# Remedies for Discriminatory Profiling

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## INTRODUCTION

The last decade has seen a vigorous debate in Canada and elsewhere about the existence of racial and religious profiling. Although not all have been convinced that discriminatory profiling exists or that it is a problem, many have. Much of the work that has been done on discriminatory profiling has focused on rights violations and not remedies. In 2001, an American commentator argued that while much important legal work has been done to challenge discriminatory profiling, "the same legal work that has helped to create an opportunity for change has distracted lawyers, advocates, commentators and police from focusing on the creation of effective remedies for racial profiling."[1] In Canada as well, not enough attention has been paid to what remedies are necessary to compensate for and prevent discriminatory profiling.

The question of remedies should be broadly conceived. Only an impoverished vision of remedies would conceive of court-ordered remedies—exclusion of evidence, damages, declarations and injunctions—as the main form of remedy for discriminatory profiling. Lawyers in particular must broaden their horizons beyond remedies ordered by courts to include remedies that may be devised by administrative bodies and tribunals, legislatures and police and security agencies themselves.

A remedy broadly conceived would include not only the fashioning of some act of compensation or reparation for past acts of profiling, but also a variety of systemic measures designed to prevent or minimize the risk of profiling in the future. It could also include systemic reform with respect to review practices or whole areas of law enforcement that would either reduce the risk of discriminatory profiling or provide better remedies for when it occurs.

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[1] Brandon Garrett, "Remedying Racial Profiling" (2001) 33 Colum Hum Rights L. Rev. 41, at p. 42.

In the first part of this chapter, I will elaborate on my argument about the importance of paying more attention to questions of remedial choice by outlining a few cautionary tales about the failure to devise effective and meaningful remedies. Excessive remedial claims may help contribute to a failure to recognize rights, while minimal remedies may result in successful litigation producing only hollow victories. The difficulties of obtaining effective remedies should not be underestimated and the process of searching for effective remedies may be one of trial and error.

In the second part of this chapter, I will outline some of the judicial remedies that could be employed against discriminatory profiling and in the third and fourth parts I will examine administrative and legislative remedies respectively. My approach will not be to suggest that any particular remedy should be preferred but to broaden the remedial imagination. In the end, remedial choice is a matter to be determined by clients and communal deliberation.[2] In addition, the various judicial, administrative and legislative remedial strategies that I outline should not be seen as mutually exclusive. Pervasive problems such as discriminatory profiling will require multiple remedial strategies and multiple remedies. At the same time, thought should be given to the strengths and weaknesses of each remedy.

## I. THE IMPORTANCE OF REMEDIAL CHOICE

Perhaps because they are made at the end of increasingly complex arguments to establish liability, questions of remedial choice can be neglected. In the controversial case of *Chaoulli v. Quebec*,[3] the Court neglected the question of whether its declaration of invalidity for legislation restricting the purchase of private health insurance should be delayed. The declaration of invalidity was only delayed when the Attorney General of Quebec requested a clarification of its ruling.

The Supreme Court has made frequent use of suspended or delayed declarations of invalidity. For example, in decisions striking down the procedures in which secret evidence is used to support security

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2 For an important early article warning about the dangers of allowing remedial choice to be dominated by the institutional or financial interests of lawyers see Derrick Bell, "Serving Two Masters" (1975) 85 Yale L.J. 470.

3 [2005] 1 S.C.R. 791.

certificates under immigration law[4] and restrictions on collective bargaining,[5] the Supreme Court attached 12 month delays to its declarations of invalidity. The Court's frequent use of such remedies is, however, controversial. Some criticize such remedies as inconsistent with traditional practices of courts providing successful litigants with immediate remedies,[6] while others defend the use of the suspended declarations as a legitimate dialogic device which recognizes the ability of the legislature to select among remedies and issue more comprehensive remedies than the courts while still recognizing that the court has an obligation to provide an effective remedy.[7] In any event, many of the decisions to use suspended declarations of invalidity cannot easily be squared with jurisprudence that suggests that they should only be used when an immediate declaration of invalidity will harm the rule of law, endanger public safety or strike down an underinclusive benefit.[8]

The importance of remedial choice was recently re-affirmed when the Supreme Court found that while Canadian officials had violated Omar Khadr's rights when interrogating him at Guantanamo Bay, the only appropriate remedy that respected the government's responsibilities over foreign policy was to declare that the rights had been violated and allow the government to determine the appropriate remedy.[9] The government responded to the decision by issuing a diplomatic note requesting that American officials not use the material obtained by Canadian officials in their ongoing prosecution of Omar Khadr.[10] The Obama Administration has, however, refused to act on this request concluding that the admissibility of evidence including that obtained by Canada will be decided by the military commission trying Omar Khadr.[11]

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4 *Charkaoui v. Canada*, [2007] 1 S.C.R. 306.

5 *Health Services v. British Columbia*, [2007] 2 S.C.R. 391.

6 Bruce Ryder, "Suspending the Charter" (2003) 21 S.C.L.R. 267.

7 Kent Roach, "Remedial Consensus and Dialogue under the Charter" (2002) 39 U.B.C. Law Rev. 211.

8 *Schachter v. Canada*, [1992]2 S.C.R. 679. See generally Sujit Choudhry and Kent Roach, "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies?" (2003) 21 S.C.L.R. (2d) 205.

9 *Khadr v. Canada*, 2010 SCC 3.

10 "Statement by Justice Minister Regarding the Supreme Court of Canada Decision Regarding Omar Khadr" Feb 16, 2010, online: Justice Canada <http://www.justice.gc.ca/eng/news-nouv/nr-cp/2010/doc_32482.html>.

11 "Rape threats used to scare detainees into confessing, Khadr hearing told" Globe and Mail May 6, 2010.

