

Dear Mayor & City Councillors,
CC: Members of Provincial Parliament in Hamilton

Systemic Racism in Policing

To understand the full impact of policing on Black and Indigenous communities it is important locate how the above communities have been treated historically. The inception of this country was born out of appropriating lands for settlers at the expense of Indigenous communities, nations, and people's. This is why the first Prime Minister of Canada pushed for the Indian Act (1876) to be enacted and this allowed for the cultural genocide of Indigenous peoples and nations under the guise of the law of the land. This is an example of how what we call the "law" is used as a systemic practice to exploit and criminalize racialized communities. It is the Indian Act (1876) that allowed for the establishment of the RCMP and its mandate was to relocate Indigenous communities, nations, and peoples into reserves to uphold Canada's interest such as the Canadian Pacific Railway.

For Black communities Canada's complicity in slavery which lasted for over 200 years is hardly known or taught. What does this mean? This means that majority of Canadians do not know how Black enslaved people in Canada were objects to be used, misused, abused, enjoyed, damaged or destroyed (Maynard, 19). Since this history is absent from schools, colleges, universities, and the public sphere Canadians have social amnesia about slavery and are oblivious to how the history of policing upholds anti-Blackness. This is evident in the Act of Union 1840 that legally endorsed the concept of separate schooling and informally blocked Black children access to schools in Canada West (Maynard, 33). In Ontario MPP Malcolm Cameron was supportive of segregation of schools. In 1910 the Immigration Act prohibited entry of immigrants belonging to "any race deemed unsuited to the climate or requirement of Canada. Here in Hamilton Black Canadians were refused access to land and housing. These are examples that set foundational practices, laws, and attitudes to foster anti-Blackness in Hamilton and Canada.

The connections of Policing to anti-Blackness have been ingrained in the Canadian way of life. In 1868, just over 3 decades after the abolition of slavery, Prime Minister Macdonald evoked both the "Black rapist" myth and the threat of lynch mobs to justify keeping rape a capital offence. He justified the need for the death penalty because of the "frequency of rape committed by Negroes," whom he argued were very prone to felonious assaults on white women (Maynard, 41). Now while many may say this happened long ago, it was Chief Decaire who elicited this very trope in 2015.¹ He then forwarded an email to his front-line officers that included a line "it is time for these black kids to stop blaming the police for the problems and take responsibility for the action of the youth."² These examples illustrate

¹ <https://www.cbc.ca/news/canada/hamilton/headlines/chief-racial-profiling-is-prohibited-but-criminal-profiling-is-not-1.3299686>

² <https://www.cbc.ca/news/canada/hamilton/news/police-board-chair-defends-chief-over-forwarding-racially-charged-email-1.3221924>

how institutions engage in the practice of anti-Blackness that is rooted in historical practices of slavery and genocide.

These issues of systemic racism have been reviewed on the provincial level and recommendations from these reviews are yet to be put in place. Many of the recommendations are directed to Police Boards, Police Services and the Province (changes to the Police Act), however most if not all haven't been taken up. It is my hope that you would read these reports to get a better picture on how anti-Black racism is part of the Ontario Criminal System.

- [Stephen Lewis Report on Race Relation in Ontario](#)
- [Report of the Commission on Systemic Racism in the Ontario Criminal Justice System](#)
- [Independent Police Oversight Review](#)
- [Independent Street Checks Review](#)
- [Use of Deadly Force in Canada](#)

Report of the Commission on Systemic Racism in the Ontario Criminal Justice System

The reports above are clear that Police services across Ontario engage in racist behavior and practices and in extension oversight bodies aren't doing enough to hold Police services accountable and to keep Black, Indigenous, racialized, and marginalized communities safe. In one of the reports they highlight an example where in 1993 Toronto Police conducted secret surveillance of prominent Black community organizations and leaders. The police "Intelligence Report" of April 25, 1989, which was shared with other police forces, contained information about individuals such as dates of birth, social insurance numbers, addresses, organizational affiliation and automobile license plates. All persons named were of African heritage and shared an interest in community-police relations. The Toronto Police were criticized and specific requests were made to the Police Service board for a justification from the Chief for this systematic invasion of privacy. (Report on Systemic Racism in the Ontario Criminal Justice System, 343). In this instance the Board didn't respond and no action was taken against the Toronto Police service.

