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Permissibility of Colour and Racial Profiling

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Permissibility of Colour and Racial Profiling

Abstract

Racial profiling in law enforcement is a contentious matter, particularly in light of U.S. police-citizen race tensions. The racial profiling debate has not been settled. Racial profiling proponents view it as a tool to effectively uncover criminal activity among certain racial groups. Critics find that racial profiling perpetuates racial stigmas and is largely inefficient as a policing tool. This article explores the ongoing debate and offers an overview of the Canadian judicial experience with racial profiling. The author proposes a middle-ground solution where racial profiling may be used under certain constraints imposed on law enforcement. The author suggests that the Crown provide justificatory evidence for the use of racial profiling when it is raised as a defence by the accused.

This article is helpful for readers seeking to learn more about:

- racial profiling, race-based profiling, driving while Black, police oversight, police accountability

Topics in this article include:

- race, racism, racial stigmas, police, policing tools, law enforcement, evidentiary burden, policing tool, and discrimination, Canada, United States, Tupac Shakur, Donald Marshall Jr, Neil Stonechild, Aboriginals, Vietnamese, Punjabis, South Asians, police officers, marijuana, traffic stop, traffic stops

Authorities cited in this article includes:

- *Canadian Charter of Rights and Freedoms*
- Stonechild Inquiry
- Royal Commission on the Donald Marshall Jr. Prosecution
- *R v Khan* (2004), 244 DLR (4th) (Ont Sup Ct)
- *R v Mann* 2004 SCC 52.

Keywords

race, racial profiling, detention, race-based profiling, driving while Black, police, police oversight, police accountability, racism, racial stigmas, policing tools, law enforcement, evidentiary burden, policing tool, discrimination, Canada, United States, Tupac Shakur, Donald Marshall Jr, Neil Stonechild, Aboriginals, Vietnamese, Punjabis, South Asians, police officers, marijuana, traffic stop, traffic stops

PERMISSIBILITY OF COLOUR AND RACIAL PROFILING

JAMES GILL *

INTRODUCTION

The use of racial profiling by police officers is controversial and has garnered much attention because of the impact on an innocent person's rights on the basis of that person's appearance. The Ontario Court of Appeal described racial profiling as "the targeting of individual members of a particular racial group, on the basis of the supposed criminal propensity of the entire group."¹ Any person of any race can practice racial profiling.² Racial profiling by police officers can be unjustifiably punitive. A person's *Charter* rights may be significantly and negatively impacted due to assumptions about appearance.

This paper argues for a more restrained use of racial profiling than some Canadian courts presently permit. The paper is in favour of a system whereby the Crown must disprove or legitimize the use of racial profiling when it is raised by the accused as a defence. Such a scheme permits race to be among the factors that can influence an officer's decision to detain an individual. Where an officer relies on racial profiling, the Crown must demonstrate the legitimacy of doing so through verifiable evidence that establishes the facts upon which the profile is based. The Crown bears this onus when the accused raises the defence of racial profiling, subject to an "air of reality" test. This recommendation does not seek to eradicate the practice of racial profiling but, instead, to ensure its careful use.

This paper is divided into five sections. The first section considers the broad practice of racial profiling, its importance in Canada, and the conflict between the practice of racial profiling and the *Canadian Charter of Rights and Freedoms*.³ The second section evaluates challenges and criticisms regarding the use of racial profiling. The third section considers arguments that support racial profiling as a tool for law

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¹ *R v Brown* (2003), 64 OR (3d) 161 at para 7, (CA) [Brown].

² *R v Singh* (2003), 15 CR (6th) 288 at para 18, (Ont Sup Ct).

³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

enforcement. The fourth section analyses current police powers concerning detention and investigation and exposes the inconsistency of the provincial courts' treatment of racial profiling. The paper concludes with a detailed analysis of the recommended reform, with the aim of ensuring the Crown justifies racial profiling.

I. OVERVIEW AND GENERAL CONSIDERATIONS OF RACIAL PROFILING

A) Background and History

Legendary musician Tupac Shakur was well known for his views on race and poverty. Through his music, he dramatically articulated some of the fears, concerns, and larger systemic issues related to racial profiling:

Cops give a damn about a negro? Pull the trigger, kill a nigga, he's a hero. Give crack to the kids, who the hell cares? One less hungry mouth on the welfare...I see no changes, all I see is racist faces. Misplaced hate makes disgrace to races, we under. I wonder what it takes to make this, one better place let's erase the wasted. Take the evil out the people, they'll be acting right. 'Cause both Black and White are smoking crack tonight.⁴

Shakur's observations on race reflect a trend in the United States to push discussions on the interaction between law enforcement and specific ethnic groups to the forefront of public consciousness. Terms such as "driving while Black" have arisen in American popular culture and are used to describe situations where young Black men are detained by police officers operating on the basis of racial profiles that associate criminal behaviour with being Black.⁵ Although Shakur's statement was made in reference to American circumstances, it bears some relevance to contemporary Canadian society. In 2011, the number of visible minorities in Canada increased to 19.1 per cent of the total population.⁶ Increasing diversity means that race-related issues are often in the foreground of public discourse.

Canada has not escaped the problem of racial biases resulting from the use of state power. Security fears following the September 11, 2001 attacks (9/11), for instance, gave way to the race-based targeting of Muslim and Arab Canadians.⁷ For

⁴ Tupac Shakur, "Changes", CD-ROM: Greatest Hits (Santa Monica, California: Death Row Records/Interscope Records, 1998).

