"CAN I HELP YOU?" TAKING SERIOUSLY CONSUMER RACIAL PROFILING IN ONTARIO'S RETAIL SECTOR

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Consumer racial profiling (CRP) is a discriminatory practice grounded in conscious/unconscious biases, and negative stereotypes held by some security guards and employees about a consumer's identities including race, colour, sex, age and religion. These negative perceptions have led to some consumers being denied services. To explore consumer racial profiling in Ontario's retail sector, this paper will focus on the definition of consumer racial; examine CRP by drawing on Human Rights Tribunal of Ontario decisions, *McCarthy v Kenny Tan Pharmacy Inc* and *Nassiah v Peel (Regional Municipal) Services*; lastly, focus on Ontario's private security guards, and offer two recommendations.

INTRODUCTION

In Ontario's retail sector and in other consumer services, consumer racial profiling (CRP) is a practice where racialized and Indigenous consumers are perceived to be 'security threats,' untrustworthy, and suspicious, by some private arbiters (e.g. security guards, frontline employees, management, business owners, and representatives of organizations). These perceptions are grounded in conscious and unconscious biases, and stereotypes held by these private arbiters about a consumer's race, skin colour, ethnicity, as well as, their other identities (e.g. sex, age, gender expression, (dis) abilities, language, religion), and whether or not they have the ability to pay or legitimate right to be on the premises. These perceptions have led to arbitrary applications of organizational policies, loss prevention strategies, and enforcement of laws (e.g. the Trespass to Property Act). As a practice, consumer racial profiling infringes upon rights protected under section 1 of the Ontario Human Rights Code, which states that

> "[e]very person has a right to equal treatment with respect to services, goods and facilities without discrimination because of race…place of origin, colour, ethnic origin,…creed, sex, sexual orientation,...gender expression, age."

This paper is divided into three parts. Part I focuses on the definition of consumer racial profiling. Part II examines the manifestation of CRP through a study of two recent Human Rights Tribunal of Ontario decisions. Lastly, Part III provides some recommendations for curtailing CRP by Ontario's private security guards.

PART I: "CONSUMER RACIAL PROFILING" DEFINED

Consumer racial profiling is generally defined as "… store employees target[ing] a shopper or shoppers for discrimina-

tory treatment based on their race or ethnicity," Gabbidon *et al.*, 2008, p. 1). These definitions of CRP tend to focus on the retail sector. Others, however, such as Harris (2003, p. 4) have sought to expand the definition to include "any type of treatment of consumers in the marketplace based on race or ethnicity that constitutes a denial or degradation in the product or service offered to the consumer." It is my view that CRP should be broadened further to recognize the differential impact of this phenomenon on consumers depending on the intersections of their identities, including but not limited to their race, skin colour, indigeneity, socio-economic status, geographical location, religion, gender expression, gender, sexual orientation, immigration status, (dis)abilities, ethnicity, nationality, and language.

Although CRP is complex and occurs primarily in retail environments as part of transactional relationships between consumers and business owners or their representatives, my approach reflects that CRP also occurs in other consumer service settings (e.g. libraries, healthcare offices, secondary and post-secondary institutions, and online). An expansion of the definition provides researchers, adversely impacted communities, and private arbiters seeking to develop and implement remedial measures, with a more nuanced definition to address the complexities of consumer racial profiling.

PART II: CONSUMER RACIAL PROFILING IN ONTARIO'S RETAIL SECTOR

The jurisprudence on consumer racial profiling in Ontario's retail sector is limited,and successfully litigated complaints at the Human Rights Tribunal of Ontario (HRTO) are the exception rather than the rule. This reality is due in part to the often subtle ways CRP operates, as well as the evidentiary requirements placed upon complainants to prove discrimination on a balance of probabilities. The cases of *Nassiah v. Peel (Regional Municipal) Services* (2007) and *McCarthy v. Kenny Tan Pharmacy Inc.* (2015) both demonstrate this exception.

