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Evidentiary Issues with Claim of Racial Profiling in *R v Kenowesequape*

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Case Commented On: *R v Kenowesequape*, 2018 ABQB 135 (CanLII)

In 1999, the Ontario Court of Appeal adopted the following definition of "racial profiling"

> Racial profiling is criminal profiling based on race. Racial or colour profiling refers to that phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group (*R v Richards*, 26 CR (5th) 286, 1999 CanLII 1602 (ON CA) at para 24).

In *R v Kenowesequape*, Madam Justice Khullar of the Alberta Court of Queen's Bench was tasked, in part, with determining whether an allegation of racial profiling was justified. This post will focus on the court's rejection of the argument that racial profiling was in play during this police action.

Facts

On the evening of November 20, 2015, William Kenowesequape was riding a bicycle on 118 Avenue in Edmonton, Alberta. As result of the bike not having a light, and because the bike appeared "more valuable than the typical bicycle" (at para 3) seen in that neighbourhood, Mr. Kenowesequape was stopped by a member of the Edmonton Police Service. Before the officer exited his vehicle, he recognized Mr. Kenowesequape and quickly ran a computer check. Upon learning that there was an outstanding warrant for Mr. Kenowesequape, the officer exited his vehicle and made the arrest. A search incident to the arrest discovered a cell phone (possessed contrary to a pre-existing recognizance), a small amount of cocaine and a small amount of Dilaudid, both controlled substances. The officer also questioned Mr. Kenowesequape about the bicycle prior to informing Mr. Kenowesequape of his rights under sections 10(a) and (b) of the *Charter* and before reading him the police caution.

At trial, the judge found the officer to be a credible and reliable witness. Mr. Kenowesequape was found guilty of two breaches of a recognizance (for possession of a cell phone and for failing to be of good behaviour), two counts of possession of controlled substances, and failing to appear for a court date related to these matters. Evidence related to whether the bicycle was stolen was excluded at trial as result of 10(a) and 10(b) *Charter* violations; Mr. Kenowesequape had not been informed of the stolen bicycle investigation and had not been advised of his right to retain counsel.

Mr. Kenowesequape appealed the convictions, arguing, in part, that he was only stopped because he is Indigenous. Mr. Kenowesequape argued that this factor should have resulted in the detention being deemed arbitrary and the evidence gathered during the detention found tainted and thereby excluded. He further argued that section 24(2) of the *Charter* was unreasonably applied and all of the evidence should have been excluded, rather than just the evidence related to whether the bike was stolen (at para 8).

Racial Profiling

Mr. Kenowesequape advanced two arguments specific to the to the racial profiling argument:

1. It was a palpable or overriding error for the trial judge to find the Constable a reliable witness; and
2. It was an error not to find the detention arbitrary as a result of racial profiling or "carding".

Mr. Kenowesequape relied on *R v Thavarajah*, 2006 ONCJ 456 (CanLII), *R v Fountain*, 2015 ONCA 354 (CanLII), and *Elmardy v Toronto Police Services Board*, 2017 ONSC 2074 (CanLII) to support the submission that the police stop was an arbitrary detention due to racial animus. Mr. Kenowesequape also asked the court to take judicial notice of the overrepresentation of Indigenous youth, especially males in the criminal legal system and referenced *R v Gladue* and *R v Ipeelee* in support (at para 15).

The Court's Decision

While acknowledging that racial profiling is currently a subject of public debate, Madam Justice Khullar noted that establishing its presence requires a fact specific analysis and may necessitate an examination of circumstantial or other evidence (at para 13).

In deferring to the trial judge's assessment of the officer as credible and reliable, Madam Justice Khullar noted that at trial the officer's evidence withstood a vigorous cross-examination (at para 14). Madam Justice Khullar declined Mr. Kenowesequape's invitation to disbelieve the officer's evidence based on "what is known about the context of policing and Indigenous people in the legal system" (at paras 15-16). Madam Justice Khullar noted that there was no direct or implicit evidence to support an allegation that racial profiling had occurred and it was too much of a leap to hold that the overrepresentation of Indigenous people in the legal system was the result of racial profiling generally or specifically in this case (at para 16). Madam Justice Khullar further held that the stop was premised on an articulable cause: investigation and enforcement pursuant to the *Vehicle Equipment Regulation*, Alta Reg 122/2009. She further noted that no evidence had been adduced at trial that there were "statistics or practices of the Edmonton Police Service" to support an allegation of racial profiling or "carding" (at para 16).