⁵ David M Tanovich, "Using the Charter to Stop Racial Profiling: The Development of An Equality-Based Conception of Arbitrary Detention" (2002) 40 Osgoode Hall LJ 145 at 147 [Tanovich, "Using the Charter"]; Zool Suleman, "Racial Profiling: Racism in Practice?" (20 September 2001), online: Canadian Bar Association <<http://www.cba.org/cba/newsletters/pdf/racial.pdf>>.

⁶ Statistics Canada, Immigration and Ethnocultural Diversity: 2011 National Household Survey (Ottawa: Minister of Industry, 2013), at 4, 17, online: Statistics Canada <<http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011001-eng.pdf>>.

⁷ Reem Bahdi, "No Exit: Racial Profiling and Canada's War Against Terrorism" (2003) 41 Osgoode Hall LJ 293 at 296 [Bahdi].

example, shortly after 9/11, former Ontario Premier Mike Harris made efforts to create special police units to track down and remove illegal immigrants as part of Canada's counterterrorism efforts.⁸ Although Arabs or Muslims were not explicitly identified as targets of this new strategy, Premier Harris reported that the unit's focus was to prevent terrorism through deportation. Consequently, little doubt was left as to the ethnic or religious identity of those who would receive "special scrutiny" from the police or law enforcement officials.⁹

A famous Canadian example of state power influenced by racial bias is the case of Donald Marshall Jr. In this case, Marshall was wrongfully convicted of the murder of Sandy Seale. He was repeatedly let down by the Canadian justice system, in part because he was Aboriginal.¹⁰ This bias manifested in the actions of the Sergeant of Detectives of the Sydney Police Department, John MacIntyre. MacIntyre decided early in the investigation that Marshall stabbed the victim despite a lack of evidence supporting this conclusion.¹¹ MacIntyre considered Marshall a troublemaker and shared in the town's general sense that "Indians" were not worth as much as "whites."¹² MacIntyre conducted his investigation in a manner that supported his presupposition that Marshall committed the murder.¹³ Two key witnesses who originally offered statements contradicting MacIntyre's conclusions reversed their positions after MacIntyre coerced them into accepting an alternative version of the events that supported his investigation.¹⁴ Marshall was wrongfully convicted and served a lengthy prison term.¹⁵ In a reference to the Nova Scotia Court of Appeal, the Court found that Marshall was not guilty of Sandy Seale's murder.¹⁶ Racial profiling played a major role in this innocent Canadian's imprisonment.¹⁷

The Stonechild murder in Saskatchewan is another case of racialized policing.¹⁸ In 1990, Neil Stonechild and Jason Roy, two Aboriginal teens, went out for drinks at a

⁸ *Ibid.* See also Charlie Gillis, "Racial Profiling Inevitable: Law Expert Courts Expected to Permit Practice at Points of Entry" *The National Post* (10 October 2001) A5.

⁹ *Ibid.*

¹⁰ CJ Alexander Hickman, ACJ Poitras, J Gregory Evans, "Royal Commission on the Donald Marshall Jr. Prosecution" (1989) in Benjamin Berger, Patrick Healy & Kent Roach, eds, *Criminal Law and Procedure: Cases and Materials*, (Toronto: Emond Montgomery Publications, 2010) [Hickman, Poitras & Evans]; Province of Nova Scotia, *Royal Commission on the Donald Marshall, Jr., Prosecution: Digest of Findings and Recommendations*, (Halifax: The Royal Commission on the Donald Marshall, Jr., Prosecution, 1989) [Royal Commission]; see generally *R v Marshall* 57 NSR (2d) 286 (SC(AD)).

¹¹ Hickman, Poitras & Evans, *supra* note 10.

¹² Royal Commission, *supra* note 10 at 3.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid* at 1. See also: *MacKeigan v Hickman*, [1989] 2 SCR 796 at paras 81, 84.

¹⁶ Royal Commission, *supra* note 10 at 7.

¹⁷ *Ibid* at 1.

¹⁸ See generally Nicole VT Lugosi, "'Truth-telling' and Legal Discourse: A Critical Analysis of the Neil Stonechild Inquiry" (2011) 44:2 *Canadian Journal of Political Science* 299 [Lugosi]; Province of Saskatchewan, Report of the Commission of Inquiry Into Matters Relating to the Death of Neil

friend's place.¹⁹ During the course of the evening, Stonechild and Roy became separated from each other.²⁰ Roy last saw Stonechild battered and bleeding in the back seat of a Saskatoon Police Service vehicle.²¹ Five days later, Stonechild's beaten corpse was found in a remote industrial area, without a winter coat and wearing only one shoe. The subsequent police investigation was superficial and inadequate. Little was done to preserve the evidence, the investigating officer did not attend the autopsy, and Roy's statements regarding Stonechild were omitted from the file.²² In fact, the police denied having Stonechild in custody that night, and the file was ultimately closed after the investigating officer spent only three shifts investigating the matter.²³

The law enforcement's actions in the Stonechild case were in fact a part of a broader, racially based police practice that targeted Aboriginals. Specifically, the police often took Aboriginals out of town and left them to walk back home on freezing winter nights.²⁴ Consequently, the Stonechild case "was not the first, nor the last" of its kind.²⁵ Sadly, ten years later, three other Aboriginal men were found frozen to death in the same area outside of Saskatoon, with a fourth narrowly escaping death after being dropped off by the police.²⁶ These events have led Aboriginal activists and organizations to call the Saskatoon Police Force racist.²⁷ Both Marshall and Stonechild stand as examples of police officers wrongfully targeting individuals based on the supposed criminal propensity of their race.

