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TAB 18

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Applying the Racial Profiling Correspondence Test

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cpd Continuing Professional Development

Applying the Racial Profiling Correspondence Test

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Introduction

In the landmark racial profiling case of *R v Brown*,[1] Justice John Morden, writing for a unanimous Ontario Court of Appeal, firmly recognized that racial profiling is a reality in policing in Canada that is "supported by significant social science research."[2] He acknowledged that racial profiling today is, at its core, largely about implicit bias—the reliance on learned stereotypes about race and crime, often subconsciously, in the decision-making process.[3] Following *Brown*, we can define racial profiling in policing as follows:[4]

> Racial profiling occurs when race or racialized stereotypes about offending or dangerousness are used, consciously or unconsciously, to any degree in suspect selection or suspect treatment. The one exception to this is where race is used as part of a known suspect's physical description, the description is detailed and an individual is investigated because he or she reasonably matches that description.

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[1] (2003) 173 CCC (3d) 23 (Ont CA) [*Brown*].

[2] *Ibid* at para 9. In *R v Grant*, 2009 SCC 32 at para 154 [*Grant*], Justice Binnie similarly acknowledged that a "growing body of evidence and opinion suggests that visible minorities and marginalized individuals are at particular risk from unjustified "low visibility" police interventions in their lives." See also, *Peart v Peel Regional Police Services* (2006), 43 CR (6th) 175 (Ont CA) at para 94 [*Peart*], leave to appeal to SCC refused, 2017 SCCA No 10. In *Peart*, Justice Doherty noted that there is now "an acceptance by the courts that racial profiling occurs and is a day-to-day reality in the lives of those minorities affected by it."

[3] *Brown*, *supra* note 1 at paras 7–8, 86.

[4] See *Peart*, *supra* note 2 at paras 89–90; and, *R v Lam*, 2014 ONSC 3538 at para 181. This definition was adopted by the Ottawa Police Service in its Racial Profiling Policy No 5.39 (27 June 2011). See further, Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* (2003) at 6–8 [*Paying the Price*]; Michele Turenne, *Racial Profiling: Context and Definition* (Quebec: The Commission des droits de la personne et des droits de la jeunesse, 2005). **In this article, "racialized" refers to Black, Brown and Aboriginal communities.** This terminology is consistent with the Ontario Human Rights Commission who "describes communities facing racism as racialized." See "Racial Discrimination – Brochure", online: <http://www.ohrc.on.ca/en/racial-discrimination-brochure>.

The central issue in *Brown* was whether the trial judge had conducted the proceedings in a fair and impartial manner. The Court of Appeal concluded that his insensitive and resistant approach to the issue—including suggesting that Brown apologize to the officer for having asserted that he was profiled[5]—raised a reasonable apprehension of bias.[6] In so holding, Justice Morden recognized that racial profiling cases must be conducted in a way that maintains public confidence in the justice system and fosters fair and unbiased adjudications.[7] Perhaps most significantly for the development of the law in this area, *Brown* established a correspondence test for proving racial profiling.[8]

This article aims to set out, in some detail, how and when the correspondence test can be applied. Part I sets out the test from *Brown*. Part II identifies the different manifestations of racial profiling. This is the first step in applying the correspondence test: understanding how racialized stereotypes can impact suspect selection and treatment. Part III examines the relevant indicators that can be used to meet the test. These indicators include context, pretext and lessons learned. Part III also summarizes the carding/street check data which reveals the widespread nature of the disproportionate policing of Black and other racialized individuals in a number of cities in Ontario, as well as Montreal and Halifax. It is suggested that this evidence requires a reconsideration of the argument made by the African Canadian Legal Clinic in *Peart*, that in order to enhance

[5] *Supra* note 1 at para 98.
[6] *Ibid* at paras 84, 86–95, 104–105.
[7] *Ibid* at para 50.
[8] *Ibid* at paras 44–45.

adjudicative accuracy and fairness, there should be a rebuttable presumption of racial profiling in litigation.[9] Parts II and III are presented in a largely non-traditional format to enhance accessibility and appreciation of the nature and scope of the problem.[10]

The article concludes with a discussion of the relevance of the impact of racial profiling in assessing whether to exclude evidence found in breach of the *Charter even where there is no finding of racial profiling in the particular case*. This is an important contribution to our exclusionary rule jurisprudence and should be relied on in any case involving a racialized accused. Finally, Appendix "A" is included which documents twenty-eight (28) positive judicial and tribunal findings of racial profiling by police in the post-*Charter* era as of April 8, 2017. These cases provide a strong jurisprudential basis to assist in thinking about correspondence and how racial profiling can be effectively raised by lawyers in relevant cases.

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[9] *Supra* note 2 at paras 144–146.

[10] Many of the ideas set out here relating to the correspondence test are explored in more depth in my articles about racial profiling. See David M Tanovich, "Gendered and Racialized Violence, Strip Searches, Sexual Assault and Abuse of Prosecutorial Discretion" (2011) 79 CR (6th) 132; David M Tanovich, "Rethinking the Bona Fides of Entrapment" (2011) 43 UBC L Rev 417; David M Tanovich, "A Powerful Blow Against Police Use of Drug Courier Profiles" (2008) 55 CR (6th) 379; David M Tanovich, "Moving Beyond 'Driving While Black in Canada': Race, Suspect Description and Selection" (2005) 36:2 Ottawa L Rev 315; David M Tanovich, "The Colourless World of *Mann*" (2004) 21 CR (6th) 47; David M Tanovich, "E-Racing Racial Profiling" (2004) 41 Alta L Rev 905; and, David M Tanovich, "Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention" (2002) 40:2 Osgoode Hall LJ 145.

