Commission des droits de la personne et des droits de la jeunesse Québec

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RACIAL PROFILING: GUIDELINES FOR INVESTIGATIONS

M[e] Michèle Turenne, legal counsel
Research and planning division

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Jacinthe Gagnon
Secretary of the Commission

Text processing

Chantal Légaré, secretary
Research and planning division

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INTRODUCTION

Racial profiling is a form of discrimination. The Commission des droits de la personne et des droits de la jeunesse has adopted the following definition of racial profiling[1]:

> "Racial profiling is any action taken by one or more people in authority with respect to a person or group of persons, for reasons of safety, security or public order, that is based on actual or presumed membership in a group defined by race, colour, ethnic or national origin or religion, without factual grounds or reasonable suspicion, that results in the person or group being exposed to differential treatment or scrutiny.
>
> Racial profiling includes any action by a person in a situation of authority who applies a measure in a disproportionate way to certain segments of the population on the basis, in particular, of their racial, ethnic, national or religious background, whether actual or presumed."

This document sets out a series of guidelines for identifying evidence in cases of racial profiling. The guidelines are not definitive, and will be regularly updated to reflect changes in the social context and the case law.

Illustrations from the case law for each of the guidelines are presented in the document "Proving racial profiling: perspectives for civil cases".[2]

1 IDENTIFYING EVIDENCE

PREMISE

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

Since this form of discrimination is generally based on grounds of discrimination that are clearly apparent,[3] such as race, colour, ethnic or national origin or religion, it must also be shown that the person in a situation of authority was able to make a link between the victim and the actual or presumed reason for the discrimination.

Other grounds on which discrimination is prohibited under section 10 of the Québec *Charter* can be a contributing factor in cases of discrimination, especially where racial profiling is involved.[4]

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1 COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Racial Profiling: Context and Definition*, Michèle Turenne, (Cat. 2.120-1.25.1) 2005, p. 18. This document reviews the underlying factors for racial profiling and the main definitions found in the doctrine and case law.

2 COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, Michèle Turenne, (Cat. 2.120-1.26), 2006.

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

4 See ONTARIO HUMAN RIGHTS COMMISSION, *An intersectional approach to discrimination addressing multiple grounds in human rights claims (Discussion Paper),* 2001. [On line] <http://www.ohrc.on.ca>

1.1 Main types of evidence

1.1.1 Grounds for the intervention, interception or arrest

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

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

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

1.1.2 Inappropriate investigations as part of a crime prevention policy

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

This category also includes the arbitrary interception, detention or arrest of a person belonging to a certain group for the purposes of an ongoing investigation, not justified by a detailed description of the suspect. For example, information that a young Black man has just committed a robbery in a given zone does not authorize police officers to stop any young Black man in the absence of other detailed, precise information, such as height, approximate age, hair colour and length, clothing colour and style, eyeglasses, or the make and colour of the suspect's vehicle, etc.

Any "proactive" investigation, even under a apparently neutral Act or policy, may result in discrimination against "racialized" individuals. The case law shows that "instinct" is not enough to justify an intrusive investigation. An action, to be legitimate and consistent with the *Charter*, must be based on valid and reasonable grounds; whether or not they are reasonable must, obviously, be decided in light of the facts of the situation.

1.1.3 Improper behaviour by respondents

Inflexible, suspicious or harassing behaviour, or discriminatory comments by the person in a situation of authority, as well as questions that are inappropriate or groundless in

the circumstances, are all elements that can be used to show or corroborate the discriminatory nature of an intervention.

Disrespectful behaviour or offensive language may sometimes suffice to show the discriminatory nature of the intervention. In other cases, it can show that the primary motivation of the respondents was discriminatory. Often, a comparison with the treatment normally reserved for individuals from a traditionally "non-profiled" group can be used to draw a conclusion about the discriminatory nature of the actions involved.

1.1.4 Unusual decisions by officers in a situation of authority

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

The application of excessive force or a request for backup that appears excessive to the complainant during an intervention by law enforcement officers may be justified by reasons of security. If they depart from normal practice they may be considered discriminatory.