B) Charter of Rights and Freedoms

Acting in their capacity as agents of the state, law enforcement's use of racial profiling violates the *Charter* values of liberty and security of the person. This is particularly so when police officers use racial profiling to stop and investigate individuals.²⁸ For example, if an officer decides to stop and investigate a person based upon a racial profile, that person may be considered "under detention" due in large part to their race. The detention of an individual based on racial profiling engages section 9

Stonechild (October 2004), online: Government of Saskatchewan
<<http://www.justice.gov.sk.ca/stonechild/finalreport/Stonechild.pdf>>.

¹⁹ Lugosi, *supra* note 18 at 299-300.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ Susanne Reber & Robert Renaud, *Starlight Tour: The Last Lonely Night of Neil Stonechild*, (Toronto: Random House Canada, 2005) at 65.

²⁴ Joyce Green, "From Stonechild to Social Cohesion: Anti-Racist Challenges for Saskatchewan" (2006) 39:3 Canadian Journal of Political Science 507 at 507 [Green].

²⁵ *Ibid.*

²⁶ *Ibid.* See also Lugosi, *supra* note 18 at 300.

²⁷ *Ibid.* at 510.

²⁸ See e.g. *R v Huang*, 2010 BCPC 336 [Huang]; *R v Ahmed* (2009), 72 CR (6th) 187 (Ont Sup Ct) [Ahmed].

of the *Charter*, which provides that everyone has a right not to be arbitrarily detained or imprisoned.²⁹ Detention is arbitrary if it is based solely on the race to which the detainee belongs.³⁰

Alternatively, racial profiling may violate section 15 of the *Charter*, which states that all individuals are equal before the law and prohibits discrimination based on race, national or ethnic origin, and colour, among other grounds.³¹ However, section 15 cases with respect to race are rare. In fact, there are only a handful of instances where the Supreme Court of Canada has directly dealt with race under section 15.³² For example, race was a factor in both *R v RDS* and *R v Williams* but neither case specifically concerned the issue of police officers engaging in racial profiling.³³

The limited use of section 15 in racial profiling cases underscores the difficulties of proving racial discrimination.³⁴ Specifically, it is the plaintiff who bears the burden of ruling out any competing explanations that are unrelated to race for the detaining officer's behaviour and it is typically not difficult to generate such explanations as a defence after the fact.³⁵ Also, the decision to act on the basis of race may be an unconscious one, in that a police officer may or may not be aware of his racist attitudes when acting on a hunch.³⁶ Lastly, the evidence upon which racial profiling can be demonstrated is generally circumstantial in nature.³⁷

II. CRITICISMS OF RACIAL PROFILING

A) The Difficulty of Using Racial Profiling

A crucial concern when permitting the use of racial profiling is the ability of a police officer to accurately discern races, particularly when different racial groups share similar physical features. For example, it would be difficult for a police officer to effectively differentiate Punjabis—who are perceived as having gang and drug trade affiliation in British Columbia—from other South Asians.³⁸ Similar issues of differentiation arise between individuals of Vietnamese descent—who have dealt with

²⁹ *Charter*, *supra* note 3 at s 9.

³⁰ See e.g. *Brown*, note 1.

³¹ *Charter*, *supra* note 3 at s 15.

³² Julie Jai and Joseph Cheng, "The Invisibility of Race in Section 15: Why Section 15 of the *Charter* Has Not Done More to Promote Racial Equality" (2006) 5:1 *Journal of Law and Equality* at 126 [Jai & Cheng].

³³ [1997] 3 SCR 484; [1998] 1 SCR 1128.

³⁴ Jai & Cheng, *supra* note 32 at 143.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ See *Brown*, *supra* note 1.

³⁸ See e.g. San Grewal, "Punjabis in Peel Warn of Teen Violence", *The Toronto Star* (9 March 2007) online: The Toronto Star <<http://www.thestar.com>>.

the image of being heavily involved in marijuana growing operations—and those of Japanese descent.³⁹ These examples illustrate that racial identifiers are not easy to pinpoint and correctly apply to a suspect or an accused.⁴⁰ Furthermore, as recognized in the case of *R v Moran*, a blanket description of any racial group can be vague and arbitrary.⁴¹ The need to avoid the use of racial profiling is especially important in ethnically diverse city centres where the challenge of precisely recognizing different races and avoiding the use of blanket descriptions can be amplified.⁴²

B) The Economic and Social Marginalization of Racial Groups

Racial profiling does not exist in a vacuum and may be influenced by economic and social factors. Racial attitudes can perpetuate and be informed by socioeconomic realities confronting racialized minorities.⁴³ Racialized groups throughout Canada face ever-increasing socioeconomic marginalization with a disproportionately high rate of poverty among racial minorities. Grace-Edward Galabuzi, an Associate Professor of the Department of Politics and Public Administration at Ryerson University, stated that there is increasing evidence that economic restructuring in Canada over recent years has intensified racialization in labour markets and contributes to the increased social and economic inequalities among racialized people.⁴⁴ These inequalities include the intensification of income disparities as well as the racialization and segregation of low-income neighbourhoods.⁴⁵ Furthermore, members of racialized groups living in low-income neighbourhoods tend to have higher high school dropout rates, welfare dependency, and unemployment rates, while also being surrounded by people facing similar conditions.⁴⁶

Since some combination of these factors often “translates into anti-social behaviour, they [racialized minorities] are disproportionate targets of contact with the criminal justice system.”⁴⁷ In other words, the poverty and related marginalization that many racialized groups experience can result in behaviour that is more likely to bring

³⁹ Vivienne Chin et al, *Marihuana Growing Operations in British Columbia: An Empirical Survey* (1997-2000) (Vancouver: International Centre for Criminal Law Reform and Criminal Justice Policy, 2002), at 44-47, online: ICCLR and Criminal Justice Policy <<http://www.icclr.law.ubc.ca/publications/reports/grow.pdf>> [Chin et al].