Failures to provide effective remedies or full rationales for remedies cannot only be blamed on judges. Litigants often avoid difficult questions of remedies. In some court cases, the choice of remedies such as exclusion of evidence or damages may be obvious, but in more complex and systemic cases, the choice of remedies is often much more difficult. One tension for lawyers is between asking for what you think you can get versus asking for a more ambitious remedy that the decision-maker may be unwilling to give. There is a constant tension between the understandable desire to win and the desire to attempt to tackle the full extent of systemic and deeply entrenched problems. In what follows, I will provide some brief sketches of remedial dilemmas posed by the dangers of asking for too much or too little in the way of remedies.

## A. THE DANGERS OF ASKING FOR TOO MUCH

By most accounts, attempts to use the *Charter* to obtain socio-economic rights for the poor in Canada have faltered if not failed.[12] Part of the reason may be the wording of the *Charter*, which does not clearly provide for a variety of social economic rights even with respect to the rights to obtain a lawyer if one cannot afford one. Nevertheless, part of the reason why claims for social economic rights have faltered is because of the perceived problems of devising effective but judicially manageable remedies for a failure of the state to provide minimum levels of sustenance.

One concern that many judges have is about interfering with the budgetary process of governments. One of the most important social welfare right cases, *Gosselin v. Quebec* underlined the potential fiscal impact of socio-economic rights by requesting damages of $389 million plus interest to compensate for diminished social assistance payments made over a four year period to those under 30 years of age.[13] Even those dissenting judges in the Supreme Court who were prepared to find that this scheme violated equality rights were not prepared to order such remedies given their potential fiscal impact on the government. Had the regime been in force, the dissenting judges would have suspended any declaration of invalidity for 18 months to give the government an

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[12] See generally Margot Young, Susan Boyd, Gwen Brodsky and Shelagh Day eds., *Poverty Rights Social Citizenship and Legal* Activism (Vancouver: UBC Press, 2007).

[13] [2002] 4 S.C.R. 429.

adequate time to respond. The Supreme Court has subsequently formulated tests for when departures from the norm of retroactive relief could be justified.[14]

Another alternative remedy that would be available to enforce some forms of socio-economic rights, as well as more traditional rights such as the right against cruel and unusual punishment in a badly run custodial institution, would be the entry of an injunction and the retention of jurisdiction to ensure that the government took prompt and reasonable steps to comply with the constitution. The Supreme Court has used this approach itself in the context of minority language rights, retaining jurisdiction until the province of Manitoba translated its laws into French.[15] The Supreme Court also upheld a decision by a trial judge to retain jurisdiction and consider plan submissions by the government until the province of Nova Scotia had constructed French language schools as required under s. 23 of the *Charter*.[16] This later decision, however, was a 5-4 decision with the four judges in dissent arguing that the trial judge had exceeded his judicial role and acted unfairly by leaving remedial questions to decide. Although *Doucet-Boudreau* affirms the availability of structural injunctions in which courts retain jurisdiction, and although this decision is consistent with those made by courts in other democracies including India, South Africa and the United States, not to mention complex relief awarded in bankruptcy and commercial cases, judges have not been eager to rely on such a sharply divided precedent.

The thesis that concern about remedies have frustrated the recognition of socio-economic rights is also borne out in a case in which the Supreme Court intervened in health care. In the *Chaoulli v. Quebec* case the Supreme Court held in a controversial 4-3 judgment that Quebec's statutory prohibition on the purchase on the private health insurance for services covered in the public health system violated the *Quebec Charter of Rights and Freedoms*. Three of the seven judges were also prepared to hold that the impugned statute was an unjustified violation of the *Canadian Charter*. The remedial significance of the case, however, is that the Court was not asked to supervise delays in the Quebec medical systems or even to ensure that specific individuals received prompt, medically necessary and potentially life-saving medical procedures. Rather the Court was only asked to render the most

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[14] *Canada v. Hislop* [2007] 1 S.C.R. 429

[15] *Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

[16] *Doucet-Boudreau v. Nova Scotia*, [2003] 3 S.C.R. 3.

traditional and simple of *Charter* remedies: the striking down of legislation. Although the Court subsequently decided to suspend the declaration of invalidity for an 18-month period, the simplicity of the remedy was likely very attractive to judges and helped persuade them to wade into the health care field. Indeed much of the mischief of *Chaoulli* is related to the fact that courts may well be reluctant to fashion remedies for those who must rely on the public health care system.[17]

The remedial lesson of the Canadian experience with the litigation of socio-economic rights is not to aim one's remedial sights too high. Remedies that require government to make large payments of funds or that require judges to supervise complex bureaucracies for an indefinite period are not impossible but they are difficult to obtain. The choice of seemingly extravagant remedies can also have a negative impact on having liability and rights claims established. The close connection between rights and remedies has been a long tradition of the common law celebrated by the likes of Blackstone and Dicey. Given this, it would be difficult to conclude that judges do not think about rights without worrying about remedies.

## B. THE DANGERS OF GETTING TOO LITTLE

Although the case of socio-economic rights may be a cautionary tale not to set one's remedial ambitions too high, there are other experiences which caution against setting remedial ambitions too low. The fight for equal rights for same-sex partners, including recognition of the right to marry, is undoubtedly one of the most significant successes of the *Charter*. Nevertheless the struggle for equal formal rights to marry or receive the benefits available to other couples has less relevance for those concerned about discriminatory profiling than the much more difficult and longer struggle of Little Sisters Book Store with customs authorities.