Part I

The Correspondence Test

As noted earlier, the relevant adjudicative standard for racial profiling cases comes from *Brown*[11] where Justice Morden, for the Court, held:

> Where the evidence shows that the circumstances [...] correspond to the phenomenon of racial profiling [...] the record is then capable of supporting a finding that the stop was based on racial profiling.
>
> [paras 44–46] [emphasis added]

It is a test that relies on inductive reasoning—the engine that drives fact-finding where the evidence relied upon is largely circumstantial.[12] In thinking about how to apply the "correspondence" test, Justice Doherty observed in *Peart*:[13]

> The courts, assisted by various studies, academic writings, and expert evidence have come to recognize a variety of factual indicators that can support the inference that the police conduct was racially motivated, despite the existence of an apparent justification for that conduct [...]
>
> The indicators of racial profiling recognized in the literature by experts and in the caselaw can assist a trier of fact in deciding what inferences should or should not be drawn and what testimony should or should not be accepted in a particular case. [...]
>
> [paras 95–96] [emphasis added]

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[11] *Supra* note 1.

[12] Inductive reasoning is the process whereby we rely on logic, common sense and human experience to fill in the inferential gap between a piece (or many pieces) of circumstantial evidence and a material fact. See David M Tanovich, "Angelis: Inductive Reasoning, Post-Offence Conduct and Intimate Femicide" (2013) 99 CR (6th) 338 at 340–343. See further, David M Tanovich, "Regulating Inductive Reasoning in Sexual Assault Cases" [forthcoming 2017].

[13] *Supra* note 2.

Part II

The Varied Manifestations of Racial Profiling

It is critical to understand how racial profiling manifests itself in order to understand the correspondence test. In this Part, six different manifestation—from explicitly using race as part of a criminal profile, to negligently using race as part of a known suspect's physical description—are identified with cases and factual examples. Before detailing the manifestations, however, it is important to reflect on the voices of those impacted by profiling, some of whom shared their experiences with the Ontario Human Rights Commission in its investigation into the issue:[14]

> "My friends who are White are bewildered because their sons do not get stopped, and my friends with Black children are afraid, because they have already had their own teenaged sons stopped, or they have young sons coming up who they know will experience the same treatment. ... [In the community] there is a chilling effect, a loss of trust, and fears for the safety of the children." (D.W.)
>
> "[Being stopped because I was driving a car registered to a union] tells me I'm not good enough to work for a union, because I am Black. And this made me feel less than a human being. And this shows that my contribution to Canadian society is not valued." (M.W.)
>
> "I have looked at the way I speak to them. I still ask when I'm pulled over ... why are you stopping me. I have no tint on my car for the last 7 years. I am very polite. I say 'thank you'. I ask, 'How are you today officer?' My car is not the dream car anymore as I don't want to be branded as one of "those". My appearance appears to be more conservative." (N.W.)
>
> "A regular person would go in their car and they would drive about, not worrying about anything, if their papers are okay. But it got to a point where leaving my house, I would make sure I would check if all my lights were working, if everything is there, if my licence is there, because I know that somewhere down the line I am going to get pulled over." (R.R.)
>
> "[When the racial profiling occurred] I felt violated and ashamed to be Aboriginal.... I am not the person I was before the allegations. I am angry all the time and feel depressed most of the time."

[14] *Paying the Price*, *supra* note 4 at 24–25, 31, 34, 38, 64. Additions in original.

The identified cases in this Part (and in the rest of article) are illustrative of cases where racial profiling was, or could have been, argued.[15] Their inclusion *does not* mean that there was a finding of racial profiling. A list of positive findings can be found in Appendix "A".

(a) Explicitly using race as part of a "criminal" profile

Noting a person was "Middle-Eastern" & linking it to "security and terrorism" in the context of an airport search
R v Neyazi, 2014 ONSC 6838 [paras 162, 203–204]

Linking Asians to marijuana grow-ops:
R v Nguyen, 2006 ONCJ 95 [paras 23–24]
R v Nguyen, 2006 CanLII 1769 (ON SC) [paras 7, 25–26]
R v Mac, 2005 CanLII 3392 (ON SC) [paras 2–5] (Female)

Accused targeted as a "smuggler" because he was Asian:
R v Chung (1994), 23 WCB (2d) 579 (Ont PC) [para 17]

CISC NATIONAL INTELLIGENCE PRIORITIES

Across the country, Vietnamese-based groups remain extensively involved in multiple residential marihuana grow operations with distribution within Canada and to the U.S. These operations are widespread throughout the B.C. Lower Mainland, Alberta and southern Ontario and will continue to increase in Saskatchewan, Manitoba, Quebec and Atlantic Canada. Profits from marihuana cultivation are often reinvested in other criminal activities, such as in the importation of ecstasy and cocaine. Marihuana cultivation continues to affect Canadians' health and safety, often resulting in toxic moulds, condemned grow houses, fire hazards and chemical vapours from pesticides. Additionally, individuals involved in marihuana cultivation often experience violence through home invasions, assaults and booby-trap-related injuries.

(Criminal Intelligence Service Canada (Annual Report, 2004))[16]

[15] To the best of my knowledge, the cases cited throughout this article involve Black, Brown or Aboriginal individuals. If race was not referenced in the decision, confirmation was obtained from counsel or reliance on other indicia like name. Cases involving Aboriginals and women are specifically noted to assist in identifying these cases.

[16] For a discussion of the CISC's Annual Reports and the link to racial profiling, see David M Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2005) at 15–18, 91–94 [*The Colour of Justice*].