⁴⁰ Bahdi, *supra* note 7 at 313.

⁴¹ 2010 ONSC 1894 at para 9.

⁴² *Ibid* at para 10.

⁴³ Grace-Edward Galabuzi, “The Racialization of Poverty in Canada: Implications for Section 15 Charter Protection” (Paper delivered at The National Anti-Racism Council of Canada Nation Conference, 10-13 November 2005), online: The Hamilton Centre for Civic Inclusion <http://www.hcci.ca/hcci1/images/hamilton/geg_section_15_implications_of_racialization_of_poverty.pdf>.

⁴⁴ *Ibid* at 9.

⁴⁵ *Ibid*.

⁴⁶ *Ibid* at 17.

⁴⁷ *Ibid* at 23.

them face to face with the criminal justice system. Their higher rates of contact with the justice system can, in turn, lead to police officers developing racial profiles and, consequently, certain biases.⁴⁸ This phenomenon presents the cyclical risk that “[t]he more that a group is targeted, the greater the likelihood that criminality will be discovered.”⁴⁹

C) The Costs of Racial Profiling to Society

David Tanovich, Professor at the University of Windsor’s Faculty of Law, argues that the existence of racial profiling cannot be disputed in the face of clear evidence and that “[t]he use of race by the police as a basis to target individuals is...a manifestation of systemic racism...[and] has had devastating and deadly consequences for the effected communities.”⁵⁰ According to Tanovich, state efforts should focus on remedial programs, including the enactment of anti-racial-profiling legislation and training programs, as well as hiring policies designed to address the use of racial profiling.⁵¹ An example of such a policy is that of the Ottawa Police Service, which states that its police officers “shall not engage in racial profiling in any of their activities.”⁵² The test for determining violations of this prohibition depends on the nature of the police activity in question, which may include the exercise of statutory powers, the exercise of investigative detention power, or the use of race in a suspect’s description.⁵³ The enactment of such a policy can be part of an effective approach to improving police culture and attitudes regarding racial profiling.⁵⁴ However, the Ottawa Police Service is one of a few police agencies in the country to have taken a vocal stance against the use of racial profiling.⁵⁵

Among the most recent developments to impact the Canadian perception of racial profiling is the aftermath of the terrorist attacks of 9/11. According to Reem Bahdi, Associate Dean of the University of Windsor’s Faculty of Law, 48 per cent of

⁴⁸ *Ibid* at 17.

⁴⁹ David M Tanovich, “E-Racing Racial Profiling” (2004) 41 *Alta L Rev* 905 at 916 [Tanovich, “E-Racing”].

⁵⁰ *Ibid* at 907, 933.

⁵¹ *Ibid* at 917, 926.

⁵² Ottawa Police Service, *Racial Profiling (Criminal Investigations Policy No 5.39)* (Ottawa: Ottawa Police Service, 2011) s 4, online: Ottawa Police Service <http://www.ottawapolice.ca/en/news-and-community/resources/Racial_Profiling_Policy27Jun11_FINALpdf.pdf>.

⁵³ *Ibid*.

⁵⁴ Tanovich, “E-Racing”, *supra* note 49 at 918 (Tanovich argues that such a policy would be an effective way to implement various precursor steps such as the hiring of an anti-racism expert within police departments, anti-racial profiling training, and requiring police officers to record race-based data concerning their stops of individuals).

⁵⁵ *Ibid* at 907. The Kingston and Montreal police agencies have also enacted policies addressing the use of racial profiling (*ibid* at 924).

Canadians explicitly supported the use of direct racial profiling following 9/11.⁵⁶ Bahdi recognized the risks of allowing racial profiling, noting “when decision makers operate against a backdrop of ingrained...stereotypes, they are likely to filter and interpret facts or events through the lens of stereotypes rather than by making an individual and rational assessment based on the particular facts of a given case.”⁵⁷ With respect to post—9/11 racial profiling, she cautions that decision makers may operate on an unfounded assumption that Arabs and Muslims are terrorists.⁵⁸

Racial profiling also does not constitute an efficient form of law enforcement because the benefits are outweighed by the costs to society.⁵⁹ For example, the benefits associated with crime prevention could be negated due to the over-inclusiveness of racial profiling, as it casts suspicion on both targeted criminals as well innocent individuals within a given profile.⁶⁰ Bahdi also notes that a racial profile could be rendered ineffective if, for example, a terrorist organization were to simply rely on an individual who does not fit the profile.⁶¹ Though racial profiling is usually not exclusively relied upon to apprehend an accused, focusing predominantly on a racial profile could lead law enforcement to miss a suspect that does not match the given profile. Ultimately, the social costs of racial profiling include inefficient policing and legislations, suspicions against innocent people, and the alienation of racialized communities.⁶²

Another criticism levelled at the use of racial profiling is the negative effects on members of targeted racial groups as well as on police officers. For example, there is a danger that police officers subconsciously operate on the basis of stereotypical assumptions regarding visible minorities.⁶³ An officer's assessment of his or her grounds for an arrest may then be improperly skewed by a belief that certain visible minorities are more likely to commit crimes.⁶⁴ Such practices would allow the police to routinely harass minority groups under the guise of law enforcement and contribute to the overrepresentation of racialized groups in the criminal justice system. These practices could also foster social stigmatization, cause psychological harm, create negative views

⁵⁶ Bahdi, *supra* note 7 at 294-98.

