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Racial Profiling, Human Rights, and Policing: An Examination of Competing Notions of Risk in the Nassiah Case

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Research in partial fulfillment of the requirements for the degree of

Master

of

Legal Studies

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Abstract:

This thesis analyzes racial profiling and policing in the Nassiah decision by the Ontario Human Rights Commission on the conduct of the Peel Regional Police Services (*Nassiah v. Peel Services Board, 2007*). The thesis analyzes definitions of racial profiling and how each organization resolved the tensions caused by competing agendas and perspectives. I discuss the laws and social policies regarding racial profiling and include an overview of current research and case law on this topic. Five theories – Herbert Packer’s crime control model and due process model and “thin-slicing”, “social risk theory” and “social exclusion theory” – will be used to examine the roots of racial profiling, the reasons behind officer bias, and to analyze and critique current law enforcement practices and proposed solutions to this problem.

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Introduction

The issue of racial profiling and policing has recently become an increasingly controversial topic. “Racial profiling refers to the use of race as a key factor in police decisions to stop and interrogate citizens. Most discussions of racial profiling focus on police-initiated traffic stops, although it can also occur in other contexts”¹. The issue has attracted attention from the media, civil libertarians and political groups, recognizing that the phenomenon is prevalent within society. There are various definitions of racial profiling depending on the institution in question; the definition outlined by the Ontario Human Rights Commission (OHRC) and eventually accepted by the Peel Regional Police will be used as a working definition that will be critically examined in more detail later. According to the OHRC, racial profiling is defined as “any action undertaken for reasons of safety, security, or public protection that relies on stereotypes about race, colour, ethnicity, ancestry, religion, or place of origin, rather than on reasonable suspicion, to single out an individual for greater scrutiny or different treatment”².

The focus of this thesis will revolve around the Nassiah case and on the process of charging, trying, and adjudicating complaints against government agencies such as the police. The study will also analyze the manner in which the OHRC and Peel Regional Police Services have worked to implement the Tribunal’s decision. The thesis will critically examine the competing perspectives and agendas of both the PRP and OHRC in order to present each organization’s outlook regarding the issue of racial profiling and more specifically the Nassiah Case decision.

¹ Weitzer & Tuch. (2002), p. 435.

² Human Rights Tribunal of Ontario Decision, 2007 HRTO 14.

On February 18, 2003, Jacqueline Nassiah alleged that she was discriminated against, based on her race, by Peel Regional Police Officer Richard Elkington. Nassiah is a black woman who was accused of stealing a bra while shopping at a Sears store in the Dixie Mall in Mississauga. The complaint against Peel Regional Police Services (PRP) was upheld by the Ontario Human Rights Commission (OHRC), and the Human Rights Tribunal of Ontario Decision (HR-0954-05) outlines that police officer Richard Elkington discriminated against Ms. Nassiah by assuming that a “black” suspect might not speak English, adopting an assumption of guilt, subjecting Ms. Nassiah to verbal abuse, threatening to take her to jail if she did not admit that she stole the item, and using a racial slur.

Most research done on racial profiling has been conducted in the U.S. and U.K. and focuses on the racial disparity in police stops and searches, not on the possible root causes of the practice. A British study using police statistics from 1977-1998 found that black people were stopped and searched at a rate of 142 per 1,000 compared to 45 per 1,000 for Asians and 19 per 1,000 for whites³. Statistics from the United States also indicate that race plays a major role in police decisions to stop and search individuals. “African Americans were about 26% of New York’s population, but they made up about 52% of all of those stopped and frisked... whites who made up 40% of the population were only 10% of all those stopped and frisked”⁴. These and other studies suggest that racial profiling is prevalent and this issue can no longer be ignored or denied by law enforcement officials.

³ Wortley & Tanner. (2003), p. 370.

⁴ Harris, D. (2006), p. 222.

Research within Canada has been lacking due to the fact that the police are not required to record the race of people they stop. A study done in 2002 showed that “over 50% of the black students surveyed... reported that they had been stopped and questioned by the police on two or more occasions in the previous two years, compared to only 23% of whites, 11% of Asians, and 8% of South Asians”⁵. Overall, there has been little research on racial profiling in Canada and there are few theoretical models used to explain the issue of racial profiling. This thesis hopes to shed light into a number of areas related to this issue and, in particular, focus on law enforcement and human rights issues and the competing value systems, institutional agendas, and theoretical models that make the problem difficult to remedy. The consequences of racial profiling can be very detrimental to the individual, organization and the society. Solutions need to be implemented in order to significantly reduce racial profiling within society.

To understand the complexities associated with racial profiling it is necessary to understand the reasons behind police bias. This thesis will focus on the theoretical aspects of racial profiling, using theories such as “social risk theory” and “social exclusion theory” along with Herbert Packer’s crime control model and due process model and “thin-slicing”, to analyze the causes of racial profiling. To be able to find solutions to an ongoing problem, all aspects of the issue need to be examined.

The issue of racial profiling raises a number of significant legal and civil rights issues. Canadian values and constitutional rights prohibit people from being discriminated against based on characteristics such as ethnicity, race, and religion. It is widely accepted both within the Canadian population and our courts that members of minority groups should not be the target of

⁵ Wortley & Tanner. (2003), p 371.

coercive actions by the police based on their race or ethnicity. Despite such clearly enunciated legal values, racial profiling persists.

In order to fully understand racial profiling, there needs to be a clear definition so that proper steps can be taken to address the problem. It is also important to understand how racial profiling develops within the police and whether it is based on personal or systemic racial biases.

In organizing my research, I wish to start with an introduction outlining the nature of racial profiling and the “solution” agreed to by both parties (PRP and OHRC) to safeguard the civil liberties of minorities against the possibility of racial profiling. Chapter one will focus on the historical background of racial profiling in order to understand the scope of the phenomenon. Chapter two will focus solely on the Nassiah case and the differing perspectives of the Ontario Human Rights Commission and the Peel Regional Police. Chapter three will provide the research methodology of the thesis. Chapter four will examine the theoretical framework in order to understand the root causes of racial profiling and therefore provide long-term solutions to eliminate the problem. Chapter five will examine the legal aspects of racial profiling and provide criticisms of the two organizations in question. Finally, Chapter 6 will conclude the thesis and provide recommendations in hopes of eliminating the practice of racial profiling within the police force.

Chapter 1 – Defining Racial Profiling: A Historical Analysis

Historical Overview:

The issue of race and policing is not a new phenomenon, but the term racial profiling has attracted a significant amount of attention over the past several years. Historically, there are many examples of overt racism in Canada, the law and public policy. Depending on the time period, there is clear evidence of differing treatment of peoples of African descent and other visible minorities such as the Chinese and Aboriginals. “These accounts indicate that racism has been historically pervasive within the criminal justice system, that it is embedded in the law itself, and that it has had a profound impact on African Canadians”⁵. All of the discriminatory practices throughout history have contributed to the social position of blacks and other visible minorities in Canada and other countries in modern life, and to the deep-rooted stereotypes regarding visible minorities within society. The practice of racial profiling can be seen as a continuation of the history and mistreatment of visible minorities.

The practice of black slavery is very much part of Canadian History. Between 1628 and the early 1800’s, there were around 3000 people of African origin who came to Canada as slaves. It was not until 1833 that the British Parliament passed the *Emancipation Act*, which prohibited slavery in all parts of the Empire including Ontario. Nevertheless, the consequences of racial discrimination and segregation remained. Many African Canadians still experience prejudice and discrimination, indicating that there still is a long way to go in order to eliminate racism within society.⁶

⁵ Smith, C. (2007), p. 92.

⁶ Ontario Human Rights Commission. (2005), p. 6.

Prior to the enactment of human rights statutes, there were many unsuccessful racial discrimination court challenges. In 1939 for example, a Black man by the name of Fred Christie sued a Montreal tavern for refusing him service. The Supreme Court of Canada rejected the lawsuit based on racial discrimination and concluded that the freedom of commerce allowed the merchant to deal with the public in any way he wanted.⁷ The enactment of the Canadian Bill of Rights, the Ontario Human Rights Code, and the Canadian Charter of Rights and Freedoms have helped protect individuals against racial discrimination. However, discrimination is still a problem and more work needs to be done regarding the issue.

Research done on racial profiling suggests that the “war on drugs” initiated by the United States in the 1980’s and later introduced into Canada (1994) has played a large role in racial profiling and policing. “Many researchers believe that the war on drugs fosters negative encounters with minorities”⁸. The premise used by the police is that minorities are most likely associated with drug offences. These beliefs followed a profile built by the Drug Enforcement Agency (DEA) that mostly focused on an individual’s race. Partly because of DEA training, police officers have learned to include race as a variable in profiling criminals, even though law enforcement and government officials have denied engaging in the practice.

Profiling in its most basic form is associated with a set of characteristics such as age, gender, race, and specific behaviours such as nervousness. This type of vetting was introduced by the DEA in Operation Pipeline, in order to enforce laws against drug

⁷ Ontario Human Rights Commission. (2005), p. 7.

⁸ Ioimo et al. (2007), p. 272.

trafficking, but it quickly turned into racial profiling. “It was not just profiling itself that caused racial bias to infect police work...it was also the attitudes, beliefs, and stereotypes that at least some police officers brought with them to the tactic”⁹. Criminal profiling is based on actual behaviour or information about suspected activity, while racial profiling is based on stereotypical assumptions due to one’s race, colour or ethnicity.¹⁰

In an effort to deter drug trafficking, law enforcement officials focused on stopping motor vehicles using traffic violations, which was often used as a strategy to stop and search individuals that were thought to be suspicious by the police. Black and Hispanic males were thought to be more likely associated with drug use or dealing, resulting in an increase in stops and searches of these minorities.

Referencing the *Orlando Sentinel News* report on 1,084 stops from 1980-1992 which led to 507 searches and 55 arrests, he notes that there were only nine traffic stops issued and that, of these stops, 70% (696) were of African Americans and Latinos, who incurred an average stop time of 12.1 minutes v. 5.1 for whites; and that of the 507 cars searched, 414 (82%) belonged to African Americans and Latinos¹¹.

The media coverage during this time reported that mostly African American and Hispanic men were being caught in possession of drugs which further reinforced the stereotypical belief within society that black and other visible minorities were more likely to commit crime. However, it is not surprising that more African American and Hispanic men were charged with such offences, given the higher level of police scrutiny to which they were subjected. “From the outset, the war on drugs has in fact been a war on people

⁹ Harris, D. A. (2006), p. 217.

¹⁰ OHRC. (2010), *What is Racial Profiling?* p. 1.

¹¹ Smith, C. (2007), p. 68.

and their constitutional rights, with African Americans, Latinos and other minorities bearing the brunt of the damage”¹².

One example of police practices during the war on drugs period is evidenced in the case of African American youths who were going to New Jersey to attend basketball camp. They were pulled over by state troopers under suspicion of drug possession and trafficking. The situation got out of hand and the troopers shot at one youth and wounded three others. This example questions the legitimacy of the criteria for vehicle stops, and the use of racial profiling in the apprehension of criminals, especially since no drugs were found on the youths. “The judge’s decision to dismiss all of the charges against the troopers outraged civil rights leaders who viewed the incident as yet another instance where police unfairly targeted racial minorities on the road for criminal investigation”¹³.

Because of such incidents and because of mounting research showing that racial profiling was a reality, law enforcement officials could no longer deny its existence and instead attempted to provide justifications for the tactic. They argued that race was used to help target potential offenders, even though critics argued that there was no clear evidence that linked race and criminal conduct. The controversy regarding racial profiling surrounding the “war on drugs” period initiated a vast amount of research on the subject, especially in the area of police stops, searches and arrest.

The belief that widespread racial profiling occurred along with the view that the differential treatment of citizens based on their race is unethical and a violation of individual rights led to calls for government action to eliminate the practice. In response to allegations of racial profiling, many jurisdictions in the U.S. and England have enacted

¹² Harris, D. (1999), p. 1.

¹³ Lopez. (2001), p. 77.

laws and/or policies that require police to note the race and other characteristics of citizens who are stopped, searched, ticketed and/or arrested.¹⁴ These reporting requirements are an attempt to provide data that will allow researchers and the community to monitor police activities and determine whether or not racially based policing is occurring.

Unfortunately, race-crime statistics are not collected in Canada. With little Canadian research on the issue of racial profiling, the question of whether the practice occurs has been hotly debated. Surveys of the general public and racial minorities in particular indicate that there is a widespread belief that this phenomenon not only occurs but is a common police practice. Survey results in Ontario reveal that African-Canadians are more likely to be stopped, searched, and arrested by the police, compared to whites. The experiences of the visible minorities show that racial profiling does occur and that it can have negative effects on the individual involved.¹⁵

In 2002, the *Toronto Star* published articles in relation to racial profiling and policing. “The authors of the *Star* series concluded that Toronto police disproportionately single out individuals of African descent and that this may constitute discriminatory treatment”¹⁶. Based on these and other studies, many scholars and civil libertarians argue that racial profiling is practised by the police, it is a widespread problem, and that laws and appropriate social policies are needed to restrain the police and protect the rights of minorities. The Ontario Human Rights Commission (OHRC)

¹⁴Birzer & Birzer. (2006), p. 646.

¹⁵ Wortley & Tanner. (2002), p. 199.

“...over 50% of the black students... reported that they had been stopped and questioned by the police on two or more occasions in the previous two years, compared to only 23% of whites, 11% of Asians, and 8% of South Asians”.

¹⁶ Smith, C. (2007), p. 10.

released a report in 2003 entitled *Paying the Price: The Human Cost of Racial Profiling*, in which they conclude that “the evidence of the existence of racial profiling is incontrovertible”¹⁷.

Defining Racial Profiling:

Racial profiling is a term that is highly charged, particularly in the United States, given its history of slavery, segregation, and racial oppression. It is also controversial in other countries such as Canada and England because it is viewed as a form of oppression of minorities by the state.

Defining racial profiling first requires an understanding of the term “profiling” and an attempt to distinguish racial profiling from criminal profiling. It seems that the concepts “racial profiling” and “criminal profiling” overlap and confusion and disagreement on how to define and distinguish these two phenomena lie at the heart of the different worldviews of the police vs. civil libertarians. There is a difference between racial profiling and criminal profiling, but to many police officers this distinction may not be clear.

“Officers concentrate their observation and enforcement activity on drivers and pedestrians who are African American or Hispanic because the people are arrested and incarcerated more often. Since officers focus on these particular citizens, they inevitably arrest more of them than they would otherwise”¹⁸.

From the police perspective, race is used in traffic stops, criminal investigations etc. in the same manner that other variables are used – as a means of preventing and solving crime. Police officials often deny the existence of racial profiling, arguing that their practices are best described as criminal profiling.

¹⁷ OHRC. (2003), p. 69.

¹⁸ Harris, D. (2006), p. 219.

Criminal profiling involves the use of a combination of offender attributes and behaviours that are typically associated with individuals who engage in criminal conduct, such as gender, age, race, dress, nervousness etc. in order to distinguish potential offenders.¹⁹ A criminal profile is built by examining earlier offenders and identifying similar characteristics in potential offenders. People who fit these specific characteristics are targeted because of the belief that they are more likely to engage in criminal activity. In criminal profiling, race is considered as one of the factors even though it may not in itself be a necessary or sufficient predictor of future criminal conduct.

Racial profiling is typically defined as the attempt by the police to identify possible criminals using factors such as race and/or ethnic background. It is based on the assumption that members of particular races or ethnic groups are more likely to commit certain crimes. Two elements are evident in racial profiling: 1) police decision making to target individuals is based partly or wholly upon race, and 2) the police are attempting to investigate/prevent criminal conduct. Thus police profiling mainly concerns proactive policing since reactive policing requires a call for assistance and is initiated by the public.