(b) Street checks: Engaging in heightened surveillance of racialized individuals/neighbourhoods using general investigative powers

Carding
Elmardy v Toronto Police Services Board, 2017 ONSC 2074
R v Fountain, 2015 ONCA 354
R v Daley, 2015 ONSC 7164
R v K(A), 2014 ONCJ 374
R v Humphrey, 2011 ONSC 3024
R v Allison, 2011 ONSC 1459 [aff'd 2013 ONCA 461]
R v Buckley, [2011] OJ No 2983 (CJ) & [2010] OJ No 2983 (CJ)
R v Bramwell-Cole, [2010] OJ No 5838 (SCJ)
("Officer Rendon [...] explained that he prepared a 208 for every person he stopped to talk with" [at para 30])
R v Marlon Davidson, 2010 ONSC 1508
R v Ferdinand (2004), 21 CR (6th) 65 (Ont SCJ)

ID/CPIC Checks
R c Gelin, 2017 CanLII 8506 (QC CM)
R v Charlie, 2015 BCSC 1579 (Aboriginal)
R v Johnson, 2013 ONCA 177 (Aboriginal)
R v Assiu, 2012 ONCJ 327
R v Reid, 2011 ONSC 6797
McKay v Toronto Police Services Board, 2011 HRTO 499 (Aboriginal)
R v Banks, 2010 ONCJ 553
R v Bruyere, 2009 MBPC 24 (Aboriginal)
Willie v City of Vancouver, 2007 BCPC 0245 (Aboriginal) (Female)
R v Harris, 2007 ONCA 574

License Plate Check
Briggs v Durham Regional Police Services, 2015 HRTO 1712

Curfew/Recognizance Checks
Elmardy v Toronto Police Services Board, 2017 ONSC 2074
R v Trott, 2012 BCPC 0174 (Aboriginal)
R v Davis-Harriot (2007), 49 CR (6th) 265 (Ont SCJ) [aff'd 2010 ONCA 161]

Conducting Opportunity Buys
R v Sterling (2004), 23 CR (6th) 54 (Ont SCJ) [paras 5–6]
(in "area of Eglinton Avenue East between McCowan Road and Markham Road" & targeting young Black males in "baggy clothing")

(c) **"Driving While Black"**: Using highly discretionary and minor statutory powers to justify criminal investigations grounded in racialized "usual offender" stereotypes

Driver not wearing a seatbelt: *R v Ohenhen*, 2016 ONSC 5782; *R v Fortune*, 2016 ONSC 2186

Not a match with registered owner: *R v Ferguson-Cadore and O'Grady*, 2016 ONSC 4872

Rear seat passenger not wearing seatbelt: *R v Thompson* (2016), 28 CR (7th) 394 (Ont CJ)

Careless driving for "turning too quickly": *R v Smith*, 2015 ONSC 3548

Changing lanes without signaling: *R v Carrington*, 2015 ONSC 7903; *R v Alexander*, 2010 ONSC 2468

Failing to yield while riding a bike: *R v Graham*, 2014 ONSC 6880

Failing to stop scooter at stop sign: *R v Gayle*, 2015 ONCJ 575

"Wellness check" on driver asleep in parked car: *R v Dane Felix Charles-Roberts*, 2014 ONSC 1261

Using cell phone: *R v Mattison*, 2012 ONSC 1795

Discarding a cigarette: *Longueuil (Ville de) c Debellefeuille*, 2012 QCCM 235

Swerving vehicle: *R v Huang*, 2010 BCPC 336

Concern of tinted windows: *R v Yousofi*, 2011 ONSC 2298

Turning left on a red: *R v Ahmed* (2009), 72 CR (6th) 187 (Ont SCJ)

Erratic driving: *R v Khan* (2004), 24 CR (6th) 48 (Ont SCJ)

(d) "Spidey Sense": Interpreting ambiguous behaviour as incriminatory when applying the investigative detention power from *R v Mann*

Hand or body movements: *R v Fountain*, 2015 ONCA 354
R v Sterling-Debney, 2013 ONSC 4584
R v Allison, 2011 ONSC 1459 [aff'd 2013 ONCA 461]
Grant, *supra* note 2
R v Yeh, 2009 SKCA 112
R v Kang-Brown, 2008 SCC 18
R v Digiacomo, 2008 ONCJ 105
R v Campbell, [2005] QJ No 394 (CQ)
R v Khan (2004), 24 CR (6th) 48 (Ont SCJ)

Apparent nervousness: *R v Neyazi*, 2014 ONSC 6838

"Looked away": *R v Bruyere*, 2009 MBPC 24 (Aboriginal)

"Elongated stare" or failing to make eye contact:
R v Kang-Brown, 2008 SCC 18
Grant, *supra* note 2

Walking away from police: *R v Darteh*, 2016 ONCA 141
R v Ferdinand (2004), 21 CR (6th) 65 (Ont SCJ)
(*Officer testified re: his "Spidey sense"* [para 23])

Flight: *R v Atkins*, 2013 ONCA 586

Other "evasive" conduct: *R v Glasgow*, 2012 ONCJ 311

Walking in a group: *R v FJ(RGT)* 2013 MBPC 25 (Aboriginal) (Female)

Clothing:
- "over-dressed for the weather": *R v Atkins*, 2013 ONCA 586 [para 3]
- "baggy clothing": *R v K(J)*, 2010 ONCJ 232
- "red bandana": *R v Flett*, [2002] MJ No 439 (Aboriginal)

Contents of car: *R v Calderon*, (2004), 188 CCC (3d) 481 (Ont CA)

(e) **"Any Negro Will Do"**[17]: Unreasonably using race to target an individual based on a purported match with the physical description of a known suspect

R v Jinje, 2015 ONSC 2081 at paras 45, 47
"There was nothing to connect Mr. Jinje to the robbery, other than the fact that the robbers were three black males and Mr. Jinje and his friends were also three black males."