⁵⁷ *Ibid* at 306. The word "stereotype" used here meaning the association of a particular race with certain characteristics or involvement in a certain activity.

⁵⁸ *Ibid*.

⁵⁹ *Ibid* at 304,

⁶⁰ *Ibid* at 309-14. Racial profiling has the potential to generate false positives because it casts a wide net of suspicion over people, including innocent people.

⁶¹ *Ibid* at 314.

⁶² *Ibid* at 312.

⁶³ James Stribopoulos, “Unchecked Power: The Constitutional Regulation of Arrest Reconsidered” (2003) 48 McGill LJ 225 at 264-73.

⁶⁴ *Ibid*.

about the justice system, and distort the view that police officers have of their environments.⁶⁵

III. ARGUMENTS IN SUPPORTING OF RACIAL PROFILING

Those less opposed to the use of racial profiling often point to statistics showing inequality among races with respect to criminal activity. One US study cites various statistics suggesting non-whites in the US have a greater propensity for criminal behaviour and are generally more hostile towards police officers than whites.⁶⁶ Specifically, the author cites data claiming that African American males are 15 to 35 times more likely to be homicide offenders.⁶⁷ He further asserts that there is evidence that non-whites are more likely to be disrespectful toward police, are more likely to behave towards the police in a manner deemed to be suspicious, and are more likely to report that the police acted improperly during traffic stops.⁶⁸ A similar study in British Columbia showed 36% of marijuana grow-operation suspects in the province were of Vietnamese decent in 2003.⁶⁹ It is important to be cautious when interpreting the results of the latter study, as it provides statistics on people who are merely suspects. Nonetheless, based on such statistics, the argument could be made that certain minority groups happen to have a disproportionately higher number of the frequent offenders among them and are not simply victims of racial profiling.

Ron Melchers, a professor at the University of Ottawa, also tackles racial profiling in a paper written for the Research and Evaluation Branch of the RCMP.⁷⁰ Although he does not directly support the use of racial profiling, he argues that courts are quick to categorize any violation of a visible minority's legal rights as racial profiling and, in such cases, "any police actions...alleged to lack sufficient grounds or "articulable cause" are now routinely submitted as cases of "racial profiling" whenever the subject of such actions is a member of a potential racialized visible minority population."⁷¹ He also noted that "[r]ather than confront racial profiling beliefs on the battlefield of evidence, one should understand them as perceptions."⁷² In doing so, there are a number of tools, such as community education and police engagement with the

⁶⁵ Tanovich, "Using the Charter", *supra* note 5 at 161.

⁶⁶ Matt DeLisi, "Where is the Evidence of Racial Profiling?" (2011) 39 *Journal of Criminal Justice* 461 at 461.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.* Author's note: Such statistics may overlook the possibility that this hostility towards police officers may itself be a result of distrust developed as a result of racial profiling practices.

⁶⁹ Chin et al, *supra* note 39.

⁷⁰ Ron Melchers, *Inequality Before the Law: The Canadian Experience of "Racial Profiling"* (Ottawa: Research and Evaluation Branch, Community, Contract and Aboriginal Policing Services Directorate, Royal Canadian Mounted Police, 2006) [Melchers].

⁷¹ *Ibid* at 18.

⁷² *Ibid* at 4.

community, which could serve to “shape public perceptions of policing and fight beliefs in racial profiling.”⁷³ Furthermore, efforts to ensure transparency and greater accountability of policing are especially important to improve the public’s understanding of the police’s role and powers.⁷⁴ The net result of Melcher’s arguments is that incidents are too quickly characterized as racial profiling.

Brandon del Pozo considers racial profiling by police in the United States and supports its use, arguing that it can be a practical policing tool.⁷⁵ He asserts that there is empirical support for racial profiling. Specifically, Del Pozo relies on data from US government agencies showing the disproportionate involvement of particular races in certain crimes. Del Pozo also considers officers’ professional experiences with certain racial groups. He further states that the common arguments against racial profiling are simply red herrings that do not overcome the ethical justification for using racial profiling to conduct police work.⁷⁶ As an example, he highlights the argument that racial profiling is wrong because it gives racist police officers a licence to harass and brutalize minorities.⁷⁷ Del Pozo states that such an argument loses merit because it incorrectly confuses racial profiling with racism or assumes that the two are inseparable.⁷⁸ However, despite recognizing its utility, del Pozo asserts that racial profiling should be used only when it is instrumental to solving the crime at hand and should nevertheless be used with caution.⁷⁹

IV. LEGAL ANALYSIS

As stated earlier, racial profiling is the targeting of a person of a particular race based on the belief that people of that race have a propensity for criminal activity.⁸⁰ When a police officer engages in racial profiling, it will often be in the context of detaining an individual for questioning or during vehicle stops.⁸¹ *R v Mann* established that a police officer must have reasonable grounds when stopping and detaining a particular individual for investigation.⁸² The detention must be considered reasonably necessary based on: 1) a clear connection between the individual and the criminal

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ Brandon del Pozo, “Guided by Race: An Ethical and Policy Analysis of Racial Profiling in Law Enforcement Decisionmaking” (2001) 1:2 Queensland University of Technology Law and Justice Journal 266 at 282 [del Pozo].

⁷⁶ *Ibid.*

⁷⁷ *Ibid.* at 284.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.* at 300.

⁸⁰ *Brown*, *supra* note 1.

⁸¹ Tanovich, “E-Racing”, *supra* note 49 at 928.

