

BC Civil Liberties Association

Racial Profiling Position Paper

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I. Introduction

Racial profiling is both ineffective as a law enforcement strategy and offensive to fundamental principles of civil liberties and the Canadian *Charter of Rights and Freedoms*.¹ The BCCLA is committed to helping end the influence of racial profiling in Canadian law enforcement as a step toward making the day to day operation of government less corrupted by a practice that allows racism and social bias to direct and distort the way government powers touch the lives of democratic citizens. Racial profiling harms individual Canadians and distorts the functioning of our democracy. By adopting this position paper, the BCCLA commits to a multi-faceted strategy to denounce and help eliminate racial profiling in Canada. This effort will, over time, include:

- developing education and outreach efforts that demonstrate why racial profiling should be denounced from a civil liberties perspective
- engaging policy-makers and legislators in supporting laws, policies and practices that eliminate profiling from Canadian law enforcement and security agencies
- engaging in test case litigation involving allegations of racial profiling

¹ *Canadian Charter of Rights and Freedoms*, s. 3, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. [*Charter*].

Racial profiling is both ineffective and wrong. Racial profiling's adverse effects outweigh its alleged benefits in all areas where law enforcement or intelligence interact with society, including criminal, immigration and national security contexts and racial profiling undermines fundamental Canadian values. The perception that crime is rampant in today's society or national security is under attack does not justify ineffective and irrational tactics by law enforcement and security agencies which disregard human rights, violate the *Charter* and erode civil liberties.

Communities that are subjected to racial profiling are unfairly over-policed, unjustly scrutinized and disproportionately represented in the criminal justice system.² Racial profiling is the product of stereotyping of racialized communities and it fuels further stereotyping.³ We pause here to note that the term racialized communities is used rather than terms such as "visible minorities", "persons of colour" or "non-white persons". References to the term "racialized communities" conveys that it is a social construct to view persons or groups who share (or are perceived to share) a given ancestry as different and unequal in ways that matter to economic, political and social life, and that this view is not based in reality.

Victims of racial profiling have their liberty interests taken from them. They are stopped, searched, arrested, subjected to unwarranted force, detained in custody⁴ and in the most extreme cases, shot, tortured or killed as a result of being ill-perceived as a serious threat. Racial

² See Tanovich, David, "*The Colour of Justice: Policing Race in Canada*," Irwin Law Inc. (2006); and Aboriginal Justice Implementation System, "*Report on the Aboriginal Justice Inquiry of Manitoba*" (November 1999) (online: <http://www.ajic.mb.ca/volume.html>) (accessed on: January 15, 2009). Import and up to date information about racial profiling can be found through the Legal Enforcement Accountability Project (LEAP) at the University of Windsor, Faculty of Law (online: <http://www.uwindsor.ca/leap>). This is a student lead project operated under the academic leadership of Professor David Tanovich.

³ Manitoba Human Rights Commission, "*Racialized Communities and Police Services Project: Interim Report*" (November 2007) (online: <http://www.gov.mb.ca/hrc/english/publications/rcaps.html>) (accessed on: January 10, 2009).

⁴ See Tanovich, *supra* note 2 at 24.

profiling has had a long and inglorious history in Canada, with serious impacts on surveillance, search, investigation, arrest and incarceration rates for the racialized communities singled out for its destructive attentions. Racial profiling can not only result in distorted levels of law enforcement and imprisonment, as it has for members of Canada's First Nations. It can be literally lethal, resulting in unnecessary deaths of suspects selected not on the basis of sound police practice, but on the basis of institutionalized racism and private bias. Since the tragic events of September 11, 2001, the destructive impacts of racial profiling have been felt more and more seriously by Canadian residents who are or are perceived to be of Muslim origin.

Racial profiling has not been proven as an effective policing strategy. It does not effectively combat crime and/or terrorism since innocent individuals are wrongly targeted, detained and interrogated, while those who are responsible may slide under the radar because of an under-inclusivity of searches and inquiries. Racial profiling also promotes cynicism about law enforcement and the judicial system amongst members of racialized communities who are subjected to racial profiling, thus decreasing the probability of citizen co-operation with legitimate investigations.

II. Racial Profiling: What Is It?

For the purposes of this paper, "profiling" and "racial profiling" are used interchangeably, to reflect the reality that illegitimate and *Charter* offending law enforcement profiling can be conducted in terms both of explicitly racial categories and in terms of social/religious/cultural identities that serve as proxies for race and similarly are invoked to justify behaviour that singles out the profiled for disproportionate suspicion, surveillance,

investigation and arrest. We adopt the Ontario Human Rights Commission's definition of racial profiling, which is: "any action undertaken for reasons of safety, security or public protection, that relies on stereotypes about race, colour, ethnicity, ancestry, religion, or place of origin, or a combination of these, rather than on a reasonable suspicion, to single out an individual for greater scrutiny or different treatment".⁵ Essentially, racial profiling is the use of race as a proxy for risk in the policing of criminality, and more recently, terrorism. Racial profiling can be an overt strategy of law enforcement or subtle and unconscious.

In its overt form, racial profiling involves the targeting of certain communities or individuals within a community for surveillance on the basis that the community itself is susceptible to crime. This form of racial profiling was evident most dramatically after September 11th when Arab and Muslim communities were held under surveillance as potential threats to national security.

In its more subtle form, racial profiling involves the filtering of information through the lens of stereotypes. For example, we believe that the RCMP racially profiled Maher Arar when they associated him with Al Qaeda with very little evidence to substantiate their conclusions. The fact that Maher Arar was an Arab Muslim man almost certainly factored into the RCMP's assessment of him. This form of racial profiling can also impact on police conduct in other ways. It can lead police to use unwarranted lethal force against members of racialized communities.

The use of disproportionate force by police is inevitably linked to an assessment, based on a stereotype that the individual they are confronting is inherently violent, because of their racialized status. One recent and tragic international example was the killing of Charles de

⁵ Ontario Human Rights Commission, "*Paying the Price: The Human Cost of Racial Profiling*" (December 2003) (online: http://www.ohrc.on.ca/en/resources/discussion_consultation/RacialProfileReportEN/pdf).