Police will argue that their own experiences, crime statistics, and research studies all reveal that race is a significant variable related to criminal conduct. In particular, race, age, and gender – namely, black, young, and male – represent a category of persons who are at significant risk of criminal behaviour. Criminal profiling, the police argue, is justified on the grounds of efficiency, necessity, and outcome. Critics argue that automatically associating race and ethnicity with crime casts such a wide net that police will engage in coercive actions that deprive innocent minorities of their rights. Critics also contend that aggressive policing towards minorities will result in many “false

¹⁹ Snook, B., Eastwood, J., Gendreau, P., Goggin, C., & Cullen, R. (2007), p. 438.

positives” – the stopping and questioning of large numbers of law-abiding minorities.

This, in turn, will alienate minorities and increase their hostility and suspicion toward the police. “...the important thing is that if we treat the community in its entirety as suspects, they will respond just as any other community would: they will begin to fear law enforcement, to regard police as enemies instead of as partners”²⁰.

There is a widespread debate on how to define “racial profiling” and how to determine “precisely what activities constitute the police practice commonly referred to as racial profiling”²¹. The police employ a different definition of racial profiling than most criminological researchers. In the criminological literature, racial profiling is said to exist when the members of certain racial or ethnic groups become subject to greater levels of criminal justice surveillance than others. According to Wortley & Tanner, racial profiling is defined as a “racial disparity in police stop and search practices, racial differences in customs searches at airports and border crossings, increased police patrols and undercover activities in racial minority neighbourhoods, or sting operations that selectively target particular ethnic groups”²².

Similarly, Bush (2001) defines profiling by law enforcement officers as the use of race as a factor in conducting stops, searches and other investigative procedures.

Tanovich suggests that

“racial profiling occurs when law enforcement or security officials, consciously or unconsciously, subject individuals at any location to heightened scrutiny based solely or in part on race, ethnicity, place of origin, ancestry or religion or on stereotypes associated with any of these factors rather than on objectively reasonable grounds to suspect that the individual is implicated in criminal activity”²³

²⁰ Harris, D.A. (2006), p. 236.

²¹ Smith & Alpert. (2002), p. 679.

²² Wortley & Tanner. (2003), p. 369.

²³ Tanovich, D. (2006), p. 4.

All of the above definitions of racial profiling refer to police initiated activities, which indicate that most of the research done on racial profiling has been based on proactive policing such as traffic stops and searches.

Most definitions of racial profiling see it as a form of racial bias in police investigations whether these acts are performed by individuals or whether they are systemic and institutionalized through values, training, and police policies. “Racial profiling is an institutional problem and is based in part on the faulty assumptions on policing about its efficacy”²⁴. The term racial profiling is often used to describe inappropriate targeting of racial and ethnic groups by police officers and other law enforcement officials. Some definitions outline that racial profiling involves the use of questionable methods by the police in targeting minority group members. Harris states that police officers “stop and search black drivers who have committed no crime based on the excuse of a traffic offence”²⁵.

Similar definitions can be found throughout the literature. For example, Kennedy states that racial profiling occurs “whenever police routinely use race as a negative signal that, along with an accumulation of other signals, causes an officer to react with suspicion”²⁶.

The definition of racial profiling depends on the author, some of whom employ a narrower and others who propose a broader definition. A narrow definition restricts the meaning of racial profiling to situations when police officers stop, question, arrest, and/or search someone solely on the basis of that individual’s race or ethnicity. In contrast, a

²⁴ Harris, D.A. (2006), p. 226.

²⁵ Harris, D. (1999), p. 265.

²⁶ Kennedy, R. (1997), p. 11.

broad definition of racial profiling sees racial profiling occurring whenever a police officer uses race or ethnicity as one of a number of factors when deciding to stop, question, arrest, and/or search someone. The broad definition of racial profiling is also adopted by civil libertarians, such as the Ontario Human Rights Commission, in an attempt to limit police power and maintain civil rights.

The police tend to use the narrow definition in order to defend themselves against accusations of racial profiling by outlining that race is just one of the many factors used in initiating traffic stops or other methods of intervention. A narrow definition of racial profiling is criticized because race is not likely to be the sole variable motivating police interventions and because even “a racially prejudiced officer likely uses more than the single factor of race when conducting biased law enforcement”²⁷. With respect to the Nassiah Case, Peel Regional Police at that time did not have a mandated definition of racial profiling. It was only in 2001 that the Commission of Accreditation for Law Enforcement Agencies (CALEA), of which Peel Regional Police was a member, adopted a standard with respect to racial profiling and policing. CALEA was not found to be efficient on biased policing under the Human Rights Code during the Nassiah Case proceedings, due to the fact that it adopted a more narrow definition of the term, and was therefore rejected by the Tribunal. “If race is one of the irrelevant factors in any police action (stop/investigation) even if other, legally relevant factors are also at play, this is a violation of the Code”²⁸. Prior to the Nassiah decision, Peel was using a narrow definition of racial profiling in accordance with the CALEA.

²⁷ Fridell, L., et al. (2001), p. 3.

²⁸ Human Rights Tribunal of Ontario Decision, 2007 HRTO 14.

The major concern over racial profiling lies in the belief that the use of race in police stops and searches results in racist policies towards minorities. Targeting people based on their appearance rather than on their behaviour is viewed as racist, unjust, an abuse of authority, and discriminatory. Since the vast majority of minority groups are law-abiding citizens, police practices that target members of these groups will inevitably subject minorities to unnecessary, offensive and intrusive stops and investigations, delays, embarrassing searches, and even detention. The high rate of traffic stops of young black males and the increasing scrutiny of Middle Eastern air passengers has led to the development of shorthand terms such as Driving While Black (DWB), Shopping While Black (SWB) and Traveling While Arab (TWA) to describe their experiences and resentment.

Of particular importance for this thesis is the definition of racial profiling adopted by the Ontario Human Rights Commission (OHRC). According to the OHRC, racial profiling is “any action undertaken for reasons of safety, security, or public protection that relies on stereotypes about race, colour, ethnicity, ancestry, religion, or place of origin, rather than on reasonable suspicion, to single out an individual for greater scrutiny or different treatment”²⁹. This definition, which is outlined in OHRC document *Paying the Price: The Human Cost of Racial Profiling*, has been criticized as too broad. The Commission views racial profiling primarily as a mindset based on various stereotypes within society and not limited to any particular group or institution. The report outlines that anyone can engage in stereotyping and while it can be intentional, most people do not even realize that they are doing it. It is even more harmful when it is committed by those in a position of authority.

²⁹ Human Rights Tribunal of Ontario Decision, 2007 HRTO 14.

“It is also important to note that concerns with profiling relate directly to the concepts of discretion and power. Persons in society who hold positions in which they exercise a large degree of discretion have more of an opportunity to engage in profiling and are also more likely to be perceived to be engaging in racial profiling”³⁰.

Due to the fact that individuals in a position of authority exercise their discretion, especially the police, it is very important that they are aware and held accountable for engaging in racial profiling.

Racial profiling can be seen throughout history and is reflected within the legal system. The issue exists in many different contexts such as in law enforcement agencies, educational institutions, shopping centers, and in the criminal justice system. The occurrence of racial profiling can no longer be denied due to the vast amount of research conducted, which clearly demonstrates its existence. However, the Nassiah Case shows that it is difficult to prove racial profiling in individual cases. Racial profiling has many negative effects on society and on individuals, and advocacy and awareness research needs to focus on finding ways to eliminate the practice. Examining the phenomenon in depth may assist our understanding of where racial profiling comes from and what its root causes are.

The issue of racial profiling raises a number of significant legal and civil rights issues. Canadian values and constitutional rights prohibit people from being discriminated against based on characteristics such as ethnicity, race, and religion. It is widely accepted both within the Canadian population and in our court system that

³⁰ OHRC. (2003), p. 8.

members of minority groups should not be the target of coercive actions by the police based on their race or ethnicity.

Summary

The focus of this thesis is the Nassiah Case and the process of charging, trying, and adjudicating complaints against the police. The study will also analyze the manner in which the OHRC and Peel Regional Police Services have worked to implement the Tribunal's decision. The thesis will critically examine the competing perspectives and agendas of both the PRP and OHRC in order to present each organization's outlook regarding the issue of racial profiling and its application to the Nassiah Case decision.

The PRP and the OHRC have been working together in order to ensure that all of the policy recommendations have been implemented. Due to each institution's differing views on racial profiling and its enforcement, there has been some tension between the two organizations. In order to analyze the competing agendas and perspectives of the police and the human rights organizations, it is important to develop an understanding of the structure within each organization. The PRP view on racial profiling stems from the crime control model, while the OHRC view is based on the due process model. The two models aim to provide an explanation for the differing perspectives of the police and civil libertarians with regard to racial profiling.

Historically, police-minority relations have been problematic in Canada, the U.S., and Britain. Research has consistently shown that members of minority groups are more likely to view the police with considerable suspicion. In addition, many studies reveal that minority neighbourhoods often express the greatest hostility toward the police. The belief or perception that the police engage in the practice of racial profiling has further

exacerbated the already strained and complex relationship between the police and members of the community.³¹ In addition, widespread public belief that the police engage in racial profiling undermines confidence in their impartiality amongst other groups within society who see the practice as biased and unfair.

A common recommendation in the research literature is that police end the practice of racial profiling and that governments pass legislation to ensure that this happens. The benefits of eliminating racial profiling will mean that police can more effectively focus their efforts on criminal behaviour rather than appearance. The recommendations outlined by the Human Rights Tribunal in regards to the Nassiah Case have been aimed at eliminating the practice in the police force. The elimination of such a well-established tactic is not an easily obtained objective. My examination of the Nassiah Case will analyze and theorize, and critique the differing perspectives of the Peel Regional Police and Ontario Human Rights Commission.

³¹ Birzer & Birzer. (2006), p. 644.

Chapter 2

The Nassiah Case Synopsis: Peel Regional Police vs. Ontario Human Rights Commission

On February 18, 2003, Jacqueline Nassiah alleged that she was discriminated against, based on her race, by Peel Regional Police Officer Richard Elkington. Ms. Nassiah is a black woman who was accused of stealing a brassier while shopping at a Sears store in the Dixie Mall in Mississauga. She tried on several brassieres and bought four. After she left the Sears store Ms. Nassiah was stopped by a security guard (John Nevers) who accused her of stealing merchandise. Nevers accompanied her to the security office where the police were called. Ms. Nassiah was in shock and offered her receipt as proof of purchase, but Mr. Nevers did not look at it. Ms. Nassiah was also searched by a female employee (Maria Santos), but there was no trace of the brassier that she was accused of stealing. During this time, Ms. Nassiah was very upset, crying and insisting that Mr. Nevers check the bag. She also asked Mr. Nevers if she could call her babysitter to explain why she was late, but was told that the only call she could make was to her lawyer.

Police officer Richard Elkington was dispatched to the Sears store in order to investigate a theft case. He is a White police officer who worked for eight years as a police officer in Leicestershire, England before moving to Canada. He was hired by Peel Regional Police in 2002, and after receiving basic training, he was assigned regular duties in September 2002. Elkington arrived at the store after Nassiah had already been detained for an hour. According to Nassiah, when officer Elkington entered the room his first words were “where is the bra?” He asked for identification and left the room when she overheard him ask Nevers, “does she speak English?” When he came back, he persisted in asking where the bra was in a more hostile tone.

Ms. Nassiah testified that the officer said “if you don’t tell me where the bra is I am going to take you down and you will spend the night in jail” and then finally leaned over to her and said “fucking foreigner...if you don’t tell me where the bra is I’m going to take you down”³².

The officer was informed that a security camera caught the theft incident on tape. The police officer examined the video several times, but when he had finally viewed the video until the end, it was evident that Ms. Nassiah had not stolen the brassier. In the video it appeared that Jacqueline Nassiah went into the change room with two brassieres and only came out with one, but she actually came out with both of the brassieres in her left hand. The police officer Richard Elkington apologized to Ms. Nassiah and offered to walk her to her car, which she refused. In total Ms. Nassiah was detained for about 2 hours.

After the examination of evidence, witnesses, investigations, and testimonies from various parties involved, including Ms. Nassiah, John Nevers, and Richard Elkington, the Human Rights Tribunal of Ontario decided in favour of Ms. Nassiah.

The decision by the Human Rights Tribunal of Ontario is based on the finding that Officer Elkington asked Ms. Nassiah if she spoke English because she is black, and therefore was more suspicious and biased during the investigation of the case. Also, during the investigation the officer is alleged to have called her a “f..... foreigner” and threatened to take her to jail if she did not tell him where the stolen item was.

The Tribunal ordered the Peel Regional Police Service Board to the following:

³² HRTTO. (2007), No 14, p. 3.

- 1) Peel needs to develop a directive that prohibits racial profiling under the Human Rights Code. The definition should outline that if race is an irrelevant factor in police decision, then it is prohibited.
- 2) Peel shall develop training material on racial profiling that is geared towards new recruits, current officers, and supervisors. The material should include the Anti-Racial Profiling Directive, social science literature on racial profiling, and the current case law.
- 3) Peel shall hire an external consultant that is an expert on racial profiling in order to assist with the preparation of the Directive and training materials.
- 4) Peel is required to provide the name and credentials of the expert, a copy of the Anti-Racial Profiling Directive, and the training materials to the commission within six months of the decision.
- 5) Peel shall make sure that all of the new recruits, current officers, and supervisors are trained on the Anti-Racial Profiling Directive within one year of the development of all of the above outlined materials.
- 6) Peel shall report to the Commission once all of the officers and supervisors have been trained.
- 7) Peel shall publish this decision and outline the findings and orders of the Tribunal in Peel's monthly police bulletin.
- 8) Officer Elkington shall attend one of the training sessions outlined above.
- 9) Peel and Officer Elkington are jointly responsible for the payment of damages of \$20,000.

Perspective of the Peel Regional Police:

The Peel Regional Police take the position that Officer Richard Elkington did not engage in racial profiling in dealing with Jaqueline Nassiah on February 18, 2003. Instead, they contend that Officer Elkington followed basic police procedure and investigation practices in dealing with Ms. Nassiah, and he eventually concluded that she was innocent of the security guard's allegations.

Officer Elkington testified that when he arrived at the store he met by Mr. Nevers outside the security office. Mr. Nevers notified him that he had seen Ms. Nassiah on the video camera entering a change room with two brassieres and coming out with one. Officer Elkington then ordered a search of the change rooms, and asked someone to retrace Ms. Nassiah's route to and from the change room. Richard Elkington did admit that he asked the security guard if Ms. Nassiah spoke English, explaining that he asked this question because he deals with many individuals who do not speak English. He noted that Ms. Nassiah was a visible minority and he wanted to make sure that they could communicate. From the perspective of the Peel Regional Police this is a legitimate question that does not suggest prejudice. However, Officer Elkington did state that he could understand how Ms. Nassiah, as a Black woman, would be offended by a White police officer and a White security guard discussing if she spoke English.

