

# Handling Human Rights Complaints from Racial Profiling to Street Checks

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# Introduction

- Google Trends indicate that the term “black lives matter” has grown in interest in Canada in the latter half of the decade and into 2021.
- Based on Google searches from 2004 to present the word “street check” also has garnered increased interest over time.
- Across Canada, allegations of discrimination based on race are founded in different human rights legislation.
- In British Columbia, race-based discrimination is contrary to s. 8 of the *Human Rights Code*, RSBC 1996 c 210 (the “Code”)

# ***Human Rights Code, RSBC 1996 c 210***

- 8 (1) A person must not, without a bona fide and reasonable justification,
  - (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
  - (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or class of persons.

# ***Moore v BC (Education)*, 2012 SCC 61**

- In order to succeed in a claim, the complainant must demonstrate *prima facie* discrimination by proving the following three elements:
  - the complainant has a characteristic protected from discrimination;
  - he has experienced an adverse impact with respect to a service; and
  - the protected characteristic was a factor in the adverse impact.

# ***Moore v BC (Education), 2012 SCC 61***

- Once the complainant proves these three things, the respondent can defend itself by proving its conduct was justified. If the respondent proves its conduct was justified, then there is no discrimination.
- If the respondent's conduct is not justified, discrimination will be found to occur: *Moore* at para 33.
  - Discrimination can take many forms, including “adverse effect” or “indirect” discrimination. It is not necessary to prove a “causal” connection between a protected characteristic and the adverse treatment. Rather, there must be a “connection”, or the protected characteristic must be a “factor” in the adverse treatment:

# Post - Moore

- In *Stewart v Elk Valley Coal Corp, 2017 SCC 30 [Elk Valley]* the Supreme Court of Canada built upon the cases of *Moore* and *Bombardier* emphasizing that discrimination can take many forms, including ‘indirect’ discrimination.
- An otherwise neutral policy may have an adverse effect on certain groups. The existence of arbitrariness or stereotyping is not a stand-alone requirement for proving *prima facie* discrimination.
- Requiring otherwise would improperly focus on “whether a discriminatory attitude exists, not a discriminatory impact”, the focus of the discrimination inquiry: *Elk Valley* at para 45.

# Post - Moore

- There must be a link or connection between the protected characteristic and the adverse treatment. The protected characteristic need only be “a factor” in the adverse treatment, not a “significant” factor or a “material” factor: *Elk Valley* at para 46.

# **Studies/Reviews by Police Boards About Street Checks in Recent Years**



# 2019 Vancouver Police Board Street Check Review

- *Over-policing* occurs when the police focus disproportionately on a racialized population or neighbourhood.
- *Pretext policing* is when a police officer detains or investigates a person for one reason but really has a secondary purpose for doing so.

# Independent Street Checks Review

- In his review of street checks in Ontario, the Honourable Mr. Justice Tulloch (2018) noted, while street checks can be legitimately used to gather intelligence and have validity as a police strategy, carding cannot.

# Street Checks

- A *street check* occurs when officers have an “articulable” basis for the practice, that is, when they have reason to suspect the person is involved in a crime.
- Street checks generally involve the police stopping individuals to collect personal information that is then stored and used for a variety of purposes, including case investigation, locating missing persons, and identifying people in cases of death.

# Carding

- *Carding*, on the other hand, occurs when the police randomly stop people and ask for their identification, which is then entered into a police database.
- Mr. Justice Tulloch describes this as a discriminatory police practice as people being asked to produce identification in the absence of any evidence they have committed a crime.
- Per the December 2019 Vancouver Police Board Street Check Review, a concern is that people in communities of diversity and racialized groups are disproportionately subjected to these random checks.

# Recent Statistics

- A January 30, 2021 Report to the Vancouver Police Board concerning street checks (Street Check Audit Report) noted a 94.3% decrease in street check records submitted between 2020 and 2019.
- The report noted this was likely due to a combination of the public dialogue on street checks and the constraints placed upon the practice by the British Columbia (BC) Provincial Police Standard which came into effect on January 15, 2020.

# Human Rights Complaints

## ***Phipps v Toronto Police Services Board and others,*** **2009 HRTO 877**

- A postal worker was followed and investigated by police because he was black, and the police officers found it suspicious for a black person to make deliveries in an affluent neighbourhood in the city.
- It appeared that the postal worker's race was the only factor that put him at risk of being investigated that day.