Little Sisters suffered a form of discriminatory profiling as books destined for their store were targeted for increased scrutiny by customs officials. Sometimes this only resulted in delays; in other cases it resulted in a refusal to allow the material into the country. Little Sisters was also affected by the lack of training and guidance for custom officials. These

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[17] For an elaboration of this argument see Kent Roach, "The Courts and Medicare: Too Much or Too Little Judicial Activism?" in Colleen Flood, Kent Roach and Lorne Sossin eds., *Access to Care Access to Justice* (Toronto: University of Toronto Press, 2005).

important equality rights violations were only established after a complex two-month trial. Little Sisters' fight, like the fight against discriminatory profiling, required messy and time consuming fact determinations. Unlike in the gay marriage cases, the inequality and discrimination was not apparent on the face of the legislation, but had to be dug out of the facts.

In *Little Sisters v. Canada*, the majority of the Supreme Court relied on a declaration that customs officials had administered legislation in a manner that had infringed freedom of expression and equality rights under the *Charter*. Despite finding evidence that there had been improper targeting of imports destined for the gay and lesbian book store and that custom officials had insufficient resources and legal training, the majority of the Court concluded, "with some hesitation, that it is not practicable" to order "a more structured s.24(1) remedy."[18] The Court did not say that it could not order more structured relief and even admitted that such a remedy may be "helpful," but concluded that such relief should not be ordered in the absence of information about what steps customs had taken in the six years that the case was on appeal to remedy the situation or suggestions from the bookstore about what steps should be taken to provide an effective remedy. The Court refused the applicant's request for an injunction enjoining against the enforcement of the legislation "permanently or until such time as there is no risk that the unconstitutional administration will continue" on the basis that it either amounted to a declaration that the legislation was unconstitutional and imposed an "unrealistic standard" of "no risk" that the legislation would be administered in an unconstitutional fashion. Justice Binnie added that: "If diluted to a call for constitutional behaviour, the result would add little to the general duty that falls on any government official to act in accordance with the Constitution and would scarcely advance the objectives of either clarity or enforceability."[19]

The Court's refusal to offer more detailed relief or retain jurisdiction over the case was unfortunate. As Justice Iacobucci recognized in his dissent, declarations will be "simply inadequate" in those cases where there are clear findings of grave systemic problems and evidence that administrators "have proven themselves unworthy of trust."[20] Perhaps the greatest weakness of declaratory relief in a context

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[18] *Little Sisters v. Canada*, [2000] 2 S.C.R. 1120, at para. 157.

[19] *Ibid.* at para. 158.

[20] *Ibid.* at para. 253.

of systemic non-compliance is that it requires the successful applicants to bear what Justice Iacobucci recognized was the "heavy" and "unfair" "burden"[21] of undergoing further expense and delay by starting new proceedings should the government continue to fail to comply with the *Charter*. This is a particular concern in the context of challenges to discriminatory forms of profiling where institutional litigants like Little Sisters may have trouble not only obtaining funding but being granted standing and where individual litigants who have been victims of specific acts of profiling may not be in a position to seek follow-up remedies.

Little Sisters did indeed commence new litigation as it continued to experience problems with importing material through customs. In 2007, however, this litigation was likely thwarted as the majority of the Supreme Court denied Little Sister's request for advance costs. The majority of the Court ruled that the case which focused on an appeal of four books did not raise matters of sufficient public interest to justify the award of advance costs. Justice Binnie who of course issued the declaration in the first case, however, viewed Little Sisters' application in the context of its overall 12-year litigation battle with customs and findings that 70% of the material detained by customs had gay or lesbian content. He concluded that the case involved a question of public importance, namely whether

> the Minister [was] as good as his word when his counsel assured the Court [in the earlier case] that the appropriate reforms had been implemented…. The public has an interest in whether or not its government respects the law and operates in relation to its citizens in a non-discriminatory fashion.[22]

He warned:

> The government is in effect being accused of fighting a war of attrition. Today four books, tomorrow another four books. Litigation follows litigation until the rational businessperson is forced to throw in the towel. This is how civil liberties can be eroded, little by little, yielded in small increments that case by case are not worth the cost of the fight.[23]

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[21] *Ibid.* at para. 261.

[22] [2007] 1 S.C.R. 38, at paras. 120, 130.

[23] *Ibid.* at para. 129.

These arguments apply with equal forces to cases involving accusations of discriminatory profiling with the important exception that litigants who are discovered with incriminating evidence because of a discriminatory stop or search will have an incentive to fight for remedies such as exclusion of evidence. Such an individualistic approach to remedies, however, could leave the systemic issues such as the style of policing and the training of officers untouched.

## II. JUDICIAL REMEDIES FOR DISCRIMINATORY PROFILING

There is much to be said in theory for looking to the judiciary as the source of remedies for discriminatory profiling. The courts are independent of the legislature and the executive and thus should be in a position to enforce the rights of unpopular minorities such as African-Canadians, Arab-Canadians and Aboriginal people. The *Canadian Charter of Rights and Freedoms* recognizes broad remedial powers both in terms of the ability of courts to strike down laws to the extent that they are inconsistent with the *Charter* and to award a broad range of appropriate and just remedies.

### A. EXCLUSION OF UNCONSTITUTIONALLY OBTAINED EVIDENCE

The most frequent remedy sought in discriminatory profiling is an application to exclude unconstitutionally obtained evidence under s.24(2) on the basis that its admission would bring the administration of justice into disrepute. Evidence can be obtained in violation of ss. 8, 9 and 15 of the *Charter* in cases of discriminatory profiling and judges can consider all the circumstances including the cumulative effects of *Charter* violations when deciding whether to exclude evidence. There is not a need for a causal connection between a *Charter* violation and the obtaining of the evidence and courts and all evidence obtained in a single transaction can be tainted by a *Charter* violation.