R v Lam, 2014 ONSC 3538 at para 207
"[I]t is not difficult to understand Mr. Rusonik's submission regarding racial profiling. Whether the situation here can properly be described or not as, 'All Asians look alike', or 'any Asian will do', or 'Even if we're wrong about him being the wanted party, the Asian passenger was likely up to no good', there was a recklessness on the part of the police respecting the applicant's s. 9 Charter right."

Maynard v Toronto Police Services Board, 2012 HRTO 1220 at para 176
"The problem is that Officer Baker cast his investigative net so wide that Mr. Maynard's race was the predominant factor that put him at risk of being investigated that day. I do not believe that if the suspect had been a Caucasian man in the same circumstances, with no other defining characteristics, particularly age, and with as little information available about the car and direction of travel, that Officer Baker would have chosen to investigate the first Caucasian man he saw driving the same car at the same intersection. It is consistent with a finding of racial profiling that all black men or all black men of a certain age, driving alone in the area in a black car were possible suspects at the moment that Officer Baker decided to commence his investigation of Mr. Maynard."

[17] See Fo Niemi & Gabrielle Michaud-Sauvageau, "Any Negro Will Do: Race and Suspect Description - the Slippery Slope towards Racial Profiling" (2000) (Centre for Research Action on Race Relations (CRARR)). See also the discussion of this issue in *The Colour of Justice*, *supra* note 16 at 151–169. **This section could also be called "Any Aboriginal Will Do"**: see, for example, *R v Mann*, 2004 SCC 52; *Willie v City of Vancouver*, 2007 BCPC 0245 at paras 26,55 (Female); and, the 1988 shooting death of JJ Harper.

(f) Over-reaction: Intensifying the investigation, for example with unjustifiable arrest, searches or excessive force, or responding to perceived danger with extreme force

Elmardy v Toronto Police Services Board, 2017 ONSC 2074 at paras 35-36 "The Appellant was an innocent man who had fled his country looking for a society in which his rights would be respected. Instead [...] he was subjected to humiliating, violent and oppressive behaviour from one of this city's police officers, all because of the colour of his skin. [...] For these reasons, there is a need for an award of damages that is significant enough to vindicate society's interest in having a police service comprised of officers who do not brutalize its citizens because of the colour of their skin [...]"

McKay v Toronto Police Services Board, 2011 HRTO 499 at para 200 (Aboriginal)
"I find that the repeated criminal records searches underscore my findings [...] that despite releasing McKay at the scene, Fitkin remained suspicious of McKay and required McKay to provide proof of the bike receipt. It is reasonable to infer [...] that the suspicions of Aboriginal criminality, which permeated the encounter, continued even after McKay was released."

R v Nasogaluak, 2010 SCC 6 at para 11 (Aboriginal)
"Cst. Chornomydz yelled at Mr. Nasogaluak to stop resisting and gave him a third hard punch in the head. Mr. Nasogaluak was pinned face down on the pavement with Cst. Chornomydz straddling his back. When Mr. Nasogaluak refused to offer up his hands to be handcuffed, Cst. Dlin punched Mr. Nasogaluak in the back, twice. These blows were strong enough to break Mr. Nasogaluak's ribs, which later punctured one of his lungs. Cst. Olthof was kneeling on Mr. Nasogaluak's thigh throughout this brief struggle."

R v B(S), 2010 ONCJ 561 (Black female strip-searched, by multiple officers including a male officer who used scissors to cut off her bra, and left half-naked in a cell for over three hours following an arrest for public intoxication)

R v Banks, 2010 ONCJ 553 at para 18
"Lim's questioning of the defendant was solely a product of Hunt's instructions[.] Indeed, even after removing the defendant from the car at gunpoint, no pat-down search of the defendant was conducted [...] – belying Lim's professed concern for officer safety."

Abbott v Toronto Police Services Board, 2009 HRTO 1909 at para 46 (Female)
"I find that Sergeant Ruffino's actions in this regard are consistent with a manifestation of racism whereby a White person in a position of authority has an expectation of docility and compliance from a racialized person, and imposes harsh consequences if that docility and compliance is not provided[.]"

R v Walcott, (2008), 57 CR (6th) 223 (Ont SCJ) at paras 72, 108
"[...] Officer Fonseca fired his taser almost two minutes after Officer Reimer had finished firing his, at a time when Mr. Walcott was lying on the ground, handcuffed, under control and compliant. [...] I find that Officer Fonseca's discharge of his taser on Mr. Walcott constituted "cruel and unusual treatment"[.]"