The Rejection of Racial Profiling

Test for Reasonable Apprehension of Bias

This case highlights the difficulty in finding that racial profiling exists in a police investigation. The crux of the examination is that the court is required to balance the evidence provided by a professional witness regarding the validity of the investigation or detention against circumstantial evidence of an underlying, socially unacceptable bias. In *R v Brown,* 2003 CanLII 52142 (ON CA), 64 OR (3d) 161, Justice Morden articulated the test for determining the existence of a reasonable apprehension of bias. The test, adopted from *Committee for Justice and Liberty v Canada (National Energy Board),* [1978] 1 SCR 369, 1976 CanLII 2 (SCC) is:

> what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly…[t]he grounds for this apprehension must, however, be substantial and I…[refuse] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

Brown also saw the court recognize that racial profiling may be the result of an attitude that is either consciously or subconsciously held, that the officer need not be an overt racist (at para 8), and further recognized that direct evidence proving a claim of racial profiling would require the officer to give evidence that "he or she was influenced by racial stereotypes in the exercise of his or her discretion" (at para 16). The unlikeliness that an officer would give this evidence explains the need for an inference drawn from circumstantial or other evidence to found a claim of racial animus (at para 44-45).

Circumstantial or Other Evidence

In the current case, the absence of an admission by the officer that racial profiling motivated his actions required an examination of "circumstantial or other evidence". Bearing in mind that Mr. Kenowesequape asked the court to take judicial notice of the plight of Indigenous people in the justice system, following are two examples of circumstantial evidence that could have been examined more closely or taken notice of.

As noted earlier, the bike Mr. Kenowesequape was riding, according to the officer, appeared "more valuable than the typical bicycle" seen in that neighbourhood. Little time was spent discussing this evidence; it appears to have been accepted as forming part of the officer's reasonable suspicion or it was ignored entirely given that the officer articulated cause under the *Vehicle Equipment Regulation* for stopping Mr. Kenowesequape. The phrase was not examined, or that examination was not reported, to determine if this phrase was an acceptable way of saying the bicycle was more valuable than the typical bicycle Indigenous people ride. No evidence was provided by the officer regarding the average value of bicycles seen along 118 Avenue in Edmonton, the value of the bike Mr. Kenowesequape was riding, or of the officer's experience in bicycle appraisal. As suggested in *Elmardy,* there needs to be a reasonable basis for suspicion of criminal behaviour as that necessarily impacts the credibility of the officer's reason for the

detention (at paras 17-18). The officer's comment ought to have been examined to determine if it was, in fact, reasonable.

Madam Justice Khullar noted an absence of evidence presented by Mr. Kenowesequape to ground the claim that an officer of the Edmonton Police Service engaged in racial profiling (at para 16). Although evidence was not presented at trial, the public discourse that Madam Justice Khullar alluded to contains many examples of the actions of the Edmonton Police Service being at the root of racial profiling or "carding" complaints (see here, here, here, here, here, and a breakdown of Edmonton Police Service street checks by race here).

Conclusion

Brown sought to set the bar for establishing the existence of racial profiling in criminal cases "[n]either too low (which could be unfair to honest police officers performing their duties in a professional and unbiased manner) [n]or too high (which would make it virtually impossible for victims of racial profiling to receive the protection of their rights under section 9 of the *Charter*)" (at para 45). As the public discourse about racial profiling advances and as further data on police practices evidencing racial animus becomes (more) available, the foundation for assertions of racial profiling will be easier to recognize. Until then, racially profiled accused persons would be wise to ensure that efforts are made to present to the court any circumstantial or other (social science studies as an example) evidence that supports their claim.

This post may be cited as: Chad Haggerty "Evidentiary Issues with Claim of Racial Profiling in *R v Kenowesequape*" (22 March, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/03/Blog_CH_Kenowesequape.pdf