Menezes, an innocent Brazilian man, in London, England following the July 7, 2005, subway bombings.⁶ Because de Menezes was brown skinned, he was mistaken for a terrorist, with fatal consequences. Another fatal incident was the shooting death of a young Aboriginal leader, J.J. Harper, on March 9, 1988. Harper was stopped by a Winnipeg police officer, who had mistaken him for a car thief. A scuffle ensued and Harper was shot, and killed.⁷ Harper allegedly had nothing in common with the suspect who was being sought other than his Aboriginal identity.

The Canadian media has significantly contributed to stereotyping and profiling of racialized communities by linking them with violence and aggression. For instance, the moral panic and anti-Black stereotypes that were perpetuated by various media outlets following the 'Just Desserts' killing in Toronto, Ont. indirectly condoned the subsequent racial profiling of Black Jamaican men on the basis that there is a relationship between Blackness and crime.⁸ This incident also prompted the Canadian government to introduce amendments to the *Immigration Act* through Bill C-44⁹ in 1995. Bill C-44 removed the right of permanent residents to appeal deportation orders based on criminality when the Minister issued an "opinion" that the appellant was a "danger to the public in Canada."¹⁰

Given the negative stereotypes that associated Black males with criminality, Bill C-44 was the legislator's attempt to "get tough on crime." This translated into a message to get tough with certain communities. Although racial profiling of Blacks was not explicitly permitted in Bill C-44, a study released by the African Canadian Legal Clinic ("ACLC") in 2002 entitled "A

⁶ Ibid at p 25.

⁷ Sawatzky, Wendy, "J.J. Harper: 15 Years Later" Canadian Broadcasting Channel (March 7, 2003) (online: <http://www.cbc.ca/manitoba/features/harper/>) (accessed on: January 7, 2009)

⁸ J. Falconer & C. Ellis., "Colour Profiling: The Ultimate Just Desserts" paper presented at the American Bar Association Conference in Toronto, August 1988; Henry, F. & Tator, C., "Racist Discourse in Canada's English Print Media" (Toronto: The Canadian Race Relations Foundation, 2000) at p. 154.

⁹ *An Act to Amend the Immigration Act and the Citizenship Act and to Make a Consequential Amendment to the Customs Act*, S.C. 1995, c. 15 [hereinafter Bill C-44].

¹⁰ Ibid at s. 70(5).

Report on the Canadian Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination" revealed that it commonly occurred.¹¹ The report showed that since Bill C-44 nearly 40% of the total removals from Ontario were Jamaicans, and that it was five times the number of the next highest recipient country of Trinidad & Tobago, another Caribbean country, and more than the number of deportees to all of Europe, the United States and South America combined.¹²

The media has also fueled the profiling of Arabs, Muslims and Asians. Several studies have demonstrated how the media has portrayed these groups as inherently violent. For example, Willard Oxtoby's study of American perceptions of Arabs confirms that Arabs are commonly depicted as fanatical, irrational, immoral, untrustworthy, and incorrigible barbarians bent on destroying peace. Oxtoby cites a 1976 issue of Harpers Magazine as an example: "Arabs are religious fanatics devoted to a non-Western warrior religion. Their bequests to us include the words *assassin* and *jihad* ... the Arab draws his blade with gusto, and when he is finished butchering he is always that much closer to Allah."¹³ Canadians receive this stereotype of the

¹¹ Lawson, Erica, et al., "*Anti-Black racism in Canada: A report on the Canadian government's compliance with the International Convention on the Elimination of All Forms of Racial Discrimination*" (July 2002) African Canadian Legal Clinic.

¹² Ibid at 48. The media hysteria surrounding the 2005 Boxing Day shooting of teenager, Jane Creba, in Toronto, Ont. is likely to have a similar negative effect on Blacks, particularly, young Black males as the 'Just Desserts' killing did. The Canadian government, under the leadership of Conservative leader and Prime Minister Stephen Harper tabled in November 2006 Bill C-10 – a law that will ensure that tougher mandatory minimum sentences are imposed for serious and repeat firearms crime – as a response to this incident. Given the resemblance of these incidents in regard to the skin colour of the victim and the accused, as well as the moral panic associated with the crime and the association of Blackness with criminality, Bill C-10 is likely to contribute to racial profiling, and, ultimately, a loss of liberty for young Black males.

¹³ Willard Oxtoby, "*Western Perceptions of Islam and the Arabs*" in the *American Media and the Arabs*, ed. by Michael C. Hudson & Ronald G. Wolfe (Washington, D.C.: Center for Contemporary Studies, Georgetown University, 1980); See Gottschalk, P., "*Islamophobia: Making the Muslims the Enemy*" Rowman & Littlefield Publishers (2007) for a discussion of how Islamophobia is reflected and perpetuated through editorial cartoons.

Arab as terrorist, or potential terrorist, through American media as well as Canadian sources.¹⁴ September 11 simply amplified the stereotype. On June 14, 2003, for example, The Globe and Mail printed a cartoon honouring Father's Day. The cartoon depicted an Arab man with stereotypical features gleefully receiving a belt of explosives from his young son.¹⁵

III. The Extent of Racial Profiling in Canada

While some deny that racial profiling takes place in Canada and argue that those who believe that there is a problem are either misguided or misinformed, others contend that racial profiling remains a part of the arsenal of police.¹⁶ Ken Closs, Chief of the Police Services in Kingston, Ontario acknowledges that racial profiling is a common policing tactic.¹⁷ This acknowledgement is reinforced by a May 2005 study of police statistics in Kingston, Ont., which found that young Black and Aboriginal men were more likely to be stopped than men from other groups. The data showed that police in the predominantly White city were 3.7 times more likely to stop a Black as opposed to a Caucasian, and 1.4 times more likely to stop an Aboriginal person than a White.¹⁸

¹⁴ Bahdi Reem, "No Exit: Racial Profiling and Canada's War Against Terrorism" (2003) 41 Osgoode Hall L.J. 293 at 304.

¹⁵ The Globe and Mail (14 June 2003) A20.