# ***Phipps v Toronto Police Services Board***

- *Phipps* was decided under the Ontario *Human Rights Code*, RSO 1990, c H 19 which contains similar language to s. 8 of the BC Code.
- The tribunal articulated a number of principles regarding discrimination:
- The grounds alleged by the applicant do not need to be the sole or the major factor in the actions taken by the respondents; it is sufficient for him or her to prove that one or more of the prohibited grounds was a factor
- There is no need to prove intention - the focus is on the effect of the respondent's actions on the applicant



# ***Phipps v Toronto Police Services Board***

- The evidence supporting the explanation must be credible on all the evidence.
- Racial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices.
- When assessing the respondent's explanation, the ultimate question is whether an inference of discrimination is more probable from the evidence than the actual explanations offered by the respondent; and
- Circumstantial evidence inference rather than direct evidence.

# Considerations by a Tribunal

- In determining whether the inference of racial discrimination is more probable than the explanations offered by the respondent officer, tribunals are also mindful of the nature of racial discrimination as it is understood today and that it will often be the product of learned attitudes and biases and often operates on an *unconscious* level

# ***Maynard v. Toronto Police Services Board, 2012***

## **HRTO 1220**

- The Toronto Police were investigating a gun call at a mall involving a black male suspect driving a black sports car. The complainant was driving his father's black BMW while coming home from his office.
- A police officer saw the complainant and decided to follow and investigate him. The complainant was not speeding or driving suspiciously.
- The complainant pulled into his driveway, and police officers pulled in behind him.
- The exchange between them escalated and the officers drew their firearms and pointed it at the complainant.
- The complainant was instructed to kneel on the ground, was physically picked up by two officers, searched and placed in the back of a police vehicle.
- Shortly after being placed in the back of the vehicle, the complainant was released as new information was received of the radio that confirmed he was not a suspect.

# ***Maynard v. Toronto Police Services Board***

- In substantiating a finding of discrimination, the Tribunal in *Maynard* found that the police officer had no possible age of the suspect and no direction of travel of the vehicle except that it had left the mall.
- The suspect vehicle was also described as speeding.

# ***Symonds v Halifax Regional Municipality, 2021*** **CanLII 37128 (NS HRC)**

- The complainant, a black man, jay walked across the street heading towards a coffee shop on the other side of the road.
- Two officers stopped him and talked to him about the dangers of jay-walking. The complainant then walked into the coffee shop. The officers then lingered by the coffee shop.

# ***Symonds v Halifax Regional Municipality***

- The complainant exited the coffee shop, and then walked across the street again at the cross-walk. Shortly thereafter, back in his office, a supervisor took the complainant into a private room and told him the police were waiting for him in the lobby. When the complainant went down to meet them, the same two policemen wrote him a \$410 ticket for crossing the street illegally saying this was normal police procedure.
- The complainant alleged he received the ticket because of his race.

# ***Symonds v Halifax Regional Municipality***

- The Board found that in assessing whether race or color was a factor, directly or indirectly, in police conduct that caused an adverse impact, it is helpful to consider the exercise of police discretion and how it is evaluated.
- *R v. Beaudry*, 2007 SCC 5 held that police officer discretion is an essential feature of the criminal justice system. A just society requires that the letter of the law be applied using judgment that adapts law enforcement to individual circumstances. "But this discretion is not absolute. Far from having carte blanche, police officers must justify their decisions rationally".
- Such justifications have both a subjective and objective component. Subjectively, a police officer must believe that they have legitimate grounds for their decision. Objectively, those grounds must accord with the material circumstances. "Thus, a decision based on favouritism, or on cultural, social or racial stereotypes, cannot constitute a proper exercise of police discretion".
- Similarly, a decision that is disproportionate to the circumstances cannot constitute a proper exercise of discretion.

# *R v Nairn*, 2021 ONSC 4582

- On March 22, 2018, two police officers stationed themselves to conduct surveillance in an area known for frequent drug activity. Mr. Guerra, a white male, and Mr. Grant, a black male, were observed walking out of a restaurant approaching a silver sedan that was parked in the lot. Mr. Grant moved towards and briefly interacted with an unknown male at a different parked vehicle while Mr. Guerra stayed by the sedan. The officers did not see anything pass between them but concluded that they were taking part in a hand-to-hand drug transaction.
- After the interaction, the accused, a black male, exited the same restaurant carrying a backpack and got into the sedan before the three of them drove off. The officers followed them in their unmarked police car to a housing complex.
- The officers observed the three individuals smoking marijuana and determined that, combined with their previous conduct, there were reasonable grounds to believe that an investigative detention was warranted.
- After requesting backup, the officers approached the three individuals, who started walking away. As one of the officers followed, the accused began to run. The accused threw something over a fence as the foot pursuit was underway and the officer stopped and discovered that it was a loaded handgun.