⁸² *R v Mann*, 2004 SCC 52 [*Mann*] at 33-34. See also *R v Simpson*, (1993), 12 OR (3d) 182 [*Simpson*] (this case provided the “articulable cause” requirement which subsequently evolved into the standard established in *Mann*).

offence established through an objective view of the totality of the circumstances informing the officer's suspicion, and 2) the overall reasonableness of a decision to detain when weighed against all of the circumstances.⁸³ More recent case law has emphasized the totality of the circumstances aspect of the *Mann* test, essentially making the standard less onerous on police officers.⁸⁴ Some relevant circumstances that may be taken into account include: (i) the nature of the situation, (ii) the information known to police about the crime or suspects, (iii) whether the stop is reasonably tailored to the effect, and (iv) that the stop is no more intrusive than reasonably necessary, after assessing the risk to the public against the liberty of the citizens.⁸⁵

The number of Canadian rulings on the use of racial profiling is limited. The few cases where it has been addressed demonstrate the varying stances taken by lower courts across the country. Among the different cases addressing racial profiling, the following were chosen because they extensively and directly tackle racial profiling by the police in the detention of individuals. An analysis of the following cases demonstrates that, where the courts take a stance that is permissive of racial profiling, they rely on officer experience as support for its use. However, where courts have opposed racial profiling, they have noted that it is not only potentially unconstitutional and contrary to fundamental human rights but also repugnant police conduct.⁸⁶

A) Cases Allowing The Use of Racial Profiling

R v Villatoro is a case where the court was permissive of racial profiling.⁸⁷ In this case, a Vancouver police officer based his stop and search of Villatoro in part on the fact that he appeared to be Hispanic and was speaking with two Hispanic drug dealers. Villatoro did not follow the officer's commands. The police officer believed that Villatoro's non-compliance was consistent with the behaviour of a drug dealer attempting to swallow drugs. The officer then squeezed Villatoro's throat to prevent him from swallowing anything but no drugs were found in his mouth. However, he was later found with drugs in his pocket. The court subsequently found that the officer had articulable cause to detain and search the accused's mouth for the drugs he believed were being swallowed.⁸⁸ The court acknowledged that "[i]n coming to this conclusion, the officer had relied upon the fact that Mr. Villatoro was with two known Hispanic drug traffickers, [and] the accused appeared to be Hispanic."⁸⁹ However, the court also stated

⁸³ *Ibid* at 34.

⁸⁴ 2007 SCC 32 [*Clayton*]. See also: *R v Chehil*, 2013 SCC 49 at 39-42 and *R v MacKenzie*, 2013 SCC 50 at 71-72 (Both of these recent decisions show the Supreme Court of Canada emphasizing the totality of the circumstances in the assessment of reasonable grounds to detain test as established in *Mann*).

⁸⁵ *Ibid* at 31.

⁸⁶ *R v Neyazi*, 2014 ONSC 6838 at 180.

⁸⁷ 2002 BCPC 0431 [*Villatoro*].

⁸⁸ *Ibid* at para 13.

⁸⁹ *Ibid*.

that, while the officer considered the accused's race, he was not guilty of inappropriate racial profiling, since his eight years of experience indicated that Hispanic males in that particular part of the city tended to stay together and recruit other Hispanic males into the drug trafficking industry.⁹⁰ Instead of determining that racial profiling had occurred, the court found that the officer's conduct was simply a reflection of the realities of that geographic area.⁹¹

The next case that allowed the use of racial profiling was *R v Huang*.⁹² In this case, Huang, the accused, was driving through rural British Columbia when he was pulled over by an RCMP constable. A subsequent search of the vehicle revealed 57 marijuana plants. The constable justified the initial stop by citing highway safety concerns.⁹³ The accused argued that the officer had stopped him for an improper purpose, namely his race, and had therefore violated his *Charter* rights under section 9. Huang alleged he had been stopped because he was Asian and, based on this fact, the officer had assumed he was involved in marijuana production. The court agreed and relied, in part, on the statements made by the officer to the accused during the course of the investigation. For example, at one point the officer said:

You must be guilty as shit. You're probably a gang member aren't you? An Asian from Surrey, right? Is that right? Well you're not saying anything so it must be right. It must be true...Involved in all these big grow ops? Then it must be right. If I were the Canadian government I'd kick your ass right out of Canada is what I'd do...You come into my country and you start trafficking dope around. That's bullshit. My wife and kids live here. In 100 Mile House. And pieces of shit like you are gonna come in. And if they are trafficking drugs in my home town. I do not like it at all.⁹⁴

Despite the incriminating statements, the police officer denied engaging in racial profiling. Instead, the officer argued that he had legitimate highway safety reasons for stopping the accused's vehicle. As a result, the analysis in the case focused on whether the stop was for an improper purpose. The court excluded the evidence by finding that the officer did not stop the accused for legitimate highway safety reasons but on the basis of race. However, if the constable had acknowledged that race had played a role in his decision to stop Huang, the court likely would have found the vehicle stop to be an acceptable use of police powers. In its reasons, the court stated that race could form a legitimate consideration in police work and that an officer's professional experience with a certain race can turn a stop based on racial profiling from one with an improper

⁹⁰ *Ibid* at para 15.

⁹¹ This case predated *Clayton*, *supra* note 84.

⁹² *Huang*, *supra* note 28.

⁹³ *Ibid* at 18.