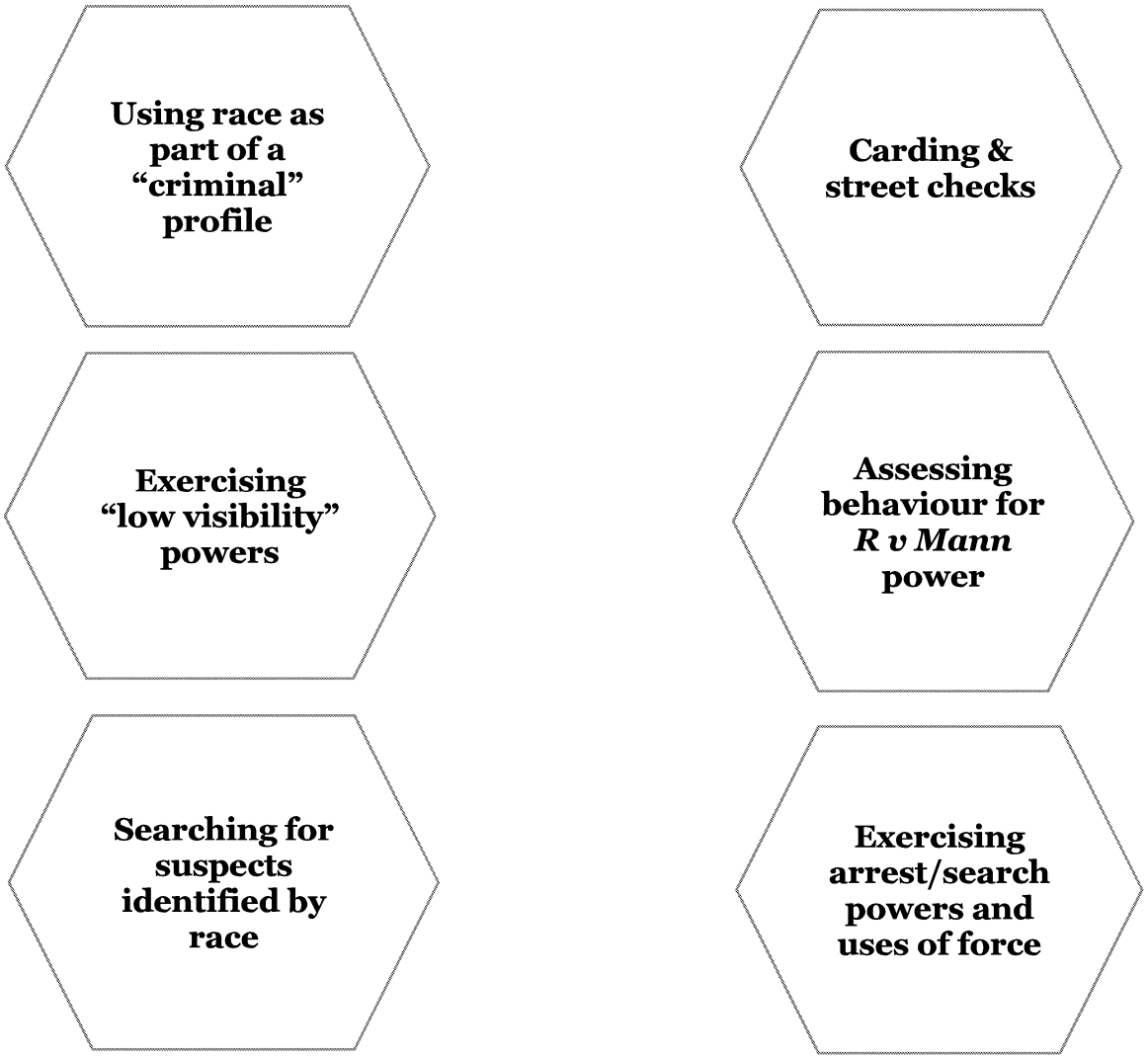
Part III

The Indicators

Having set out the different manifestations of racial profiling, the article turns to three indicators that can be used to prove racial profiling: (i) context; (ii) pretext; and (iii) lessons learned.

(i) Policing in Contexts Vulnerable to Racial Profiling

Relevant Inquiry: *Did the police conduct take place in a context where experience has shown us that racial profiling manifests itself? These contexts include:*



As noted earlier, in *Peart*,[18] a civil racial profiling case, the African Canadian Legal Clinic (ACLC) argued that the burden of proof in racial profiling cases should fall on the police.[19] Justice Doherty responded to this argument as follows:

> [The ACLC] contends that the onus should fall on the police where the party who was subjected to detention or arrest is black. In effect, the ACLC submits that any arrest or detention of a black person by the police is as constitutionally suspect as a warrantless search and, therefore, merits the same rebuttable presumption of unconstitutionality.
>
> This contention is based on the argument that racial profiling is so common that where it is alleged, placing the burden on the police to disprove racial profiling is more likely to achieve an accurate result than is leaving the onus on the party alleging racial profiling. As *McCormick*, *supra*, indicates at 475-76:
>
> > Perhaps a more frequently significant consideration in the fixing of the burdens of proof is the judicial estimate of the probabilities of the situation. The risk of failure of proof may be placed upon the party who contends that the more unusual event has occurred. [Emphasis added.]
>
> The reality of racial profiling cannot be denied. There is no way of knowing how common the practice is in any given community. I am not prepared to accept that racial profiling is the rule rather than the exception where the police detain black men. I do not mean to suggest that I am satisfied that it is indeed the exception, but only that I do not know.
>
> [paras 144–146]

[18] *Supra* note 2.
[19] This is an argument that I also made in *The Colour of Justice*, *supra* note 16 at 144–147.

Peart was decided in 2006. Since then, we have learned a lot more about the scope of disproportionate policing across Canada, particularly in southern Ontario. The following is a summary of the carding/street check and other data that has been released and publicized from 2010-2017.

Toronto[20]

"For black males, the ratio for most patrol zones ranges from about 4:1 to 8:1. For brown young men, most zones have a ration of 2:1 to 8:1. For white young men, the typical range is between 1:1 and 2:1. For those designated as "other", most zones have a ratio of less than one to one.

Overall in Toronto, the number of carded young black men between 2008 and mid-2011 was 3.4 times higher than the young black male population. The ratio for young brown men was 1.8:1, and for white young men and those considered "other," the ratios dropped to 1:1 and 0.3 to one, respectively."

Peel[21]

"The race-based data obtained Tuesday shows that in 2011, blacks were stopped in 5,830 street checks by Peel police out of 26,1113 total checks, or 22 percent of the times.

That year blacks had three times the chance of being stopped, compared to whites, a number that remains consistent when using the street-check data from 2009-2014."

