
Protecting Equality in the Face of Terror: Ethnic and Racial Profiling and s. 15 of the *Charter*

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A. Introduction

The anti-terrorism omnibus bill currently before Parliament is a lengthy and complex statute whose provisions, taken together, have the twin goals of enhancing the effectiveness of existing instruments, and creating new instruments, for law enforcement officials to prevent terror both in Canada and abroad. What is striking about the legislation is its silence on one of the central issues in the public debate over how Canada and other liberal democracies should respond to September 11: ethnic and racial profiling (which I shall refer to simply as profiling in this paper).

Profiling has burst onto the national agenda in the wake of the horrific events of September 11. Long criticized by academics and public interest organizations examining the workings of the criminal justice and immigration systems, profiling has now, as a result of September 11, attained renewed prominence. The reason is clear – the hijackers identified by American law enforcement officials all appear to have been Arab, and the argument made by proponents of ethnic and racial profiling is that had airport security officials engaged in profiling, the terrorist acts of September 11 could have been prevented. It was no doubt this sort of reasoning that led retired Major-General Lewis MacKenzie, now security advisor to Premier Mike Harris, to suggest that profiling would be an acceptable law enforcement strategy to fight terror.¹ Indeed, an editorial in the *National Post* went so far as to state that ‘it would be criminally negligent if Air Canada did not engage in racial profiling.’² Advocates of profiling have not made clear who it is who would be profiled – Arabs, persons of

Middle Eastern appearance, or Muslims, three groups whose membership overlaps, but is not at all identical. I will assume that it is the first group which is at issue.

Despite the lack of clarity over who would be profiled, the mere prospect of profiling has met with a chorus of disapproval. Federal Fisheries Minister Herb Dhaliwal has denounced the practice, having once been profiled himself,³ as have organizations such as the Canadian Arab Federation, the National Council on Canadian Arab Relations, and the Canadian Muslim Civil Liberties Association. And a controversial directive issued to port-of-entry immigration and customs officers, published in the *Globe and Mail*,⁴ prompted federal Immigration Minister Elinor Caplan to state '[t]here is no racial profiling, not by gender or religion.'⁵

What is extraordinary about the debate over profiling is the absence, for the most part, of any analysis of whether it would be constitutional. This is all the more extraordinary, since the constitutional concerns raised by the omnibus bill have already generated considerable interest in the legal community, and will propel various provisions of the statute to court in the weeks, months, and years to follow. In my view, the rather minimal public attention devoted to the constitutional challenges raised by profiling is a direct function of the form that such a policy would likely take. If immigration and law enforcement agencies begin to engage in the profiling of persons of Arab background or appearance, they will do so through means – ranging from internally distributed departmental memoranda, to informal word-of-mouth directives issued by superior officers – which are less visible and hence less susceptible to public scrutiny and democratic debate than publicly promulgated legal texts such as statutes and regulations. Civil libertarians must therefore ensure that in focusing so closely on the text of the omnibus bill, they do not overlook the threat posed by other components of the war against terrorism to the very values that that war seeks to defend. This is particularly true in a multiracial and multiethnic democracy such as Canada, which is constitutionally committed to equality and non-discrimination.

B. What is Racial and Ethnic Profiling?

What is racial and ethnic profiling? It is important to be absolutely clear here, because the debate over profiling has not yielded a precise definition of what that practice is. As Randall Kennedy of the Harvard Law

School has suggested, there seem to be two definitions of profiling.⁶ The broad definition holds that profiling consists of a decision to detain or arrest an individual, or to subject an individual to further investigation, 'solely on the basis of his or her' race or ethnicity.⁷ The narrow definition is that profiling consists of the use of race or ethnicity *along with other factors*, such as suspicious behaviour. The narrow definition has been seized upon by advocates of profiling, not only because it may better fit the actual practice of law enforcement (a disputed point), but also because it appears to dilute the importance of race and ethnicity, and hence gives the impression that race or ethnicity would not drive law enforcement decisions. However, Kennedy correctly argues that this inference is based on faulty reasoning, because allowing the use of race or ethnicity even as one factor must mean that it can play a 'decisive' role in whether to subject an individual to further investigation.⁸ That is, any use of race and ethnicity may serve to distinguish two individuals who otherwise manifest identical suspect behaviour, subjecting one to heightened scrutiny, while letting the other walk free. And if this is true, then decisions to target law enforcement will still be made on the basis of race or ethnicity, even if that factor is one among many.

