R.R. D/4210 (CSC); *National Capital Alliance on Race Relations v. Canada (Health and Welfare)* (1997), 28 C.H.R.R. D/179 (C.H.R.T.).

Carol AGOCS, “Racisme émergeant en milieu de travail : Preuves qualitatives et quantitatives d’une discrimination systémique”, (2004) 3:3, *Diversité canadienne* 27.

⁸⁹ As noted by the British Columbia Human Rights Tribunal in *Radek*, (par. 507): “The decision of the British Columbia Council of Human Rights in *Bitonti v. British Columbia (Ministry of Health)* (No. 3) (1999), 36 C.H.R.R. D/263, (cited at para. 114) contains a helpful discussion of the uses and misuses of statistical information. The Council observed that statistical evidence is often used in cases alleging adverse effect discrimination, and quoted the following passage from *Proving Discrimination in Canada* (Toronto: Carswell, 1987), where Beatrice Vizkelety wrote at p. 175:

However, statistical proof is not without its share of drawbacks. There is the risk of misuse and even the abuse of this type of evidence. An oft-quoted criticism is that “too many use statistics as a drunk man uses a lamppost — for support, and not illumination.” The use of statistical evidence is not an end in itself nor is it a substitute for legal reasoning. In the barrage of statistics and conflicting expert evidence one ought not to lose sight of the substantive law when determining the usefulness, the relevance, and the weight of statistical evidence. [...] Not surprisingly, this evidence will most often call for the assistance of expert testimony.”

See *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, concerning the judicial knowledge of the social context. [On line] www.lexum.umontreal.ca/csc-scc/en/pub/1997/vol3/html/1997scr3_0484.html

of the total population⁹⁰ The situation may depend on a range of factors (unfavourable economic and social conditions, intercultural communication problems, etc.) but the possible impact of racial profiling cannot be neglected.⁹¹

The Ontario Human Rights Commission has stated as follows:

“Over-representation of racialized persons in police stops, jails and in other areas of the justice system may be indicative of the practice of racial profiling or other forms of racial discrimination. Similarly, evidence of racialized children and youth being disproportionately disciplined, suspended or expelled under “zero tolerance” school safety policies may be suggestive of discriminatory effects of these policies.”⁹²

- In *R. v. Brown*, the Ontario Court of Appeal points out that racism is an inescapable reality in the judicial system.⁹³

“In the opening part of his submission before this court, counsel for the appellant said that he did not challenge the fact that the phenomenon of racial profiling by the police existed. This was a responsible position to take because, as counsel said, this conclusion is supported by significant social science research. I quote from the *Report of The Commission on Systemic Racism in the Ontario Criminal Justice System* [...] at 358:

The Commission’s findings suggest that racialized characteristics, especially those of black people, in combination with other factors, provoke police suspicion, at least in Metro Toronto. Other factors that may attract police attention include sex

⁹⁰ See MINISTÈRE DE LA SÉCURITÉ PUBLIQUE ET DE LA PROTECTION CIVILE, *Aperçu statistique : Le système correctionnel et la mise en liberté sous condition*, December 2004 [On line] www.psepc.gc.ca/publications/corrections/pdf/stats04/49569_Fre_finna1.pdf

⁹¹ On this topic, the Open Society Justice Initiative remarks as follows: “Where data are available, disturbing patterns suggest that racial and ethnic minorities in certain countries may be charged with more serious crimes. When convicted of these crimes they often receive harsher sentences than others convicted for the same crime.” OPEN SOCIETY JUSTICE INITIATIVE, “Racial Discrimination in the Administration of Justice”, a brief submitted to the UN Committee on the Elimination of Racial Discrimination at its 65th session, August 2004, p. 7 [On line] www.justiceinitiative.org/db/resource2/fs/?file_id=14451

See also: *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, *op. cit.*, note 13; NATIONAL COUNCIL OF WELFARE, *Justice and the Poor*, Spring 2000.

⁹² ONTARIO HUMAN RIGHTS COMMISSION, *op. cit.*, note 11, p. 34.

See also the study by Léonel Bernard, “La surreprésentation des jeunes haïtiens dans le système québécois de protection de la jeunesse (en vertu de la *Loi sur la protection de la jeunesse*, L.R.Q., c. P-34.1)”, *Revue Intervention* (no. 120, July 2004). The author explains: “Although, among other things, note is taken of the lack of a stable parental income, the lack of food (as key factors in infringements of a child’s rights), the decisions are mainly made on the basis of keeping bad company, delinquency and problems at school.” p. 120. [...] “In addition to being reported more often than young Québec children, it is clear that the more young Haitians advance into the system, the more they are likely to accumulate penalties such as emergency removal from their family [...] or a court case” p. 122. The author concludes: “[...] among other things, [...] the “visibility” of the behaviour of young Haitians and the limits of social practices in a context of poverty [...] appear to contribute to discrimination and the stigmatisation of young Haitians [...]” p. 123.

⁹³ *Brown*, *op. cit.*, note 16, par. 9.