Waterloo[22]

"Black people account for two percent of the regional population, but nine percent of all people stopped, seven per cent of individuals carded just once, nine per cent of individuals carded more than once and eight per cent of all individuals carded."

[20] See Jim Rankin & Patty Winsa, "Known to police: Toronto police stop and document black and brown people far more often than whites", *Toronto Star* (9 March 2012), online: <www.thestar.com>; Jim Rankin, Patty Winsa, Andrew Bailey & Hidy Ng, "Carding drops but proportion of blacks stopped by police rises", *Toronto Star* (26 July, 2014), online: <www.thestar.com> [emphasis added].
[21] See Sam Grewal, "Blacks three times more likely to be carded by Peel police than whites", *Toronto Star* (24 September 2015), online: <www.thestar.com> [emphasis added].
[22] See Jeff Outhit, "Waterloo Regional Police 4 times more likely to stop you if you are black", *The Record* (25 March 2016), online: <www.therecord.com>.

Hamilton[23]

"In Hamilton, 11 to 14 percent of the police street checks were done on black people over the last five years. But only three percent of the population in Hamilton is black, according to the 2011 Census."

London[24]

"Last year London police conducted about 8,400 street checks (far more than officers in other cities and at a rate triple of Hamilton and Ottawa). That included recording data of about 14,000. Of those, 7.7% of the people documented were black and 5.3% Indigenous. According to the 2011 census, only 2.5% of Londoners are black and 1.9% are Indigenous."

Ottawa (Street Checks)[25]

"The police service's combined statistics from 2011 through 2014 show that 58 per cent of people they have street checked are white, 20 per cent are black and 14 per cent are middle eastern. Aboriginal, Asian, East Indian, Latin American and those whose race is unknown accounted for about seven per cent. The ethnicity of about 10 per cent of people street checked wasn't recorded.

But, according to the 2011 National Household Survey, black people account for just under six per cent of the population, while those classified as "Arab" make up less than four per cent of Ottawa's population."

Ottawa (Vehicle Stops)[26]

"The disparities were more pronounced when looking just at young men. Middle Eastern men between the ages of 16 to 24 were 12 times more likely to be stopped, and young black men were 8.3 times more likely to be stopped. Young men police identified as white were stopped 1.7 times more than their population would suggest."

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[23] See Kelly Bennett, "Hamilton police disproportionately stop and question black people", *CBC News Online* (23 July 2015), online: <www.cbc.ca/news>.
[24] See Jennifer O'Brien, "Carding stats show racial bias on police force, critics say", *London Free Press* (14 October 2015), online: <www.lfpress.com>.
[25] See Shaamini Yogaretnam, "Street checks data about racialized men concerning to civil liberties advocates", *Ottawa Citizen* (26 July 2015), online: <www.ottawacitizen.com>.
[26] See "Ottawa police stopping Middle Eastern, black drivers at 'disproportionate' rate", *CBC News Online* (24 October 2016), online: <www.cbc.ca/news>.

Montreal[27]

"The report suggests that the number of young black men stopped and questioned by police in Montreal's sensitive neighbourhoods is "much too high" and even amounts to "fishing expeditions."

Between 2001 and 2007, the report shows the frequency of police identification checks on individuals increased by 126 per cent in the Montreal North borough and 91 per cent in St-Michel.

This "alarming" increase "touched primarily blacks" such that *by 2006 and 2007 between 30 and 40 percent of young black men in these areas faced police identity checks, compared to 5 to 6 per cent of whites.*

Meanwhile, only about 5 percent of the checks yielded arrests or infractions. "A large proportion of these checks," study author Michel Charest concludes, "can be judged as arbitrary or malicious."

Halifax[28]

"New data shows that about 20 per cent of people stopped in police 'street checks' in Halifax are black, despite black people making up less than four per cent of the city's population."

"In a 10-year period between 2006 and 2016, there were 25,322 street checks done by police. Of that number, 2,981 were conducted on black people, 12 per cent of the total street checks. [...]

Data by RCMP also showed there were 1,246 street checks between January and October 2016. A total of 509 black people – 41 per cent – were checked with 475 checks being performed in Cole Harbour district, 93 per cent of the overall number of black people checked. In addition, 440 were in East and North Preston and the Cherrybrook area."

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[27] Andrew Chung, "Racial profiling 'alarming' in Montreal", *Toronto Star* (9 August 2010), online: <www.thestar.com> [emphasis added].
[28] Josh Dehaas, "Halifax police far more likely to stop black people, data shows", *CTV News Online* (9 January 2017), online: <www.ctvnews.ca>; Sean Prevail, "Halifax RCMP conduct street checks on black people more than Halifax police", *Global News Online* (11 January 2017), online: <www.globalnews.ca>.

Given what we (and by extension Justice Doherty) now know from the carding data about the extent of the disproportionate policing of racialized communities, it is time to reconsider the reverse onus/presumption argument put forward in *Peart*. At a minimum, this data should change where we start on the evidentiary scale for adjudication. I would argue that where the impugned police conduct takes place in a context vulnerable for racial profiling, judges should begin with the presumption that there is some evidence of the influence of racialized stereotypes in the exercise of discretion. The analysis would then turn to whether there is evidence of other indicators of profiling that would support a finding that racial profiling likely, or probably, occurred in the case, which is the required standard of proof in *Charter* cases. This would be ensuring what Justice Doherty referred to in *Peart* as "a sensitive appreciation of the relevant social context in which racial profiling claims must be assessed" in order to "[provide] further protection against the failure of meritorious claims as a result of the allocation of the burden of proof."[29] The article now examine two other indicators: pretext and lessons learned.