There are two additional points to note here. First, to the best of my knowledge, profiling has been advocated in order to target investigative efforts, but not as a reason for final decisions, such as to prove guilt in a criminal proceeding, or to deny persons admission to Canada. This is important, because at times, profiling has played this role. During the Second World War, for example, the internment of Japanese Canadians amounted to the use of profiling to conclusively deprive persons of their liberty without due process of law, not merely to subject them to more probing investigation.

Second, Kennedy's definitions are very much framed in the context of the United States, where a significant body of evidence documents the use of profiling in law enforcement against African Americans and Latinos. In recent years, the tool of choice for law enforcement has been the pretext stop, in which a police officer stops a driver, ostensibly because of a traffic violation, for the purpose of searching his vehicle and its passengers in connection with non-traffic related offences, usually related to drugs.⁹ The evidence suggests that pretext stops have been employed disproportionately against African Americans and Latinos, because law enforcement officials believe those groups are more likely to commit drug-related offences. Many will be familiar with the recent controversy

surrounding racial profiling in New Jersey, where state troopers had a policy of pulling over African American and Latino drivers, while the state governor denied the very existence of that policy for over a decade.¹⁰ What is striking about the American experience is that prior to Sept. 11, a broad consensus had emerged that racial profiling in policing was unacceptable and should be banned. According to a Gallup poll taken in 1999, 81% of respondents, including 80% of white respondents, opposed racial profiling in policing.¹¹ During the 2000 presidential campaign, both candidates pledged to ban racial profiling in policing, and President Bush reiterated his position as late as July, 2001.¹² Indeed, a bill that would ban profiling – the *End Racial Profiling Act* – was introduced in the United States Senate in June, 2001.¹³

The dominance of the American experience should not lull Canadians into thinking that racial and ethnic profiling is not a problem that we face. It most certainly is. Let me cite two pieces of evidence. The first is a study initially prepared by Scot Wortley of the University of Toronto's Centre for Criminology for the Commission on Systemic Racism in the Ontario Criminal Justice System.¹⁴ The study surveyed Torontonians to establish whether the likelihood of people being stopped and searched by police officers differed on the basis of race. The study found that African Canadians were twice as likely as whites to be stopped once, and four times as likely to be stopped more than once. In particular, African Canadian men seem to be the targets of policing activity. The second piece of evidence is an analysis by Wortley of data collected by the African Canadian Legal Clinic that strongly suggests that African Canadians are subject to higher levels of scrutiny than white individuals by customs and immigration officers at Pearson International Airport.¹⁵

For the sake of simplicity, when I talk about profiling in Canada, I would like to focus on two situations that involve profiling by the state or its agents, and hence that engage the *Charter*. First, there is the use of profiling at the border, with respect to the degree of scrutiny that travellers – be they citizens, permanent residents, or visitors – receive by customs and immigration officers as they enter Canada. Second, there is the use of profiling by airport security, prior to boarding, on both domestic and international flights. Needless to say, there are other examples I could use – such as the profiling of applicants for immigration, or of candidates for civil service jobs – both of which have been suggested in the wake of September 11, and both of which are extremely problematic from a constitutional perspective. But I have chosen these two examples because they are at the forefront of public debate.

C. The Constitutionality of Racial and Ethnic Profiling under s. 15 of the *Charter*

Is profiling constitutional? I will confine my constitutional analysis to the *Charter's* equality rights provision, s. 15, and its reasonable limits clause, s. 1. For this reason, I will not be touching upon ss. 7 through 10, which confer procedural rights on persons who come into contact with the criminal justice system. However, as I will show, there is some cross-over between the procedural fairness and equality arguments.