The Supreme Court of Canada's new approach to the exclusion of evidence under s. 24(2) leaves plenty of room to respond to police misconduct. In all cases, judges must balance the seriousness of the *Charter* violation, the effects of admission on *Charter*-protected interests and the adverse effects of excluding evidence. In the *Grant* case, which involved an arbitrary detention and search of a young African-Canadian male in Toronto, the Court noted that there was no suggestion that the

accused "was the target of racial profiling or other discriminatory police practices."[24]

The seriousness of the offence charged and the importance of the evidence to the prosecution's case are factors that militate against the exclusion of evidence. In many but perhaps not all cases, victims of discriminatory profiling may face less serious charges such as drinking and driving offences or possession of drugs or weapons. At the same time, the evidence sought to be excluded, especially drugs or weapons, may be critical to the prosecution's case. The calculus may be different in cases where the victim of discriminatory profiling is charged with a terrorism offence. This would obviously be a very serious offence. At the same time, the evidence that could be excluded may not be vital to the prosecution because in many terrorism investigations, the state may be gathering a wide range of evidence about a suspect.

The courts will determine the seriousness of the violation in all the circumstances. Any racist intent on the part of the investigating offences will make the violation very serious, but the courts are also likely to hold that adverse effects on racial minorities also makes the violation serious. The courts can look to all the circumstances in determining the seriousness of the violation and can take notice of general concerns about discriminatory profiling in Canadian society. Good faith reliance on statutes or even police policies can mitigate the seriousness of the violation, but this is unlikely to be a factor given that discriminatory profiling will not generally be authorized in such laws or policies.

In most cases where discriminatory profiling has been established, the evidence obtained will generally be excluded because of the seriousness of the violation. This will make the exclusionary remedy attractive to litigators. The disadvantage of the remedy, however, is that it is only available in cases where incriminating evidence has been discovered on the victim of discriminatory profiling and the state has chosen to prosecute the case. The fact that many victims of discriminatory profiling who seek the s.24(2) exclusion remedy may be factually guilty of some criminal offence should not disentitle them from a remedy, but it does place limits on the ambit of the exclusionary remedy. The factually innocent victim of discriminatory profiling cannot benefit from the exclusionary remedy.

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[24] [2009] 2 S.C.R. 353, at para. 133.

## B. OTHER CRIMINAL LAW REMEDIES

The question of alternative remedies should not enter into the decision of whether to exclude evidence, because s. 24(2) mandates the exclusion of evidence once a judge determines that its admission would bring the administration of justice into disrepute. There are, however, some other remedies for discriminatory profiling that could be ordered under s. 24(1) in criminal prosecutions. One such remedy is a stay of proceedings, which might be thought to be the appropriate remedy in cases where the discriminatory profiling is the sole cause for the prosecution. An example could be a situation where a person is stopped for discriminatory reasons but then charged with an offence such as breaching probation. The Supreme Court has, however, taken a restrictive approach to the use of stays of proceedings and held that they should generally only be ordered where a fair trial is no longer possible and that courts should factor in the seriousness of the offence charged before ordering the remedy.[25] It is possible to argue that discriminatory profiling taints the community's sense of fair play so much that a stay of proceedings is the appropriate remedy.

Another possible remedy is the reduction of sentence. In some cases it might provide an accused with some tangible compensation for discriminatory profiling. The Supreme Court of Canada has recently affirmed that trial judges can reduce sentences in response to state misconduct even in the absence of a finding that the misconduct violates the *Charter*. In most cases, discriminatory profiling would relate to the circumstances of the offence and the offender.[26]

## C. DAMAGES

The most obvious alternative judicial remedy for the factually innocent victim of discriminatory profiling would be damage awards. Although there is growing experience in the United States with the use of damage awards to provide remedies for discriminatory profiling, there are important differences between the two legal systems that may make damage awards more difficult to obtain in Canada. The most important is the loser pay indemnity rule that is used in Canada. This means that a person who sues the police or another organization and loses will be

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[25] *R. v. Regan*, [2002] 1 S.C.R. 297.

[26] *R. v. Nasogaluak*, 2010 SCC 6.

responsible for a significant part of the legal costs of the winning side. This cost rules deters innovative litigation in general and may in particular deter litigation where damage awards may be nominal.

Another problem with civil litigation in Canada is that damage awards for discriminatory profiling, at least in the absence of accompanying pecuniary damages, are likely to be quite low. Even after twenty-five years of the *Charter*, the experience with *Charter* damage claims is surprisingly sparse, and courts have frequently awarded trivial sums, such as $500 for the violation of *Charter* rights where there is no financially measurable damage. In *Ward v. Vancouver*, $5000 in *Charter* damages was awarded for an arbitrary detention and another $5000 was awarded for an unconstitutional strip search.[27] In a divided decision, the British Columbia Court of Appeal upheld these awards under s. 24(1) of the *Charter*. Saunders J.A., however, dissented and followed Ontario authority that would require some proof of governmental fault for damages under s. 24(1),[28] as is required when litigants seek s. 24(1) damages in conjunction with a s. 52(1) declaration of invalidity.[29] The case is under reserve in the Supreme Court of Canada and will do much to determine the viability of *Charter* damages as a response to *Charter* violations such as discriminatory profiling when the aggrieved person is not charged and cannot seek a remedy in the criminal courts.

Modest damage awards are not likely to encourage potential litigants to make civil claims once they learn that if they lose they risk having to pay the government's or the police's costs of litigation and that even if they win, the likely damages are bound to be modest. The modest nature of likely damage awards will also make all but the most committed lawyers reluctant to agree to take on the case, especially under contingency fee arrangements that provide that they will not be paid for acting unless the victim of discriminatory profiling wins his or her civil suit. Although it is possible to seek advance costs from the court to help finance litigation that would otherwise not be financially viable, the Supreme Court's decision to overturn an advance costs order in *Little Sisters* suggests that not all judges will be persuaded that claims of

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[27] 2009 BCCA 23. I disclose that I represented the British Columbia Civil Liberties Association in its interventions in both the Court of Appeal and the Supreme Court in defence of allowing Charter damages to be ordered in the absence of proof of governmental fault.