¹⁶ See Royal Canadian Mounted Police, "Inequality Before The Law: The Canadian Experience of 'Racial Profiling'" (February 2007) (online: <http://www.rcmp-grc.gc.ca/ccaps-spcca/ineq-eng.htm>) for the claim that the practice exists only in the minds of its critics; See Closs and McKenna, "Profiling a Problem in Canadian Police Leadership: the Kingston Data Collection Project" (2006), 49 Canadian Public Administration 143 (online: <http://www.police.kingston.on.ca/Profiling%20a%20problem%20in%20Canadian%20police%20leadership.pdf>) (accessed on: January 7, 2009) for another perspective.

¹⁷ Ibid.

¹⁸ Supra note 5.

Stephen Lewis, the former Ontario NDP leader and Canadian Ambassador to the United Nations, released a report in December 1995, which extensively examined racism in policing in Canada. Researchers for the report conducted telephone interviews in 1994 with 1,257 individuals who self-identified as Black (417), Chinese (405), or White (435). The study revealed that:

- 17% of Black residents reported having been stopped on two or more occasions over the previous two years, as compared to only 8% of White residents; and
- 43% of Black male residents reported having been stopped by the Toronto police in the previous two years, as opposed to only 25% of White male residents.

Racial profiling in Ontario is often referred to bitterly as having created the crime of “driving while black” or “DWB.” David Tanovich’s book, *The Colour of Justice*, opens with a vivid account of a DWB incident.

In the early morning hours of October 22, 2003, Dwight Drummond, a popular City tv assignment editor, and his friend, Ron Allen, were driving home in Drummond’s Blue Volkswagen Passat. They were young Black men and about to experience, as Drummond would later call it, a “rite of passage” – an unwarranted encounter with the police.¹⁹

The two men were boxed in by police cruisers, ordered to exit their vehicles, raise their hands, get on their knees, and lie on their stomachs with their hands outstretched. They were handcuffed, searched and placed in the cruiser.

What was a routine ride home from work and a meeting of friends suddenly escalated into a situation where Drummond and Allen faced the very real possibility of joining the many other young Black men who have been shot by the Toronto police under troubling circumstances.²⁰

¹⁹ See Tanovich, *supra* note 2 at 9.

²⁰ *Ibid* at 10. The LEAP website contains an updated list of cases, reports and other resources involving racial profiling. *Supra* note 2.

Scot Wortley, one of the commission researchers and criminology professor at the University of Toronto, conducted a follow-up study. Wortley found that Blacks were still two -times more likely to experience a single stop, four-times more likely to experience multiple stops and seven-times more likely to experience an “unfair” stop.²¹

1. Profiling Blacks

Prior to 9/11, Black Canadians were subject to some of the most egregious examples of racial profiling.²² In waging the “war on drugs” between 1986 and 1992, police intensified their patrol of low income areas in Ontario targeting Black people as suspects.²³ This directly resulted in the overrepresentation of Blacks in prison as reported by The Ontario Systemic Racism Commission even though there was no evidence to suggest Canadian Black populations were any more likely to use or profit from drugs than members of other races.²⁴ The perceived success of profiling Blacks signaled by the high incarceration rates fueled the already existing stereotype that young Black males were likely to be involved in drug related crimes and in turn contributed to more overt racial profiling. Consequently, the profile became so loosely based that any Black male regardless of his age, or location was a potential threat.²⁵ Toronto police went as far as initiating what legal scholar David Tanovich calls a no-walk list requiring African

²¹Wortley, Scot, “*Racial Profiling in Canada: Evidence, Impacts and Policy Debates*” (online: http://www.toronto.ca/metropolis/metropolistoronto2005/pdf/wortley_metro_profile.pdf at 15).

²²Supra note 14 at 294.

²³Supra note 4 at 88.

²⁴Ibid at 17 ((judicially noted in *R. v. Borde* (2002), 172 CCC (3d) 225 at 231-32 (Ont.Ca)).

²⁵Ibid at 90.

Canadian youth and other racialized groups to carry identification while walking the streets of Toronto.²⁶

The limitless precautions taken at the sight of a Black male with no evidence of criminal activity other than the colour of his skin, immediately poses the question “is this really necessary?” For instance, the Toronto Star recently conducted a national survey in which it asked Canadians how many people with a Canadian criminal record are visible minority, including Aboriginals. The average response in the survey was 36.7 per cent, while the correct answer, which comes from an RCMP database containing the criminal histories of 2.9 million people, shows that the percentage of "non-Whites" with a criminal record is 16.7 per cent – below 2006 Census data on the total percentage of visible minorities (racialized communities) and Aboriginal groups in Canada (20.0 per cent). Even though the statistics show that racialized communities are not committing as many crimes, as so many believe, the targeting of these communities, particularly Blacks and Aboriginals, has led to an over-representation of these groups in the criminal justice system.²⁷

2. Profiling Arabs and Muslims

September 11 led to an increased acceptance of racial profiling of Arabs and Muslims for national security. Special forces such as the RCMP and CSIS were instructed to use their discretion in order to minimize the likelihood of another terrorist attack.²⁸ Moreover, the

²⁶ Tanovich, David “*One List for Air Travelers, One List For Black Youth*” Toronto Star (Thursday July 5, 2007) at AA8.

²⁷ Supra note 4. See also the Canadian Criminal Justice System Association, “*Aboriginal People and the Justice System*” Ottawa (May 15, 2000) (online: <http://www.ccja-acjp.ca/en/abori4.html>) (accessed on: January 14, 2009).

²⁸ See Bahdi, supra note 14. See also Tanovich, supra note 2 at 19 – 20 which discusses the RCMP profile.

Canadian parliament passed statutes in response to September 11, including Bill C-36, the *Anti-terrorism Act* and Bill C-17, the proposed *Public Safety Act*, which were absolutely silent on this issue. These bills neither explicitly authorized profiling nor expressly banned it. Consequently, profiling persons based on race, ethnicity, place of origin and/or religion was implicitly accepted by the Canadian government. It is not surprising that racial profiling has become part of the “war against terrorism.”