# ***R v Nairn***

- In respect of racial profiling in the context of the police authority to detain, the Court emphasized how detention must be based on a “constellation of objectively discernable facts” and that the presence of an individual in a high crime area is only relevant as it relates to an accused’s proximity to a particular crime.
- In particular, the Court stated how a “hunch” based on intuition gained by experience is not a reasonable ground to suspect criminality and detain, no matter how accurate that “hunch” turns out to be. Such a hunch can mask an officer’s discriminatory conduct based on irrelevant factors such as the detainee’s sex, colour, age, ethnic origin or sexual orientation.

# ***R. v. Nairn***

- The Court reiterated the Supreme Court's decision in *R. v. Le*, 2019 SCC 34 that a detention based on racial profiling is arbitrary as it is not based on reasonable suspicion, and that racial profiling is also relevant when assessing whether police conduct was so serious and lacking in good faith such that evidence can be excluded pursuant to s. 24 of the Charter.
- Racial profiling claims are also usually proven by inference drawn from circumstantial evidence, as direct evidence would involve an admission by an officer that they were influenced by racial stereotypes in the exercise of their discretion. Failing to abide by the prohibition against consciously or unconsciously employing discriminatory hunches and biased inferences may result in the evidence seized being excluded.

# R. v. Nairn

- The accused argued that the officers were motivated by racial profiling because there was no justifiable reason to believe that he and his associates were involved in criminal activity, as neither the context of the plaza with its history of drug trafficking, nor the interactions the officers observed are sufficient to infer criminality.
- Ultimately, the Court declined the applications as the connection between the alleged incident of racial profiling and the accused's arrest on firearm charges two months later was too remote to prove that a right was infringed.
- Furthermore, the Court did not decide on whether the police engaged in discriminatory profiling. The Court found that the firearm was discovered in an entirely different context with only a remote nexus to the alleged drug transaction, and that a racial profiling claim cannot be raised as an at-large or stand-alone claim that is unconnected to the violation of a right. As a result, the accused was found not guilty on all charges due to the lack of reliable identification evidence.

# **Disingenuous or Unmeritorious Claims**

# ***Akintoye v. Vancouver Police Board (No. 2), 2013***

## **BCHRT 298**

- The complainant was mistakenly identified as another individual, for whom there was an outstanding arrest warrant (“Mr. X”). Both men were of African origin.
- The complainant claimed that the Vancouver Police engaged in racial profiling and discriminated without a bona fide or reasonable justification.
- The court held that the actions taken by the Vancouver Police against Mr. Akintoye after this initial encounter – placing him in handcuffs and subsequently arresting him – were in response to his non-compliance with police instructions, rather than stereotypes about his race. The court found that no inference could be drawn that one or more of Mr. Akintoye’s characteristics – race, colour, or place of origin – was a factor in the adverse treatment that he experienced on that day.

# ***Jean v Ottawa Police Services Board, 2015 HRTO 1488***

- The Tribunal found that there was insufficient evidence to establish discrimination based on race, colour, ethnic origin or age in the context of a police traffic stop of a young, Black man of Haitian descent.
- In considering the meaning of racial profiling and how it manifests, the Tribunal found that there was insufficient evidence to support the complainant's perception that the officer was consciously or unconsciously influenced by a criminal stereotype when he chose to stop the complainant and ticket him for a cellphone infraction.

# Conclusion

- Tribunals are not immune to the sway of public discourse.
- Recent investigations by police boards across Canada have also led to more concrete policies regarding street checks and training on potential racial profiling.
- The crystallization of policies over the past few years will likely have some effect on how Human Rights claims are decided.
- It is prudent for police boards and police departments to ensure their officers are aware of evolving policies and receive training on same and that those policies are implemented in day-to-day policing activities.

# Conclusion

- The decisions of the Boards and Courts highlight the importance of having objectively discernable facts in the preliminary stage of the investigation that provide the officer with a reasonable basis to proceed.
- Officers must be aware and careful of their unconscious biases when exercising their discretion to proceed with an investigation or risk the exclusion of evidence and potentially the finding of a human rights breach.





HAVE A QUESTION?



# Q&A