[29] *Supra* note 2 at para 147.

(ii) Using a Pretext

Relevant Inquiry: *Did the police purport to use a statutory or other investigative power or purpose as a pretext or ruse for a criminal investigation, leaving it open to conclude that what really drove the investigation was racialized stereotypes about crime?*[30]

Proving that the exercise of authority was a pretext can be done on a "totality of circumstances" approach & relevant considerations include:[31]

Is the activity under investigation consistent with the normal duties of the officer?

Ex: Would not expect Emergency Task Force officers to issue tickets for routine offences.

How long did it take for the officer to stop the vehicle?

Ex: Would not expect an officer who claimed to be exercising their *HTA* power to refer to the violation having been committed *after* having followed the individual.

Did the officer have to go out of their way to make the stop?

Ex: Would not expect the police to make a U-turn in busy traffic or on the highway over a *possible* backseat passenger seatbelt infraction.

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[30] It is now well-accepted that using a pretext is an indicator of racial profiling. See *Brown*, *supra* note 1 at para 48; *R v Ferguson-Cadore and O'Grady*, 2016 ONSC 4872 at paras 26–35 [*Ferguson-Cadore and O'Grady*]; and *R v Smith*, 2015 ONSC 3548 at paras 168–183 [*Smith*]. In *Peart*, *supra* note 2, for example, Justice Doherty observed (at para 110):

> Speeding can be a pretext for a racially motivated stop [...] Whether it is a pretext will depend on the findings of fact in each case. For example, if as Mr. Peart testified he was travelling at ten to twenty kilometres over the speed limit at 3:30 in the morning when Officer Ceballo began to follow him, it would be open for a trial judge to find that Peart's excessive speed was a pretext for the officer following his vehicle.

See further, David M Tanovich, "Operation Pipeline and Racial Profiling" (2002) 1 CR (6th) 52.

[31] See *The Colour of Justice*, *supra* note 16 at 130–135.

Make of the vehicle.

Q: Was the individual driving an expensive car, thus potentially triggering the stereotype that he must be involved in criminal activity?

The location of the stop.

Q: Does it take place in an affluent neighbourhood thus potentially triggering the "out of place" stereotype or so-called "high crime" area, triggering the "he could be up to 'no good'" stereotype?

Was there a call to dispatch or call for back-up?

Ex: Would not expect the officer to only refer to possible criminal activity in the call if the intent was to enforce the *HTA* or request back-up for a seatbelt violation in the middle of the day on a busy street.

The nature of the questioning of the individual. Is it consistent with the purported reason for the stop or a criminal investigation? Are those with the driver or target questioned?

Ex: One would not expect the first questions to be about whether the driver or passenger is on bail or what they were doing in a particular area or during a set time-frame.

(iii) Using Lessons Learned From Experience

Relevant Inquiry: *What have we learned from the jurisprudence (including human rights cases), the testimony of those profiled, human rights reports, academic studies and commentary about the officers' conduct and/or testimony consistent with racial profiling?*

Some of the lessons learned include:

Deciding to investigate a young Black male driving an expensive car

Brown, *supra* note 1 [para 46]
R v Ohenhen, 2016 ONSC 5782 [para 105]
Smith, *supra* note 31 [para 183]
R v K(A), 2014 ONCJ 374 [paras 16, 45–46, 54]
R v Khan (2004), 189 CCC (3d) 49 (Ont SCJ) [para 68]

Looking into the car at some point before stopping the vehicle

Brown, *supra* note 1 [para 46]

Inconsistent evidence on when the police saw the race of the individual under investigation

Peart, *supra* note 2 [para 114]
R v Thompson (2016), 28 CR (7th) 394 (Ont CJ) [para 10]

Stopping the person where he or she appears "out of place"

Brown, *supra* note 1 [para 87]
Shaw v Phipps, 2012 ONCA 155 [paras 2, 35]
Ferguson-Cadore and O'Grady, *supra* note 30 [paras 5–6]

Lying about the reason for the stop
Brown, *supra* note 1 [para 45]
Elmardy v Toronto Police Services Board, 2017 ONSC 2074 [para 22]

Asking questions about what the person is doing in the area, whether they are subject to bail conditions, have any outstanding warrants or where they are from

Longueuil (Ville de) c Debellefeuille, 2012 QCCM 235 [para 121]

Purporting to rely on a racially neutral "criminal" profile

R v Chehil, 2013 SCC 49 [paras 41–44]

Failing to investigate or treating differently similarly situated White individuals

Shaw v Phipps, 2012 ONCA 155 [para 23]

Discrepancies or other irregularities in the officer's notes or testimony

Brown, *supra* note 1 [para 46]
R v Thompson (2016), 28 CR (7th) 394 (Ont CJ) [paras 11–12]

An explanation for the investigation that lacks credulity or defies common sense

Elmardy v Toronto Police Services Board, 2017 ONSC 2074 [paras 20, 23]
Shaw v Phipps, 2012 ONCA 155 [para 24]
Longueuil (Ville de) c Debellefeuille, 2012 QCCM 235 [para 4]
R v Huang, 2010 BCPC 336 [paras 13–16]
R v Khan (2004), 189 CCC (3d) 49 (Ont SCJ) [para 65]

Deviations from standard practice

Johnson v Halifax Police Service, [2003] NSHRBID No 2 [para 62]

Where the police incite the commission of an offence like cause disturbance, mischief or resist arrest to justify their conduct

R v Osbourne, 2008 ONCJ 134
R v A(L), 2005 ONCJ 546 (it is unclear whether racial profiling was argued in these cases but it certainly could have been given the facts)

In suspect descriptions cases, there are clearly distinguishing features between the two individuals; or, the officer cannot articulate what other parts of the description he or she was relying on (e.g. height, weight, age, location, or other features)

Maynard v Toronto Police Services Board, 2012 HRTO 1220 [para 176]
Longueuil (Ville de) c Debellefeuille, 2012 QCCM 235 [para 121]

Conclusion

One of the concerns I have written about over the years is the failure of lawyers to raise racial profiling in appropriate cases.[32] Given the paucity of judgments filed with databases like CanLII, Westlaw or Quicklaw each year across Canada, this still appears to remain a problem. This article has attempted to facilitate the identification, litigation and adjudication of racial profiling cases by setting out how the correspondence test can be applied, by identifying the many relevant factors and cases that can be relied upon and, by arguing for a presumptive "some evidence" starting point.