The post 9/11 wave of panic and insecurity felt by many Canadians has served as a rationale for profiling Muslim and Arab communities since it seems to only make sense to focus one’s resources on the likely perpetrator. This idea was advanced by Ed Morgan, Professor of Law at the University of Toronto. After 9/11 Professor Morgan said that “[w]e have to assume that some level of profiling will not only be done but upheld.” He said that “[i]t is only rational law enforcement to do some kind of profiling -- if you have evidence to fit the profile.”²⁹ Given that Arabs and Muslims were portrayed as fanatical, violence-loving maniacs in the popular presses of both Canada and the United States even before the 9/11 incident, the subsequent profiling of them was perceived by many as rational, reasonable and inevitable.

The mass hysteria caused by 9/11 all but solidified the common stereotype associating terrorism to Arab and Muslims and the panic that followed was a major contributor in making profiling an acceptable tool just as it seemed to be falling out of favour; although not necessarily out of use. In a survey released in 2003, 48 per cent of Canadians reported that they approved of

²⁹National Post, “*Racial profiling inevitable: law expert Courts expected to permit practice at points of entry*” October 10, 2001 (online: <http://www.geocities.com/CapitolHill/2381/CanadaCustomsandRevenueAgency/cdnracialprofileinevitable.html>).

profiling Arabs and Muslims,³⁰ despite the fact that their civil liberties were going to be called into question. Moreover, a survey released in 2002 by a national Islamic anti-discrimination and advocacy group, The Council on American-Islamic Relations CANADA (CAIR-CAN)), a majority (60 percent) of Canadian Muslims say they experienced bias or discrimination since the 9/11 terrorist attacks.³¹ In addition, a national survey conducted by Ipsos Reid in 2005 revealed that Muslims and Arabs were the most likely group to be targets of racism, at 38 per cent - a finding that largely results from the after-effects of the 9/11 terrorist attacks against the United States.³² The overwhelming support for profiling Arabs and Muslims along with the increased racism that they were subjected to after 9/11 served to justify and condone intensifying the scrutiny, surveillance and profiling of individuals based on ethnicity, place of origin and religion.

Although we still do not have a complete or fully accurate picture of how the Arab and Muslim community has been affected by stereotyping in law enforcement and racial profiling, we do know that the consequences can be severe. Maher Arar's case represents an extreme example of racial profiling gone wrong. Canadian officials labeled Arar an "Islamic Extremist" without an evidentiary basis and thus contributed to his detention and torture overseas. But there are other serious consequences. The freezing of assets of those individuals and entities identified as terrorist is but one example.³³ The Office of the Superintendent of Financial Institutions (OSFI) held the responsibility of issuing a consolidated list with the names of terrorists to the

³⁰ Khan, Sheema, "*Don't shackle us to 9/11*" (Thursday, September 12, 2002) (online: <http://www.ctv.ca/special/sept11/hubs/muslim/khan.html>) (date accessed: 1 May 2003).

³¹ Council on American-Islamic Relations Canada, "*Survey*" *More than half of Canadian Muslims Suffered Post-9/11 Bias*" (September 22, 2002) (online: http://www.caircan.ca/itn_more.php?id=A90_0_2_0_M).

³² CTV.ca News Staff, "*1 in 6 Canadians victims of Racial Profiling: Poll*" (March 21, 2005) (online: http://www.ctv.ca/servlet/an/story/CTVNews/20050321/racism_ipsos_050321) (accessed on: December 29, 2008); and Powell, Terry, "*One in Six Canadians Victims of Racism*" (March 21, 2005) Canadian Press (online: http://www.caircan.ca/mw_more.php?id=P1488_0_7_0_C) (accessed on: December 29, 2008).

³³ *Supra* note 14 at 300.

financial institutions.³⁴ However, in addition to providing the list, they also advised the institutions to “regard with suspicion not only the people whose names are on the list, but anyone whose name resembles the name of a listed person.”³⁵ This measure encouraged racial profiling as it promoted further scrutiny of Arabs and Muslims on the sole evidence of their last name. Furthermore, it resulted in many innocent people with common Arabic/Muslim names being humiliated and forced to endure the hardship of convincing their financial institutions that they are not the listed entity.³⁶ While the primary focus of this paper is on the negative impacts of racial profiling when it misguides the law enforcement powers of the state, it is notable how the damage created by racial profiling by law enforcement filters out into the larger society and creates more irrational bias and unfair treatment in matters like banking.³⁷

Security measures which were derived with no intention of exacerbating the disparity between human beings can, and have had, the opposite result. For example, airlines are required to provide information on passengers at the request of foreign governments regardless of their nationality.³⁸ This seemingly unbiased requirement provides an open door for racial profiling because of the existing stereotype linking Arabs and Muslims to terrorism. Given that Arabs and Muslims are already depicted in America as violent, fanatical, incorrigible barbarians bent on destroying peace,³⁹ it should come at no surprise that upon receipt of information that an Arab is travelling aboard an aircraft, they would likely be subject to intense scrutiny within an airport

³⁴ Ibid at 301.

³⁵ Ibid.

³⁶ Ibid at 302 For example, Abd Al-Hadi Al-Iraqi is included on the list of suspected individuals with no other identifying information other than his alias “Abu Abdullah,” an extraordinarily common Arab name, and a suggested alternative spelling of his name, Abdal Al-Hadi Al-Iraqi.

³⁷ See for example Bahdi, supra note 14.

³⁸ Ibid at 303.

³⁹ Ibid at 304.

setting.⁴⁰ It is without a doubt that racial profiling in Canada has contributed to the hardships faced by the Arab and Muslim community. Individuals are being subjected to greater scrutiny, unjust surveillance, an intrusion of their privacy rights and even torture.

3. Other Victims of Profiling in Canada

Although the profiling of Blacks, Arabs and Muslims receive the most media attention and scrutiny, other racialized groups such as South Asians and Aboriginals feel the sting of being stigmatized. The Criminal Intelligence Service Canada (CISC) provides reports each year linking South Asians to the drug trafficking scene between Vancouver and Alberta resulting in the same type of increased scrutiny used by police, which ultimately leads to complaints and challenges.⁴¹ These reports also include Aboriginals, South Americans and Caribbean groups and their propensity to commit certain types of crimes.⁴²

Aboriginal peoples in particular have historically experienced racial profiling in their interaction with police and the criminal justice system.