(male), youth, make and condition of car (if any), location, dress, and perceived lifestyle. Black persons perceived to have many of these attributes are at high risk of being stopped on foot or in cars. This explanation is consistent with our findings that, overall, black people are more likely than others to experience the unwelcome intrusion of being stopped by the police, but black people are not equally vulnerable to such stops.”⁹⁴

- In *Radek*, the tribunal remains prudent concerning the influence of the social context, in the absence of statistical data. On the other hand, testimony from experts and community workers involved with the so-called profiled communities, letters of complaint from profiled persons, newspaper articles, and security reports by the security agency involved, were all taken into account to assess the unequal treatment of the complainant and to prove systemic discrimination against aboriginal people. The following passage should be noted:

“[...] In the employment context, it may not be unreasonable to expect that statistical evidence of patterns of hiring and promotion may be available. This particularly true in the case of large or public employers, as in *Lasani* and *Action travail des Femmes* and the other cases referred to, where the employer may, due either to legal requirements or for its own purposes, keep records with respect to the demographics of its workforce.”⁹⁵

The Tribunal specifies, in *Radek*, that it is difficult to gather statistical data on discrimination that does not occur in the workplace:

“Such an expectation would, by contrast, rarely be reasonable in a service context, where a service provider may be dealing with very large numbers of people where it would be difficult if not impossible to obtain the information necessary to keep reliable records of the demographics of the people whom it serves. It would, of course, be absolutely impossible for a complainant to amass such records independently of the respondent.”⁹⁶

Later, referring at length to the Supreme Court decision in *Law*,⁹⁷ the Tribunal concludes that despite the lack of statistical data, it is clear that Aboriginal people encounter discrimination because the policies concerned have an innate discriminatory effect:

⁹⁴ *Op. cit.*, note 21.

⁹⁵ *Radek, op. cit.*, note 23, par. 506.

⁹⁶ *Id.*

⁹⁷ In paragraph 77 of *Law (v. Canada (Minister of Employment and Immigration))*, [1999] 1 S.C.R. 497) is found the following: “First, I should underline that none of the foregoing discussion implies that the claimant must adduce data, or other social science evidence not generally available, in order to show a violation of the claimant's dignity or freedom. Such materials may be adduced by the parties, and may be of great assistance to a court in determining whether a claimant has demonstrated that the legislation in question is discriminatory. However, they are not required. A court may often, where appropriate, determine on the basis of judicial notice and logical reasoning alone whether the impugned legislation infringes s. 15(1). It is well established that a court may take judicial notice of notorious and undisputed facts, or of facts which are capable of immediate and accurate demonstration, by resorting to readily accessible sources of indisputable accuracy: see J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (1992), at p. 976. There will frequently be instances in which a court may appropriately take judicial notice of some or all of the facts necessary to underpin a discrimination (... suite)

"[...] In this case, for example, there was absolutely no evidence of the racial makeup of the people entering International Village. We do not know if 5% or 25% of the people attempting to enter the mall were Aboriginal. In the absence of this information, it would, even with the best and most reliable information about the racial makeup of persons ejected from the mall (which we did not have), be impossible to determine if Aboriginal people were ejected from the mall in numbers disproportionate to the rate at which they visited the mall. [...] However, in order to prove a discriminatory effect, it is not necessary to prove this sort of disproportionate effect. [...] A discriminatory effect can also be proven in other ways. If, for example, the effect of the respondents' policies and practices was that Aboriginal people tended to be wrongly viewed as suspicious, and thus discriminated against, then that would be sufficient to establish a negative or discriminatory effect, regardless of the proportion of Aboriginal people so viewed in relation to the population as a whole. If that was the effect of the respondents' practices, it would not matter how many Aboriginal people were affected, or what proportion they made up of the whole population of visitors to the mall. [...]."⁹⁸

Statistical or documentary evidence, when available, can also be used to show the unwarranted presence⁹⁹ of law enforcement officers in places where a high proportion of people from "profiled" groups are found, or the harassment and intimidation to which such people may be subjected in public places where they represent no threat.¹⁰⁰

- In *Ferdinand*, the Ontario Superior Court of Justice mentions in an obiter that young people should be free to gather and enjoy themselves, especially in their own neighbourhood, without fear of intrusive action by the police:

"[...] Stopping and investigating people merely because of some "Spidey sense" being engaged goes far beyond the standards our society demands and expects of our police. Young people have a right to "just hang out", especially in their neighbourhood, and to move freely without fear of being detained and searched on a mere whim, and without being advised of their rights and without their consent. Mere hunches do not give police the grounds to "surprise" a group of young people, or to "get right on them" for investigative purposes without something further that provides a lawful basis for doing so."¹⁰¹

Statistical data may also be useful in demonstrating the application of a discretionary power in an arbitrary fashion, for example when more stops are made or more tickets are issued to the members of a given group, compared to the treatment received in similar circumstances by the members of non-profiled groups.

claim, and in which the court should engage in a process of logical reasoning from those facts to arrive at a finding that s. 15(1) has been infringed as a matter of law."

⁹⁸ *Radek, op. cit.*, note 23, par. 512.

⁹⁹ Compared to other segments of the population in similar circumstances.

¹⁰⁰ See D. HARRIS, *op. cit.*, note 25; S. WORTLEY, *op. cit.*, note 27.

¹⁰¹ *Op. cit.*, note 42, par. 54.

Evidence that, in similar situations with similar levels of risk, the authorities impose fewer constraints on other groups may be used to support a claim of racial profiling, at least in systemic form, and corroborate testimony in a specific case.¹⁰²

- To illustrate the viability of this possibility, we will look at the facts in the case *Selwyn Pieters*.¹⁰³

In this case the complainant, a black Canadian, alleged before the Canadian Human Rights Tribunal¹⁰⁴ that the Canadian Customs and Revenue Agency had subjected him to differential treatment (a baggage search without reasonable grounds) when he returned to Canada after a trip to the United States, simply because of his race. Section 1 of the settlement between the two parties is confidential, and the nature and amount of the damages awarded cannot be presumed. However, the agreement specifies that the Canadian Customs and Revenue Agency must set up a pilot project to verify the extent of any behaviour patterns based on racial or ethnic profiling within its services.¹⁰⁵

- In Ontario, the Kingston police commissioned a study, the first of its kind in Canada, to analyze how often and for what reasons police officers stopped people in public areas and on public roads, according to their ethnic background. The last results were finally released on September 20, 2005 and tended to show that racial profiling existed within the Kingston police force, especially with regard to Black people.¹⁰⁶

Last, with reference to the *Radek* decision, that documentary or statistical evidence can be used to show the propensity of the respondent to commit discriminatory acts and to corroborate the factual evidence presented.