Officer Elkington stated that he then entered the room and introduced himself to Ms. Nassiah and explained why he was there. He also said that he asked her where the brassier was in a neutral tone. He then proceeded to ask her for identification and returned to his vehicle to conduct a criminal record check, a traffic offence check, and a "suspicious activity" check. All of

the results were negative. According to Peel's spokesperson, Officer Elkington was following police procedures accurately and doing everything by the book in order to resolve the issue.³³

It is common practice for police officers to do a records investigation to provide them with background information on a suspect. Police officers can search their own database for information on the individual and they may also use the Canadian Police Information Center (CPIC) for records of criminal arrests and convictions and motor vehicle records. The CPIC is a computerized system that is designed for storage and retrieval of shared police information. The information in the CPIC database includes people that have a criminal record for any Criminal Code or other Federal Statute offence, have been judged not criminally responsible for an offence because of mental disorder, have federal and/or provincial charges pending, and are on probation or subject to a Prohibition Order³⁴.

Once Officer Elkington conducted the records check, he returned to the security room, looked into the Sears bag and noted that there were four brassieres in the bag and a receipt for all of them. Officer Elkington stated that in his mind this did not exonerate Ms. Nassiah; it simply proved that the stolen item was not in the bag. Throughout his experience in investigating theft cases, many suspects legitimately purchase some goods as a ruse for stealing. He was simply eliminating possible hiding places, including the change room, the surrounding area, and the Sears bag. He considered the possibility that the brassier was hidden on Ms. Nassiah, and arranged a search. He did testify that he was told that a search had already been done but he wanted to be sure that it was done properly. The search was conducted by Ms. Narcisco, a female

³³ Interview with PRP Diversity Director. (2009).

³⁴ Royal Canadian Mounted Police.

employee at Sears, who reported that nothing was found. After the search was conducted, Officer Elkington approached Ms. Nassiah and asked for her coat, where he found six hundred dollars. When he asked her what the bills were for, she explained to him that it was a gift for her parents in Trinidad, which he accepted.

Officer Elkington examined the video a couple of times during the investigation. He stated that Mr. Nevers cued the video and showed him the portions where Ms. Nassiah was seen entering the fitting rooms with two bras and then seen apparently coming out with one bra. Officer Elkington then asked to view the entire video until the end, and saw two tags hanging from Ms. Nassiah's hand. He then went back to the security room where he advised Ms. Nassiah that there was no evidence of her stealing the brassier and that she was free to go. He apologized for the delay he caused her, asked her to sign his notebook, and he offered to walk Ms. Nassiah to her car, but she declined.

According to Office Elkington he arrived at the Sears store around 6:14 p.m. and released Ms. Nassiah by about 7:00 p.m. He then stayed at the store to ensure that Mr. Nevers understood the evidence and how it proved that Ms. Nassiah was innocent. He contacted Peel at 7:16 p.m. and reported "report of theft unfounded on proper examination of video tape no items stolen or concealed. Detained party released unconditionally at that scene"³⁵.

It is the position of Peel Regional Police that Officer Elkington investigated the case successfully and exonerated Ms. Nassiah after examining all relevant evidence. Officer Elkington denied using any hostile tone, calling her a "f..... foreigner", and threatening to "take her down". He also denied asking Ms. Nassiah to sign a blank notebook and taking her receipt.

³⁵ HRT0. (2007), No 14, p. 7.

During the interview with PRP, the spokesperson outlined the importance of exonerating Ms. Nassiah because she would not be able to return to the Sears store if Officer Elkington did not clear her of any theft allegations. Therefore in the view of Peel, Richard Elkington investigated the case according to procedures and successfully resolved the issue³⁶.

An analysis of the evidence reveals that the Human Rights Tribunal of Ontario chose to believe Jacqueline Nassiah over Officer Elkington even though they were sceptical of some of her testimony. Ms. Nassiah has provided information in her testimony that is inconsistent with regards to the “f..... foreigner” comments and jail references. Ms. Nassiah, her brother Glen Nassiah and the security guard John Nevers all agreed that after the incident Ms. and Mr. Nassiah returned to the store and accused Mr. Nevers of calling Ms. Nassiah a “f..... foreigner”. Mr. Nevers stated that he did not recall Ms. Nassiah correcting her brother that it was the officer who had said that. The Ontario Human Rights Tribunal noted that it was possible that Ms. Nassiah embellished or fabricated the comment and falsely told her brother that it was made. Nevertheless, the Tribunal found it more probable that Officer Elkington did use discriminatory language and that he did threaten to take her to jail.

Ms. Nassiah also testified that she was asked to sign a blank page in Officer Elkington’s notebook. In the officer’s notebook, information was present that could have only been taken in the presence of Ms. Nassiah. For example the officer recorded her full name, address with postal code and driver’s licence number. In this matter Ms. Nassiah was found to be untruthful, but her testimony regarding the “f..... foreigner” comments and jail reference was found to be credible.

³⁶ Interview with PRP Diversity Director. (2009).

According to Peel, Officer Elkington was consistent in his testimony as he initially denied making hostile racist statements, threatening to “take her downtown”, while admitting that he asked if she spoke English.

In the defence of Officer Elkington, the diversity director of Peel Regional Police noted that their divisions are not located “downtown” and that the police typically do not use that term³⁷. Peel also argued that the question he posed “does she speak English” to Mr. Nevers was neither discriminatory nor inappropriate. Officer Bob Gooding from the Ontario Police College was called by Peel as an expert witness in order to testify about investigation procedures. Officer Gooding testified that it was good police practice to ensure that the detained individual spoke English so that the suspect is able to understand the investigation process.

According to Bob Gooding, when an officer is called to investigate an allegation of theft or shoplifting, the essential elements that need to be established are the identity of the accused and if anything was taken with the intent to deprive the owner temporarily or indefinitely of the property. Officers should collect as much information as possible about a suspect prior to the investigation. It is important and common police practice to conduct a record check on prior convictions, traffic offences, etc. During the investigation phase, the officer can adopt one of three approaches: assumption of guilt, an assumption of innocence, or an assumption of neutrality. The police officer has the discretion to choose the best approach according to the situation.

³⁷ Interview with PRP Diversity Director. (2009).

Officer Gooding testified that it is preferable to ask open-ended questions during the investigation phase in order to get as much information as possible from the accused. The officer can then determine the credibility of the suspect by examining his/her behaviour and his/her story. If the officer believes that the evidence suggests guilt, then the interrogation process will begin. During the interrogation, the officer confronts the suspect with the facts of the case and the evidence against him/her, also incorporating other interrogation tactics in order to get the suspect to confess to the crime.

Officer Gooding characterized Officer Elkington's questioning as more investigative than interrogative and stated that it was reasonable for Officer Elkington to accept the security guard's version of events as truthful. The assumption is that security guards hired by retail outlets are trained to protect the employer's property and act in good faith. Gooding suggested that Officer Elkington should have viewed the video tape entirely before conducting further investigation, but in the end he still exonerated Ms. Nassiah. "Mr. Gooding states that in his opinion few officers would have been as diligent as Officer Elkington in keeping an open mind and pursuing the investigation into such a minor offence to a conclusion which eventually exonerated Ms. Nassiah"³⁸. Overall, Officer Gooding characterized Officer Elkington's investigation process as acceptable and proper.

According to a Peel Police spokesperson, when police officers are called to investigate an alleged theft, they are expected to exercise their discretion based on the facts of the case³⁹.

³⁸ HRT0. (2007), No 14, p. 39.

³⁹ Interview with PRP Diversity Director. (2009).

Accused persons have no legal right to be presumed innocent during an investigation and a presumption of guilt by an officer does not necessarily mean that the police are acting in a discriminatory manner. According to Peel, Officer Elkington could have been more thorough in the investigation and should have viewed the video tape entirely before proceeding, but that does not mean that he discriminated against Ms. Nassiah during the process.

Peel took the stance that if Officer Elkington did not continue with the investigation and if he had released Ms. Nassiah on the basis of insufficient evidence that would have negative consequences for Ms. Nassiah. She would not have been proven innocent and Sears could have decided to issue a “no trespass” order against her; consequently she would not have been able to enter the store based on the suspicion of unproven theft. Also, the final report of Officer Elkington would have been inconclusive, which would have resulted in a “suspicious activity” record rather than a full exoneration. Even though the investigation was prolonged, Officer Elkington’s investigation resulted in a full exoneration for Ms. Nassiah.

Perspective of Human Rights Tribunal of Ontario:

The decision by the Human Rights Tribunal of Ontario on May 11, 2007 regarding the Nassiah Case by Adjudicator Kaye Joachim concluded that Officer Richard Elkington of the Peel Regional Police discriminated against Ms. Nassiah on the basis of race. Peel Police was found liable for the discriminatory conduct of its employee, Richard Elkington, under section 45(1) of the *Code*.

The *Ontario Human Rights Code* can be found on the Ontario Human Rights Commission website. The “*Code*” is designed for everyone and its goal is to prevent discrimination and harassment. “The functions of the Commission are to promote and advance respect for human rights in Ontario, to protect human rights in Ontario and, recognizing that it is in the public interest to do so and that it is the Commission’s duty to protect the public interest, to identify and promote the elimination of discriminatory practices...”⁴⁰. The *Code* is considered to be very significant because it unites all aspects of human rights law.

The *Ontario Human Rights Code* is a provincial law that gives every person the right to equal treatment and equal opportunities in five social areas: Employment, Housing, Goods, Services and Facilities, Contracts, Membership in trade and vocational associations. Part I of the Code deals with Freedom from Discrimination and protects individuals from being discriminated against and harassed in the following areas: Race, Colour, Ancestry, Place of Origin, Citizenship, Ethnic Origin, Disability, Creed, Sex, Sexual Orientation, Family Status, Marital Status, Age,

⁴⁰ OHRC. (1968).. *The Code*. Part III, Section 29.

Reception of Public Assistance, and Record of Offences.⁴¹ The Code is established in order to ensure that the dignity and worth of every person is maintained.

The Human Rights Tribunal of Ontario decides if an individual's human rights have been violated or not. Applications can be filed directly with the Tribunal, where the Tribunal determines the best way to proceed with each application. The Human Rights Legal Support Center is designed to assist people with the applications to the Tribunal. Some of the services offered include advice and legal representation. The Ontario Human Rights Commission develops policies in order to deal with the root causes of discrimination. The Commission monitors human rights, does research and produces publications on the issue, and also conducts human rights inquiries. The main goal of the Commission is systemic change in regards to human rights, and it can intervene in cases before the Tribunal.

The *Ontario Human Rights Code* begins with a “preamble” and is followed by seven main parts. The Preamble was inspired by the 1948 Universal Declaration of Human Rights and should be given “a broad and generous” interpretation.

“Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

And Whereas it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province;

And Whereas these principles have been confirmed in Ontario by a number of enactments of the Legislature and it is desirable to revise and extend the protection of human rights in Ontario”⁴²

⁴¹ OHRC. (1968). *The Code*. Part I, Section 1-9.

If there is a conflict between the *Code* and Ontario law, the *Code* has priority. Part I, *Freedom of Discrimination*, outlines the basic rights and responsibilities. Part II, *Interpretation and Application*, explains the interpretations of the *Code* and its sections. Part III explains the structure and the role of the Commission. Part IV outlines how the Tribunal operates and how the *Code* is enforced. Part IV.1 outlines the procedures for the Human Rights Legal Support Center. Part V deals with general matters such as civil remedy, penalty, regulations, etc. Part VI deals with transitional provision, which includes definitions, applications and so on.

The Adjudicator in the Nassiah Case outlined three major points within the decision: Officer Elkington asked Ms. Nassiah if she spoke English in part because she is black; he was more suspicious during the investigation because she is black; and the fact the he called her “f..... foreigner” during the investigation and threatened to take her to jail if she did not produce the brassier.

During the interview with OHRC, the spokesperson indicated that racial profiling is unacceptable behaviour, especially by the police since they represent power within society. The OHRC does not accept the one bad apple theory, as they feel it is they duty of the Police Force to educate their officers because the organization is responsible for its members. The spokesperson further stated that Officer Elkington assumed guilt and conducted his investigation based on that assumption.⁴³

⁴² OHRC. (1968). *The Code*. Preamble.

⁴³ Interview with Director of the Legal Services Branch of the OHRC. (2009).

In assessing the facts in relation to the Nassiah Case, the Human Rights Tribunal of Ontario used the traditional test of credibility set out in *Faryna v. Chorney*, [1952] 2 D.L.R. 354 at 356-357 (B.C.C.A):

“Opportunities for knowledge, powers of observation, judgement and memory, ability to describe clearly what he has seen and heard, as well as interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize is reasonable in that place and in those conditions...Again a witness may testify to what he sincerely believes to be true, but he may be quite honestly mistaken”⁴⁴.

In this particular case, it is important to weigh the differing oral testimony of Ms. Nassiah and Officer Elkington and take into consideration the written documents recorded by key witnesses.

One of the important factors within the Nassiah Case is that Officer Elkington asked if Ms. Nassiah spoke English. During cross-examination Officer Elkington did state that part of the reason he asked if she spoke English was because Ms. Nassiah is Black. Even though Officer Gooding testified that it was normal investigation procedure to ensure that the suspect speaks English, the Tribunal ruled that it was discriminatory to pose such a question based in part on a person’s skin colour. The Human Rights Tribunal of Ontario believes that it is not acceptable for an officer to make assumptions if an individual speaks English based on their ethnic group, colour, or race. “Given the way the events transpired, asking the question immediately upon

⁴⁴ HRTTO. (2007), No 14, p. 10.

seeing her, I infer that Officer Elkington consciously or subconsciously acted on a stereotypical assumption that because Ms. Nassiah is Black she may not speak English”⁴⁵.

Upon hearing the testimony of Richard Elkington and Jaqueline Nassiah along with the witness statements, the Human Rights Tribunal concluded that Officer Elkington did call Ms. Nassiah a “f..... foreigner” and that he threatened to take her to jail. According to the OHRC, Officer Elkington discriminated against Ms. Nassiah based on her race and the derogatory comment was based on the stereotype that she is likely to be a “foreigner” because she is Black. The Commission concluded that even if Officer Elkington did not make those comments, the investigation of the alleged theft of the brassier was biased because of race.

The final piece of evidence that added to the alleged discriminatory investigation is the fact that Officer Elkington was more suspicious and treated Ms. Nassiah with hostility during the investigation because she is Black. The commission viewed this type of behaviour as racial profiling and they also called an expert witness, Professor Scot Wortley, in order to give evidence about racial profiling.

“Professor Wortley testified that the following factors would indicate racial profiling in the sense of heightened suspicion: asking whether she spoke English, asking “where’s the bra”, failure to look at the receipt for the bras purchased, conducting three police checks, viewing the video more than once, ordering a second search of her person, questioning about \$600 in cash. He did not accept any of these as “normal” police investigation techniques”⁴⁶.

The Tribunal ruled that upon seeing that Ms. Nassiah was Black, Officer Elkington became more suspicious, which caused him to act with the assumption of guilt instead of an assumption of innocence. The Commission believes that the investigation would have been resolved much

⁴⁵ HRTTO. (2007), No 14, p. 27.

⁴⁶ HRTTO. (2007), No 14, p. 34.

more quickly if Officer Elkington had viewed the entire videotape at the beginning of the investigation rather than the end. The video tape was highly relevant because it proved Ms. Nassiah's innocence.

According to the OHRC, the video shows Ms. Nassiah holding two brassiers in her left hand when she exited the change room, and it is unclear how Mr. Nevers and then later Officer Elkington were positive that the video showed theft. The videotape regarding Ms. Nassiah started recording at 5:29 p.m. and ended at 5:34 p.m. during which she was picked up by a different camera, so there was no actual footage of Ms. Nassiah entering the change room. The camera does show her exiting, but the bottom half of her body is not very visible and therefore the Commission determined that it was not possible to see if Ms. Nassiah had anything in her hands right after exiting the change room.