It is well documented that Aboriginal peoples are vastly over-represented in the criminal justice system and that the treatment they receive, while there, is strikingly different from other racial groups. While representing only 2.8 per cent of Canada's population, self-identified Aboriginal people represent approximately 17 per cent of the federal offender population. Adult Aboriginal persons are incarcerated more than 6 times the national rate. Aboriginal inmates waive their rights to a parole hearing more frequently than do other inmates. And parole is denied at a higher rate than for non-Aboriginal offenders.⁴³

⁴⁰ Ibid at 303.

⁴¹ Supra note 3 at 92-3.

⁴² Ibid.

⁴³ Supra note 5 at 59.

Nineteen years after his conviction, Micmaq Donald Marshall was exonerated by a Commission of Inquiry that found that racism and prejudice against Aboriginal peoples and a willingness at all levels of the criminal justice system to presume that Aboriginal peoples are prone to criminality resulted in Marshall's wrongful conviction.⁴⁴ Very simply, had Marshall been White, the investigation would have taken a different turn.

IV. Arguments in Favour of Racial Profiling:

Even though the adverse effects of racial profiling on individuals and communities have been documented and widely discussed, some proponents of racial profiling nonetheless contend that the price is worth it. Proponents of racial and ethnic profiling often validate profiling on the basis of utilitarian logic which holds that crimes are committed disproportionately by certain racial groups and that therefore disproportionate targeting and suspicion of members of those groups is appropriate. It is within this context that some individuals would support racial profiling. Racial Profiling, it is argued, prevents terrorist attacks and activities.

1. Deter and Disrupt

Advocates of profiling justify it as a counter-terrorism measure for three main reasons. First, they argue that racial profiling deters and disrupts terrorist networks and activities. For example, the American Department of Homeland Security asserts that various anti-terrorism measures which focus on Arabs and Muslims enhance national security because they deter and disrupt terrorist activity. For example, justifying policies aimed at weeding out and deporting

⁴⁴ *Royal Commission on the Donald Marshall, Jr. Prosecution*, [Halifax, N.S.] (1998), *RG 44 vol. 239*.

Arab and Muslim men after September 11, the DHS asserted that the programme was justified because it “signaled a clear message to those ‘sleeper’ terrorists embedded in U.S. communities, that U.S. immigration law would be enforced.” DHS also claimed that programmes which focused on Arabs and Muslims “forc[ed] would be terrorists to comply with the terms and conditions of their admission to the United States or run the risk of being removed from the United States. This additional pressure may make the job of carrying out a terrorist mission much more difficult, therefore disrupting the mission.”⁴⁵

2. Muslim is Simply Part of the Equation

The second type of argument advanced in favour of profiling relies on analytical reasoning. Proponents argue that it not only necessary but inevitable that race and/or religion will become a probative factor in investigations given that national security is threatened by Muslim extremism. In such a context, one cannot take Muslim out of the equation. Thus, it makes sense to focus on Maher Arar as an investigative target if one is concerned about “Islamic extremism.” Arar came to the attention of RCMP officials because of his association and meetings with Mr. Abdullah Almalki. Arar had several characteristics which would have identified him as a risk if one accepts the efficacy of racial profiling: he was an Arab Muslim man who also knew about wireless technologies, was born in Syria and travelled to countries that had links to terrorism. The same kind of logic might be applied to the Air India disaster. Given that Canadian officials knew about a specific threat by Sikh extremists, they could have prevented the Air India tragedy if they had simply paid greater attention to Sikh passengers the

⁴⁵Eldridge, Thomas, R., et al., “9/11 and Terrorist Travel: Staff Report of the National Commission on Terrorist Attacks Upon United States of America” (online: http://www.9-11commission.gov/staff_statements/911_TerrTrav_Monograph.pdf) at 160.

fateful day when a suitcase filled with explosives was allowed onto a flight originating from Canada.

3. Risk Management

Finally, some proponents of profiling contend that racial profiling makes statistical sense as a risk management and resource allocation strategy. Racial profiling gained popularity within law enforcement circles as part of a general move towards profiling and statistics based risk management theory. Rather than appealing to vague claims about deterrence and substitution, some advocates contend that racial profiling makes statistical or actuarial sense. The actuarial argument for profiling purports to appeal to value-free hard facts and seemingly neutral numbers. Profiling is presented as an aspect of a risk management. As one commentator has observed,

Young Muslim men bombed the London tube and young Muslim men attacked New York with airplanes in 2001. From everything we know about the terrorists who may be taking aim at our transportation system, they are more likely to be young Muslim men.⁴⁶

Racial profiling, according to this viewpoint, is just smart law enforcement. If you know that risk comes from within a particular group, then it only makes sense to focus resources on that group. After all, statistical or actuarial methods have worked in law enforcement when compiling other types of profiles such a geographic profiling.

Popular press articles supportive of profiling often rely on statistical arguments. For example, Heather MacDonald, a writer for the City Journal, is convinced that the “anti-profiling crusade thrives on an ignorance of policing and a willful blindness to the demographics of

⁴⁶ Harcourt, B., "Muslim Profiles Post-9/11: Is Racial Profiling an Effective Counterterrorist Measure and Does it Violate the Right to be Free From Discrimination?" in "Security and Human Rights" edited by Benjamin Goold and Liora Lazarus (Oxford, UK: Hart Publishing 2007) at 73.

crime.”⁴⁷ In her article, she cites a number of statistics demonstrating the reportedly elevated crime rates amongst racial minorities in comparison to the majority. This is then used to substantiate her claim that race is a likely indicator of potential criminal activity. In response to what she calls the hue and cry of anti-profiling juggernauts, MacDonald states that there is “nothing illegal about using race as a factor among others in assessing criminal suspiciousness”; especially given the fact that many crime filled areas just happen to be populated by minorities.⁴⁸ “Hence, special efforts at crime reduction directed at members of such groups are justified, if not required”⁴⁹

According to this argument, the resulting feeling of inferiority faced by the supposed victims of racial profiling are minor when compared to the salutary benefits of catching criminals. In essence, if you make a few innocent Blacks or Arabs uncomfortable at the benefit of stopping a major drug deal or terrorist plot, you have made an acceptable trade off of rights for security in the public interests. Indeed, Risse and Zeckhauser contend that the hurt feelings of minorities does not have so much to do with racial profiling as it does with their historical encounters with the ruling class.⁵⁰ In that sense, the harm is expressive since an event or practice is a reminder of other painful events or practices. As an example, women have been treated as merely sex objects for hundreds of years, so it is not surprising that many would be against pornography due to its historical background.⁵¹ Yet pornography, in large part, constitutes a legal practice. History is the driving force behind the alleged overreactions which underlie anti-racial profiling arguments. But, racial profiling should not be abandoned for this reason. Rather, the

⁴⁷ MacDonald, Heather, “*The Myth of Racial Profiling*” (Spring 2001) City Journal (online: http://www.city-journal.org/html/11_2_the_myth.html) (accessed on: June 18, 2008).