[28] See for example *Ferri v. Root*, 2007 ONCA 79, leave to appeal to S.C.C. refused 281 D.L.R.(4th) vii.

[29] *Mackin v. New Brunswick*, [2002] 1 S.C.R. 405.

discriminatory profiling raise systemic issues of public importance that justify the award of advance costs.[30]

One less costly alternative that may be available in some provinces is to commence small claims actions against the police or other provincial or municipal officials who may be responsible for discriminatory profiling. Small claims courts are designed to be used by members of the general public without the assistance of lawyers, but at the same time damages are often capped. Unfortunately, there is no small claims court for claims against the federal government or federal officials. In such cases litigation will have to be commenced in the Federal Court. The rules of the Federal Court do provide for simplified proceedings in cases where less than $50,000 are sought, but these procedures contemplate trial by affidavit and still may be difficult for an unrepresented litigant to access. Another alternative is to bring a class action. This can provide economies of scale for the lawyers, but the courts may well find that the individual issues concerning both liability and damages so outweigh the common issues that individual litigation is required. As suggested above, the downside costs of such litigation so outweigh the upside benefits in Canada at least that we are not likely to see extensive use of damage claims for discriminatory profiling.

## D. DECLARATIONS AND INJUNCTIONS

In many cases, discriminatory profiling arises not just for the behaviour of individual law enforcement officers, but from the standard operating procedures of police and security agencies. The Little Sisters case discussed above provides a good example of how discriminatory profiling could be related to organizational and institutional factors including issues of training of line officers. The Supreme Court in that case contented itself with a simple declaration that the *Charter* had been violated in the past with an expectation that the government was taking action to respond to the conditions that led to the violation. This deferential remedial approach followed from an early case involving the provision of sign language interpreters in the health care system in which the Court concluded that a

> declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options

[30] [2007] 1 S.C.R. 38.

> available to the government that may rectify the unconstitutionality of the current system. It is not this Court's role to dictate how this is to be accomplished.[31]

Reliance on declarations reflects assumptions that governments will comply with declarations promptly and in good faith and that governments have an appropriate and continued policy making role in selecting the precise means to comply with the declaration.

The continuing disputes between customs and Little Sisters, however, suggest that these assumptions may not always be valid in the context of discriminatory profiling. One factor may be the emotive nature of claims of discriminatory profiling. Officials almost always deny that they engage in discriminatory profiling which they frequently equate with intentional racial or religious discrimination. In contrast, governments may frequently concede that their health care or minority language education systems do not comply with constitutional standards as articulated by the courts. Another factor may be that governments can ensure constitutional compliance in the latter scenario, frequently by spending more money on deficient systems. In contrast, they may be unable to ensure that no individual officers engage in discriminatory profiling even if they take steps to increase training and safeguards in a police force or customs agencies.

Declarations are one-shot remedies that assume that governments are both willing and able to take steps to ensure compliance with constitutional standards. In many cases involving discriminatory profiling, ensuring constitutional compliance may be more difficult and may require courts to engage in more intrusive remedies. In *Doucet-Boudreau*, the Supreme Court held in a 5-4 decision that trial judges have discretion to retain jurisdiction over a case after they have issued a series of remedial orders. That case involved provincial wide remedial orders relating to French language education in Nova Scotia. The majority of the Court stressed that courts have broad remedial discretion and have engaged in supervisory jurisdiction in the past including in commercial cases. It also stressed that courts had to provide full and effective remedies and were justified in this case because of remedial delay. Similar factors may occur in discriminatory profiling as such practices are not likely to start overnight and may well have a long history.

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[31] *Eldridge v. B.C.*, [1997] 3 S.C.R. 624, at para. 96.

It is noteworthy, however, that four judges dissented in *Doucet-Boudreau*. Although they acknowledged that injunctions could be issued against the government under s. 24(1) of the *Charter*, they stressed that judges should only enforce them through contempt of court proceedings and not through the on the record reporting and progress sessions contemplated by the trial judge in *Doucet-Boudreau*. Thus even the minority's view suggests that judges could issue clear and enforceable injunctions that prohibit conduct that had been found to result in discriminatory profiling in the past. Judges might, however, be reluctant categorically to prohibit police or security agency conduct in such a manner. Indeed the minority itself suggests that judges should not enter the realm of administrative supervision and decision-making.

The closely divided decision in *Doucet-Boudreau* has not inspired judges to retain jurisdiction over cases or devise structural injunctions as a means of ensuring that public institutions do not continue to engage in *Charter* violations. Traditions of respect for police discretion and independence may make judges less willing to retain jurisdiction or devise intrusive remedies involving the police than other parts of government such as educational bureaucracies who fail to comply with minority language educational rights. Although *Doucet-Boudreau* remains good law and judges can retain a supervisory jurisdiction, it may often be difficult to convince judges to exercise their remedial discretion in that manner in cases involving discriminatory profiling. That said, the *Little Sisters* experience should be a cautionary tale about relying on simple declarations to ensure that security organizations do not continue to engage in discriminatory profiling.

## E. SUMMARY

As can be seen above, there is a range of remedies for discriminatory profiling but many of these remedies have disadvantages. The exclusion of evidence obtained through a discriminatory stop and seizure is a powerful remedy but it is not available in cases where factually innocent people are victims of discriminatory profiling. Although damages are available to such people, they can be difficult to obtain, especially if as in some provinces the applicant must establish fault in addition to the violation of the *Charter*. Moreover, modest quantums of damages may make damage actions risky, especially compared to the downside risk of suing the government and losing. Although *Doucet-Boudreau* stands as authority for trial judges being able

to retain jurisdiction after issuing injunctions to ensure meaningful and effective remedies, judges may often be reluctant to exercise their remedial discretion in this fashion in cases involving the police and other security agencies. That said, the failure of the declaration issued in *Little Sisters* should remind judges that concerns about discriminatory profiling will not easily be resolved by relying on declaratory relief.