The test for determining whether there has been a s. 15 violation was recently rearticulated by the Supreme Court in *Law v. Canada*,¹⁶ and has three parts: (a) that a distinction be drawn, (b) that it be drawn on the basis of a prohibited ground, and (c) that it be a discriminatory distinction. The first two steps would be easily met by a policy of profiling, because the whole point of profiling would be to target individuals for heightened scrutiny on the basis of their race and ethnicity, both of which are enumerated in s. 15 as prohibited grounds of discrimination. The heart of the analysis, as in all recent s. 15 cases, would be whether this differential treatment is discriminatory. To answer this question, *Law* states that we must ask whether the distinction demeans the dignity of the rights-claimant, where dignity 'means that an individual or group feels self-respect and self-worth,' understood in terms of both 'physical and psychological integrity and empowerment.'¹⁷

Several strands of the Court's equality jurisprudence suggest that profiling would be found to be discriminatory under s. 15. One of these is the centrality of stereotyping to a finding of discrimination. In the context of s. 15, *Law* explained that a stereotype can mean one of two different things. It can mean that a distinction drawn on the basis of a prohibited ground reflects the view that all members of a group who share that characteristic – race, religion, gender, and so on – possess certain undesirable traits that in fact none of them do. The most virulent forms of anti-Semitism, for example, rely on stereotypes of this sort. Far more common, though, is a stereotype that is an over-generalization – that is, an assumption that all members of a group possess certain undesirable traits that some members of those groups possess, when in fact some, or many, do not. The harm to human dignity – what transforms the use of stereotypes into discrimination – is that doing so has the effect of stigmatizing all members of that group, by promoting the view that they are somehow less worthy of respect and consideration, because they all possess the undesirable trait in question. The Court suggested that these claims

would be easiest made out if the group at issue experienced pre-existing prejudice, because the use of stereotypes in framing government action can interact with and reinforce that existing disadvantage. Finally, the perspective to be adopted in this inquiry is subjective and objective: 'that of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant.'¹⁸

Front and center in *Law*, then, are the *social meaning* of government practices and the *social context* within which those practices occur. In *M. v. H.*, for example, the Court found that the exclusion of same sex couples from the spousal support provisions of the Ontario *Family Law Act*, in the context of widespread prejudice against same sex couples, meant that that exclusion promoted the view that same sex relationships were 'less worthy of recognition and protection.'¹⁹ In the context of September 11, profiling would take the fact that some Arabs committed terrorist acts as a reason to subject *all* Arabs to heightened scrutiny. In other words, profiling employs race and ethnicity as a *proxy* for the risk of committing terrorist or criminal acts. But to profile in this way raises the serious danger of tarring an entire group with the crimes of the few, by giving rise to the myth that being an Arab reflects a propensity to engage in terrorist activity.

An aid to the success of this argument would be the demonstration of pre-existing disadvantage faced by Arabs. But the Court also made it very clear in *Law* that proof of pre-existing social disadvantage was not a *sine qua non*. What would be very significant to the s. 15 inquiry, in my view, is the kind of treatment that profiling entails. In both of my examples, profiling would involve the differential imposition of the burden of law enforcement on Arab travellers by agents of the state, in public and in full view of other passengers. The image here is stark: persons of Arab appearance being taken aside before boarding for more intensive questioning, or being steered at customs and immigration for secondary questioning, not because of any evidence that could reasonably give rise to suspicion of their links to terrorist organizations, but rather because of their physical appearance. It would also be significant that profiling would occur in the context of law enforcement, where the goal is to identify those who pose a threat of engaging in criminal activity. The mere fact of being subject to heightened scrutiny in the criminal context carries with it a stigma. Subjecting members of a racial or ethnic group to more probing investigation threatens to stigmatize an entire community.

To be sure, this kind of targeting would be rightly viewed as revolting by many Canadians. Indeed, images of the coercive power of the state

directed at visible minorities in a public manner – at blacks in South Africa or in the American South, at Muslims in Bosnia – stand for many Canadians as paradigmatic examples of the grossest violations of human rights. In all of these cases, what was often involved was the selective enforcement of laws that themselves did not distinguish upon the basis of race or ethnicity. And that same history has taught us the chilling lesson that the targeting of state power on minorities can socially label those persons as deviant or inferior. It can lead otherwise reasonable and fair-minded people to rationalize or explain away the discriminatory application of state power, and even to engage in discrimination themselves. This prospect is all the more likely in a climate of fear.

Defenders of profiling might counter that the extent to which profiling stigmatizes turns on *how* profiling is handled in practice. The frame of reference here is the use of pretext stops in the United States, where what is objectionable is not simply the use of racial profiling, but the way in which those stops and the subsequent searches have not infrequently been conducted – with guns drawn, with verbal abuse, with no explanation as to why individuals have been stopped, and with no apology afterward.²⁰ A defender of profiling would argue that if handled professionally and politely, the more intrusive investigation of Arabs by airport security and immigration officials would minimize the indignity and stigmatization experienced by those passengers.