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid at 146.

⁵¹ Ibid at 149.

underlying pathology which leads some to reject racial profiling needs to be understood so that the value of racial profiling can be appreciated.⁵²

V. Arguments Against Racial Profiling:

1. Profile Evasion and Substitution:

First, critics of racial profiling in the national security context in general and of the DHS' counter-terrorism programmes in particular point out that terrorists tend to study and know the legal and administrative regimes within which they are working. They carefully alter or tailor their behaviour to escape scrutiny within the confines of a given regime. The *9/11 Commission Staff Report About Terrorist* travel confirmed this point. It note that:

To avoid detection of their activities and objectives while engaging in travel that necessitates using a passport, terrorists devote extensive resources to acquiring and manipulating passports, entry and exit stamps, and visas. The al Qaeda terrorist organization was no exception. High-level members of al Qaeda were expert document forgers who taught other terrorists, including Mohamed Atta, the 9/11 ringleader, their tradecraft. The entry of the hijackers into the United States therefore represented the culmination of years of practice and experience in penetrating international borders.⁵³

Terrorists also have access to sophisticated fraudulent documents and other means to evade the profile. This is particularly the case where the profile relies on stereotypes of Arab and Muslim looks and behaviour.

New York City Police Commissioner Raymond Kelly pointed to the substitution problem when he expressed his frustration with the suggestion that profiling is just smart law enforcement. Commissioner Kelly stated that:

⁵² Ibid.

⁵³ Supra note 45.

Look at the 9/11 hijackers. They came here. They shaved. They went to topless bars. They wanted to blend in. They wanted to look like they were part of the American dream. These are not dumb people. Could a terrorist dress up as a Hasidic Jew and walk into the subway, and not be profiled? Yes. I think profiling is just nuts.⁵⁴

Similarly, Bernard Harcourt concludes:

There is no reliable empirical evidence that racial profiling is an effective counter-terrorism measure and no solid theoretical reason why it should be. The possibility of recruiting outside the profiled group and of substituting different modes of attack renders racial profiling in the counter-terrorism context suspect.⁵⁵

MI5 has recently reportedly reached a similar conclusion about the ineffectiveness of racial profiling as a national security strategy.⁵⁶

A recent study sponsored by the Canadian Human Rights Commission and the Canadian Race Relations Foundation has confirmed that racial profiling is not an effective law enforcement strategy in any context. The study extensively reviewed the profiling literature and concluded that “the results are credible and suggest that profiling does not constitute an effective method of investigation or prevention. This is especially the case for studies on racial profiling.”⁵⁷

The fact that the profile can be evaded undermines all three arguments in favour of racial profiling. The three strands of the pro profiling position all tend to assume the elasticity of the targeted groups (more attention on the groups will mean less terrorist activities within them) but ignore the elasticity of the non-profiled groups (less attention on the non-profiled groups creates

⁵⁴ Supra note 46 at 74.

⁵⁵ Ibid.

⁵⁶ The Smith Institute, “*Britain and Security*” edited by Paul Cornish, (2007) (online: http://www.smith-institute.org.uk/pdfs/british_security_FINAL.pdf).

⁵⁷ Bourque, Jimmy et al., “*The Effectiveness of Profiling from a National Security Perspective*” Canadian Human Rights Commission and Canadian Race Relations Foundation (March 2009) at 21. See also Tanovich, supra note 2 for a discussion of how racial profiling has proven ineffective in the wars against drugs, gangs and terrorism.

greater opportunities within them). This dual elasticity creates the opportunity for substitutions. Individuals change tactics, seek to evade the profile by either recruiting from outside the profiled group or creating identities for themselves that evade the profile.

2. Racial Profiling and Stereotyping or Discrimination

While the substitution argument focuses on the inadequacy of profiling because of its impact on the behaviour of the profiled terrorist, the stereotyping and discrimination argument focuses on the inadequacy of racial profiling because of its influence on the decision-maker him or herself. Race does not operate as a neutral factor in decision-making. When race and religion form part of the assessment, they eventually overtake other characteristics as part of the purported risk assessment. Instead of remaining one factor among a multitude of factors, race or religion becomes the lens through which all other information is filtered and understood. This is because we often unconsciously make decisions and assumptions about people on the basis of their race. Where the race or religion is associated with stereotypes, the information we assess about an individual is thus filtered through a lens tainted by stereotype.

This type of dynamic played itself out in the case of Maher Arar. Rather than rationally investigating Arar's activities, the RCMP irrationally and without sufficient justification labeled him "an Islamic extremist individual with links to the Al Qaeda network." This information was subsequently shared with American authorities without caveats and led to Arar's ordeal in Syria. Justice O'Connor neatly summed up the problem with racial profiling and stereotyping in the context of national security investigations. His observations in this regard are worth citing at length.