Bob Gooding was called by Peel as an expert witness in order to testify about the procedure and elements of a normal investigation. The commission was very cautious in accepting Mr. Gooding's evidence because he did not prepare his own expert report but rather used a statement prepared by Peel. While Mr. Gooding is an experienced police officer with good qualifications in police investigations, he has not published any academic articles nor has he reviewed any academic literature in regards to police investigations. His oral evidence stemmed from his experience, which was lessened by the lack of academic qualifications.

In providing evidence on normal police investigation practice, Bob Gooding considered Officer Elkington's approach as an assumption of guilt. "Officer Gooding characterized Officer Elkington's investigation approach to the February 18, 2003 incident as an assumption of

guilt”⁴⁷. Mr. Gooding testified that officers have discretion and that it is up to them to determine which approach is best. While the advantage of the assumption of guilt approach is the element of surprise, which may lead the individual to confess to the crime, the disadvantages are much greater. Where a police officer adopts an assumption of guilt approach when the suspect is innocent, the trust is lost and it is more difficult to get the suspect to open up regarding the incident. Another disadvantage is that innocent individuals can refuse to cooperate, causing the police officer to wrongfully interpret that behaviour as indicating guilt. During the investigation phase it is preferable for officers to ask open-ended questions to gain a suspect’s cooperation. This makes it easier for the police officer to assess the credibility of the suspect’s statements and behaviour. Mr. Gooding did indicate that Ms. Nassiah’s behaviour and level of upset is consistent with a truthful individual.

The next stage of a normal investigation, according to Bob Gooding, is to move to an interrogation method if the evidence leans towards the suspect’s guilt rather than innocence. While Mr. Gooding testified that he believed Officer Elkington took an investigative rather than interrogative approach to the Ms. Nassiah Case, the Commission on the other hand found that Richard Elkington adopted a strong assumption of guilt approach. According to the Commission, Officer Elkington acted in a highly suspicious manner and continued with the assumption of guilt approach until the final viewing of the video which clearly showed Ms. Nassiah’s innocence. Due to the wide range of discretion during a police investigation, it is not plausible to determine what a normal investigation entails. As per Officer Gooding’s testimony, an officer should assess whether there is sufficient evidence to charge a suspect, if not then the suspect should be

⁴⁷ HRT0. (2007), No 14, p. 37.

released. According to the Commission it is not an officer's responsibility to prove that a suspect is innocent, but rather to assess the evidence and act accordingly. The Tribunal ruled that Officer Elkington did not have enough evidence to pursue the investigation, but he did so anyway and subjected Ms. Nassiah to a more intensive and prolonged investigation because she is Black.

Summary

In examining all of the factors relating to the case, the Commission concluded that Officer Elkington consciously or unconsciously discriminated against Ms. Nassiah because she is Black. The Commission found that Richard Elkington treated Ms. Nassiah with greater suspicion than he would have a White suspect. The following factors were concluded by the Commission regarding the Ms. Nassiah Case:

- He stereotypically assumed that a Black suspect may not speak English.
- He accepted the security guard's assertion that he had video tape evidence of theft without even looking at the video; he proceeded to investigate assuming that Mr. Nevers was telling the truth, although he had no basis for determining the relative credibility of Mr. Nevers (who is White) versus Ms. Nassiah (who is Black).
- He adopted an assumption of guilt approach to the investigation by asking "where's the bra" as his first question, which was not the "textbook" or "preferred" approach.
- The video tape provided very weak evidence of theft; it did not clearly indicate whether Ms. Nassiah had even entered the fitting room with two brassieres; it was equally unclear how many brassieres she held immediately upon exiting the fitting room; the willingness to infer theft from the video was unreasonable; to persist in asking "where's the bra" after viewing the weak video evidence demonstrates a high degree of suspicion.
- He arranged for a second search of Ms. Nassiah's person, although he had no reason to believe that the first search was inadequate.
- After the second physical search, he was still not satisfied that the evidence was insufficient to lay a charge of theft, but he continued to investigate rather than releasing her.

- Peel Regional Police expert testified that few officers would have been as diligent as Officer Elkington on such a minor offence. While Officer Gooding concluded that this was evidence of an “open mind” investigation, the evidence is equally consistent that Elkington pursued Ms. Nassiah more diligently than ordinarily because she was Black. He spent a minimum of 45 minutes (on his own evidence) diligently pursuing an allegation of theft of a brassier worth less than \$10, regardless of specious video evidence.

It is evident that Peel Regional Police and the Ontario Human Rights Commission have different perspectives in regards to the Nassiah Case decision. The Ontario Human Rights Tribunal was presented with a she said/he said situation and chose to believe the complainant in the face of some facts that appear to have discredited Ms. Nassiah. In viewing the decision from the police perspective, a more prudent conclusion based on the evidence would have been to say that the facts and findings of the case did not allow the tribunal to conclude either way – for the complainant/plaintiff or for the defendant, and therefore the case would be dismissed. The view of the Peel Regional Police seems to suggest that the Tribunal’s decision may have been political, to enable the Ontario Human Rights Commission to have leverage with Peel Police. The targeting of a large organization such as the police force allows the Ontario Human Rights Commission to develop policies that will be more effective in eliminating racial profiling and policing because the police interact with a larger community.

It is more beneficial for the Ontario Human Rights Commission to target Peel Regional Police over one officer, but the fact still remains that Officer Elkington did discriminate against Ms. Nassiah to some degree.

Chapter 3: Research Methods

The issue of racial profiling has attracted a vast amount of research of the last few years. In particular, researchers have focused on the use of race and ethnicity by the police and security officials in order to profile criminals and would-be terrorists. The use of race and ethnicity by the police and security officials in order to profile criminals has come under scrutiny. This section aims to examine the issues associated with racial profiling and policing following the Nassiah decision. The relationship between the Ontario Human Rights Commission and Peel Regional Police is examined in order to understand the variable definition of racial profiling and to resolve the tension between the two organizations. The nature of the discussion focuses on the laws and policies regarding racial profiling and analyzes data and statistics in order to show gaps in current research.

The data gathered in this research study is used in conjunction with the literature review in an attempt to answer some of the following questions. When should policing be characterized as racial profiling? What are the root causes of racial profiling and why does it occur? What are the discrepancies between civil libertarians and the police regarding racial profiling, and can they be resolved? What are the consequences of racial profiling? Are the new policies more effective? How can the issue be prevented?

Research on racial profiling has mainly focused on police traffic stops and search practices, and on investigating whether black people and other visible minorities are under greater police surveillance than people of other racial backgrounds. Most of the research has been carried out in the United States and Britain, with police officers recording the race of the individuals they stop and search. With a study conducted in Britain “police statistics from 1977-1998 reveal that black people were stopped and searched at a rate of 142 per 1,000, compared to

45 per 1,000 of Asians and 19 per 1,000 of whites”⁴⁸. Statistics within the United States also indicate that race plays a major role in police decision to stop and search individuals. “African Americans were about 26% of New York’s population, but they made up about 52% of all of those stopped and frisked...whites who made up 40% of the population were only 10% of all those stopped and frisked”⁴⁹. The statistical data shows the existence of racial profiling and the issue can no longer be ignored by law enforcement officials.

A Canadian study done by Wortley and Tanner showed that “over 50% of the black students...reported that they had been stopped and questioned by the police on two or more occasions in the previous two years, compared to only 23% of whites, 11% of Asians, and 8% of South Asians”⁵⁰. Survey results in Ontario also indicate that African-Canadians are more likely to be stopped, searched, and arrested by the police, compared to whites. The experiences of the visible minorities show that racial profiling does occur and that it can have negative effects on the individual involved.

In 2002, the *Toronto Star* published several articles on research conducted between 1996-2002 in relation to racial profiling and policing. The publications outlined that the Toronto police do engage in discriminatory behaviour by disproportionately targeting visible minorities, especially those of African descent. *Toronto Star* revealed that black individuals in the Toronto area are over-represented in specific criminal categories, that they are more likely to be treated badly after arrest, and that black offenders are more likely to be detained in custody than white offenders.

⁴⁸ Wortley & Tanner. (2003), p. 370.

⁴⁹ Harris, D. (2006), p. 222.

⁵⁰ Wortley & Tanner. (2002), p. 371.

Other data for this study were collected through interviews with Brian Cryderman, Peel Regional Police Diversity Director, and with Prabhu Rajan from the Ontario Human Rights Commission who litigated the Nassiah Case. Both of the subjects were selected based on their role within the Nassiah Case, as the majority of the communication between the two organizations was done through these two individuals. Bryan Cryderman provides the perspective of the police while Prabhu Rajan provides the perspective of the civil libertarians with respect to the Nassiah Case. The interviews attempt to outline the differing perspectives between the two organizations and to show each organization's policies and procedures on racial profiling.

Peel Directive, Training, and Interview

The interview process was about an hour in length. The interview questions were based on the Nassiah Case and on the particular organizational policies regarding racial profiling. Some questions were based on the relationship between the PRP and OHRC, and on the disagreements between the two organizations following the Nassiah decision in order to get a better understanding of the perspectives of each organization. Some questions focused on the definition of racial profiling and on the elimination of the issue. Other questions centered on organizational goals and the effects of the Nassiah Case recommendations.

The interviews were very beneficial in understanding the perspectives of each organization on the issue of racial profiling, and they clearly reflected each organization's views and beliefs on the subject. Nevertheless, the value of the interview data may be limited as the individuals may not fully express their opinion on the issue and their answers may be based on

legitimizing their organizational actions; therefore there may be some limits on what can be inferred from such data collection.

The failure to include an interview with Jacqueline Nassiah may be viewed as another limitation, but Ms. Nassiah's testimony is very detailed within the case decision⁵¹. Also, the aim of the thesis is to examine the occurrence of racial profiling and policing on a greater level which focuses more on the organizational policies and on the theoretical models.

One of the orders of the Human Rights Tribunal of Ontario following the Nassiah Case decision on May 11, 2007 required Peel to develop a specific directive prohibiting racial profiling under the *Human Rights Code*. On June 1, 2007, Peel Chief of Police M. Metcalf issued a racial profiling directive outlining the purpose, policy, definitions, statement of principle, and the responsibilities of every member of the Peel Regional Police in relation to racial profiling. The purpose of the directive is "to familiarize all personnel with the policy of the Peel Regional Police regarding racial profiling in accordance with the principles stated by the Ontario Human Rights Commission"⁵².

The policy of Peel Regional Police is very important as it reflects the changes incorporated by Peel following the Nassiah Case decision. The new policy aims to "prohibit all forms of racial profiling in interacting with, investigating and processing all persons; and, adhere to the principles stated in the Race Relations and Anti-Discrimination Directive I-B-136(F).⁵³ In the section entitled Responsibilities Relating to Racial Profiling, Peel addresses important issues surrounding racial profiling and policing, while also providing training procedures for new recruits, current officers, and members of Peel Regional Police. The directive states that the

⁵¹ HRTO. (2007), No 14.

⁵² Peel Regional Police Directive. (2007).

⁵³ Peel Regional Police Directive. (2007).

training should be at least two hours long and in cooperation with the Diversity Relations Bureau. Also, the training material should be designed to give Peel members a better understanding of racial profiling and provide ways of preventing the practice.

The training video is also important because Peel Regional Police and the Ontario Human Rights Commission had a difficult time coming to an agreement in regards to the video's content. The video was designed for the purpose of training the employees of Peel Regional Police. The video includes different scenarios of police to citizen interaction in order to give a better understanding of what constitutes racial profiling. The differing organizational goals and views between the PRP and OHRC on racial profiling are reflected in the finalization of the training video, because it took several drafts for an agreement to be reached. The video demonstrated how the police take more of a law enforcement approach while the OHRC focus on civil liberties and rights.

The differing institutional classification for risk management between the Peel Regional Police and the Ontario Human Rights Commission is apparent in one of the scenarios included in the training video. The "Street Interview" section outlines how a police officer should react in order to avoid racial profiling. In this scenario, there was a reported theft and a police officer was called to look for suspects in the neighbourhood. The police officer came across a boy with a backpack, who happened to be Black, walking across the lawn of his house. The police officer was friendly and he explained the reasons that they were stopping and questioning civilians. The police officer asked the boy what was in his backpack and if he can be searched, and the officer asked the boy if he was sure that this was his house.

Peel Police viewed the scenario as acceptable behaviour by a police officer. The officer was not targeting the boy because he is Black, but rather because there was a theft that occurred

in the neighbourhood and because of the boy's suspicious behaviour. The Ontario Human Rights Commission, on the other hand, viewed the actions of the police officer as unacceptable because the boy did not do anything wrong and therefore the officer had no right to search his backpack.

This example demonstrated the differing approach in law enforcement by the PRP and the OHRC. The training video provides an agreement between the Peel Regional Police and the Ontario Human Rights Commission regarding the training material of Peel employees on the issue of racial profiling. The video is significant because it demonstrates that even though the two organizations have disagreements, they are still able to find a common ground.

Ontario Human Rights Commission Review

Documentation was collected from the Ontario Human Rights Commission website, in order to analyze the organization's policy and guidelines when it comes to racial profiling. The Ontario Human Rights Code is an important piece of information because it provides legal guidelines for the Tribunal to determine if there was a violation of human rights and if racial profiling did occur. Prior to 1962, there were various laws prohibiting discrimination, but the Human Rights Code brought everything together in one law. In June 2008 there were revisions done to the Code and as a result of these changes, Ontario's Human Rights system now consist of three independent parts: the Human Rights Tribunal of Ontario, the Human Rights Legal Support Center, and the Ontario Human Rights Commission. It is important to analyze the OHRC "*Code*" in order to have a better understanding of the Nassiah Case decision.

The OHRC website also contains a report entitled *Policy and Guidelines on Racism and Racial Discrimination*. The Guidelines are based on the provisions of the *Ontario Human Rights Code* in relation to racial discrimination. The policies and guidelines are there to ensure compliance with the *Code* by individuals, employers, service providers, and policy makers. While they are not binding on the human rights tribunal or on courts, there is great importance placed on adherence to them. They deal primarily with issues that are within the jurisdiction of the Commission, and are determined within Canada's legal framework for analyzing discrimination. The policy takes a broad approach to the interpretation of the *Code*. It is thus consistent with the quasi-constitutional status of the *Code*, which states that it be given liberal interpretation that best ensures its anti-discriminatory goals.

The preface of the report gives an understanding of the definition of racial discrimination and provides "Every person in Ontario has a right to be free from racial discrimination and harassment in the social areas of employment, services, goods, facilities, housing accommodation, contracts and membership in trade and vocational associations"⁵⁴. The policy report aims to outline the importance of awareness regarding racial discrimination, and that the phenomenon is still very much a part of society today. The report shows the OHRC's dedication to civil liberties and it shows the organization's dedication in maintaining human rights.

The policy sets out the Commission's view on racism, racial discrimination, and racial harassment, and is designed to replace the Commission's 1996 *Policy on Racial Slurs and Harassment, and Racial Jokes*. *The Policy and Guidelines on Racism and Racial Discrimination*

⁵⁴ OHRC. (2005), p.4.

consists of a wide range of topics, all in relation to racial discrimination. Part I of the policy outlines background information of Racism, and provides information to help understand and define the phenomenon. Part II is the Policy Framework section and it explains the types of racial discrimination and the organizational responsibility regarding the issue. Part III of the policy outlines the Guidelines of Implementation: Monitoring and Combating Racism and Racial Discrimination. In the concluding statements, the Commission addresses organizational responsibility to proactively adopt measures to address racism and racial discrimination. The Commission takes it upon itself to pursue public interest that is aimed at correcting systemic discrimination and historical discrimination in decisions before the tribunal. “Individuals, organizations and institutions can be held liable for actions that are discriminatory or harassing but also for failing in their duties to take appropriate action to address human rights issues of which they are aware, or ought to be aware.”⁵⁵ This report along with the *Ontario Human Rights Code* is used to demonstrate the perspective of the OHRC and to show the organization’s view on racial profiling.

