SUMMARY OF CANADIAN RACIAL PROFILING CASE LAW REVIEW

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This paper outlines significant legal developments in racial profiling jurisprudence that may have an impact on, or be relevant to, interpreting and applying the Ontario *Human Rights Code*. Much fruit has been borne in the jurisprudence in the past ten years; the right to be free from racial profiling has grown and expanded significantly. However, there are still barriers preventing full realization.

In the past 10 years, there have been several decisions across Canada dealing with racial profiling, both under the Canadian *Charter of Rights and Freedoms (Charter)* and various provincial human rights statutes. However, significant legal developments that may have an impact on, or be relevant to, interpreting and applying the Ontario *Human Rights Code (Code)* are the focus of this document.

A review of the case law indicates that the right to be free from racial profiling has grown and expanded significantly. Much fruit has been borne in the jurisprudence, but there are still barriers preventing full realization. The case law demonstrates that, among other things:

- The OHRC's definition of racial profiling and a similar definition advanced by the Québec Commission des droits de la personne et des droits de la jeunesse were recently confirmed by the Supreme Court of Canada in *Bombardier*.

- Racial profiling may be the product of stereotypes about Indigenous peoples, African Canadians and Arabs and Muslims in addition to stereotypes about criminality.

- Racial profiling is not limited to the law enforcement context; it is a form of everyday racism. For example, it can occur in a law association lounge, school discipline, an investigation by a children's aid society, employment, an assessment of health and safety risks associated with accommodating creed, and while shopping.

- Racial profiling is a systemic problem in policing. More broadly speaking, there is also recognition of systemic discrimination faced by African Canadians and Indigenous peoples in the criminal justice system.

- Race only needs to be a factor in the adverse treatment to constitute racial discrimination.

- Intention to discriminate is not necessary.

- Racial stereotyping will usually be the result of unconscious beliefs, biases and prejudices. However, this proposition cannot act as a substitute for adjudicative facts ("who," "what," "why," "when," and "where").

- Racial discrimination and profiling can rarely be identified through direct evidence; they will more often be proven by circumstantial evidence and inference.

  - Testimony from individuals affected by racial discrimination or profiling may not be required to establish a prima facie case of discrimination; expert and other circumstantial evidence may be sufficient.

  - In effect, the Supreme Court's decision in *Bombardier* may be viewed as having set a high bar for the circumstantial evidence required to establish a prima facie case of racial discrimination. However, the parties agreed that Bombardier's decision to deny pilot training to Mr. Latif under his Canadian license was based solely on the refusal of U.S. authorities to allow him to train under his U.S. license. This may explain why the Supreme Court placed little or no weight on the circumstantial evidence regarding Bombardier's conduct.

- It can be helpful to hypothesize how events would have unfolded if the person who was the recipient of adverse treatment was White.

- The HRTO may order a respondent to produce race-based data in a racial profiling case. Race-based data may (or may not) reveal a pattern of racial disparities and therefore be relevant to the question of whether an individual was racially profiled.

- A person may face racial profiling based on multiple aspects of his or her identity that intersect in a socially significant way.

- Racial profiling of Indigenous peoples may be exhibited through over-policing. Over-policing causes Indigenous peoples to have disproportionately more frequent contact with police, often for less serious matters, and perpetuates negative police attitudes about them.

- Racial discrimination and profiling often involve the inappropriate exercise of power.

- People who believe they are being racially profiled can be expected to find the experience upsetting. They might react in an angry and verbally aggressive way. A person's use of abusive language requires reasonable tolerance and tact, and cannot form the basis of further differential treatment.

- The police cannot cast their investigative net widely on racialized individuals when dealing with a vague suspect description involving race.

- Racial profiling is not limited to police decisions to stop, question or detain someone. It can occur prior to a stop and affect how an officer continues to deal with an individual after an initial encounter. For example, it can occur in a check of a license plate, searches, arrest decisions, and incidents involving use of force.

- A hunch based entirely on intuition gained by experience cannot suffice as a credible non-discriminatory explanation for adverse treatment.

- The ends do not justify the means. The results that racial profiling produces cannot be used as an *ex post facto*, or after the fact, justification for engaging in the discriminatory practice.