Although this may change in the future, anti-terrorism investigations at present focus largely on members of the Arab and Muslim communities. There is therefore an increased risk of racial, religious and ethnic profiling, in the sense that race, religion or ethnicity of individuals expose them to investigation. Profiling in this sense would be at odds with the need for equal application of the law without discrimination and with Canada's embrace of multiculturalism. Profiling that relies on stereotyping is also contrary to the need discussed above for relevant, reliable, accurate and precise information in national security investigations. Profiling based on race, religion or ethnicity is the anti-thesis of good policing or security intelligence work.⁵⁸

The propensity for profiling to morph into stereotyping was confirmed by the European Union Network of Independent Experts in Fundamental Rights warned that the proposed terrorist profiles presented a major risk of discrimination.⁵⁹ Profiling and stereotyping are inextricably linked. Profiling – in the sense of allowing race or religion to be considered a risk factor – quickly morphs into stereotyping. Profiling plays to people's fears and presuppositions about group characteristics and invites judgment of an individual through the lens of group characteristics. Profiling cannot be separated from stereotyping. Given the existence of widespread and unconscious stereotypes of Arabs and Muslims, profiling thus leads to irrational results rather than good intelligence or effective enforcement. This argument against racial profiling applies to instances of profiling across time and not simply once the profiled terrorists have the opportunity to devise new tactics.

The concern about profiling and stereotyping exists beyond the counter-terrorism context. In *Radek*,⁶⁰ the British Columbia Human Rights Tribunal held that the negative stereotypes of Aboriginal individuals lead to their victimization. In this case, the respondent developed a neutral policy that intended on denying access to the shopping plaza of all suspicious people and

⁵⁸Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, "*Report of Events Relating to Maher Arar: Arar Commission*" (Canada, Canadian Government Publishing, 2006) at 356.

⁵⁹Supra note 57 at 62.

⁶⁰*Radek v. Henderson Development Canada Ltd.* (no. 3), 2005 BCHRT 302 (QL).

vagrants; however, this policy had an adverse effect on the Aboriginal population. Security officers were advised to look for individuals who: wore ripped or dirty clothing; exhibited attitudes when approached; proved reluctant to answer questions; talked to themselves; had open sores and wounds on their face and body; had red eyes; acted intoxicated or stoned; bothering customers; begged for money or cigarettes on the street; and, had bad body odour.⁶¹ Some of the criteria used to deny access were commonly held stereotypes of Aboriginals. This was reiterated by expert witness, Dr. Bruce Miller, who identified a number of currently held stereotypes about Aboriginal people. These included, but were not limited to the following:

- Aboriginal people are backwards-looking and stand in the way of social progress;
- All Aboriginal people drink and are alcoholics - the "drunken Indian" image;
- Aboriginal people are violent and prone to petty crime;
- Aboriginal people are lazy and will not work or keep a steady job;
- Aboriginal people are unhealthy and have a fatalistic disinclination to do anything about their health and other problems; and
- Urban Aboriginal people are degraded drug and alcohol abusers and sex-trade workers (an image reinforced by the recent publicity about the murder of large numbers of women from the Downtown Eastside, many of whom were Aboriginal).⁶²

⁶¹ Ibid at para. 126.

⁶² Ibid at para. 135.

Dr. Miller explained that stereotypes funnel perception and create a strong conservative bias in the thought process of decision-makers: people place stimuli into existing categories and ordinarily reject discordant observations. In the case of interactions between Aboriginal peoples and members of non-aboriginal society, the non-aboriginals channel their observations through their existing schemas or understandings of them.⁶³ Ultimately, the prejudices of Aboriginals tended to support the idea that they needed to be targeted or watched closely to maintain peace and prevent crime.

3. Implementation Problems

We do not agree that certain groups are more inclined to commit crimes than others. There may well be more drug use in wealthy White neighbourhoods than poorer racialized neighbourhoods, for example, but selective street stops and searches in neighbourhoods where people of colour live and congregate tip the statistics in ways that reinforce racist stereotypes of the “criminal other.” Rather, these statistics “produce hidden distortions with significant costs for society.”⁶⁴ However, even in the event that statistically, certain racialized groups are more inclined to commit certain crimes, or at least to be arrested and convicted due to unequal enforcement tactics driven by racial profiling, there is no empirical evidence that racial profiling does in fact reduce crime rates.⁶⁵

Even if racial profiling might work in theory, it is impossible to develop strategies to implement it efficiently and effectively in practice. Experiences in the United States clearly

⁶³ Ibid at para. 138.

⁶⁴ Harcourt, Bernard E. *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (Chicago: University Of Chicago Press: December 15, 2006) at 21.

⁶⁵ Durlauf, Steven N. “*Assessing Racial Profiling*” (2006) 116:515 *The Economic Journal* 402 at 406.

demonstrate this point. For example, after September 11, American authorities developed a system for registering Arab and Muslim non-citizens on the theory that all of the men involved in the terrorist attacks were in the United States on some form of visa and some of them violated the terms of their visas. If they had been caught and deported for violating the terms of their visas, September 11 might have been avoided. Extensive resources have therefore gone into watch lists and registration programmes. Nonetheless, all of these lists and registration programmes contain gaps and inconsistencies that would have allowed the September 11 terrorists to remain in the United States. For example, the 9/11 Commission Report observes that the exit interview conducted under the NSEERS programme which is designed to track the exit of non-citizens is not conducted at the actual place of exit. It is possible, therefore, that individuals be registered as having departed the United States when they have not in fact left the country. It also remains relatively easy for a sufficiently motivated individual to avoid registration in the NSEERS programme in the first place despite the networks and resources dedicated to NSEERS.

Canadian experiences also suggest the problems with translation profiling into practice. Muslim communities have long complained that national security agencies focus on questions such as how often an individual prays. Presumably such questions come from the belief that if one is investigating Islamic extremists who are driven to violence by religious fervour, then it only makes sense to gauge a target's devotion to his/her religion. There are many grounds on which to criticize such quests to translate profiling theory into practice, including the general point that equating a person's dedication to his or her religion with fanaticism and terrorist propensity smacks of Islamophobia.⁶⁶ Religion is central to both the Ku Klux Klan and a Catholic priest. Yet, we would never use devotion to religion to try to distinguish between the

⁶⁶ See Gottschalk, P., *supra* note 13.

Klansman and the priest. Similarly, one cannot say that simply being a dedicated adherent of Islam – as measured by the number of times one prays - should be considered a risk factor. People who are devoted to non violence pray devoutly. So what does devotion to religion tell us in assessing someone’s behaviour and potential for violence? It tells us little because it does not allow us to distinguish between those who are a risk and those whose values society embraces.