Statistical data illustrating the social context, when available, can be a useful tool for demonstrating some discriminatory situations and proving systemic discrimination. For racial profiling, for example, the data can prove that people belonging to “racialized” groups receive differential treatment and corroborate, depending on the circumstances, the facts alleged in a specific case. However, as stated by the Supreme Court in Law, “none of the foregoing discussion implies that the claimant must adduce data, or other social science evidence not

¹⁰² See: *Règlement Pieters*, *op. cit.*, note 27; *Radek*, *op. cit.*, note 23.

¹⁰³ *Op. cit.*, note 27.

¹⁰⁴ Created under the *Canadian Human Rights Act* (R.S. 1985, c. H-6).

¹⁰⁵ In the meantime, the Minutes of Settlement state that the Agency must, beginning in March 2002, hire an anti-racism expert to provide anti-racism and cultural diversity training to all Customs officers. The way in which the implementation of the measures will be monitored is not yet known.

¹⁰⁶ Investigation conducted between October 1, 2003 and September 30, 2004.

[On line]

www.police.kingston.on.ca/Professor%20Wortley%20Report.Kingston.pdf

www.police.kingston.on.ca/Bias%20Free%20Policing.pdf

www.police.kingston.on.ca/Data%20Collection%20Final%20Report%202005-09-15.pdf

According to this analysis, a Black man (men are more likely to be stopped than women) aged between 15 and 24 is three times more likely to be stopped by the police than a White man of the same age, in proportion to their representation in the city. The author, Scot Wortley, mentions however that other studies must be conducted to determine possible links between the stop rate and deviant behaviour by ethnic group.

generally available. [...] A court may often, where appropriate, determine on the basis of judicial notice and logical reasoning alone whether the impugned legislation [or, in our cases, the practice called into question] infringes s. 15(1).¹⁰⁷ In *Radek*, for example, the Tribunal concluded that despite the lack of statistical data, that the Aboriginal people concerned were the victims of racial profiling once it had analyzed the policies and practices that had a discriminatory effect.

¹⁰⁷ *Law, op. cit.*, note 97, par. 77.

PART TWO DEFENCES AVAILABLE TO THE RESPONDENT

INTRODUCTION

As pointed out in Part One, since a discriminatory act is a civil matter, evidence to prove it is assessed using the balance of probabilities.¹⁰⁸

Jean-Claude Royer writes, in *La preuve civile*:¹⁰⁹

“[Tanslation] In a civil liability suit, the victim must prove the elements that show the fault, the damage caused and the causal link. A defendant who invokes a contributory fault must prove it.”

However, Royer later adds that

“[Tanslation] before a disciplinary board or the professions tribunal, the degree of proof required is that of the balance of probabilities. Such authorities may, however, require a higher quality of proof to establish, on the balance of probabilities, that a professional has committed a crime [in our opinion, this applies to a derogatory act analyzed under the applicable Code of ethics].”¹¹⁰ (emphasis addd)

Could the same reasoning be applied, by analogy, when agents in a situation of authority are accused of racial discrimination or racial profiling in a case brought before a disciplinary board or a court?

Since there is a difference in the way evidence is assessed, and since discrimination is seldom overt, it is essential to look at the possible defences that may be raised by the defendant.

In Part One, we set out certain guidelines for gathering evidence to show racial profiling. In Part Two, we will focus specifically on the arguments the most often raised by the defendant to counter the case of the defendant. We will also look at certain situations that arise in civil cases.

2 ARGUMENTS MOST OFTEN ADVANCED BY THE RESPONDENT IN A CASE OF RACIAL PROFILING

2.1 Existence of reasonable grounds for the action taken

The case law on racial profiling reveals that the complainant must be able to show that the actions that infringed a protected right, in particular under the Québec *Charter*, were not based on a reasonable ground or suspicion. The assessment of whether a ground or suspicion is reasonable is carried out by the court in light of all the evidence presented by the parties. In

¹⁰⁸ See article 2804 C.C.Q.

¹⁰⁹ *Op. cit.*, note 31, p. 96.

¹¹⁰ *Id.*, p. 119-120.

Brown, for example, the Court explains that a racial profiling claim is general proven by circumstantial evidence.

“A racial profiling claim could rarely be proven by direct evidence. This would involve an admission by a police officer that he or she was influenced by racial stereotypes in the exercise of his or her discretion to stop a motorist. Accordingly, if racial profiling is to be proven it must be done by inference drawn from circumstantial evidence.

[...] I do not think that it sets the hurdle either too low (which could be unfair to honest police officers performing their duties in a professional and unbiased manner) or too high (which would make it virtually impossible for victims of racial profiling to receive the protection of their rights under section 9 of the *Charter*).”¹¹¹

Similarly, in *Johnson*, the Board of Inquiry states that an act may still be discriminatory even if other legitimate factors are invoked:

“I infer that once Constable Sanford was aware of the race of the occupants of the vehicle, this fact confirmed his suspicions that something was amiss. It was an operative element in his decision-making, though mixed in with other legitimate factors. I am not required to find whether this resulted from a conscious decision on his part or resulted from a subconscious stereotype. Either way it was still a violation of the Nova Scotia *Human Rights Act*.”¹¹² (Our emphasis)

Respondents can demonstrate the legitimacy of their actions in several ways. For example, they can argue that criminal profiling and racial profiling are not the same, or justify their actions on the grounds of the complainant’s behaviour. These two possibilities are illustrated below.