## III. ADMINISTRATIVE REMEDIES

Administrative remedies are designed to be more accessible than judicial remedies. As seen above, the damages that are available from a successful discriminatory profiling claim will often not exceed the cost of such litigation before the ordinary courts. Given this, litigants may be well advised to seek remedies from a wide range of administrative bodies and tribunals including human rights commissions and police complaints board. Such administrative venues for remedies are also attractive because they are generally less based on fault and more on prevention than remedies in ordinary tort or *Charter* litigation.

### A. HUMAN RIGHTS COMPLAINTS

Because they allege claims of racial or religious discrimination, most discriminatory profiling claims can be made to human rights commissions and tribunals. Some human rights commissions, such as the Ontario Human Rights Commission, have been particularly proactive in conducting research and raising awareness about discriminatory profiling. At the same time, there is an increased emphasis on adjudication in many human rights systems and for this reason attention should be paid to the range of remedies that can be ordered by human rights tribunals.

In *Johnson v. Halifax (Regional Municipality) Police Service*, professional boxer Kirk Johnson brought a successful human rights complaint alleging racial discrimination in the manner he was stopped by the police.[32] His complaint stated: "If feel that I was pulled over and harassed by Constable Sanford on the evening of April 12, 1998 because I am a black man."[33] The board of inquiry found that there was racial discrimination because race "was an operative element" in the police

[32] [2003] N.S.H.R.B.I.D. No. 2.

[33] *Ibid.* at para. 6.

constable's decision-making, "though mixed in with other legitimate factors. I am not required to find whether this resulted from a conscious decision on his part or resulted from a subconscious stereotype. Either way it was still a violation of the *Nova Scotia Human Rights Act*."[34] The board of inquiry also found that the stop of Mr. Johnson was not an isolated incident. He claimed to have been stopped by the police 28 times during the 3 months he spent in the Halifax area in the preceding 5 years and this was confirmed in part by the 21 CPIC inquiries made about his vehicle during that time.[35] Although the board of inquiry did not use this information to determine liability in the night in question, it provided contextual and historical information that was very relevant to the choice of remedy.

In determining the appropriate remedy the board of inquiry, Dalhousie law school professor Philip Girard, took a systemic approach that focused on the organizational context of the police officer's behaviour. He specifically addressed the concerns of police officers on the beat by noting that the officer in question had not been served well by his employer in terms of providing the appropriate anti-racism training.[36] At the same time, he rejected the complainant's request for mandatory racial sensitivity training for all Halifax police officers and employees on the basis that it would be an excessive response and one that "would be seen as punitive and might cause a firm of backlash."[37] Although some might see this as a form of heckler's veto, it does underline that remedies often involve instrumental and strategic considerations that are quite different from the factual and normative considerations that dominate when an adjudicator is determining liability.[38]

The board of inquiry ordered that two consultants be retained by the police to provide a needs assessment of the Halifax police's current policies and practices on anti-racism and diversity training. The reports were to be made public, with both the police force and the human rights commission being able to comment publicly on the reports. Within three months of the publication of the reports, the police force was to make public its response to the consultant's reports. This gradual remedial approach seemed designed to promote police buy-in to the remedial

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[34] *Ibid.* at para. 41.

[35] *Ibid.* at paras. 42–43.

[36] *Ibid.* at para. 71.

[37] *Ibid.* at para. 106.

[38] Paul Gewirtz, "Remedies and Resistance" (1983) 82 Yale L.J 585.

process as well as to promote public debate about the appropriate nature of anti-racism training and process. Two extensive consultant's reports were indeed made publicly available at the end of 2004 and in early 2005. Both reports made numerous findings with respect to diversity and cross-cultural understanding within the Halifax police and made many recommendations to improve diversity and interactions and outreach with the African-Canadian community. The police responded with an action plan that included an equity diversity officer, a diversity advisory committee, targeted recruiting, enhanced complaints procedures, enhanced community policing, new human resources policy and mandatory diversity training.[39] Unfortunately, research has not been done on the effectiveness of the response, but the board's gradual remedial approach demonstrates a willingness to attempt to remedy the organizational and institutional determinants of discriminatory profiling. In many ways, the institutional response remedy resembled the plan submission process used in *Doucet-Boudreau*.

The human rights board of inquiry also awarded Kirk Johnson just under $5000 in special damage to pay for six trips from his Texas home to Halifax to deal with the complaint and $10,000 in general damages for harm to reputation and humiliation. The special damage component of this award is important in ensuring that complainants that effectively act in the public interest by bringing legitimate claims of discrimination are not further disadvantaged by a process that only provides modest financial rewards. Any figure with respect to general damages is bound to have an arbitrary component, but the $10,000 seems significant enough not to trivialize the finding of discrimination. The board of inquiry also awarded Kirk Johnson his legal costs, which were eventually taxed at just over $61,000. Although it can be argued that legal representation should not be necessary or encouraged given the structure of the human rights commission process, this figure at the very least underlines the significant costs of legal representation that will be necessary to make civil and *Charter* claims in the ordinary courts. In any event, the significant cost order made by the board of inquiry was subsequently overturned on the basis that the human rights act did not empower the adjudicator to award costs.[40]

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[39] Halifax Regional Police, *A Principled Response for Action* (no date).

[40] *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission),* 2005 NSCA 70.