VI. Profiling’s Impact Upon Affected Communities

Directly responding to Risse and Zechauser’s article, Annabelle Lever challenges the expressive harm thesis stating that it underestimates the damage that racial profiling can do in a society that is predisposed already to favor White people’s perspectives on crime.⁶⁷ Racial profiling does more than just reflect racist attitudes, habits and institutions⁶⁸; it contributes to them all by compounding on these harms and giving them an official seal.⁶⁹ For example, publicly associating Blacks to criminality severely “increases the likelihood that Whites will think of Blacks as importing crime into their supposedly crime-free neighbourhoods”.⁷⁰ This fuels stereotypes and ultimately leads to increased racism experienced by Blacks in every capacity; even while attending school.⁷¹ Therefore, the incremental harm that Risse and Zechauser speak of is much larger than it is projected to be. Laws and their enforcers should never contribute to or aggravate existing inequalities.⁷²

⁶⁷ Lever, Annabelle “*Why Racial Profiling Is Hard to Justify: A Response to Risse and Zeckhauser*” (2005) 33:1 *Philosophy & Public Affairs* 94 at 101.

⁶⁸ *Ibid* at 97.

⁶⁹ *Ibid* at 106.

⁷⁰ *Ibid*.

⁷¹ *Supra* note 4 at 29.

⁷² [1994] R.J.Q. 671, 113 D.L.R. (4th) 623 (C.A.) [*Barrette*].

Racial profiling also offends against numerous sections of the Canadian *Charter of Rights and Freedoms*, a document which guarantees Canadian rights against abusive actions of government. Section 15 of the *Charter* was created to ensure equality in the formulation and application of the law.⁷³ Specifically, it guarantees equality before and under the law, equal protection of the law and equal benefit under the law.⁷⁴ Therefore, any unequal treatment or differential impact regardless of the intent of the government action can be seen as a violation of one's *Charter* protected right.

Bearing this in mind, racial profiling offends against this right as it allows enforcers to deliberately subject individuals to differential and unequal treatment without sufficient evidentiary basis.⁷⁵ Section 9 of the *Charter* protects individuals from arbitrary detainment.⁷⁶ “Canadian law stresses that decisions made on the basis of stereotypes subvert the integrity of any decision-making process. Decision-makers who labour under stereotypical assumptions cannot produce informed, accurate or just results.”⁷⁷ Therefore, when enforcement agencies arrest and detain individuals for reasons generated by preconceptions, they are in effect violating s.9 of the *Charter*, as well as s.7 since individuals' life, liberty and security interests are being deprived contrary to the principles of fundamental justice. Finally, sections 2(c) and 2(d) of the *Charter*, which protects the fundamental freedom of peaceful assembly and association respectively, is constantly being impaired by the practice of racial profiling, as it subjects individuals to increased scrutiny on the basis of their congregation and association with each other. This could be as simple as a group of Muslims playing paintball or a group of Black males

⁷³ *Charter*, supra note 1 at R.S.Q. c. C-12, s. 15.

⁷⁴ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S. C. R. 497.

⁷⁵ See Tanovich “*Colour of Justice*”, supra note 2 at 77.

⁷⁶ *Charter*, supra note 1 at R.S.Q. c. C-12, s. 9.

⁷⁷ Bahdi, R., “*Sounds of Silence: Racial Profiling and national security in Canada.*” (June 13th, 2008 version) [work in progress] at 8.

walking and talking on a city street. Canadian research data reveals that Black youth in groups are four times more likely to be stopped and six times more likely to be searched than similarly situated White youth.⁷⁸

Moreover, racial profiling disempowers those racialized communities that are subjected to profiling, and, ultimately creates a level of mistrust between the institutions of the state responsible for administering security and law enforcement and those racialized communities. Lastly, in regard to the societal impact, racial profiling leads to the underrepresentation of these racialized communities in key societal institutions, including ones that are perceived to be engaging in racial profiling.⁷⁹

As a result of racial profiling in Black communities, fear of violence and death at the hands of law enforcement officials in addition to feelings of hurt, resentment and distrust plague many victims.⁸⁰ Unfortunately, these feelings resurface even in situations where officers appear to be polite and considerate⁸¹ causing them to arouse even more suspicion from police officers by their actions. It would seem as though the profiled also profile the profiler effectively creating a cycle of “reciprocal distrust”.

VII. Profiling’s Impact Upon Law Enforcement and Intelligence Agencies

An often overlooked aspect of racial profiling is the fact that it may backfire on the institutions that use it. This can happen in a number of ways. First, because profiling is over-

⁷⁸ See Tanovich “*Colour of Justice*”, *supra* note 2.

⁷⁹ Ontario Human Rights Commission, Fact Sheet (online: <http://www.ohrc.on.ca/en/resources/factsheets/themes>).

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

inclusive, it can lead to significant wasted resources and false-leads. Contrary to the suggestion that racial profiling helps focus and funnel resources so that they can be used efficiently, racial profiling thus results in inefficiencies. In the Maher Arar case significant resources were devoted to investigating Mr. Arar in circumstances that implicated his race and religion.⁸² Second, profiling can undermine agency reputations. When no concrete evidence was found, not only was Mr. Arar a victim but Canada also suffered the extreme embarrassment of taxing its resources on a false lead. Finally, because profiling is linked to stereotyping, it can create an increased tolerance for stereotyping and racism within an agency.

VIII. Conclusion

While racial profiling may seem attractive and rational in the abstract, racial profiling undermines law enforcement, subverts individual rights and undermines Canadian values. Racial profiling promotes stereotyping of individuals and communities and negatively influences the law enforcement agencies. It not only far from producing rational, effective and efficient law enforcement, racial profiling encourages stereotyping, creates evasion opportunities and sets investigators down the wrong path. As one of the nation's oldest and best respected defenders of civil liberties, the BCCLA has an important role to play in eliminating racial profiling. The Association will contribute to public education programs, consult with policy makers and legislators and intervene in court cases. Moreover, it might offer assistance to those who have been racially profiled and wish to file complaints against police services, customs, security agencies, as well as any other agency and/or institution that profiles based on race, place of

⁸² Supra note 21.

origin, ethnicity and/or religion. The result will be better law enforcement and more carefully protect civil liberties, especially for visible, racial and religious minorities.

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