⁵⁵ OHRC. (2005), p.44.

Chapter 4: Theoretical Analysis of Racial Profiling and Nassiah Decision

Background on Race and Theory

In current research regarding racial profiling, there is little focus on the theoretical context surrounding the issue of race and policing. Many of the studies conducted are directed toward police traffic stops, searches, and arrests. “Problems with the interpretation of empirical data are due partially to data collection efforts that have not addressed why officers might engage in decision making based on citizens’ race”⁵⁶. In order to understand the complexities of racial profiling, one needs to examine the possible reasons behind a police officer’s biased behaviour. “Social risk theory” and “social exclusion theory”, along with Herbert Packer’s crime control and due process model and “thin-slicing”, are a series of approaches that will be used to examine the roots of racial profiling, the concept of bias, and to analyze and critique current law enforcement practices and proposed solutions to this problem.

Due Process and Crime Control

Herbert Packer’s two models of the criminal justice system are important in analyzing the differing agendas and perspectives of the police and civil libertarian organizations. The models will also analyze the competing perspectives that the Peel Regional Police and the Ontario Human Rights Commission brought to the Nassiah Case. Both institutions use the notion of risk management, but the type of model used in assessing risk is where the two organizations differ.

The Human Rights Tribunal of Ontario uses the due process model in measuring risk to individual liberty while the Peel Regional Police uses the crime control model in measuring risk

⁵⁶ Engel, Calnon, & Bernard. (2002), p. 259.

to public safety. Even though the OHRC and PRP are both utilizing risk-based approaches, they end up with competing agendas. It is therefore understandable that each organization would have a different definition of racial profiling and a different outlook on the enforcement of laws regarding racial profiling and policing.

The due process model explains the value perspective and agendas of civil libertarians, lawyers, and the Human Rights Commission. This model emphasizes individual rights outlined in the *Charter* and the *Ontario Human Rights Code* in order to protect citizens from the coercive actions of persons in authority. The model stresses potential error within the system, particularly against minorities, and operates on the presumption of innocence. Under this model, the police are expected to operate in accordance with the rule of law in order to minimize police powers and protect citizens.

The Tribunal's concern for due process is clear throughout the proceedings in the Nassiah Case. The Tribunal hears the testimony of both parties and their witnesses, and evaluates the evidence fairly based on the balance of probabilities. The role of the Tribunal is to provide equal access and equal rights to the parties involved by utilizing the *Ontario Human Rights Code*. The tribunal's role is to focus on the human rights issues and determine if the *Human Rights Code* has been violated. "The *Code*'s goal is to prevent discrimination and harassment because of race, sex, disability, and age, to name a few of the fifteen grounds. All other Ontario laws must agree with the *Code*"⁵⁷. Everyone is given a fair chance to represent their case in order to ensure that the due process model is maintained throughout the legal proceedings.

⁵⁷ OHRC. (2009).

The perspective of the Ontario Human Rights Commission illustrates the view of civil libertarians in maintaining and protecting fundamental human rights guaranteed to individuals by law. The concept of due process thus includes applying the law plus police discretionary power in a non-discretionary way. The Commission aims to limit the power of governmental authority and ensure that the private citizen's rights are not abused.

According to Herbert Packer, the crime control model emphasizes efficiency in law enforcement and operates on the presumption of guilt. The model views police as the “good guys” and therefore the laws should be enabling so that the police can use powers that are necessary to arrest and charge offenders, investigate crime, and obtain convictions. The rights of the public outweigh the rights of individuals where the repression of crime and maintenance of social order is of the highest importance in the justice system. The crime control model reflects the values and agendas of police agencies and naturally comes into conflict with values that prioritize concern for civil rights.⁵⁸ The Peel Regional Police do not deny the existence of racial profiling and agree that steps need to be taken in order to reduce and eventually eliminate racial profiling within the police force. The PRP nevertheless argues that race is a necessary factor in criminal profiling that can help police officers identify and apprehend potential offenders.

Officer Elkington's investigation in the Nassiah Case demonstrates the crime control approach to policy. The key element of this model is the presumption of guilt, which is clearly visible in Officer Elkington's investigation. He accepted the security guard's assertion that the video tape showed evidence of theft. He adopted an assumption of guilt approach to the investigation by asking Ms. Nassiah “where's the bra” repeatedly, even though there was no clear evidence of theft. Also, the officer demonstrated a high degree of suspicion by continuing

⁵⁸ Packer, H. (1968), p. 158.

to investigate the case instead of releasing Ms. Nassiah, even though the video did not clearly indicate theft, and two physical searches of Ms. Nassiah's person came up with nothing.

The presence of the Crime Control Model within police investigations is further demonstrated by the interview with the Peel Regional Diversity Director. The Peel spokesperson outlined that Officer Elkington was following basic police procedure and that his investigation was thorough and considered good practice. "The presumption of guilt is what makes it possible for the system to deal efficiently with large numbers, as the Crime Control Model Demands"⁵⁹. The Peel spokesperson further outlined that Officer Elkington maintained the police standard by establishing the facts of the case and exonerating Ms. Nassiah.

Officer Elkington asked Ms. Nassiah if she spoke English because she is Black. Upon seeing that Ms. Nassiah was a Black woman, he was more suspicious and his investigation was heightened. Due to the belief that visible minorities are more likely to commit crime and be at greater risk to society, Officer Elkington adopted a guilty approach to the investigation. Race should never be a factor in police stops, searches, arrests, etc. The OHRC clearly outlines that racial profiling is not to be allowed in any circumstances, and that the due process concerns should always take precedence over the crime control concerns. The adaptation of the crime control model when race is a factor can increase the likelihood of racial profiling by the police whether it is conscious or unconscious.

Due to the fact that the crime control model is concerned with efficiency in preventing and punishing crime, it is also for the purpose of efficacy that racial profiling occurs. "The model, in order to operate successfully, must produce a high rate of apprehension and

⁵⁹ Packer, H. (1968), p. 160.

conviction...Routine stereotyped procedures are essential if large numbers are being handled”⁶⁰. The nature of the Crime Control Model makes police more prone to racial profiling because the focus lies on efficiency rather than accuracy, which can lead to wrongful apprehension and conviction.

Thin-Slicing

“Thin-slicing” can also be applied to understanding the competing notions of risk between the OHRC and PRP, reflecting each institution’s actions and agendas. According to Malcolm Gladwell, thin-slicing allows individuals to make quick decisions based on minimal information. “Thin-slicing refers to the ability of our unconscious to find patterns in situations and behaviour based on a very narrow slice of experience”⁶¹. Thin-slicing is a natural human trait that can be very beneficial when we are coming to conclusions in regards to an individual, career or a particular situation. In the book *Blink*, one of the examples that outline the benefits of thin-slicing is the way doctors diagnose heart attacks in Cook County Hospital in Chicago. Doctors thought that getting as much information as possible from the patient would help them determine if the patient was at risk, but it turns out that the doctors were not very accurate. After several studies the hospital adapted the Goldman algorithm for chest pain, which states that all that is needed to predict heart attacks right now is the patients ECF, blood pressure, fluid in the lungs, and unstable angina. “What screws up the doctors when they are trying to predict heart attacks is that they take too much information into account”⁶². Thin-slicing may allow us to get to the truth with minimal information, yet it can also cause us to make the wrong snap judgement.

⁶⁰ Packer, H. (1968), p. 159.

⁶¹ Gladwell, M. (2005), p. 23.

⁶² Gladwell, M. (2005), p. 137.

Sometimes quick decisions can be clouded by previous experience or by the environment. “What we think of as free will is largely an illusion: much of the time, we are simply operating on automatic pilot, and the way we think and act – and how well we think and act on the spur of the moment – are a lot more susceptible to outside influences than we realize”⁶³. Due to the fact that most of these biases are unconscious, it becomes very difficult to identify them and solve the problem. One of the examples used in the book *Blink* is the Race Implicit Association Test (IAT) developed by psychologist to test how the unconscious can play a role in one’s thoughts and behaviour. The test is done on the computer and people are directed to complete it quickly. A series of pictures and words are flashed on the computer screen, and the subject is asked to match the image to the word. Part 1 of the test uses one category of European American or bad and African American or good, and in part 2 the categories are reversed. The results showed that people had more difficulty putting negative associations to white people but it was fairly easy for them to put the negative associations to black people.

“It turns out that more than 80 percent of all those who have ever taken the test end up having pro-white associations, meaning that it takes them measurably longer to complete answers when they are required to put good words into the “Black” category than when they are required to link bad things with black people”⁶⁴.

Living in a society that portrays the idea of white as good and associates black with crime can negatively affect an individual’s beliefs and behaviour without the individual even realizing it.

Stereotypical beliefs regarding visible minorities may be embedded within our unconscious and projected on to individuals without our awareness. In the Nassiah Case, it is quite possible that both the security guard and the police officer are not consciously racist, but seeing that Jacqueline Nassiah is a black woman could have interfered with their ability to see

⁶³ Ibid. p. 58.

⁶⁴ Ibid. p. 84.

that she was innocent. “The Warren Harding error is the dark side of rapid cognition. It is at the root of a good deal of prejudice and discrimination”⁶⁵. While the security guard was watching the security video, his attention focused on Ms. Nassiah possibly because of our general predisposed ideas about black people and crime. When Jacqueline got out of the change room, it seemed as though she only had one brassiere in her hand instead of two. The security guard then made a snap judgement that she in fact stole the bra. The video was not fully examined by the security guard and even after the body search did not provide the stolen brassiere, the security guard still detained her and called the police.

When Officer Richard Elkington arrived at the scene, his reaction to the suspect reflects a racial stereotype. Upon seeing Jacqueline Nassiah, the officer asked if she spoke English, and then proceeded to believe the security guard over the suspect, even though the video tape was not fully examined and there was no sign of the stolen brassiere. The suspect was detained and questioned for over two hours even though there was not enough evidence to prove that she in fact did steal the brassiere. Ms. Nassiah has indicated in her testimony that Officer Elkington repeatedly asked her where the brassiere was, even though she said she did not have it, leading up to the point that he uttered a racial slur and threatened to take her to jail if she did not produce the brassiere.

Officer Elkington adopted an assumption of guilt approach based on very little factual evidence. It is very plausible that on an unconscious level, Richard Elkington saw that Ms.

⁶⁵ Gladwell, M. (2005), p. 76.

The Warren Harding Error: “Many people who looked at Warren Harding saw how extraordinarily handsome and distinguished-looking he was and jumped to the immediate – and entirely unwarranted – conclusion that he was a man of courage and intelligence and integrity. They didn’t dig below the surface. The way he looked carried so many powerful connotations that it stopped the normal process of thinking dead in its tracks.”

Nassiah was a Black woman and based his approach on the belief that black people are more likely to engage in criminal activity. Upon seeing that Ms. Nassiah is Black, Officer Elkington's investigation was more intense, suspicious and heightened. In the Tribunal's findings, the Adjudicator Kaye Joachim concluded that Richard Elkington consciously or unconsciously treated Ms. Nassiah with more suspicion that he would have a White suspect, based on her skin colour.⁶⁶ Even in light of the video evidence, which showed an indeterminate portrayal of theft, the officer persisted in asking Ms. Nassiah where the brassier was, which demonstrates a high degree of suspicion. The officer continued with his investigation with little factual evidence, even after the second search of Ms. Nassiah's person provided no evidence of the stolen brassier. According to Malcolm Gladwell, racial discrimination may not be deliberate, as some people are not even aware of their unconscious attitudes.

Officer Elkington's and the security guard's stereotypical views could have originated from various sources such as personal experience, media, and systemic police force beliefs. "Our instinctive reactions often have to compete with all kinds of other interests and emotions and sentiments"⁶⁷. This is an example of thin-slicing gone awry. Neither the security guard nor the police officer were able to consider the possibility of Jacqueline Nassiah's innocence because their snap judgements were influenced by the suspect's skin colour. When rapid cognition fails, is it typically due to a specific and consistent set of reasons which can be identified and controlled. Racial discrimination that is embedded in our unconscious can be managed, but it is dependent on each individual person. As long as people are aware of the problem, they can educate themselves and learn how to think logically and make better snap judgements. "Taking rapid cognition seriously – acknowledging the incredible power, for good and ill, that first

⁶⁶ HRT0. (2007), No 14, p. 40.

⁶⁷ Gladwell, M. (2005), p. 15.

impressions play in our lives – requires the we take active steps to manage and control those impressions”⁶⁸

There are many different factors that can affect people’s snap judgements and Gladwell provides many ways of dealing with the interruptions to rapid cognition. The key factor in making the right snap judgements is training and experience. In the case of police officers, they need to be properly trained and have adequate experience so that they are able to make the right decisions without outside interruptions like stress and/or racial bias. “Our unconscious thinking is, in one critical respect, no different from out conscious thinking: in both, we are able to develop our rapid decision making with training and experience”⁶⁹. This is an important factor when it comes to racial profiling and policing, because it demonstrated that the issue can be eliminated within the police force with proper training techniques and an officer’s own will. “Every moment – every blink – is composed of a serious of discrete moving parts, and every one of those parts offers an opportunity for intervention, for reform, and for correction”⁷⁰. According to risk theory, the police services are always risk-profiling and are tailored to specific racial and ethnic populations.

Social Theory of Risk

Risk theory focuses on risk management, and classifying populations based on their risk to society. The theory argues that the police are part of the risk communication system which involves other institutions and operates under specific rules and procedures.

⁶⁸ Ibid. p. 98.

⁶⁹ Ibid. p. 237.

⁷⁰ Ibid. p. 241.

“Policing is a matter of responding not only to individual demands for service but also to institutional demands for knowledge about risk...the framework through which police officers think and act is determined not only by formal legal rules, administrative rules, and the informal rules of the occupational culture but also by the risk communication rules, formats and technologies of external institutions”⁷¹.

The bulk of police work is collecting and formatting data about specific populations to determine those who pose a risk to society, so that these individuals or groups can be managed not just by the police but also by other governmental institutions. The idea of the police officer as a crime fighter shifts to the police officer as a knowledge worker.

The risk theory views deviance as a problem and offers systemic and mechanical solutions. A great deal of importance is placed on technology when it comes to risk management, especially on surveillance.

“The focus on surveillance for risk management means that knowledge of the person, organization, or other thing as a risk is emphasized more than the subject’s moral culpability or responsibility for a particular act of wrongdoing. Everyone and everything is to be made knowable through surveillance mechanisms. Everyone is presumed guilty until the risk profile proves otherwise”⁷².

People are being monitored so that the police and other institutions are aware of their activities, and those individuals who have engaged in criminal activity or have been convicted are even more likely to be monitored. Black people, for example, are viewed by the general public as more likely to be associated with crime, which in turn causes greater surveillance and a greater probability of being caught in criminal behaviour. Visible minorities have been portrayed in a certain way by the media, which causes people and police officers who come in contact with these individuals to automatically associate negative traits with their behaviour. The system of

⁷¹ Ericson & Haggerty. (1997), p. 17.

⁷² Ibid. p. 42.

risk management follows specific rules, which significantly impacts a police officer's view on certain groups and populations.