However, I reiterate that the relevant perspective under s. 15 is that of the reasonable person in the position of the rights-claimant. Even if the heightened scrutiny is handled professionally and politely, for the persons who are subject to profiling, the indignity is real. Those travellers would essentially be asked to establish their legitimacy; they would be placed in the position of having to state and justify their reasons for travelling, an entirely legal activity, while other travellers would face no such burden. They would face this burden of persuasion every time they fly, or pass through customs and immigration. The cumulative effect on individuals of bearing this burden, simply because of one's looks, in a historical and social context where the differential imposition of the burden of law enforcement on the basis of race and ethnicity have been identified with the most odious forms of discrimination, would be enormously damaging on their self-respect and self-worth. And it is a cost that advocates of profiling altogether ignore.

Another factor identified by *Law* as relevant to a finding of discrimination is the nature of the interest at stake, the idea being that the more important the interest, the more likely a finding of discrimination. In the two examples I have chosen, the interests at stake are nothing less

than physical liberty and privacy. It is important to be absolutely clear on how physical liberty and privacy are implicated in these two situations. I am not suggesting that anyone has a constitutional right to travel by air, or that non-citizens have a constitutional right to enter the country. However, in both of these cases, profiling would entail additional questioning by agents of the state regarding a variety of personal matters. It might also entail the involuntary, physical redirection of travellers to areas where they can be questioned further. The significant point here is that both privacy and physical liberty attract the protection of several rights in the *Charter*, unlike many of the interests which the court has found sufficiently important to count as reasons in favour of finding distinctions discriminatory – e.g., the protection of a human rights code,²¹ or the right to seek spousal support payments.²² The constitutional status of these interests should count as a reason to view with deep suspicion distinctions drawn with respect to their enjoyment.

Although *Law* strongly suggests that racial profiling would be found to violate s. 15, it contains one significant holding that cuts the other way. The Court in *Law* stated that a distinction is not discriminatory if it treats a rights-claimant ‘differently on the basis of actual personal differences between individuals.’²³ The Court made this point by reference to an earlier decision upholding the separate placement of a child with a learning disability, which, the Court held, did not discriminate against her because it was made in her best interests.²⁴ This argument, if anything, could cut against profiling, because profiling treats people differently regardless of anything about them *per se*, but rather because of behavioural inferences drawn from their race and ethnicity. However, the Court in *Law* then went on to say that distinctions made on the basis of ‘informed statistical generalizations’ would not be discriminatory, because they corresponded closely enough with actual need.²⁵ What does this statement mean? Look at the holding of *Law* itself – the Court upheld age-based restrictions on survivors’ benefits under the Canada Pension Plan on the ground that younger individuals were more likely to be able to re-enter the workforce than older persons – using ‘age as a proxy for long-term need’²⁶ – knowing full well that this generalization did not hold true for many individuals. What the Court seemed to be saying is that relying on generalizations is acceptable in some circumstances, even if those generalizations are stereotypes. This is an apparent contradiction to what the Court said a few paragraphs earlier in its judgment.

The implications of permitting statistical generalizations for the con-

stitutionality of profiling under s. 15 are clear and dramatic. But *Law* contained narrowing language, suggesting that this derogation from equality principles was only permissible in the context of remedial social benefits legislation which is under-inclusive, and stating that generalizations would be impermissible 'where the individual or group which is excluded by the legislation is already disadvantaged or vulnerable within Canadian society.'²⁷ These caveats should have been enough to put to rest any suggestion that the use of statistical generalizations would be acceptable in applying the burden of law enforcement upon a racial and ethnic minority.

What gives me pause for thought, though, is the majority judgment of the Supreme Court in *Little Sisters v. Canada*.²⁸ In that case, the Court held that Customs agents had discriminated on the basis of sexual orientation by targeting their enforcement efforts at homosexual erotic materials being imported by a lesbian bookshop, while adopting a relatively lax attitude to the importation of heterosexual materials by mainstream booksellers. *Little Sisters*, on its face, would thus seem to set a helpful precedent, because it found profiling based on sexual orientation to be discriminatory under s. 15. But the majority went on to say that the targeting would have been constitutional had it been based on 'evidence that homosexual erotica is proportionately more likely to be obscene than heterosexual erotica,' because in those circumstances, there would be a 'legitimate correspondence between the ground of alleged discrimination (sexual orientation) and the reality of the appellant's circumstances (importers of books and other publications including, but by no means limited to, gay and lesbian erotica).'²⁹ So even in a law enforcement context involving the differential application of burdens on a vulnerable minority, *Little Sisters* suggests that an informed statistical generalization would count as a reason for holding that profiling is not discriminatory, despite what was said in *Law*.