2.1.1 Criminal profiling is not racial profiling

In its report on racial profiling, the Ontario Human Rights Commission is careful to distinguish between racial profiling and criminal profiling:

“[...] racial profiling differs from criminal profiling which isn’t based on stereotypes but rather relies on actual behaviour or on information about suspected activity by someone who meets the description of a specific individual. In other words, criminal profiling is not the same as racial profiling since the former is based on objective evidence of wrongful behaviour while racial profiling is based on stereotypical assumptions.”¹¹³

Given the attention focused on police forces in recent years in connection with racial profiling, several people have made the argument that actions resembling racial profiling must be dis-

¹¹¹ *Brown, op. cit.*, note 16, par. 44-45.

¹¹² *Johnson, op. cit.*, note 27, p. 16.

¹¹³ *Paying The Price: The Human Price Of Racial Profiling*, Inquiry Report, 2003, p. 7.

tinguished from actions that are necessary to conduct law enforcements operations effectively.¹¹⁴

For example, a policy implemented on March 22, 2004 by the Montréal city police department to combat racial profiling defined racial profiling as follows:

“Illicit racial profiling is defined as any action instigated by persons in authority against any individual or group, for reasons of public security or protection and solely on the basis of factors such as race, ethnic origin, colour, religion, language, social status, age, sex, disability, sexual orientation, or political convictions, that exposes the individual to differential scrutiny or treatment without actual grounds or reasonable suspicion.”¹¹⁵ (Our emphasis)

This is a laudable effort, but the use of the term “solely” to define the concept is, in our opinion, inadvisable and could be used to justify a case of racial profiling.¹¹⁶

We cannot ignore the fact that various studies and critiques have defended the position that racial profiling is, in fact, rational criminal profiling since it is based on statistics and observations that show that the members of a given group are more likely to commit certain offences.¹¹⁷

As the author Julian Tanner notes,

“It does not stretch the imagination too far to deduce that the creation of special gang units will increase the amount of youth crime detected, and hence recorded, in the official statistics. Similarly, in a climate of concern about youth crime, the police will be more inclined to arrest than discharge the juveniles that they encounter on the street.”¹¹⁸

And, in addition,

“Not surprisingly, other studies revealed that so-called “victimless” crimes, such as prostitution, drug offences and gambling, are almost never reported to the authorities unless they are committed in public in ways that offend third parties such as local residents.

¹¹⁴ See the articles published in the Toronto area as the debate began to take hold in the community: “We Do Not Do Racial Profiling” *Toronto Star* (19 October, 2002); “Analysis Raises Board Hackles” *Toronto Star* (20 October 2002); “Police Union Blasts Star” *Toronto Star* (22 October 2002); “Ontario Chiefs Back Fantino’s Profiling Denial” *Toronto Star* (29 October 2002); “No Racial Profiling By Police: Gardner” *Toronto Star* (18 November 2002).

¹¹⁵ SERVICE DE POLICE DE LA VILLE DE MONTRÉAL, Politique d’intervention numéro 259-1 : *Le profilage racial et illicite*.

¹¹⁶ See D. M. TANOVICH, *op. cit.*, note 21, p. 151-169.

¹¹⁷ See Jeffrey GOLDBERG, “The Color of Suspicion” *The New York Times Magazine* (20 June 1999), p. 51-87 cited in David M. TANOVICH, “Using the Charter to Stop Racial Profiling: the Development of an Equality Based Conception of Arbitrary Detention”, (2002) 40 *Osgoode Hall Law Journal* p. 152.

¹¹⁸ In “Teenage Troubles: Youth and Deviance in Canada” (Toronto: Nelson Canada, 1996), p. 42, cited in *Justice and the Poor*, *op. cit.*, note 91, p. 10.

All these findings about the pervasiveness of crime make it clear that figures such as the number of calls to the police and official crime rates are extremely imperfect measures of the reality of crime in our society. They are nevertheless crucial for policing practices, because they are the main reasons for the greater police presence in low-income neighbourhoods. High police presence leads to complaints of too much policing, or police harassment, from poor young men who feel they are too often stopped, questioned, frisked and arrested on the street for trivial offences or nothing at all [...].¹¹⁹

It is well known that poor people from “racialized” groups are the most vulnerable to racial profiling.¹²⁰

Despite these observations, many people continue to deny the reality of racial profiling.

As Heather Mac Donald writes, in the article *The Myth of Racial Profiling*,

“The anti-profiling crusade thrives on an ignorance of policing and a willful blindness to the demographics of crime.

[...] The ultimate question in the profiling controversy is whether the disproportionate involvement of blacks and Hispanics with law enforcement reflects police racism or the consequences of disproportionate minority crime.”¹²¹

According to Tim Wise, quoted in the racial profiling report of the Ontario Human Rights Commission,¹²² this argument does not hold water:

“Racial profiling has been justified by arguing that some groups commit a disproportionate amount of crime, relative to their percentage in the population. However, this approach has been argued to be logically flawed, as it is actually more likely that a member of the majority group will have committed the offence. For example, if group A represents 20% of the population but commits 40% of violent crimes and group B represents 80% of the population and commits 60% of violent crimes. It is true that group A commits a disproportionate amount of violent crime. However, if a violent crime takes place, it is still more likely that it was committed by a member of group B – a 6 out of 10 chance. It would therefore make more sense to be looking for someone in group B. A profile that looks for someone in group A will be wrong more than half the time.”¹²³

¹¹⁹ *Justice and the Poor*, *op. cit.*, note 91, p. 9.

¹²⁰ See: D. M. TANOVICH, *op. cit.*, note 21; S. WORTLEY, *op. cit.*, note 27.