According to the risk theory, every population of individuals is subject to surveillance and the type of surveillance system that people are subject to is dependent on the institutions that they participate in. "Those populations whose risk histories have constituted them as weak and dependent are subjected to the state's criminal, welfare, and mental health surveillance systems, among other forms of surveillance"⁷³. Every individual is considered to be guilty until their "risk profile" proves otherwise.

The way that the police think and act is heavily influenced by external institutions because they are required to follow a particular format of risk classification. It is these rules and formats that can cause police officers to have biased opinions or stereotypical views about specific groups or ethnic minorities.

"Just as the police think and act in ways that are responsive to the age structure of the population, they also think and act in ways that are responsive to racial and ethnic classification. The officer is thereby always reminded to think of race as a relevant variable when dealing with people"⁷⁴.

The occurrence report that is filled out by the police has a category for the racial and ethnic backgrounds, which indicates that race is used in order to assemble people into proper categories. Race becomes a significant factor in these reports, because the police associate the race with the particular crime.⁷⁵ Therefore any interaction between the police officer and visible minorities may be influenced by the specific classification determined to be associated with a specific race.

⁷³ Ibid. p. 41.

⁷⁴ Ibid. p. 282.

⁷⁵ Ibid. p. 8.

The application of risk theory to the Nassiah Case can shed light on some of the reasons behind the officer's biased behaviour. Richard Elkington's response to Ms. Nassiah is consistent with the risk theory. The presence of risk classification, especially associated with a specific race is part of risk management, and has an impact on the officer's behaviour and investigation practices. According to this theory, Officer Elkington's actions were based on the institutional requirements of risk management. Members of the African communities are under greater surveillance by the police, due to the institutional belief that Black people are more likely to be associated with crime. "Urged by other institutions, the police use racial and ethnic classification to understand trouble and to risk-profile populations".⁷⁶ Therefore, the Police Force is required to follow certain rules and procedures in dealing with the public, which can lead to racial biases and discrimination. Placing specific individuals and groups in categories can lead to the targeting of innocent individuals. The basis of risk theory emphasizes the organizational role in racial profiling as it is the requirement of the police organization that leads individual officers to engage in discriminatory behaviour.

Racial profiling may be associated with the organization in which the officers are encouraged to stop, search and/or investigate certain types of offenders. Through risk management, the police organizations have knowledge of "hot spots", which are areas where crime most frequently occurs. Through the knowledge of these geographical areas, the police are more likely to target these specific locations in order to reduce crime. Usually these locations are predominately occupied by minority groups.

"Due to the fact there is a strong relationship between crime, calls for service, and neighbourhood racial composition, it is very possible these places are differentially

⁷⁶Ibid. p. 444.

located in predominately minority communities. Therefore, these organizational policies may explain the disparity in encounters between the police and the minority public”.⁷⁷

The organization believes that there is racial variation in crime. The targeting of these “hot spots” is therefore justified under the account that specific minorities commit crime at higher rates.

The interviewing of the spokesperson from the Ontario Human Rights Commission showed that the view of the civil libertarians is that racial profiling is in part an organizational issue. The spokesperson stated that it is the employer’s obligation to educate their employees and to deal with behaviours and practices. The police force needs to ensure that they have policies and procedures in place to deal with any cases of racial profiling if they arise.⁷⁸ The Peel Regional Police on the other hand believes that it is not an organizational issue because they have “aggressive training and conduct” in place and take the view that they will not recruit perfect police until the society is perfect.⁷⁹

Social Exclusion Theory

In examining risk theory, it is important to understand the reason certain ethnic groups or populations are more likely to be at risk of criminal activity. The Nassiah Case deals with racial profiling in a different setting, where it was replicated in a shopping mall with a private sector security guard. Nassiah was seen as an “outsider” and a “threat” which immediately triggered

⁷⁷ Novak, K. (2004), p. 69.

⁷⁸ Interview with Director of the Legal Services Branch of the OHRC. (2009).

⁷⁹ Interview with PRP Diversity Director. (2009).

exclusionary thinking. The theory of social exclusion can shed some light on the issue by explaining the patterns of the current postmodernist society and how it can impact our thinking.

The theory of exclusion focuses on the changing patterns of crime throughout history, and how the criminal pattern in today's society is one of exclusion. "It is a movement from an inclusive society of stability and homogeneity to an exclusive society of change and division"⁸⁰. *The Exclusive Society* by Jock Young outlines the transition from a society of certainty and inclusion to one of uncertainty and exclusion. The way that society viewed deviance under modernity was in terms of rehabilitation and socialization, so that the deviant individual could become part of society once again. In postmodernist society, deviant individuals are viewed as outsiders or abnormal with the stereotypical label following them throughout life.

With the transformation in the structure of society comes the concept of the "underclass", a group of individuals, usually visible minorities, who are excluded from the labour markets, civil society and the criminal justice system. "In the modern world exclusion occurs in three levels: economic exclusion from labour markets, social exclusion between people in civil society and the expanding exclusionary activities of the criminal justice system and private security"⁸¹. With limited job opportunities, the "underclass" is labelled as dangerous and therefore excluded once again from protection and security. These minorities are more likely to feel that they are being targeted by the police, which decreases cooperation with the police and increases crime. "The theme of exclusion enters this argument as the criminal justice system increasingly bases its activities on the selection of social categories that are most likely to commit a crime"⁸². Young argues that it is not necessarily the deprivation of opportunities that causes disorder but rather the

⁸⁰ Young, J. (1999), p. 3.

⁸¹ Ibid. p. 3.

⁸² Reithof, M. (2000), p. 3.

unfair distribution of the existing resources. The focus of law enforcement should not be on risk management but rather on accepting diversity and eliminating relative deprivation.

Relative deprivation refers to individuals or a group of people who feel that they are unfairly disadvantaged over others who have similar attributes.

“Relative deprivation is conventionally thought of as a gaze upwards: it is the frustration of those denied equality in the market place to those of equal merit and application...it is also a gaze downwards: it is dismay at the relative well-being of those who although below one on the social hierarchy are perceived as unfairly advantaged”⁸³.

Relative deprivation may explain a propensity to steal, but this is not the issue. The issue here is the behaviour of the police who target and discriminate. However if minorities are viewed by the police as poor, the police will more likely focus their attention and suspicions on them and proactively stop, question, and search, etc. “Minority citizens for some time have argued that they are singled out for traffic law enforcement and that, once stopped, they are at greater risk for more invasive investigations...”⁸⁴ It is this discontent that is transformed into crime. Crime is considered more widespread because discontent can be experienced anywhere within the class structure, but discontent is the greatest among those socially excluded. The underclass is created from social exclusion in the labour market and civil society. An important instrument for the creation of this exclusion has historically been policing.

A clear distinction between the outsiders and the core group is created in every aspect of life, especially by money. The “underclass” usually live in areas more susceptible to crime and police surveillance. “This section of the population has a large ethnic minority constitution, creating the possibility of easy scapegoating and of confusing the vicissitudes of class with those

⁸³ Young, J. (1999), p. 9.

⁸⁴ Tomaskovic-Devey, Mason, & Zingraff. (2004), p. 4.

of race”⁸⁵. The focus is on keeping these individuals excluded from the rest of society through poverty and deprivation. Many companies move their business to South East Asia where labour is cheaper, leaving the workers in North America unemployed. Due to the decrease in the labour market, many of these individuals are left jobless and often turn to criminal behaviour for survival. The success of the companies is measured by increasing profit and productivity while decreasing workers. “It is an actuarial process of exclusion and risk management coupled with a cultural mechanism of scapegoating: the creating of a spatially and socially segregated deviant other”⁸⁶.

The tendency of law enforcement to focus on risk management can result in the targeting of visible minorities. Social exclusion theory can provide some insight in regards to the reasons why the police are more likely to target minorities. Minorities are more likely to reside in lower-economic neighbourhoods, which are associated with higher crime rates and therefore resulting in increased police surveillance. Racial profiling is more likely to occur as the police and minorities are in contact more frequently.

Jaqueline Nassiah is a black woman who was accused by the security guard, John Nevers, and later by the police officer, Richard Elkington, of committing a crime that she did not commit. The targeting of visible minorities can be seen through the social risk theory and through the social exclusion theory. According to risk theory, police are more likely to target ethnic and/or racial minorities due to the fact that they are considered to be at a higher risk of criminal activity. The reason for the increase in risk is the fact that visible minorities are more likely to be excluded from society and therefore more likely to engage in crime. Ms. Nassiah

⁸⁵ Young, J. (1999), p. 20.

⁸⁶ Ibid. p. 22.

immigrated to Canada from Trinidad, and according to the social exclusion theory, immigrants are often excluded from the economic system, forcing them into lower economic areas and thus resulting in increased police surveillance.

Research regarding racial profiling and policing has mostly focused on the way in which the enforcement of traffic regulations is used as an excuse to stop, search, and arrest radicalized motorists. In examining and analyzing the issue of racial profiling, it is evident that the phenomenon does exist, but the reason why it occurs is not very clear. In examining different theories, it is evident that racial profiling can stem from various sources, such as society, the individual, and an organization. It is important to note that biases stem from a combination of factors but can be heightened if an individual is part of an organization that condones the behaviour. Risk theory suggests that every organization operates under a set of characteristics and classification in order to produce knowledge to external institutions.

The differing perspectives between the Ontario Human Rights Commission and the Peel Regional Police are based on the different classifications of each organization. The Police Force is more focused on risk management while the civil libertarians are more focused on human rights. In order to eliminate or reduce the occurrence of racial profiling and policing, the structure of the Police Force needs to shift from a risk management method towards more of a civil libertarian approach.

Summary

None of the theoretical models mentioned are adequate in themselves to analyze the various issues related to racial profiling. Racial profiling is a complex issue that is connected to law enforcement, social order agendas, civil liberties and various other institutions and factors. Consequently each of the models have shortcomings, but together they can provide a better understanding of the conflicting issues and perspectives of the police, minorities, and other agencies including the Ontario Human Rights Commission.

Herbert Packer's two models of the criminal justice system are important in analyzing the differing perspectives of the police and civil libertarian organizations. The crime control model and the due process model particularly pertain to the Nassiah Case because each organization follows a specific model when it comes to the issue of racial profiling. The Human Rights Tribunal of Ontario focuses on the due process model by emphasizing individual liberties and freedoms. Peel Regional Police on the other hand lean toward the crime control model, placing emphasis on enforcement and prosecution of suspects, and therefore sometimes violating an individual's rights. The two competing system of values cause tension between the Peel Regional Police and the Ontario Human Rights Commission. This tension can be seen throughout the Nassiah Case and is reflected in the differing perspectives of each organization regarding the issue and occurrence of racial profiling.

Another important theory in relation to racial profiling is Thin-slicing. Thin-slicing theory refers to rapid cognition, or the thinking that occurs with a blink of an eye.⁸⁷ Gladwell describes thin-slicing as "sifting through the situation in front of us, throwing out all that is irrelevant while we zero in on what really matters"⁸⁸. There is also a dark side of Thin-slicing which can interrupt the normal process of thinking. People's racial attitudes on an unconscious level can be influenced by external factors, and risk theory, crime control and due process models, and social exclusion theory can be used to understand the reasons behind a police officer's discriminatory behaviour.

Risk theory outlines the organizational structure of the police, a process where individuals are classified based on their risk to society. Thin-slicing theory, on the other hand, refers to the snap judgement that occurs within the unconscious, which can be influenced by external factors. A police officer's snap judgement can be influenced by various factors such as the police department's organizational structure of risk management, by the crime control model, and by the officer's experience. When all of the above factors are put together, it is easier to understand how these factors could have interrupted officer Elkington's ability to see that Nassiah was innocent.

Another factor that could have clouded officer Elkington's judgement is relative deprivation. Relative deprivation is part of the social exclusion theory and it suggests that the socially excluded "underclass" are more likely to commit crime because of the lack of opportunity to achieve economic expectations. Social exclusion theory focuses on the changing crime patterns throughout history, and society's transition from one of inclusion to exclusion.

⁸⁷ Gladwell, M. (2005), p. 23.

⁸⁸ Ibid. p. 23.

This is an important factor that can influence a police officer's snap judgement, because the police are more likely to target and discriminate minorities who are poor and who they believe are more likely to commit crime. The necessary steps required in order to significantly reduce the occurrence of racial profiling is to design policies which address all of the above issues.

Chapter 5

Legal Outlook and Solutions

The issue of racial profiling and policing has initiated much research and public debate, and has been prominent in legal policy for a number of years. Racial profiling is alleged to occur within law enforcement and the Nassiah Case is held out as an example of this common practice. The Ontario Human Rights decision is significant because it reinforces the principle that discrimination is not acceptable and that individuals who feel discriminated against can take action. The decision has also led the Peel Regional Police to reform their racial profiling policies. This chapter will analyze and critique the Human Rights process, the Nassiah decision, and the Peel Regional Police response to the recommendations. The chapter will also outline the consequences of racial profiling and its ability to directly influence the relationship between citizens and police and the public's trust in the Canadian legal system.

Consequences of Racial Profiling

Current research indicates that minority groups and other citizens perceive the police to be racially biased and to engage in racial profiling in making traffic stops. "Minority citizens for some time have argued that they are singled out for traffic law enforcement and that, once stopped, they are at greater risk for more invasive investigations..."⁸⁹. The issue of racial profiling is known in several other countries where the police and other law enforcement officials are frequently accused of targeting racial and ethnic minorities for increased scrutiny and detention. As indicated by the 2003 *Toronto Star* publications on racial profiling, many

⁸⁹ Tomaskovic-Devey et al. (2004), p. 4.

media outlets have accused the police of engaging in discriminatory practices, and called on governments to pass laws prohibiting such practices with respect to minorities.

Racial profiling has detrimental effects on individuals and is viewed as harmful for a variety of reasons. Royson (2006) refers to the practice as racist and “an assault on the senses, the mind, the self-esteem, one’s humanity”⁹⁰. Similarly, Tanovich (2006) contends that racial profiling causes enormous psychological damage to racial and ethnic communities and engenders within them a mistrust of the police and the justice system. Harris argues that racial profiling is harmful and misguided since it leads to the constant stopping, questioning, and searching of people who fit a very crude profile of suspects. “Most of these stops constitute wasted effort because the vast majority of citizens targeted are in fact law abiding, hard working, taxpaying citizens”⁹¹. Law enforcement organizations need to explore what needs to be done to increase citizens’ confidence in the fairness of the police.

The public perception of policing is important and should not be viewed by the police as insignificant. The belief that police may be enforcing the law in a biased fashion is enough to undermine confidence in the police and reduce community cooperation. When people lose confidence in the integrity and even-handedness of the police and trust in them erodes, people will feel less inclined to talk to the police and pass important information on to them⁹².

Police-minority relations have been known to be problematic in Canada, the U.S., and Britain. Research has consistently shown that members of minority groups are more likely to view the police with considerable suspicion. In addition, many studies reveal that residents of

⁹⁰ Royson, J. (2006), p. 4.

⁹¹ Harris, D.A. (2006), p. 234.

⁹² Ibid. p. 228.

neighbourhoods with large minority populations often express the greatest hostility towards the police. “The belief or perception that the police engage in the practice of racial profiling has further exacerbated the already strained and complex relationship between the police and members of the minority community”⁹³. In addition, widespread public belief that the police engage in racial profiling undermines confidence in the police among other groups within society who see the practice as biased and unfair.