Little Sisters forces us to consider the rationale behind the use of, and the constitutional discipline to be imposed on, informed statistical generalizations. Amazingly, both *Law* and *Little Sisters* say little to nothing about either of these issues. This is a glaring oversight, given the obvious tension between permitting statistical generalizations and the Court's own emphasis in *Law* on the harm to equality caused by over-generalization. What are likely at work here are efficiency concerns of different sorts. In the social benefits context, the alternative to rules determining eligibility on the basis of personal characteristics such as age is a process of case-by-case decision-making that directly assesses need. Such a situa-

tion would be time-consuming, expensive, and potentially open to abuse because it would require that individual decision-makers be vested with considerable discretion. In the law enforcement context, the Court in *Little Sisters* suggested that targeting is permissible because Customs 'is obliged to use its limited resources in the most cost-effective way,' an explicitly utilitarian line of argument that gives priority to maximizing the yield of finite law enforcement activities.³⁰ Proponents of profiling at airports and at immigration will no doubt point to this latter comment in *Little Sisters* in defence of the constitutionality of such policies.

However, there are three large problems with permitting informed statistical generalizations to defeat claims of discrimination. First, statistical generalizations may often be unreliable, or, even worse, reflective of discrimination themselves. To permit governments to rely on them as justification for differential treatment may do no more than to revictimize the victims of discrimination. This is a well-known argument in the context of racial crime statistics, which are notoriously unreliable because they may reflect discriminatory policing practices in the process of investigation. A proponent of profiling would respond that the events of September 11 are different, because the perpetrators of those terrorist acts are clearly drawn from one ethnic group. But here we encounter the second problem – the question of fit. The justification for using personal characteristics such as race or ethnicity as proxies for risk is that they have some sort of predictive value. *Law* says nothing, though, about *how much* predictive value they must have to suffice for the purposes of s. 15. More precisely, profiling generates both false positives and false negatives, because they subject to scrutiny people who pose no risk whatsoever, and omit from scrutiny people who do in fact pose some risk. *Law's* silence on this issue is deeply problematic, because both false positives and false negatives generate equality concerns. For the former, innocent persons are subject to the unequal burden of law enforcement because of their race and ethnicity, and for the latter, the law is enforced unequally against persons who pose a risk because of their race and ethnicity.

This leads me to the final and most important point: that statistical generalizations cut against the grain of a conception of equality itself – that is, that individuals not be judged on the basis of presumed group characteristics, but rather on the basis of their individual traits.³¹ This theme has been very important in the Court's equality jurisprudence, and comes from its case-law interpreting human rights codes. That jurisprudence has been shaped by the impulse that access to the goods whose

distribution is regulated by those statutes – principally employment, but also housing and services – should not be governed by criteria that erect arbitrary and irrational barriers, but instead by criteria that are relevant, such as talent, ability to pay, and need. The difficulty with profiling is that it subjects persons to heightened scrutiny not on the basis of criteria that are tied to their conduct, which is the legitimate concern of law enforcement, but instead to the colour of their skin or appearance, which is not.

What is the way forward? As constitutional lawyers know, concerns regarding administrability are classically considered under s. 1, where the burden of proof is on the governments who possess the relevant information, not rights-claimants, who do not. Because they are motivated by efficiency concerns, the justification of statistical generalizations should therefore be relegated to s. 1. But even there the Court must soon develop an account of the legitimate and illegitimate use of statistical generalizations in equality rights cases. Left unchecked, the combination of *Little Sisters* and *Law* is dangerous.