⁹⁴ *Ibid* at para 22.

purpose to one with a proper purpose.⁹⁵ Further, the court found that there was evidence to support the use of racial profiling in this instance since,

In the case at bar there was a good deal of evidence that large scale marijuana production was, and perhaps still is, a significant concern for the RCMP in the rural areas around 100 Mile House and that some of those ‘grow operations’ were believed to be the work of organized crime groups based in the Lower Mainland and made up of persons of Asian descent. *It may be that there could be an evidentiary basis for linking race with a particular type of criminal conduct in the 100 Mile House area at this point in our history.*⁹⁶

B) Cases Opposing the Use of Racial Profiling

The Alberta case of *Faqi* diverges from judicial acceptance of racial profiling. Here, an officer entered a bar on a tip that drugs were being sold on the premises.⁹⁷ He approached and questioned Faqi, the accused, who was a Black man. The accused was identified by the officer as someone with whom “he ought to engage in conversation as a consequence of the fact that [he] was black.”⁹⁸ The case centered on the doctrine of entrapment, which requires, in part, an assessment of whether the police officers were engaging in a bona fide inquiry when approaching the accused. The court noted “police investigative powers which interfere with individual liberty of freedom...must satisfy the common law test of either a bona fide inquiry or action based on a reasonable suspicion that the targeted individual is already engaged in criminal activity.”⁹⁹ The court also stated “[i]n the analysis of what amounts to a bonafide inquiry, the court must...be given articulable reasons for the inquiry [by] the police. Police acting on a ‘hunch,’ police acting pursuant to negative stereotyping, racial profiling, and other such activities cannot form the basis for a bonafide inquiry.”¹⁰⁰

In *R v Khan*, the accused was pulled over in Ontario by police officers who found a kilogram of cocaine in the accused’s possession.¹⁰¹ The police officers’ version of the facts stated Khan was driving erratically. Once Khan was stopped, witnesses testified that Khan was seen fumbling with something in the glove box in one hand and trying to stow something under the driver’s seat with the other when police approached the vehicle. The officers removed Khan from the vehicle after Khan refused to comply with police orders. Khan’s statement of the facts noted that he was driving in a normal manner. He asserted that he was a victim of racial profiling and that the police pulled

⁹⁵ *Ibid* at para 26.

⁹⁶ *Ibid* [emphasis added].

⁹⁷ *R v Faqi*, 2010 ABPC 157 rev’g on other grounds 2011 ABCA 284 [*Faqi*].

⁹⁸ *Ibid* at para 4.

⁹⁹ *Ibid* at para 12.

¹⁰⁰ *Ibid* at para 11.

¹⁰¹ (2004), 244 DLR (4th) 443 (Ont Sup Ct) at para 1 [*Khan*].

him over solely because he was a young Black man driving an expensive car.¹⁰² Khan alleged that he cooperated with the police and provided them with identification. The court ultimately accepted Khan's version of the facts. The court found that the police had stopped Khan for an improper purpose and strongly condemned the racial profiling that had occurred.¹⁰³ In its decision, the court stated,

Conduct of this kind by the police is reprehensible. It cannot be condoned or excused. It is a most serious breach of Mr. Khan's human rights, as well as his rights under ss. 8 and 9 of the Charter.¹⁰⁴

In *R v Ahmed*, a young Black man stopped at a red light next to two police officers in a cruiser. It was daylight, and the police officers were able to visually identify the man's race. They subsequently conducted a check of the vehicle's license plates, found that Ahmed had a criminal record, and decided to pull him over. He was found with small quantities of marijuana and cocaine and was consequently arrested. The accused argued that he had been the victim of racial profiling. The court agreed and held,

[T]he initial stop was not for a valid purpose. The detention that followed was not permissible. It was not a proper investigative detention in furtherance of a valid purpose. The police had no lawful basis to pull Mr. Ahmed over, to demand that he get out of the car, to take him out of the car, to detain him or to search him or his car...In my view, the circumstantial evidence is such that, on a balance of probabilities...Mr. Ahmed was investigated and arbitrarily detained because of his race.¹⁰⁵

These cases show that in some instances, as in *Villatoro* and *Huang*, the courts have been willing to accept that racial profiling can be a legitimate consideration and a practical tool in police work. In other words, it may be permissible to use racial profiling to form reasonable grounds to detain. In *Faqi, Khan* and, to a lesser extent *Ahmed*, the courts have taken the opposite position that racial profiling constitutes an improper purpose for the detention of an individual.¹⁰⁶ Ultimately, what these cases illustrate is that the approaches adopted by the courts across the country have not been consistent.

V. ARGUMENT: RACIAL PROFILING SHOULD BE PERMITTED IN NARROW CIRCUMSTANCES

¹⁰² *Ibid* at para 2.

¹⁰³ *Ibid.* at para 68.

¹⁰⁴ *Ibid* at para 69.

¹⁰⁵ *Ibid* at 60.

¹⁰⁶ *Huang, supra* note 28 at para 26 (This case also recognized the stop was based on race and was an improper purpose in that particular instance, but that an evidentiary basis linking race with a particular type of criminal conduct could have rebutted this).

Conflicting positions from scholars, writers, and courts demonstrate the law does not offer a clear stance on whether racial profiling is justifiable. Despite its occasional usefulness as a law enforcement tool, racial profiling can negatively impact an individual's *Charter* rights. For this reason, a solution is needed that recognizes all angles of the issue and presents a compromise rather than an outright ban of the practice. The solution should take into consideration *Charter* rights, the practical difficulties of racial profiling, and the arguments both for and against its use. It should allow limited reliance on racial profiling as a tool in those circumstances where its use stems from a belief that is fact-based and demonstrable. Further, a racial profile should not be the sole factor relied upon by the police officer to detain an individual. When racial profiling is the only factor relied upon in detaining an individual, it should remain classified as an improper purpose.¹⁰⁷ The new approach to racial profiling aims to prevent the perpetuation of stereotypes and mitigate the potential for police harassment of racialized groups.