Even if after a considered decision to not raise racial profiling is made, or if it is raised and dismissed, a number of decisions have recognized that the experience of profiling by racialized communities remains a relevant consideration in assessing the seriousness of a *Charter* violation under section 24(2), if one is found. In *R v Harris*,[33] a case involving a CPIC check of a Black passenger during a vehicle stop, Justice Doherty observed that:

> The use of the broad powers associated with *Highway Traffic Act* stops to routinely investigate passengers who have nothing to do with the concerns justifying those stops must have a significant cumulative, long-term, negative impact on the personal freedom enjoyed by those who find themselves subject to this kind of police conduct. While for persons in some segments of the community, these stops may be infrequent, this record suggests that for others the stops are an all too familiar part of their day-to-day routine. Viewed from the perspective of those who are most likely to find themselves stopped and questioned by police, I think this form of interrogation is anything but trivial. It seems to me at some point it must become provocative.

[32] See David M Tanovich, "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008) 40 Sup Ct L Rev 655 and David M Tanovich, "The Further Erasure of Race in Charter cases" (2006) 38 CR (6th) 38.
[33] 2007 ONCA 574.

No racial profiling argument was advanced in *Harris*. In *R v Jinje*,[34] Justice Nordheimer held in excluding a gun under section 24(2):

> The impact on Mr. Jinje's *Charter* rights is significant. [...] The conduct of the police will [...] only serve to reinforce Mr. Jinje's perception of unequal treatment at the hands of the police. Mr. Jinje could hardly be faulted for having such a perception given the numerous times that Mr. Jinje has been stopped by the police, as outlined by him in his evidence. That evidence was confirmed, at least in part, by Officer Censoni who said that police records show twenty-seven instances of encounters between Mr. Jinje and the police. I should add, in that regard, that Mr. Jinje has no criminal record. He is employed and he goes to school. He deserves the same respect from the police as any other citizen of this city ought to receive.
>
> [para 59]

And more recently, in *R v Athwal*,[35] Justice Hill observed in excluding gun and ammunition evidence under section 24(2) that:

> The arbitrary detention was not fleeting or technical given its duration and character. To repeat, the applicant was handcuffed and in custody without lawful authority for over 20 minutes.
>
> [...]
>
> While racial profiling has nothing to do with the actions of the police in this case, the courts, representing society, nevertheless cannot be seen as condoning the arbitrary detention of visible minority members of the community if we are to eliminate perceptions of racism on the part of the police within a community like Peel where 57% of the population are visible minority inhabitants. The impact of the arbitrary detention upon the applicant strongly favours exclusion of the statement evidence.
>
> [para 267]

These cases should also serve to support the raising of race-based *Charter* claims, leading to more racial profiling arguments being heard and recognized by the courts.

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[34] 2015 ONSC 2081.
[35] 2017 ONSC 96.

Appendix "A"

Positive Findings (1982–April 8, 2017)

	1982-2008 (11)	2009-2013 (8)	2014-2015 (4)	2016-2017 (5)
Criminal Cases (17)	*R v Chung* (1994), 23 WCB (2d) 579 (Ont PC) *R v Peck*, [2001] OJ No 4581 (SCJ) *R v Khan*, (2004), 189 CCC (3d) 49 (Ont SCJ) *R v Safadi*, 2005 ABQB 356 *R v Campbell*, [2005] QJ No 394 (CQ) *R v Mac*, [2005] OJ No 527 (SCJ) *R v Nguyen*, [2006] OJ No 272 (SCJ) *R v Nguyen*, 2006 ONCJ 95	*R v Ahmed* (2009), 72 CR (6th) 187 (Ont SCJ) *R v Huang*, 2010 BCPC 336	*R v K(A)*, 2014 ONCJ 374 *R v Neyazi*, 2014 ONSC 6838 *R v Smith*, 2015 ONSC 3548	*R c Gelin*, 2017 CanLII 8506 (QCCM) *R v Ohenhen*, 2016 ONSC 5782 *R v Ferguson-Cadore and O'Grady*, 2016 ONSC 4872 *R v Thompson* (2016), 28 CR (7th) 394 (Ont CJ)
Human Rights Cases / Other (11)	*Johnson v Halifax Police Service*, [2003] NSHRBID No 2 *Nassiah v Peel (Regional Municipality) Services Board*, 2007 HRTO 14 *Pelletier c Simard*, 2007 QCCQ 9847	*Abbott v TPSB*, 2009 HRTO 1909 *Pelletier c Laberge*, 2009 QCCS 729 *McKay v TPSB*, 2011 HRTO 499 *Shaw v Phipps*, 2012 ONCA 155 *Maynard v TPSB*, 2012 HRTO 1220 *Longueuil (Ville de) c Debellefeuille*, 2012 QCCM 235	*Briggs v Durham Regional Police Services*, 2015 HRTO 1712	*Elmardy v Toronto Police Services Board*, 2017 ONSC 2074