## B. POLICE COMPLAINTS

Mr. Johnson first made a complaint against the police officer in question. Attempts were made to informally resolve the complaint, but they failed. The human rights board of inquiry subsequently criticized this process as only producing:

> A bland apology, a signature on a form and a cheque for the $69 towing fee. No face to face meeting, no real acknowledgement of the gravity with which Mr. Johnson obviously regarded the incident, simply a neat bureaucratic way of closing a file.[41]

He also quoted Mr. Johnson's recollection that he told the officer handling the complaint that if he received a personal apology from the officer "this is over. I'm not going to court. I'm not trying to make no formal complaint. That will rectify the whole problem." When informed that no such apology would be made even if the result was a formal complaint and negative publicity for the force, Mr. Johnson concluded that it was not worth "trying to talk to you guys…. I'll see you guys in court."[42] Professor Girard concluded that this was a missed opportunity for a consensual resolution one that could be based in part on principles of restorative justice that stress the importance of direct dealing between the affected parties.[43] At the same time, such a resolution would probably not have addressed the larger institutional issues that figured so prominently in the eventual adjudicative remedy.

Most police complaints systems rely on the police investigating and making initial decisions about the resolution of complaints. Even when such decisions are reviewed by independent bodies, there may not always be sensitivity to the dangers and harms of discriminatory profiling. The Arar Commission, in making recommendations for the review of the national security activities of the RCMP, stressed the dangers of discriminatory profiling in current anti-terrorism investigations and the need to respond to concerns about discriminatory treatment. It also noted that complaints alone would be an inadequate vehicle to supervise national security investigations, given both the reluctance of many people who are affected by such investigations to make complaints, as well as the secrecy of many such investigations. It thus recommended that the existing Commission for Public Complaints ("CPC") against the RCMP

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41 *Johnson v. Halifax*, [2003] N.S.H.R.B.I.D. No. 2, at para. 115.

42 *Ibid.* at para. 115.

43 *Ibid.* at para. 118–121.

be given enhanced powers to engage in self-initiated reviews of the RCMP's national security activities. Although the government has recently indicated that it will replace the Commission for Public Complaints, it is not clear whether these changes will implement the Arar Commission's recommendation.

The existing system for complaints against the RCMP has been used with respect to at least one high profile national security investigation, namely Operation Thread, which resulted in the 2003 detention on national security grounds of 19 non-citizens who were in Canada with fraudulent student visas. The arrests made headlines because of allegations that the men were a terrorist cell and that one was taking flight lessons over the Pickering nuclear reactor in suburban Toronto. The government, however, soon backed down from its claims of national security and proceeded against the men on the grounds of their fraudulent student visas. Many of the men made refugee claims on the basis that they would face persecution if returned to Pakistan after having been associated with a terrorism investigation in Canada.

None of the affected men made a complaint about the conduct of the RCMP in the case. The RCMP act, however, allows third parties to make complaints, and one was brought by a retired priest in Toronto. The Chair of the CPC rejected the complaint of discriminatory profiling. He noted that 31 of 420 persons who were in Canada on fraudulent visas were targeted for a national security investigation in part because the 31 persons came from Pakistan. Despite this use of country of origins, the Chair concluded that there was no discriminatory profiling because religion was not used and because not all the students from Pakistan were targeted. He stated:

> The criteria used to identify the thirty-one persons to be arrested included not only whether the person was from an identified "source country," such as Pakistan, but it also included several other factors that were unrelated to the person's country of origin. A person's religious affiliation was not one of the criteria considered. In order to be identified as a person to be arrested as part of the investigation, a person had to meet multiple criteria. The person's country of origin alone was not sufficient to qualify for inclusion. There were a number of students from Pakistan who were illegally in Canada who did not make the list of persons to be arrested because they did not meet multiple criteria.

> Given the multiple criteria that were taken into consideration in identifying the persons to be arrested and the underlying purpose to identify persons who were illegally in Canada that may pose a threat to national security, I am satisfied that the RCMP members involved were not motivated by racism or racial profiling in their handling of the investigation.[44]

The approach taken by Chair Kennedy in this case differs from that taken by Philip Girard in the Kirk Johnson case discussed above. In the latter case, Girard stressed that so long as race was one factor, even when mixed with other factors and regardless of whether the officers intended to discriminate on the basis of race, there was discrimination under the Nova Scotia Human Rights Code. In contrast, Kennedy stressed the lack of intent to discriminate when he concluded that "the RCMP members involved were not motivated by racism or racial profiling."[45] He also did not seem to consider that the use of national origin, in this case Pakistan, could be an indirect form of discrimination and a proxy for identifying students who were Muslim.

Another disturbing feature of the Operation Thread decision was the conclusion that the adverse publicity surrounding the arrest could not be reviewed because it was not caused by the RCMP. The Chair concluded in this respect:

> As reported in the media, the reports of suspected links to terrorism negatively affected the persons arrested even after their release. Although this was an unfortunate consequence, it was a consequence unrelated to any information disclosed by the RCMP and the RCMP took steps to ensure the media was properly informed that the persons arrested were not suspected of having links to terrorism. Accordingly, I am satisfied that that the RCMP did attempt to correct the media.[46]

This conclusion is based on the fact that the CPC's jurisdiction to limited to RCMP conduct and does not extend to other security officials, in this case those from immigration, even when they are conducting, as was the case in Operation Thread, a joint operation with the RCMP. At present there is no external review body for complaints against immigration

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[44] Chair's Final Report, Feb 28, 2006, online: Government of Canada at http://www.cpc-cpp.gc.ca/prr/rep/rev/chair-pre/finR-060228-eng.aspx.

[45] *Ibid.*

[46] *Ibid*.

officials. The Arar Commission recommended that the jurisdiction of the Security Intelligence Review Committee be expanded to include review of the national security activities of immigration officials. It also recommended that gateways be created that would allow different review bodies to share information and conduct joint investigations given the increasingly integrated nature of national security investigations.[47] A prerequisite for effective administrative remedies will be that various human rights and complaints bodies have adequate financial and statutory resources to conduct thorough investigations. In the national security field, where concerns about discriminatory profiling or targeting of Arabs and Muslims may frequently arise, it will be vitally important that review bodies be able to review the conduct of not only the police, but immigration and security intelligence officials.