¹²¹ *City Journal*, Spring 2001, vol. 11, n° 2, p. 1, (U.S.A.)
[On line] /www.city-journal.org/html/11_2_the_myth.html

¹²² *Op. cit.*, note 113, p. 91.

¹²³ Tim WISE, “Racial Profiling and It’s Apologists”, *Z Magazine* March 2002.
[On line] www.zmag.org/Zmag/articles/march02wise.htm

Concerning racial profiling in the fight against terrorism, Bruce Garvey writes in the *National Post* as follows:

“[...] Racial profiling? [...] But to my recollection, the vast majority of the terrorist evil-doers who’ve struck the West traced their roots to the Middle East or South Asia [...].”¹²⁴

In this respect, David M. Tanovich, in a recent book, points out that to profile all Arabs and Muslims is not a effective way to fight terrorism. Potential terrorists can change their name, dress conventionally, etc. In addition, a terrorist attack may be launched by a citizen of the country concerned, as was the case in the London underground bombings of July 2005.¹²⁵

Sherry F. Colb, Professor at the Rutgers Law School in Newark, agrees:¹²⁶

“[...] It would, of course, be irrelevant if profiling were to prove as ineffective in the war on terrorism as it has been in the war on drugs [...] It may also be that terrorist from now on will consciously choose people falling outside of any profiled groups to carry out their atrocious objectives [...].”

However, one question remains: what analysis will emerge from the case law if a respondent refutes a charge of racial profiling by quoting data showing that certain groups are more likely to commit certain crimes? Could the targeting of individuals, based on statistics showing that the racial group to which they belong is predominant in certain illicit activities, be considered non-discriminatory?

According to the author Sujit Choudhry,¹²⁷ an obiter of the Supreme Court in *Little Sisters*¹²⁸ offers a perplexing outlook for racial profiling cases brought solely¹²⁹ under section 15(1) of the *Canadian Charter*.¹³⁰

The Supreme Court made the following comment:

“[...] Targeting is not necessarily unconstitutional. The Customs Department is obliged to use its limited resources in the most cost-effective way. This might in-

¹²⁴ “*Finally Canadians begin to wake up*”, Wednesday, July, 27, 2005, p. A-14.

¹²⁵ D. M. TANOVICH, *op. cit.*, note 21, p. 114-115.

¹²⁶ *The New Face of Racial Profiling: How Terrorism Affects the Debate*, 10 October 2001. [On line] <<http://writ.news.findlaw.com/colb/20011010.html>>

¹²⁷ Sujit CHOUDHRY, “Protecting Equality in the Face of Terror: Ethnic and Racial Profiling and s. 15 of the Charter”, University of Toronto Press, 2001, 367.

¹²⁸ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120. In this case, the Supreme Court concluded that the right of the appellants to equal treatment was not infringed, even if “[...]The appellants were entitled to the equal benefit of a fair and open Customs procedure, and because they imported gay and lesbian erotica, which was and is perfectly lawful, they were adversely affected in comparison to other individuals importing comparable publications of a heterosexual nature,” par. 120.

¹²⁹ The key provisions in criminal trials are sections 8 and 9 of the *Canadian Charter*.

¹³⁰ CHOUDRY, *op. cit.*, note 127, p. 371-379.

clude targeting shipments that, on the basis of experience or other information, are more likely than others to contain prohibited goods.”¹³¹ (Our emphasis)

The application of the approach suggested by the Supreme Court to justify questionable future practices by the police is a concern, especially since the data showing the over-representation of certain groups in connection with certain crimes could be caused by the unfair application of a discretionary power.¹³²

According to Choudry,¹³³ Tanovich¹³⁴ and several other authors, in the absence of reliable circumstantial elements, the “profiling” of individuals belonging to a certain phenotype cannot be considered reasonable and compliant with a charter of rights.

The Nova Scotia case *Bevis and Karela*¹³⁵ is interesting from this point of view. A few days after the events of September 11, 2001, rumours were circulating about terrorists fleeing to the coast of Eastern Canada. On September 16, 2001, Mr. Karela, originally from Kosovo, a Muslim with a relatively dark complexion and his neighbour, apparently white, were unjustly arrested by the Royal Canadian Mounted Police (RCMP) as they left as Nova Scotia ferry. They were released shortly after, once the RCMP realized its mistake. A complaint was filed against the RCMP under section 24(1) of the *Canadian Charter*¹³⁶ for arbitrary detention and imprisonment (section 9, *Canadian Charter*). The complainants won their case and received \$1,500 compensation each in damages.¹³⁷

On the other hand, in *R. v. Smith*¹³⁸, statistical and contextual data concerning drug smuggling from Jamaica, combined with other circumstantial evidence (in this case, a plane ticket paid for in cash shortly before the trip, and unlikely statements made to customs officers concerning the reasons for and conditions of the trip to Jamaica) allowed the suspect to be intercepted without infringing her Charter rights.

Given the above, it is important to remain vigilant. As pointed out by the Ontario Human Rights Commission,

¹³¹ *Op. cit.*, note 128, par. 120.

¹³² D. M. TANOVICH, *op. cit.*, note 21, p. 67.

¹³³ *Op. cit.*, note 127.

¹³⁴ *Op. cit.*, note 21.

¹³⁵ *Bevis and Karela v. CTV Inc., Burns and Kelly*, 2004 NSSC 209; *Bevis and Karela v. CTV Inc., Burns and Kelly* 2004 NSSC 246; *Bevis and Karela v. CTV Inc., Burns and Kelly* 2004 NSSC 247. An appeal will be filed against the amount of damages awarded on 16 February 2006, see *Bevis v. CTV Inc.*, 2005 NSCA 160.