In *Nassiah*, the applicant, Ms. Jacqueline Nassiah was a 40 year-old, Trinidadian-Canadian Black single mother with a small child, and an accent. The consumer racial profiling incident took place on 18 February 2003 at a Sears Outlet store in Dixie Mall, Mississauga. This incident involved a Peel Regional Services Police Officer R. Elkington, and an older White male security guard. The guard and the store were not named as respondents. In 2007, the Tribunal found Ms. Nassiah had been discriminated against on the basis of race by the police officer while in the "provision of a service" because he called her 'f…ing foreigner,' 'asked if she spoke English,' subjected her to a second body 'strip' search despite video evidence clearing her of wrongdoing, and 'threatened to take her to jail if she did not produce the bra' because she was Black.

This decision is insightful for two reasons. First, the HRTO found that the security guard had engaged in consumer racial profiling practices. He had not checked Ms. Nassiah's bags or receipt upon initially detaining her, he had subjected her to a body search by a female employee where no bra was found, told her to shut up, denied her permission to call her babysitter, and called the Peel Regional Police Services. The HRTO noted the security guard had "made a serious mistake apprehending Ms. Nassiah" and subjecting her to unlawful detention despite having no evidence of wrongdoing. In fact, these findings were taken into account during the Tribunal's damages award assessment. Second, the cumulative harm caused to Ms. Nassiah, as she described in a press conference "the fear [had] changed [her] life" (Cotroneo, *Toronto Star*, May 18 2007) is an excellent example of what researchers refer to as psychological effects and racism-related stress of consumer racial profiling. These findings highlight why researchers and human rights practitioners need to consider harm when critically analyzing this phenomenon.

In *McCarthy*, the applicant, Ms. Mary McCarthy, a Black woman in her mid-50s was a regular customer at Shopper's Drug Mart, and lived close to Kenny Tan Pharmacy, a Shopper's Drug Mart franchisee. On 22 May 2011, Ms. McCarthy was subjected to an arbitrary search of her backpack in the dental aisle by a Ms. Balachandra, a South Asian woman, a five-year employee, and night supervisor at Tan Pharmacy (the Respondent). In October 2015, the Tribunal found "objectively, the racial profiling and discrimination that the applicant experienced, which included being rudely approached… being falsely accused of trying to shoplift and having her backpack searched…and not being apologized to because she is Black, was an extremely serious violation of the Code… [the Tribunal had] no doubt that she w[ould] feel the negative effects of it for the rest of her life."

This decision contains two key insights. First, consumer racial profiling occurs on intra-group levels between diverse racialized store employees and racialized consumers. With this knowledge, researchers and employers have to use an intersectional approach to inform their understanding and responses to consumer racial profiling. Second, it supports existing scholarly research on the social exclusion of racialized consumer groups in retail settings where service providers adversely treat these groups as criminals based on conscious or unconscious biases and stereotypes.

PART III: PRIVATE SECURITY GUARDS AND ADDRESSING CONSUMER RACIAL PROFILING

Private security guards are often viewed as important actors in CRP as evident in the HRTO cases reviewed above. Most of Ontario's 34,985 security guards are governed by the *Private Security and Investigative Services Act* (the Act) (2005).

The Act requires them to complete a mandatory minimum 40-hour basic security guard training course, pass a written licence test, and comply with a Code of Conduct. Under loss prevention protocols, security guards are often the first or second point of contact for consumers suspected of wrong doing or shoplifting in retail settings.

Based on the foregoing I recommend that:

- a mandatory anti-consumer racial profiling training be added to the security guard training syllabus developed by the Ministry of Community Safety and Correctional Services, Private Security and Investigative Branch. This training would provide security guards with alternative observational strategies when interacting with racialized and Indigenous consumers.

- the collection of demographic data from consumer contacts done by security guards and staff in order to assess whether or not workplace policies are being followed, and to determine if particular groups of consumers are being targeted for differential treatment.

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