Human Rights Tribunal of Ontario Procedures and Nassiah Case

The Human Rights Tribunal is responsible for resolving Applications filed by individuals or organizations who claim that they have experienced discrimination or harassment. An Application must be filed in order for the Tribunal to determine if a violation of the Human Rights Code has occurred. The Tribunal hears both sides in an attempt to resolve a dispute and settle an agreement through mediation or adjudication.

“If the Tribunal finds that the Applicant experienced discrimination or harassment the Tribunal can make an order to address the discrimination or harassment. This can include ordering the Respondent to pay financial compensation to the applicant, and/or make orders to prevent further human rights violations. If the Tribunal finds that discrimination did not occur, it will dismiss the Application”⁹⁴.

The Applicant must complete the relevant forms pertaining to the type of harassment or discrimination so that the issue can be dealt with by the Tribunal.

The Tribunal aims to provide an inclusive environment where all members of the community are treated equally. It utilizes the Ontario Human Rights Code as the basis for its hearings and all hearings must meet specific criteria and legal procedures. The Information

⁹³ Birzer & Birzer. (2006), p. 644.

⁹⁴ HRTTO. (2008a).

Bulletin outlined by the Human Rights Tribunal of Ontario (HRTO) states that outcomes are based on the facts of the case, the law, and the merits of the application. Within the hearing process the tribunal commits itself to the following: “that it is fair, just and expeditious, responsive to parties that appear before the HRTO, appropriate to the nature of the particular case, and that they are able to determine the merits of an application, considering the facts and the relevant legal principles”⁹⁵. The hearing is considered a legal process where the parties are expected to be present and prepared to present their case.

Parties may be self-represented or represented by a lawyer or a paralegal who is licensed by the Law Society of Upper Canada (LSUC). In some cases parties can be represented by unlicensed individuals providing that the LSUC has exempted them from their licensing requirements. The current exemptions allow a friend or a family member, volunteers and employees of Legal Aid clinics, and students to act as representatives. A licensed representative needs to provide the Tribunal with the LSUC number in order to ensure that the process is not abused. The representative, whether licensed or not, is expected to know and follow the HRTO’s rules and orders. Also the representatives are responsible for all communications between the HRTO and other parties, including presenting the client’s case in front of the HRTO.

The HRTO adjudicator plays a primary role in the hearing process in order to ensure that the hearing is fair and that all facts and legal contexts have been considered. “The HRTO’s Rules of Procedure allow the adjudicator to adopt non-traditional methods of adjudication in order to best focus on the human rights issues in dispute and reach a decision about whether the Ontario

⁹⁵ HRTO. (2008b).

Human Rights Code (the “Code”) has been violated”⁹⁶. The procedures in each hearing can vary depending on the particular case, including if the parties are represented or self-represented. The HRTTO adjudicator is a neutral decision maker that has the power to question witnesses and parties, receive testimony that is not under oath, and limit the submission and evidence on any issue. After the hearing, the adjudicator carefully considers all the evidence and submissions in order to make a fair decision. If the adjudicator believes that there has been a violation of the code then a proper remedy will be determined, but if the adjudicator does not believe that the code has been violated then the case would be dismissed. Once a decision has been made, both parties will receive a copy of the decisions including an analysis of the evidence.

Critique of the Human Rights Tribunal of Ontario

The facts behind the Nassiah Case are ambiguous, contradictory, and the Peel Police argue that they do not prove that Officer Richard Elkington discriminated against Ms. Nassiah based on her race on February 18th 2003. Officer Elkington was dispatched by the Peel Regional Police to investigate a potential theft case. Research indicates that the majority of racial profiling cases occur during proactive policing rather than reactive. Reactive policing involves a call for assistance and is usually activated by the members of the public, while proactive policing is a police initiated response where the officer has identified a problem and engaged in a potential solution. In the Nassiah Case, Officer Elkington did not proactively accuse Jaqueline Nassiah of stealing the brassier, he was simply responding to a call for service and investigating a potential theft case. As part of normal investigation procedure, the officer must assess the evidence and determine if the potential suspect should be charged or not.

⁹⁶ Ibid.

The Tribunal chose to believe Ms. Nassiah's word, the complainant, against that of Officer Elkington, the defendant, despite the fact that the evidence presented did not clearly indicate discrimination and there was some questions as to the validity of the complainant's testimony. One of the disagreements between the parties was that Officer Elkington called Ms. Nassiah a "f...ing foreigner" and that he threatened to take her to jail if she did not provide the brassier. The adjudicator determined that the above allegations against Officer Elkington are consistent with Ms. Nassiah's emotional upset that evening and the next morning, which indicates signs of serious verbal abuse. "Nonetheless I find that the degree of emotional upset felt by Ms. Nassiah amounted to "mental anguish" under the *Code*. I find that Officer Elkington's comment about "f...ing foreigner" and the threat to take her to jail were wilful, thereby justifying an award for mental anguish"⁹⁷. Officer Elkington has denied making any of the above statements and the correlation between the comments and Ms. Nassiah's upset are unclear. It is understandable that the incident had negative consequences on Ms. Nassiah, but it is not very clear that the reason for Ms. Nassiah's upset as outlined by the Tribunal is due to the fact that Officer Elkington called her a "f...ing foreigner" and threatened to take her to jail.

In paragraph 183 of the Nassiah Decision, the adjudicator indicates that Ms. Nassiah's reaction to the incident was partially due to apprehension and unlawful detention by the security guard Mr. Nevers. While Ms. Nassiah was detained for a total of two hours, only about forty-five minutes of that detention was due to Officer Elkington's actions. Regardless of a possible alternative explanation of the above facts and variable testimonies of the parties, the Commission concluded that Officer Elkington did engage in racial profiling. In this particular case the Commission accepted the discriminatory verbal abuse as factual, viewed the officer's question

⁹⁷ HRT0. (2007), No 14, p 43.

about whether or not Ms. Nassiah spoke English, and interpreted that the investigation by Officer Elkington was evidence of racial profiling. The decision can be debated, since there is evidence to support both the complainant and the defendant's claims. The Human Rights Tribunal is to make their decisions based on a balance of probabilities, and the adjudicator believed Ms. Nassiah over Officer Elkington.

According to the Commission's definition, racial profiling is any action that relies on racial stereotypes rather than on reasonable suspicion. The definition is unclear because research shows that the police are more likely to be suspicious of visible minorities because of the belief that they commit more crime. "For instance, it is suggested that police are generally more suspicious of racial minorities than of white people"⁹⁸. The definition of reasonable suspicion is ambiguous as some police officers are more suspicious of ethnic minorities, which increases the chances of the officer following, stopping, or searching individuals based on their race. Officer Elkington can argue that he had reasonable suspicion to believe that Ms. Nassiah did in fact steal the brassier as indicated by the security guard, and that his suspicions had nothing to do with Ms. Nassiah's skin colour.

The Nassiah decision is significant because it addresses an important and controversial issue of racial profiling, which is very much a part of today's society. Criticism on the Human Rights Decision and Process are necessary in order to improve the Human Rights system within Canada.

⁹⁸ Waddington, P., Stenson, K., & Don, D. (2004), p. 891.

Critique of Peel Regional Police:

In interviews with the Peel Regional Police regarding the Nassiah Case and on the issue of racial profiling, it was evident that they had some disagreements with the decision. The following analysis and critique is based on the views of Peel Regional Police on the issue of racial profiling and on the Tribunal's decision.

The Peel Regional Police have accepted the recommendations outlined by the Human Rights Tribunal, but nonetheless express scepticism regarding the Nassiah Case. The Diversity Relations Director of Peel Regional Police has made it clear that Peel Police do not believe that Officer Elkington discriminated against Ms. Nassiah based on her race. The Peel spokesperson also stated that alleged instances of racial profiling in the Peel Region are extremely rare, with only about two cases a year. Furthermore, when asked if race should be used in criminal investigations, the Peel spokesperson used a narrow definition of racial profiling and stated that it should not be the only factor used by the police, but indicated that race is sometimes relevant to investigations.⁹⁹ Peel Regional Police are aware of the racial profiling issue and they even have mandatory training programs and consequences for those who do not follow procedures, but at the end of the day, they still believe that it is a rare occurrence and that most of their members do not engage in racial profiling.

A common justification used by the police to explain deviant conduct by officers is the "Bad Apples Theory". Rather than blame the organization itself, responsibility is placed on the individual officers. Most police forces have mandatory training on racist behaviour and appropriate consequences if in fact any member of the police does engage in racial profiling. Therefore, the actual expression of racism in police forces should be relatively rare, but some

⁹⁹ Interview with PRP Diversity Director. (2009).

does occur because of “Bad Apples”. “Bad Apples are observed as officers with high levels of racial disparity after accounting for the race distribution of at-risk drivers”¹⁰⁰. If a particular officer is racially prejudiced or dislikes specific minorities, then the chances of discrimination are much higher than for those officers who are neutral. Even if there are training materials and consequences in place, an officer who is racist can still discriminate against minorities, and this absolved the organization from responsibility, unless they have no training or discipline programs in place.

Peel Regional Police Diversity Director Brian Cryderman states: “until society is perfect, then we will not recruit perfect police”¹⁰¹. This statement supports the view of a few “bad apples” by shifting the blame away from the organization and placing it on society. He also mentioned that Peel Regional Police has progressive training and courses with respect to racial profiling and that the occurrence of racial profiling is rare. The position of the Human Rights Commission of Ontario is different. They take the view that regardless of the fact that specific individuals are more likely to be racially biased than others, it is the responsibility of the Police Force to recruit individuals and ensure that they follow the Human Rights Code and that they treat every citizen equally and with dignity. The police have a great deal of power and discretion and with that comes the responsibility to maintain public safety and social order without discrimination.

Peel Regional Police Service and the Ontario Human Rights Commission have different ideologies and mandates. This accounts in large part for the different perspectives held on the

¹⁰⁰ Tomaskovic-Devey et al. (2004), p. 10.

¹⁰¹ Interview with PRP Diversity Director. (2009).

issues related to racial profiling and policing. For example, the training video about racial profiling designed by Peel Regional Police outlines different traffic stops done by the police to demonstrate what actions are acceptable and what is considered as racial profiling. However, organizations could not agree on the contents. The Ontario Human Rights Commission thought that the training video indicated discriminatory behaviour against minorities whereas the Peel Regional Police took the position that the case examples illustrated exemplary police behaviour.

In one of the scenarios a resident reports a theft in their household and the police are in search of the suspect. A boy carrying a backpack and who is Black is approached by a police officer. The police officer asks the boy several questions and explains that there was a reported theft in the neighbourhood. The officer then asks the boy if his bag can be searched and conducts the search. Peel Regional Police believe that the officer had reasonable grounds for searching the boy's bag, while the Human Rights Commission takes the position that this protocol exhibits racial profiling because the boy was black and because a search should not be done if the individual did not do anything wrong. Similar discrepancies occurred in other scenarios of the training video and the two organizations had a very difficult time reaching an agreement regarding the contents of the training video¹⁰².

Regardless of the differing perspectives between the two organizations, both the Human Rights Tribunal and the Peel Regional Police agree that racial profiling is an issue that needs to be addressed. The implementation of the requirements by the Human Rights Tribunal of Ontario indicates that Peel is willing to comply, and it is a first step in combating racial profiling in policing.

¹⁰² Peel Regional Police Training Video on Racial Profiling. (2009).

Private vs. Public Officers and Racial Profiling

The term racial profiling usually refers to police-initiated action in which race is used as a factor in conducting stops, searches, and other investigative procedures. Research done on racial profiling tends to focus more on law enforcement officers where police identify possible criminals by using factors such as race and/or ethnic background. “Racial profiling occurs when law enforcement or security officials, consciously or unconsciously, subject individuals at any location to heightened scrutiny based solely or in part on race, ethnicity, place of origin, ancestry or religion...”¹⁰³. There has been significantly less research on private security officers and on the racial profiling that occurs in retail establishments. The definition of racial profiling is based on the assumption that members of particular races are more likely to commit certain crimes than members of other races, which does not limit the phenomenon to public officers. but also includes private security officers.

Private policing has experienced such tremendous growth over the years that there are now more private security officers than public law enforcement officers. “The 1991 census reported that there were 61,500 police officers and 104,800 security guards in Canada; by 1998, according to more recent statistics, there were only 54,722 public police but over 109,900 guards and watchmen”¹⁰⁴. It is important to examine the extent of racial profiling in retail settings, where Jaqualine Nassiah alleges she was discriminated against while shopping in a Sears store. Racial profiling in stores is so prevalent that the term “Shopping While Black” is used by researchers to describe the phenomenon. “It is unclear where and when the term Shopping While

¹⁰³ Tanovich, D. (2006), p. 13.

¹⁰⁴ Rigakos, G. (2002), p. 10.

Black came into usage, but what is clear is that, although the practice has existed for some time, very few researchers have broached the subject”¹⁰⁵.

The terms “Driving While Black” and “Shopping While Black” are closely related because they are both based on the belief by police and store security that members of particular races or ethnic groups are more likely to commit crime, as a result, they are more likely to be watched, followed, stopped, harassed and accused. Although there has been a great deal of research on the “Driving While Black” phenomena, which includes public law enforcement officers, few studies examine the “Shopping While Black” phenomena where the private security officers are predominately at fault.

“In a retail environment, Consumer Racial Profiling (CRP) can take many forms, ranging from overt or outright confrontation to very subtle differences in treatment, often manifested in forms of harassment. Outright confrontation includes verbal attacks, such as shouting racial epithets, and physical attacks, such as removing customers from the store. Customer harassment includes slow or rude service, required pre-payment, surveillance, searches of belongings, and neglect, such as refusing to serve African-American customers”¹⁰⁶.

Research done by Harris (2003) on CRP suggests that open and subconscious racism are the two major causes for discrimination in a retail setting. Open racism refers to individuals who dislike or hate African individuals and therefore discriminate against them, while subconscious racism refers to retailers who make assumptions about black customers based on stereotypes that blacks are more likely to commit crime.

Whether the discrimination experienced by African individuals is overt or subconscious the consequences of Consumer Racial Profiling are detrimental to victims.

“Specifically, victims experience an erosion in their self-confidence, as well as physical consequences such as stress-related illnesses. The exclusion and alienation that targeted individuals experience result not only in individual harm but in societal harm. Frustrated

¹⁰⁵ Gabbidon, S. (2003), p. 349.

¹⁰⁶ Harris, A.G. (2003), p. 4.

by reminders that they do not belong, some black youths further distance themselves from the society that rejects them through deviant behavior such as shoplifting”¹⁰⁷.

The unequal treatment of racialized communities is a violation of civil rights and can lead to mistrust of the justice system and to the lack of cooperation with law enforcement authorities.

With regards to the Nassiah Case, Jaqueline Nassiah was initially accused of stealing merchandise by a Caucasian security guard named John Nevers who worked as a part-time employee for Sears from 2000 until 2006. He claims that he became suspicious of Ms. Nassiah because she glanced around to see if anyone was watching her (which he thought to be suspicious). He watched her through the camera and focused one of the cameras on the fitting room to see when she emerged. When Ms. Nassiah exited the change room carrying what appeared to be one black brassier, Mr. Nerves concluded that he had video evidence of Ms. Nassiah going into the fitting room with two brassieres and coming out with only one. Mr. Nevers asked one of his sales associates, Maria Santos, to check if there was a black brassier left in the fitting room. Once Ms. Santos indicated that no brassier was found, Mr. Nevers followed Ms. Nassiah outside the store and brought her to the security office.