¹³⁶ Section 24 (1): “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”

¹³⁷ A TV report showing the two suspects was broadcast on the CTV network, which was ordered to pay \$15,000 in damages to Mr. Karela, who could be recognized from the footage.

¹³⁸ (2004) O. J. No. 4979, 26 CR (6th) 375 (Ont. C.S.J.).

“No one would argue that public faith in institutions and systems such as the criminal justice system, law enforcement, customs and border control and the education system is a cornerstone to democracy, order and a harmonious society.

[...] However, racial profiling seriously erodes public confidence in these institutions.”¹³⁹

2.1.2 Aggressive behaviour or evasion by the complainant as grounds for the action taken

Depending on the circumstances and facts laid before the tribunal, an argument by the respondent that the contested actions were taken because of the complainant’s behaviour can be excluded.

In *Johnson* and *Campbell* in particular, the fact that the complainant evaded the police was not considered a valid defence for the discriminatory treatment.

As explained in *Campbell*,

“[...] They did not speak to him or address him by name; they did not say what they were about. Instead, officer Dumas got out of the car and started calling after the accused, without using his name. At this point, the accused was aware that his liberty of movement was restricted by the police officers; arguably he was psychologically detained from the time he saw the patrol car for the second time. So much so, that the accused started to run. He would not have run had he not thought that his liberty of movement was being restrained.

In the context of a minority person, his reflex to move away from the police does not necessarily infer that he had committed an offence.”¹⁴⁰

In *Johnson*,

“[...] Constable Sanford’s impression of evasion was advanced as a justification for continuing to follow the vehicle and deciding to stop it. I accept that, in general, a perception of evasion by a police officer is good justification for stopping a vehicle, but I must still consider all the surrounding circumstances, and *R. v. Brown* directs me to be alive to the possibility of subconscious stereotyping. [...]”¹⁴¹

[...] A citizen who honestly and reasonably believes he is being treated unjustly by the police is not obliged to sit meekly by to let matters take their course. He or she is entitled to remonstrate vigorously with the authority who is believed to be acting in error, [...]”¹⁴²

¹³⁹ *Op. cit.*, note 113, p. 27-28.

¹⁴⁰ *Campbell*, *op. cit.*, note 24, par. 58-59.

¹⁴¹ *Johnson*, *op. cit.*, note 27, p. 16.

¹⁴² *Id.*, p. 18.

In our view, these decisions show that it may be considered normal, according to the circumstances, for an individual matching the profile of a “racialized” group to display evasive or aggressive behaviour when an action is unjustified or discriminatory. This understandable behaviour cannot then be used to justify the discriminatory attitude of the person in a situation of authority.

2.2 Other considerations to be taken into account in a civil case

2.2.1 Civil cases involving racial profiling following a judgment in a criminal case¹⁴³

In civil cases involving an allegation of racial profiling, some facts may already have been presented during a criminal trial. How are these cases dealt with?

A. Civil trial following a conviction in a criminal trial

A judgment in a criminal case does not have the authority of a final judgment¹⁴⁴ in a civil case, although it may be relevant as evidence.¹⁴⁵

In *Ali c. Compagnie d'assurance Guardian du Canada*, the Québec Court of Appeal states as follows:

“[Translation] A criminal judgment is a juridical fact that cannot be ignored, is relevant and may have probative value. The judge in a civil case, without treating the criminal conviction as having the authority of a final judgment, in fact or in law, is free, depending on the circumstances, to draw the appropriate factual conclusions and presumptions.”¹⁴⁶

In a civil case involving racial profiling, following a finding of guilt, it is important to realize that the conviction does not necessarily jeopardize the civil complaint.

First, the outcome of the criminal trial could have been different if the offender had presented racial profiling or discrimination as a defence. Similarly, if the ground of racial profiling was argued during the criminal trial and excluded on a balance of probabilities, the judge in the civil trial may still take it into account in the civil judgment.

It is also possible that the discriminatory act brought forward during the criminal trial did not cause the exclusion of the incriminating evidence under section 24(2) of the *Canadian Charter*.¹⁴⁷ Lamer J. specifies the purpose of that provision:

¹⁴³ With assistance from Catherine Marier, law intern at the Commission’s legal division in February 2006.

¹⁴⁴ See article 2848 of the *Civil Code of Québec*: “The authority of a final judgment (*res judicata*) is an absolute presumption; it applies only to the object of the judgment when the demand is based on the same cause and is between the same parties acting in the same qualities and the thing applied for is the same.” (Our emphasis)

¹⁴⁵ Jean-Louis BAUDOIN and Patrice DESLAURIERS, *La responsabilité civile*, Cowansville, Éditions Yvon Blais, 1998, p. 38.

¹⁴⁶ REJB 1999-12678 (C.A.), par. 44.

¹⁴⁷ Cited above, note 36.

“Misconduct by the police in the investigatory process often has some effect on the repute of the administration of justice, but s. 24(2) is not a remedy for police misconduct, requiring the exclusion of the evidence. [...] the purpose of s. 24(2) is to prevent having the administration of justice brought into further disrepute by the admission of the evidence in the proceedings.”¹⁴⁸ (Our emphasis)

It should be stressed that since *R. c. Strachan*,¹⁴⁹ the Supreme Court appears to require a stronger causal link between the way the evidence was obtained and the violation of a Charter right before section 24 (2) of the *Canadian Charter* can apply.¹⁵⁰

“In my opinion the words “obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter” particularly when they are read with the French version, *obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte*, do not connote or require a relationship of causation. It is sufficient if the infringement or denial of the right or freedom has preceded, or occurred in the course of, the obtaining of the evidence. It is not necessary to establish that the evidence would not have been obtained but for the violation of the *Charter*. Such a view gives adequate recognition to the intrinsic harm that is caused by a violation of a *Charter* right or freedom, apart from its bearing on the obtaining of evidence. [...]”¹⁵¹