## C. INTERNAL ORGANIZATIONAL CHANGE

In addition to remedies designed by administrative tribunals, internal organizational change should also be considered to be an administrative remedy. The Kirk Johnston case discussed above served in large part as a catalyst for internal organizational charge in the Halifax police department around issues such as diversity and community outreach. The Arar Commission in its first report on the activities of Canadian officials in relation to Maher Arar also made a series of recommendations in relation to organizational change. One recommended change was increased training for national security investigators including specific training on both social context and information sharing. The Commission also recommended that both the RCMP and its proposed independent review body periodically review the training curriculum.[48] The Commission also recommended that the RCMP as well as CSIS and the Canadian Border Service Agency develop a written policy that both prohibited and defined racial, religious and ethnic profiling. It stated:

> Working in consultation with others, including those in Canada's Muslim and Arab communities, the RCMP should develop a

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[47] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Public Works, 2006).

[48] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Analysis and Recommendations* (Ottawa: Public Works, 2006), at pp. 323–327.

> precise definition of the racial, religious and ethnic profiling that it prohibits. Moreover, its policy in this regard should be widely distributed within the Force, as well as to the independent review body and the public…. Clear written policies against racial, religious and ethnic profiling that are made publicly available could correct any misperceptions and perhaps enhance co-operation between the RCMP and specific communities.[49]

This recommendation also indicates that in addition to the normative case against discriminatory profiling, there is also an instrumental case for combating discriminatory profiling. In both the national security field and in ordinary policing, police agencies can benefit from community co-operation. Concerns that the police are engaging in discriminatory profiling and using stereotypes that associate certain groups with crime may well discourage co-operation with the police within the affected communities. This can also result in a vicious circle that affects the way the police interact with the affected community; this could reinforce negative stereotypes among police officers about the affected community.

Other forms of internal organizational changes include employment equity programs, diversity officers and the use of advisory groups to receive community input and engage in outreach. With respect to the advisory groups, there is a danger that such groups may not be perceived to be sufficiently independent of the police. At the same time, such groups will face pressure from the affected communities and have the option of resigning should they conclude that the organization is not paying adequate attention to their input.

## IV. LEGISLATIVE REMEDIES

There is nothing stopping either federal or provincial legislatures from defining discriminatory profiling and providing prohibitions and remedies for such conduct in relevant legislation such as police acts. During the post 9/11 debate about the Anti-Terrorism Act, Irwin Cotler proposed that a non-discrimination clause be added to that act, but no such amendments were made even after Mr. Cotler became Minister of Justice.[50] The Special Senate Committee on the Anti-Terrorism Act

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[49] *Ibid.* at pp. 356–357.

[50] Irwin Cotler, "Thinking Outside the Box," in Daniels, Macklem and Roach eds., *The Security of Freedom* (Toronto: University of Toronto Press, 2001).

similarly proposed the enactment of a non-discrimination clause in 2001 but the issue is not mentioned in their recently completed review of the anti-terrorism act.[51] Before 9/11, there was bi-partisan support in the United States for legislation that would both define and prohibit discriminatory profiling and proposals were made to adapt that proposed legislation as an amendment to the Anti-Terrorism Act.[52] Again these proposals have not been followed.

It would be naïve to conclude that a legislative prohibition on discriminatory profiling would stop profiling overnight. As suggested above, the determinants of profiling are complex and often rooted in organizational structures and social attitudes and stereotypes that are not easily changed by legislation. That said, however, there would be several benefits from developing a legislative prohibition on discriminatory profiling. Perhaps the greatest benefit would be to clarify the definitional issue. Although at one level everyone from police to community activists is against profiling, no consensus has yet emerged about the precise definition of profiling. As seen above in the Operation Thread decision, some equate profiling with discriminatory intent or motive, while others follow equality rights jurisprudence by expressing concerns about the discriminatory effects of policies that may on their face be neutral with respect to race, religion and other prohibited grounds of discrimination. A definition could also clear up misperceptions that profiling occurs when race is used as used as a means to identify a known suspect to the police. A statutory definition of prohibition would raise awareness of the dangers of discriminatory profiling.

There is some danger in having a debate about the proper definition of discriminatory profiling, especially one that results in a codified definition. The danger is legitimating whatever conduct that is not captured by the definition. For example, some would argue that discriminatory profiling only occurs when an investigative action is taken solely on the basis of a prohibited ground of discrimination. An acceptance of such a definition could have an unfortunate effect of legitimating investigative activity that was motivated in part by a person's race. It will be recalled that the human rights board of inquiry which found discrimination in Kirk Johnson's case found that the officer was

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[51] Special Senate Committee on the Anti-Terrorism Law, *Final Report* (2001); *Final Report* (2007).

[52] Sujit Choudhry and Kent Roach, "Racial and Ethnic Profiling" (2003) 40 Osgoode Hall L.J. 1.

motivated by legitimate factors as well as by race. Although a legislative strategy is not without risks, it should be seen as part of the remedial arsenal for combating discriminatory profiling.

## CONCLUSION

The ultimate choice of remedial strategy should depend on the priorities of the affected community and the opportunities that are presented to that community. Legislative definition and prohibition of discriminatory profiling would not preclude the use of other judicial and administrative remedies surveyed in this chapter. Indeed, legislation could encourage people to seek such alternative remedies. This chapter has not attempted to make a case for a single optimal remedy for discriminatory profiling. Rather it has attempted to make the case for greater thought and resources being devoted to questions of remedial choice. It has also attempted to outline the broad range of remedies that could be made available for discriminatory profiling. The task that remains is to make the most effective use of these remedies. No one remedy will fit all situations and remedial strategies will likely be both multi-pronged and dynamic. That said, there is a need to develop more effective, creative and comprehensive remedial strategies. Simply establishing a rights violation is not enough.