It is unclear why Ms. Nassiah filed her complaint against the Peel Regional Police Officer Richard Elkington and not John Nerves and why the OHRC did not take action against the security guard. This appears to be a classic case of racial profiling in a retail setting, yet the complaint focuses on the behaviour of the police officer instead of the private security guard. In the Nassiah decision, adjudicator Kaye Joachim states in paragraph 57 that Mr. Nevers made a

¹⁰⁷ Ibid. p. 6.

serious mistake in the apprehension of Ms. Nassiah and that he faced potential employment consequences¹⁰⁸.

The OHRC took action against the Peel Regional Police Service rather than against the store and/or security guard. It can be hypothesized that the OHRC may have believed that to take action against the security guard only would have limited impact and would not have a significant effect on racial profiling incidents. In targeting a larger organization such as the Peel Regional Police Service, there is a higher chance of reducing racial profiling because changes in police training and policy influence the entire police force and because police officers have more power within society.

A security guard is typically privately employed either by the property owners or by security firms. The role of the security guard is to protect property and ensure that theft does not occur. In Canada, private security officers fall under the jurisdiction of each province and territory. Although the jurisdictions may differ in their requirements, all security guards are required to be licensed. “The basic requirements to obtain a licence are: 18 years of age or older (may vary slightly in some provinces), no criminal record for the past five years, and Canadian citizenship”¹⁰⁹. In order for the security guards to be licensed to work, they are not always required to complete a training course or have previous experience, but requirements may vary depending on the employer.

An exposé in a recent article published by the *Toronto Star* on Sept 18, 2009, alleged that the requirements to become a licensed security guard are quite lax. Staff reporter Brent Popplewell from the *Toronto Star* went to the Ministry of Community Safety and Correctional

¹⁰⁸ HRT0. (2007), HR-14.

¹⁰⁹ Swol, K, (1998), p. 10.

Services in Toronto to obtain his security license. All he was required to do was to complete a security guard application form at a cost of \$80, provide his passport photo and visa number, and sign a permission form to allow for a check of his criminal record. Two weeks later, Brent received his license without any training on the use of force, how to implement first aid or CPR, and none of the other basic training necessary to safeguard citizens' lives.¹¹⁰ The Ontario government has not fulfilled a promise they made four years ago to institute training as a condition of licensing. It is easy to see how the inadequate training of security guards can lead to discrimination against minorities.

The powers of security officers are limited, as they do not have the power to arrest unless they witness a criminal offence in relation to the property they are protecting. This is considered a "citizen arrest". Security guards do not have the right to detain individuals unless they are under arrest. "Private security personnel have the same powers of arrest, search and detention as an ordinary citizen does and these are stipulated in section 494 of the Criminal Code of Canada"¹¹¹. Licensed security officers are not allowed to use or carry firearms. Section 17 of the Firearms Act restricts the ability of the security guards to be armed.

It is plausible that one of the reasons that the Ontario Human Rights Commission did not target the security guard for racial profiling is because Ms. Nassiah filed a complaint against Officer Elkington of Peel Regional Police. According to the letter that Ms. Nassiah wrote to Inspector Dineen from Peel Regional Police, she outlined that she was accused wrongly and arbitrarily held for two hours without being able to tell her family, but more seriously that she was subject to verbal abuse and racial profiling by a Peel Regional Police Officer. In her

¹¹⁰ Popplewell, B. (2009), pp. 1A, 14A.

¹¹¹ Swol, K, (1998), p. 9.

testimony, Ms. Nassiah has stated that it was Officer Elkington who asked if she spoke English and who called her a “f...ing foreigner” and threatened to take her to jail. Perhaps the way that Ms. Nassiah was treated by Officer Elkington caused her to file the complaint against him and the Peel Regional Police rather than the security guard and the Sears store.

The security guard in this particular case has been ignored even though evidence indicates that the initial form of discrimination occurred when Mr. Nevers apprehended Ms. Nassiah. In examining the video tape evidence, the Commission could not understand why Mr. Nevers and later Officer Elkington were certain that the video tape showed theft. The commission noted that the video tape may have given rise to suspicion on Mr. Nevers part, but unless the brassier was found on Ms. Nassiah, there is no way that the theft could be proven based on the video alone. In conclusion, Mr. Nevers suspected that Ms. Nassiah stole the item based on unreliable video evidence but still chose to detain Ms. Nassiah and later call the police even though the brassier was not found on Ms. Nassiah or in her bag.

It can be argued that the OHRC should have taken action against the security guard and Sears in order to ensure that this type of incident does not occur again. It is unclear what qualifications Mr. Nevers had, other than the fact that he was employed at Sears as a security guard for about six years. The Tribunal could have ordered the Sears store to provide training requirements for security guards in regards to racial profiling in hopes of minimizing these types of incidents in the future. Due to the fact that the initial form of discrimination occurred at the Sears store by the retail’s security guard, the Tribunal’s decision and orders do not impact the security guard and do not prevent the same type of situation from reoccurring at the retail level.

Summary

In analyzing the Nassiah decision, it is important to examine the Tribunal's process in order to understand how the outcome was determined. The consequences of racial profiling are also presented in order to show the effects of racial profiling on citizens and how it can negatively influence the co-operation of citizens with police officers and more importantly the trust within the Canadian Criminal Justice System. Several issues are outlined in regards to the Tribunal's decision, including the analysis of evidence and the omission of action against the security guard who initially discriminated against Ms. Nassiah. Criticisms of the Human Rights decision and of the Peel Regional Police are outlined in order to show the differing perspectives of the two organizations, specifically in regards to the issue of racial profiling.

Chapter 6: Conclusion and Summary

In examining the competing perspectives of both the Peel Regional Police and the Ontario Human Rights Commission, it is evident that the controversy over racial profiling and policing is far from over. It is also evident that more in-depth research needs to be conducted on the topic in order to eliminate the issue. A more thorough investigation is necessary to better understand the root causes of racial profiling, focusing on the theoretical aspect of the phenomenon.

The thesis analyzed the issues associated with racial profiling and policing in regards to the Nassiah Case decision (*Nassiah v. Peel Services Board, 2007*). The goal was to provide the differing perspectives of Peel Regional Police and the Ontario Human Rights Commission on the issue of racial profiling in order to get a better understanding on the root causes of the issue and therefore provide a more substantive solution to the problem. Through the examination of the historical background, theoretical framework, and the legal policy on racial profiling it is apparent that the phenomenon continues to be an ongoing problem with negative consequences for everyone involved. More research needs to be conducted on different aspects of racial profiling in order to define and understand the issue in hopes of significantly reducing its occurrence within modern society.

Racial Profiling is not a new concept and traces of discrimination can be seen throughout Canadian history. "...A legacy of racism – particularly towards Aboriginal persons, but to other groups as well including African, Chinese, Japanese, South Asian, Jewish and Muslim Canadians

– a legacy that profoundly permeates our systems and structures to this day, affecting the lives of not only racialized persons, but also all people in Canada”¹¹². In addition to the historical instances of racial profiling and policing, research suggests that the “war on drugs” played a big role in fostering negative stereotypical views regarding visible minorities. Current research supports the existence of racial profiling and its consequences, outlining that steps need to be taken to significantly reduce the practice.

Examination of the Nassiah Case indicates that racial profiling does not only occur in traffic stops, searches and arrests, but rather that it can happen in all aspects of police and public interaction. In the case of Ms. Nassiah, she was discriminated against based on her race in a shopping center, indicating that racial profiling can and does occur in different situations. There is a thin line as to what constitutes racial profiling and what does not, making it difficult to determine if racial profiling did in fact occur. In relation to the Nassiah Case both the PRP and the OHRC had compelling arguments, but according to the definition of racial profiling by the OHRC, the tribunal ruled in favour of Ms. Nassiah.

In interviewing both the Peel Regional Police and the Ontario Human Rights Commission, it is evident that the two organizations have differing perspectives on what constitutes as racial profiling in the Nassiah Case, which resulted in some tension between the two. Both the PRP and the OHRC had valid points, but ultimately it was the security guard who initially discriminated against Ms. Nassiah. The Ontario Human Rights Commission should have also examined the security guard’s role within the Nassiah Case and provided recommendations to reduce racial profiling that occurs in retail establishments by private policing. With the

¹¹² OHRC. (2008).

expansion of private policing over the last couple of years, it is beneficial to create programs and educate security officers on racial profiling and its consequences.

Most of the methodology for the thesis was based on current research on racial profiling, which is largely restricted to police stops, searches and arrests. There is limited research on racial profiling in retail establishments, which made it difficult to provide a variety of perspectives on the occurrence. There is also little research done on the theoretical analysis of racial profiling, outlining that there are a lot of gaps in current research on the issue. The interviews conducted with the two organizations (OHRC and PRP) proved to be very beneficial because they specifically pertained to the Nassiah Case and they outlined how the two organizations found a common ground in spite of differing goals and agendas. This shows that regardless of the differing perspectives on the issue of racial profiling, a solution can be found that benefits the public, civil libertarians and law enforcement.

In response to allegations of racial profiling within the U.S., many jurisdictions have started to track information about those who are stopped, searched, ticketed, and/or arrested by law enforcement officers. Data collection efforts are an attempt to provide the tangible numbers that will enable police and community leaders to better understand their policing activities¹¹³. In Canada, police officers are currently not required to record such data. Perhaps if the policy was introduced there would be a more accurate representation of racial profiling and policing within Canada.

¹¹³ Birzer & Birzer. (2006), p. 644.

In addition to introducing mandatory data collection, provisions need to be set out in order to guide police officers' behavior during encounters with the public to prevent racial profiling or the discriminatory use of racial characteristics. Thorough examination of research literature, national survey of police executives, existing policies, legal scholars, and law enforcement agencies needs to be conducted to ensure that the use of race and ethnicity is in accordance with all the appropriate Charter and Criminal Code requirements. Accountability must be ensured by providing disciplinary actions for officers who are in violation of their department's rules and regulations.

As noted throughout the thesis, there has been little research on the theoretical framework of racial profiling. Most of the research conducted on police stops, searches and arrests simply outlines that racial profiling does occur within the police force. There is limited research on the reasons why racial profiling is prevalent in society and more specifically within the police force. Examining the theoretical aspects of racial profiling can provide a better understanding of why it occurs and how it can be reduced.

In reference to the Nassiah Case, the different theories can provide a better understanding of the events that took place on February 18, 2003. The crime control model is important in explaining the initial approach of Officer Elkington because the model, which is commonly adopted by police officers, prioritizes the power of the government in order to protect society and places less emphasis on individual liberties. Thin-slicing theory examines the unconscious and provides a possible explanation on why Officer Elkington's investigation was more suspicious and intense.

“Lacking substantial and valid individual information, people are likely to categorize others on the basis of highly visible and easily attributable characteristics such as race, gender, and age. In turn, these categories have an almost automatic effect on our perceptual process once persons are categorized, influencing our impressions of them and often our behavior toward them”¹¹⁴.

Cognitive biases are therefore very important because they are the most widespread and the most difficult to control.

Each theory discussed in the thesis provides a possible reason why a police officer would discriminate based on race. Since the police structure is a risk-based system that can interfere with an officer’s ability to make unbiased snap judgments, the police are therefore inherently prone to profiling, which needs to be understood by the Ontario Human Rights Commission, not as a threat, but as an institutional necessity. This same risk thinking causes exclusionary practices because a police officer’s actions are based on risk management and therefore could lead to race and ethnic classification. Peel Regional Police Diversity Director Brian Cryderman stated that it is acceptable and beneficial to use race as a factor when identifying and describing an unknown suspect because it can help in the apprehension of criminals.¹¹⁵ The Ontario Human Rights Commission understands that under some circumstances it is acceptable to use race as a factor, as long as the police are accurate in their description.¹¹⁶

Due to the fact that the police organization is a risk-based system that classifies individuals based on their risk to society, upon seeing that Ms. Nassiah is a Black woman, the officer’s snap judgment could have been interrupted based on the systematic belief that black

¹¹⁴ Tomaskovic-Devey, Mason, & Zingraff. (2004), p. 15.

¹¹⁵ Interview with PRP Diversity Director. (2009).

¹¹⁶ Interview with Director of the Legal Services Branch of the OHRC. (2009).

people are more likely to commit crime. “Institutional discrimination refers to organizational practices that produce racial inequalities”¹¹⁷. Even though racial profiling may sometimes be useful for police investigation, the problem is that these practices are likely to disadvantage minorities. Whether the institutional discrimination is intentional or not, it still violates individual civil rights and liberties.

The theory of social exclusion states that the shift from an inclusive to an exclusion society creates the concept of an “underclass” and leads to relative deprivation. The “underclass” is described as a group of individuals who are usually visible minorities that are excluded from society through various means such as economy, class, and the justice system. This exclusion causes relative deprivation, which refers to individuals who feel deprived of equal opportunity compared to the larger society. If minorities are excluded from society and viewed as poor and more likely to commit crime, then the police are more likely to focus their suspicions on them due to the risk management classification system. “Because crime rates tend to be higher in lower class communities where African Americans disproportionately reside, they are more likely to be subjected to aggressive policing”¹¹⁸. The police need to be warned against this, because it can lead to racial profiling.

None of the theoretical models on their own can provide an accurate understanding of racial profiling. When each theory is examined independently and then combined with the rest of the theories used within the thesis, it is then that one can begin to understand the conflicting issues of racial profiling. Racial profiling is a phenomenon that has occurred throughout history,

¹¹⁷ Tomaskovic-Devey, Mason, & Zingraff. (2004), p. 10.

¹¹⁸ Ibid. p. 19.

and various aspects need to be analyzed in order to understand the root cause of the problem. Law enforcement, civil libertarians, social agencies, and the public need to come together to create policies that provide stricter limitations on when officers can stop, search, and detain potential suspects, while still being able to do their job effectively.

The police need to be able to show clearly why people are proactively stopped, or in the Nassiah Case why they are being detained, regardless of race. It is a violation of everyone's civil liberties, thus training and police directives should require detailed reasons for stops, searches, arrests, and detention, which should all be documented clearly in the police notes. "Addressing the problem by collecting data gives the management of the police department... crucial information that can help improve the department by giving managers facts on which to base change and decisions"¹¹⁹.

The police need to inform potential suspects on why they are being stopped, searched, arrested, or detained based on legal grounds. This will not completely eliminate the problem, but it will reduce relative deprivation and create a more inclusive feeling amongst visible minorities. It will also help suspects or targeted individuals understand and perhaps accepted why they are being stopped or detained, thus building a healthy relationship between the police and the public. If police interaction with the public is a violation of civil liberties and no adequate grounds for stops and detention are provided, then the police should be held responsible. In the case of Ms. Nassiah, where she was initially detained by a security guard and informed of the reason for her detention, the police officer should explain the investigation process outlining that evidence needs to be examined before the suspect can be released.

¹¹⁹ Harris, D. A. (2006), p. 229.

Through the examination of the Nassiah Case and in particular the theoretical framework on racial profiling, it is evident that the reasons for its occurrence can be identified and controlled. Racial discrimination is embedded within our unconscious, but through education and training it can be managed and significantly reduced. If everyone and not just the police are aware of the root causes of racial profiling, then people can educate themselves and learn how to enhance their ability to make better snap judgments. “Our first impression are generated by our experiences and our environment, which means that we can change our first impressions – we can alter the way we thin-slice – by changing the experiences that comprise those impression”¹²⁰. Cognitive biases are more difficult to control because they are based not only through our experience but also through our environment. Once each individual tackles the issue of racial profiling within themselves, introducing policies and organizational regulations will be much easier and more effective to maintain.

¹²⁰ Gladwell, M. (2005), p. 97.

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