To justify the admissibility of the evidence in *Strachan*, the Supreme Court specifies that:

“[...] Any denial of a *Charter* right is serious, but s. 24(2) is not an automatic exclusionary rule. Not every breach of the right [...] will result in the exclusion of evidence. In this case where the breach of the right [...] was inadvertent and where there was no mistreatment of the accused, exclusion of the evidence rather than its admission would tend to bring the administration of justice into disrepute.”¹⁵²

¹⁴⁸ *R. c. Collins* [1987] 1 S.C.R. 265, 280-281
[On line] www.ijcan.org/ca/cas/scc/1987/1987scc11.html

In *Droit pénal Procédure et preuve* (Collection de droit, éd. Yvon Blais, p. 97), the authors, referring to *Collins* (p. 377 and following), set out three groups of factors to be analyzed in light of section 24 (2) of the *Canadian Charter*:

- “1- whether the use of the evidence will affect the fairness of the trial;
- 2- the gravity of the violation;
- 3- whether the exclusion of the evidence will bring the administration of justice into disrepute.”

¹⁴⁹ [1988] 2 S.C.R. 980. [On line] www.ijcan.org/ca/cas/scc/1988/1988scc101.html

¹⁵⁰ See Gerard MITCHELL, *The Supreme Court of Canada on excluding evidence under S-s 24(2) of the Charter*, February, 2005, p. 36 (101 pages).

¹⁵¹ *Strachan*, *op. cit.*, note 149, p. 1001.

¹⁵² *Id.*, 1008-1009. In this decision, the right to consult a lawyer, protected by section 10 (b) of the *Canadian Charter*, was seen to be violated, but this did not cause the incriminating evidence to be excluded in application of section 24 (2) de la *Canadian Charter*.

Since section 15(1) of the *Canadian Charter* is not generally the provision used in the criminal judgements rendered so far with a racial profiling connection, compared to sections 8 and 9 which are widely evoked, what would happen if there was no violation of section 8 or 9, but if the right to equal treatment was infringed? Would the incriminating evidence gathered be excluded? The question remains unanswered, and the outcome of this type of criminal trial uncertain for now.¹⁵³

However, it is possible to suggest, in light of *Strachan*, that a criminal trial could result in a guilty verdict despite the infringement of a *Charter* right, such as the right to equal treatment, if the causal link between the infringement of the right and the manner in which the evidence was obtained is weak¹⁵⁴ and if, in addition, the use of the evidence obtained was not likely to bring the administration of justice into disrepute. If this occurred, the guilty verdict would not, in theory, prevent a civil case being brought for racial profiling.

B. Civil trial following a guilty plea in a criminal trial

In *Belnavis*, La Forest J. in a dissenting opinion states as follows:

“[...] the Court's understanding of the implications of the police action may be obscured by the fact that most cases that come before them relate to someone who has already been convicted. The courts have little "feel" for what this means to persons who have committed no wrong or any idea of the number of such people who may be harassed by the overly zealous elements in any police force. [...] The court's job is not to restrict the rights of the citizen; it is to protect them.”¹⁵⁵

It is true that the Québec Court of Appeal has admitted the fact that some people may plead guilty despite their innocence:

“[Translation] Of course, in some hypotheses the accused, even if innocent, may plead guilty, in particular to avoid the costs of a trial. In such a case, the judge in a civil trial may, without contradiction, consider the guilty plea in context and draw the necessary conclusions.”¹⁵⁶

In the practice of law, it can be observed that people plead guilty for a variety of reasons, for example as a means to buy peace or avoid the costs and stress of a trial, etc., even though they never committed the offence with which they are charged,¹⁵⁷ or in other cases because they are represented by an incompetent lawyer.¹⁵⁸

¹⁵³ See D. M. TANOVICH, *op. cit.*, note 51.

¹⁵⁴ For an illustration, see *Joseph*, a case before the Comité de déontologie policière described in Part One, note 69.

¹⁵⁵ *R. c. Belnavis*, [1997] 3 S.C.R. 341, par. 65
[On line] www.lexum.umontreal.ca/csc-scc/en/pub/1997/vol3/html/1997scr3_0341.html

¹⁵⁶ *Op. cit.*, note 146, par. 43.

¹⁵⁷ J.-L. BAUDOIN and P. DESLAURIERS, *op. cit.*, note 145, p. 38; *Ali c. Compagnie d'assurance Guardian du Canada*, *op. cit.*, note 146, par. 43.

¹⁵⁸ See N. ST-PIERRE, *op. cit.*, note 15, p. 102-103: in the area of racial profiling, few lawyers can convincingly use the *Canadian Charter* in defence.

First, it is important to note that a guilty plea constitutes, for the purposes of a civil trial, an extrajudicial admission that the judge may take into consideration as evidence in the case. The author Ghislain Massé discusses this point:

“[Translation] The probative value of an admission will always depend on the circumstances, which determine the degree of sincerity of the person making the admission and whether the person has verified the fact admitted to; the probative value results from the evidence used to show that the admission results from a factual error or lie, and is inversely proportional to the value that the court places on that evidence. The presumption of truth created by the admission, like any other legal presumption, has a minimum probative value in the absence of evidence to the contrary: the existence of the fact admitted is still more probable than its non-existence.”¹⁵⁹

The credibility of the party that brings its own guilty plea into question is therefore of the utmost importance.