As a tentative suggestion, I would propose the courts distinguish on the basis of the nature of the policy at issue. In cases involving under-inclusive social benefits schemes, a good case can be made for the constitutionality of distinctions drawn on prohibited grounds of discrimination if the statistical generalizations meet some threshold level of fit. But with respect to the burden of law enforcement, which by necessity entails deprivations of liberty and privacy, generalizations of this sort are deeply problematic. It is here that procedural fairness concerns can inform the interpretation of s. 15. Section 8 of the Charter prohibits ‘unreasonable’ search and seizures, and s. 9 prohibits ‘arbitrary’ detention and arrest, which has been interpreted to impose a requirement of ‘articulable cause.’ Although a majority of the Supreme Court has not spoken to this issue directly, the dissenting judgments of Sopinka J. in *R. v. Ladouceur*,³² and La Forest J. in *R. v. Belnavis*,³³ as well as the Ontario Court of Appeal’s judgment in *R. v. Simpson*,³⁴ all indicate that detaining an individual simply because of her race constitutes an arbitrary detention or arrest under s. 9 (*Ladouceur*, *Simpson*) or makes a search unreasonable under s. 8 (*Belnavis*). In my view, the interpretation of ‘arbitrary’ under s. 9 and ‘unreasonable’ under s. 8 should inform the interpretation of ‘discrimination’ under s. 15, so as to render race and ethnic-based deprivations of liberty and privacy based on statistical generalizations *per se* discriminatory. What is required instead is a process of individual decision-making on a case-by-case basis.

D. Conclusion: Section 1, Alternative Means and the Anti-Terrorism Bill

If a policy of profiling were found to violate s. 15, many difficult issues would arise under s. 1, such as whether that policy would be prescribed by law, the appropriate level of deference owed by the courts, and whether profiling minimally impairs the right to equality. By way of conclusion, I want to focus on the last of these three issues. The obvious alternative to race- or ethnic-conscious policies for airport security and immigration is the use of other criteria that are not prohibited grounds of discrimination, nor thinly veiled proxies for them. Indeed, I want to argue in favour of one provocative alternative to profiling, which is to subject *everyone* to intrusive investigation both by airport security personnel and immigration officers. This policy would be extremely effective, and would comport entirely with the equality guarantee. But amazingly, not a single proponent of profiling has even considered it, even if only to reject it.

If we were to take this proposal seriously, as we should, what would be the principal arguments against it? One argument is that it would be extremely costly, and that in a world of scarce resources, governments cannot be expected to adopt the absolutely least intrusive means for securing their public policies. However, we should be extremely sceptical of this claim. The same voices that are calling for racial and ethnic profiling also claim that in the war on terrorism, money is no object, and that significant resources should now be devoted to Canada's military, intelligence services, and law enforcement agencies. And the expectation is that significant resources will be made available. If this is true, the plea of poverty rings hollow. The true question is not whether moneys are available, but the relative priority to be attached to different kinds of expenditures prompted by September 11. At the very least, in tallying up the costs of the war on terror, the costs of complying with s. 15 must be taken into account. Indeed, I would go even further, and argue that in the allocation of scarce resources, compliance with the *Charter* should presumptively take priority.

The other argument against a policy of blanket scrutiny is that it would exact enormous costs in terms of liberty and privacy. No doubt, the infringements on liberty and privacy of a blanket policy would be severe, and would be a significant cost to be weighed. However, the policy would also have an enormous benefit, because it would eliminate one of the principal costs of profiling: the stigma born by those who are singled

out for heightened investigation. What this means is that a blanket policy would *redistribute* the costs of the fight against terrorism, and ensure that they are borne by everyone, not just those who through no choice of their own share the race and ethnicity of those responsible for September 11. Indeed, distributing the costs in this way might lead to a better social valuation of the war on terror, because those who advocate racial and ethnic profiling are not the ones who will bear the costs of that policy. It is deeply ironic that the same voices who call for racial and ethnic profiling are precisely those who now call for solidarity across ethnic and racial lines, and proclaim that we should all be willing to surrender some freedom in favour of security. But if solidarity is truly their guiding principle, and their willingness to surrender freedom is genuine, then their policy proposals should match their rhetoric. Profiling does not.