The solution would first require that the accused raise the defence of racial profiling at trial. A low evidentiary threshold should be required to demonstrate its existence, in recognition of the difficulties that an accused faces when attempting to prove racial profiling.¹⁰⁸ All that would be necessary is for the accused to show an air of reality to the existence of racial profiling rather than proving its existence through extensive circumstantial evidence.¹⁰⁹ Once demonstrated, the persuasive burden is on the Crown to either prove that the police officer did not rely on a racial profile or to prove the legitimacy of the use of the racial profile as a factor, among others, in the particular circumstances of the case.¹¹⁰ In order to do so, objective evidence should be used to show, on a balance of probabilities, that the belief underlying the racial profile is based on facts.¹¹¹ For example, as alluded to in the *Huang* case, if the Crown can establish that people of X race show a greater involvement in the production of drugs and are known to carry out affiliated drug operations in a particular part of rural BC, where few people of X race live, then in this instance it would be permissible for the

¹⁰⁷ See e.g. *Brown*, *supra* note 1, *Faqi* *supra* note 100.

¹⁰⁸ *Brown*, *supra* note 1 at para 44.

¹⁰⁹ See e.g. *R v Cinous*, [2002] 2 SCR 3, 2002 SCC 29 at paras 52-54 [*Cinous*] (Unlike in *Cinous* where the court ruled that the air of reality test was necessary before a defence could be put to a jury, the test would be necessary in this instance before the burden shifts to Crown. In essence, the trial judge would consider the totality of the evidence, and assume the evidence relied upon by the accused to be true (*Cinous* at 52) and decide if the burden should shift to Crown); see e.g. *Brown* *supra* note 1, *Ahmed*, *supra* note 28.

¹¹⁰ Tanovich, "E racing", *supra* note 49 at 931. The assertion here is similar to the argument advanced by Tanovich. In that article, Tanovich suggested in those jurisdictions where courts have recognized the existence of racial profiling by police, the onus should be reversed and placed on the Crown instead to establish on a balance of probabilities that a vehicle stop was not motivated by race.

¹¹¹ See e.g. Tanovich, "E-racing", *supra* note 49 at 931.

police officer to rely, in part, on a racial profile.¹¹² This would differ from the subjective evidence that some courts have allowed, whereby officers can rely on their own experience to support the use of a racial profile.¹¹³

As noted, often when a police officer is engaging in racial profiling, the profile is based on a number of factors, including the officer's experience or knowledge relating to the crime, the geographic area, and the specific race at hand.¹¹⁴ Basing the use of racial profiling solely on an officer's beliefs could result in the abuse of policing powers, the harassment of certain racial groups, and the potential for police officers to act on overtly racist attitudes and beliefs.¹¹⁵ The possibility of these negative outcomes can overpower the legitimate use of racial profiling as a policing tool.¹¹⁶ However, the viability of racial profiling would be enhanced by requiring objective evidence to support the use of a profile and prohibiting the use of a racial profile as the sole factor required to detain or investigate an individual. The potential occurrence of negative outcomes such as police harassment of certain racial groups would be reduced with these constraints on law enforcement's ability to use racial profiling. The suggested solution therefore offers a balanced approach to employing racial profiling: cases where racial profiling cannot be effectively used would be reduced while still allowing the application of racial profiles when objective evidence supports their use. Moreover, ensuring the Crown has the burden to justify engaging in racial profiling is consistent with the general principles of equality and fairness.¹¹⁷ The solution is also in accordance with the Crown's responsibility to maintain the administration of justice, part of which encompasses the work of police officers.¹¹⁸

If the use of racial profiling were permitted under this solution, it would contribute to the satisfaction of the "reasonable grounds to detain" requirement set out in *Mann*.¹¹⁹ As stated earlier, the detention must be viewed as reasonably necessary based on an objective view of the totality of the circumstances.¹²⁰ The proposed solution allows racial profiles to satisfy the reasonable grounds-to-detain requirement and the reasonable suspicion requirement, as it would require the support of objective evidence and avoid reliance on a police officer's mere intuition.

CONCLUSION

¹¹² *Huang, supra* note 28 at para 26. The criminal involvement should be shown through data addressing conviction rates. It should not simply rely on charge rates.

¹¹³ See *Villatoro, supra* note 87.

¹¹⁴ See e.g. *Villatoro, supra* note 87, *Huang, supra* note 28.

¹¹⁵ Tanovich, "E-Racing", *supra* note 49 at 933 (Tanovich recognized this as a risk of racial profiling in general); Tanovich, "Using the Charter" *supra* note 5 at 161.

¹¹⁶ See *Villatoro, supra* note 87, *Huang supra* note 28.

¹¹⁷ Tanovich, "E-racing", *supra* note 49 at 931.

¹¹⁸ *Ibid.*

¹¹⁹ See *Mann, supra* note 82.

¹²⁰ *Ibid.*

When assessing the permissibility of racial profiling, the challenge is to balance the protection of rights against the need to ensure effective policing. Achieving this balance is further complicated by varying judicial and scholarly positions on the use of racial profiling and by the fact that the Supreme Court of Canada has yet to rule on the matter. However, achieving this balance is not impossible. Limiting the use of racial profiling to rare instances where the facts upon which the profile is based can be established may help achieve a balanced and more justifiable approach to its use.