In *Côté c. Provençal*¹⁶⁰, the Superior Court discusses the effect of guilty pleas by respondents as follows:

“[Translation] The courts will generally examine attentively the circumstances in which it [the plea] was made, to ensure that it constitute genuine recognition of a conduct or action and was not simply a means buy peace, or to avoid inconvenience or negative publicity.”¹⁶¹

The circumstances in which a victim of racial profiling pleads guilty to an offence he or she claims not to have committed must therefore be taken into account. These elements must be examined before deciding if a case should proceed.

In some cases, even though the alleged conduct of the complainant constitutes an offence, the complainant would probably not have been arrested or charged had it not been for the infringement of his or her rights. During a civil trial, the facts and circumstances presented in evidence could lead the court to conclude that racial profiling took place. For now, this approach remains theoretical. As far as we know, Canadian case law currently contains no civil actions instituted to obtain damages after the incriminating evidence was excluded because it was obtained in a manner that violated rights protected under the *Canadian Charter*.

In short, a guilty verdict or admission of guilt in a criminal trial does not preclude a civil recourse, and will not be automatically rejected. The circumstances are paramount.

¹⁵⁹ Ghislain MASSÉ, “*La complexité de l’aveu qualifié simple*”, (1985) 189 *R.J.T.* 25, p. 45. See art. 2852 (2) C.C.Q.

¹⁶⁰ *Côté c. Provençal*, REJB 2001-24687 (C.S.).

¹⁶¹ J.-L. BAUDOIN and P. DESLAURIERS, *op. cit.*, note 145, p. 40, cited in par. 66 of the judgment.

2.2.2 Prescribed cases

The time within which a case must be instituted for an infringement of a *Charter* right is the prescriptive period set out in the *Civil Code of Québec* for personal rights of action in general, namely three years.¹⁶²

However, since January 1, 2002, section 586 of the *Cities and Towns Act*¹⁶³ has read as follows:

“Every action, suit or claim against the municipality or any of its officers or employees, for damages occasioned by faults, or illegalities, shall be prescribed by six months from the day on which the cause of action accrued, any provision of law to the contrary notwithstanding.”

This means that a claim for damages against a municipality, and its police force, is subject to a six-month prescriptive period. However, prescription will not apply in the situations listed in article 2930 of the *Civil Code of Québec*,¹⁶⁴ namely cases in which “the action is founded on the obligation to make reparation for bodily injury caused to another.”

The case law on what exactly constitutes bodily injury is not clear. In a recent judgment at the Québec Court of Appeal, the judge Jean-Louis Baudouin remarked:

“[Translation] [...] it remains difficult to determine exactly what is meant by the expression “bodily injury”.”¹⁶⁵

Citing LeBel J. in *Schreiber c. Canada*¹⁶⁶ concerning the fact that “[translation] the moral injury resulting from an injury to the human body must be included in this category,” Beaudoin J. explains:

“[...] I have no hesitation, following the dominant position in the case law, in saying that a psychological injury, however slight, resulting from a physical injury to the human body falls into this category. A human being must be considered as a whole, in other words in its material aspects (body, physical health) and also in its psychological or immaterial aspects (well-being, mental health). As soon as an individual’s physical integrity has been breached, in whatever way or degree, and if the breach has psychological consequences, then there has been a bodily injury within the meaning of the law.

¹⁶² Article 2925, C.C.Q.

¹⁶³ R.S.Q., c. C-19.

¹⁶⁴ Article 2930, C.C.Q.: “Notwithstanding any stipulation to the contrary, where an action is founded on the obligation to make reparation for bodily injury caused to another, the requirement that notice be given prior to the bringing of the action or that proceedings be instituted within a period not exceeding three years does not hinder a prescriptive period provided for by this Book.”

¹⁶⁵ *Roman Andrusiak, tant personnellement que ès qualités à sa fille mineure Dorothy Geneviève Andrusiak c. Ville de Montréal et al. et Le Procureur général du Québec et al.*, C.A. Montréal, n° 500-09-013967-039, 1 October 2004, Baudouin, Morin and Rochon JJ., par. 15.
[On line] www.jugements.qc.ca/php/decision.php?liste=14348981&doc=5B430B41580E1601

¹⁶⁶ [2002] 3 S.C.R. 269, cited in *Andrusiak*, par. 16.

This solution may appear strange, for two reasons. First, a psychological injury with no link to a bodily injury will not be protected by the prescriptive period of three years. Second, breaches of other fundamental rights that, without causing physical injury, nevertheless cause a moral injury, will be completely eliminated.¹⁶⁷

The judge Benoît Morin, also referring to *Schreiber*, concludes that “[translation] the notion of physical integrity remains flexible, and may include the nervous shock caused by a brutal police intervention.”¹⁶⁸

The conclusions of Beaudouin J. also deserve our attention. He ends as follows:

“[Translation] [...] in this case, the compatibility of the provisions of the municipal law with the *Charter* has not been raised, and it is therefore not our place to rule on this question.”¹⁶⁹

This therefore remains a possible course of action.

¹⁶⁷ *Andrusiak*, par. 17-18.

¹⁶⁸ *Id.*, par. 48.

¹⁶⁹ *Id.*, par. 20.

CONCLUSION

This document set outs the current position for presenting evidence in the area of racial profiling, especially in a civil case.

We have seen that, like other forms of racial discrimination, racial profiling is often insidious. This makes it even more important to be aware of all the types of circumstantial evidence and relevant facts that must be gathered to support a claim of racial profiling.

It is important to anticipate the evidence that may be advanced by the respondent and document it in order to foresee the outcome of a complaint in light of all the elements to which the court will have access.

The motives for the actions of the people in a situation of authority, their behaviour, the application of policies of a discriminatory nature or effect, and the broader social context, are all elements that must be taken into account to assess the outcome of a complaint of racial profiling.

The document *Racial profiling: guidelines for investigations* reviews the main elements that must be considered in an investigation into racial profiling.