Notes

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- 1 S. Schmidt, 'Ontario denies anti-terror policy is racist: Retired general says checking Arabs "common sense"' *National Post* (5 October 2001) (available on-line at: [http://www.nationalpost.com/search/story.html?f=/stories/20011005/721871.html&q=MacKenzie%](http://www.nationalpost.com/search/story.html?f=/stories/20011005/721871.html&q=MacKenzie%20)) (date accessed: 7 November 2001).
- 2 'Profiles in Prudence (editorial)' *National Post* (20 September 2001) A17.
- 3 D. Leblanc & S. McCarthy, 'The War on Terror: Terror bill worries Dhaliwal' *The Globe and Mail* (30 October 2001) A11.
- 4 E. Oziewicz, 'The Brink of War: Border alert targets pilots, Canadian guards told to watch for men with technical training and links to 16 "conflict" countries' *The Globe and Mail* (19 September 2001) A1.
- 5 S. McCarthy & E. Oziewicz, 'The Brink of War: CANADA'S RESPONSE – Ministers defend new border alert' *The Globe and Mail* (20 September 2001) A6.
- 6 R. Kennedy, 'Suspect policy: racial profiling usually isn't racist. It can help stop crime. And it should be abolished' (1999) 221:11 *New Republic* 31 (available on-line at: <http://www.thenewrepublic.com/archive/0999/091399/coverstory091399.html>) (date accessed: 7 November 2001). Kennedy's definitions actually refer only to racial profiling, but in fact encompass profiling on the basis of both race and ethnicity.
- 7 *Ibid.* (emphasis mine).

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- 8 R.L. Kennedy, *Race, Crime and the Law* (New York: Vintage Books, 1998) at 148.
- 9 The constitutionality of this practice was upheld by the United States Supreme Court in *Whren v. United States*, 116 S.Ct. 1769 (1996).
- 10 P. Verniero & P.H. Zoubek, *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling* (20 April 1999).
- 11 F. Newport, 'Racial Profiling is Seen as Widespread, Particularly Among Young Black Men' *Gallup News Service* (9 December 1999) (available on-line at: www.gallup.com/poll/releases/pr991209.asp) (date accessed: 7 November 2001).
- 12 'Remarks by the President to National Organization of Black Law Enforcement Executives' (30 July 2001) (available on-line at: <http://www.whitehouse.gov/news/releases/2001/07/20010730-5.html>) (date accessed: 7 November 2001).
- 13 S 989.
- 14 S. Wortley, 'The Usual Suspects: Race, Police Stops and Perceptions of Criminal Injustice,' *Criminology* (forthcoming); Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995) at 352 to 360.
- 15 R. James, 'Black Passengers Targeted in Pearson Searches? Lawyers plan court fight over "racial profiling" by customs officials at airport,' *The Toronto Star* (29 Sunday 1998) A1.
- 16 *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [hereinafter *Law*]
- 17 *Ibid.* at para. 53
- 18 *Ibid.* at para. 60
- 19 *M. v. H.*, [1999] 2 S.C.R. 3 at para. 73.
- 20 D.A. Harris, *Driving While Black: Racial Profiling On Our Nation's Highways* (American Civil Liberties Union, 1999) (available on-line at: <http://www.aclu.org/profiling/report/index.html>) (date accessed: 7 November 2001). For those who think that demeaning police conduct toward members of racial minorities is strictly an American problem, we need only remind ourselves of the public strip search conducted of Ian Vincent Golden, an African Canadian, the constitutionality of which is currently before the Supreme Court of Canada: *R. v. Golden*, [1999] S.C.C.A. No. 498 (hearing date: Feb. 15, 2001).
- 21 *Vriend v. Alberta*, [1998] 1 S.C.R. 493.
- 22 *M. v. H.*, *supra* note .
- 23 *Law*, *supra* note at para. 71.
- 24 *Eaton v. Brant (County) Board of Education*, [1997] 1 S.C.R. 241.
- 25 *Law*, *supra* note at para. 106.
- 26 *Ibid.* at para. 104.
- 27 *Ibid.* at para. 106.
- 28 *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 [hereinafter *Little Sisters*].
- 29 *Ibid.* at para. 121.

30 *Ibid.* at para. 120.

31 *Miron v. Trudel*, [1995] 2 S.C.R. 418 at para. 131.

32 [1990] 1 S.C.R. 1257 at 1267.

33 [1997] 3 S.C.R. 341 at 376-7.

34 (1993), 12 O.R. (3d) 182 (C.A.). Also see *Brown v. Durham Regional Police Force* (1998), 131 C.C.C. (3d) 1 at 17 (Ont. C.A.) (stating that detention under Ontario *Highway Traffic Act* for reasons of race would be illegal because of lack of articulable cause).