1.1.5 Organizational policies or practices of doubtful relevance

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

Racial profiling practices may be institutionalized and, in some cases, result from apparently "neutral" written policies. For example, in *Radek*[5], one of the written policies governing the activities of security guards at a shopping mall described the following characteristics as suspicious: "dirty clothing, talking to themselves, red eyes, begging for money or cigarettes inside or around the shopping centre, bothering customers, acting intoxicated or stoned, having bad body odour, […]." The evidence presented (testimony from experts and from community workers and complainants, security reports of security agency, etc.) showed clearly that the policies and practices concerned were based on a stereotypical view of aboriginal people and had a discriminatory effect.

1.1.6 Contradictory or unlikely explanations from the respondents

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

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5 *Radek* v. *Henderson Development (Canada) Ltd. (No 3)*, 2005 BCHRT 302, par. 126.

1.1.7 Differential treatment for people belonging to "non-racialized" groups

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

In this case, the demonstration focuses on the differential treatment accorded to other, "non-racialized" individuals. This "comparative" evidence can corroborate other facts tending to show the existence of racial profiling.

1.1.8 Social context

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

The courts must assess the weight to be given to the social context and statistical data to prove racial discrimination or racial profiling. The information may be found relevant in support of an allegation.

For example, in *Radek*, the British Columbia Human Rights Tribunal took into consideration testimony from experts and community workers involved with the so-called profiled communities, letters of complaint from profiled persons, newspaper articles, and security reports by the security agency involved to assess the differential treatment to which the complainant was subjected and to prove systemic discrimination against Aboriginals.

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

Statistical data may also be useful in demonstrating the application of a discretionary power in an arbitrary fashion, for example when more stops are made or more tickets are issued to the members of a given group, compared to the treatment received in similar circumstances by the members of non-profiled groups. Evidence that, in similar situations with similar levels of risk, the authorities impose fewer constraints on other groups may be used to support a claim of racial profiling, at least in systemic form, and corroborate testimony in a specific case.

2 DEFENCES AVAILABLE TO THE RESPONDENT

Respondents may try to justify their actions in various ways, as presented below.

2.1 Existence of reasonable grounds for the action taken

2.1.1 Criminal profiling is not racial profiling

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

> "[...] racial profiling differs from criminal profiling which isn't based on stereotypes but rather relies on actual behaviour or on information about suspected activity by someone who meets the description of a specific individual. In other words, criminal profiling is not the same as racial profiling since the former is based on objective evidence of wrongful behaviour while racial profiling is based on stereotypical assumptions."[6]

It is important to remember that there must be reasonable grounds for any intervention.

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

It may be considered normal, according to the circumstances, for an individual matching the profile of a "racialized" group to display evasive or aggressive behaviour when an action is unjustified or discriminatory. This understandable behaviour cannot then be used to justify the discriminatory attitude of the person in a situation of authority.

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

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

- Civil trial following a conviction in a criminal trial

A conviction in a criminal case does not have the authority of a final judgment [7] in a civil case, although it may be relevant as evidence.

The conviction does not, in principle, prevent a subsequent civil trial for racial profiling. In some cases, the outcome of the criminal trial could have been different if the offender had presented racial profiling or discrimination as a defence. Similarly, if the ground of racial profiling was argued during the criminal trial and excluded on a balance of probabilities, the judge in the civil trial may still take it into account in the civil judgment.

- Civil trial following a guilty plea at a criminal trial

In the practice of law, it can be observed that people plead guilty for a variety of reasons, for example as a means to buy peace or avoid the costs and stress of a trial, etc., even though they never committed the offence with which they are charged.

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

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

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

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

2.2.2 Prescribed cases

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

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

This provision is an exception to the general rule, set out in the *Civil Code of Québec*, that personal rights of action must be instituted within three years.

This means that a claim for damages against a municipality, and its police force, is subject to a six-month prescriptive period. However, prescription will not apply in the situations listed in article 2930 of the *Civil Code of Québec*,[8] namely cases in which "the action is founded on the obligation to make reparation for bodily injury caused to another."

Morin J. in *Andrusiak*, a judgment by the Québec Court of Appeal, explains that:

> "the notion of physical integrity remains flexible, and may include the nervous shock caused by a brutal police intervention."[9]

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

> "[…] in this case, the compatibility of the provisions of the municipal law with the *Charter* has not been raised, and it is therefore not our place to rule on this question."[10]

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

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

10 *Id.*, par. 20.