The 1995 a report on systemic racism in Ontario was submitted to the Honourable HNR Jackman (Lieutenant Governor of Ontario). The report talks about community policing and offers recommendations to Police Board and Police services across Ontario. Many of the recommendations have not been implemented and are in fact in line with demands from the #blacklivesmatter and #defundpolice movement.

Community Policing – Recommendations from the Commission on Systemic Racism in the Ontario Criminal Justice System

*Traditional structures of police governance are insufficiently accountable and accessible to the community

* Police board were said to be too weak to regulate effectively, too distant from the concerns of ordinary people and too close to police leadership to provide oversight.

Here are the recommendations on Community policing in the report

1. Each Ontario service should conduct a comprehensive review of its commitment to racial equality, publicize action plans in most common languages in the service areas, progress on implementation should be reported to police board and to the public.
2. Police boards should establish local community policing committees around either divisional levels, geographical area or community groups in conjunction with Police boards.
3. Minister of Solicitor general & correctional services in association with police boards and services fund community surveys regarding safety.
4. Ministry of Solicitor general develop guidelines for the exercise of police discretion to stop a question people with the goal of eliminating differential treatment of black and other racialized people. Guidelines should be translated into common languages
5. Ministry of Solicitor General develop a comprehensive public complaints database about police stops of Black or other racialized people and fund education on formal and informal police complaint mechanisms.
6. Police Service boards ensure policies for policing schools reflect the goals of community policing policies and standards in the local area

Systemic Responses to Police Shootings - Recommendations from the Commission on Systemic Racism in the Ontario Criminal Justice System

Perhaps no incidents involving the criminal justice system generate as much public outcry, especially in the black community as police shootings of civilians. The police are quicker to use their guns against Black people and that the shootings are unduly harsh responses to the incidents under investigation. The shootings are tragedies that affect the entire Black community and as a reflection of the destructive force of systemic racism.

Because the Ontario government in April 1991 failed to give the SIU sufficient financial support to function properly there was a secret protocol between Ontario police forces and the Solicitors general's office. In effect, the protocol handed back to local forces the investigation of the very incidents that the SIU was created to investigate

3 problems with the SIU: inadequate funding, lack of cooperation from police services and the refusal of the individual officers to be interviewed.

Recommendations:

1. Funding for SIU be significantly increased
2. Police act be amended to require any officer involved in an investigation falling within the jurisdiction of SIU be required to turn any requested information and evidence to SIU not later than 24 hrs after request
3. Police Act be amended to provide director of SIU be authorized to charge any officer who fails to provide such information or evidence in a timely fashion with a misconduct offence.
4. Police Act be amended to require that any officer who fails to answer questions from an SIU investigator be suspended without pay
5. Police Act be amended to provide that when the director of SIU informs Chief of police that an officer under the chief's command has failed to give a complete statement to an SIU investigator the chief shall suspend the officer forthwith without pay.

Report of the Independent Police Oversight Review

This report looks at the Ontario's three civilian police oversight bodies, the Special Investigations Unit (which investigates police-civilian interactions that result in serious injury or death to a civilian, the Office of the Independent Police Review Director (oversees public complaints about the police in Ontario) and Ontario Civilian Police Commission (which primarily adjudicates appeals of police disciplinary hearings, among a number of other functions).

Recommendations for Police Service Boards

1. The Ministry of Community Safety and Correctional Services should establish selection criteria for police services board appointees.
2. The Ministry of Community Safety and Correctional Services should develop mandatory training for police services board members. This training should be developed in partnership with the Ontario Association of Police Services Boards and post-secondary institutions with expertise in the areas of public sector and not-for-profit governance.

The issues of systemic racism in Policing and in our society aren't going to disappear as such as we move forward it is important to acknowledge how racism impacts Black Indigenous People of Color on an individual level and an institutional level. For many people particularly white people of North America and European descent this might be hard to understand since you will never experience racism. However, we can move forward to address racism by listening to and implementing the



suggestions offered by Black, Indigenous, and racialized communities. It may and will disrupt what is common to white people but that is what anti-racism is about. I hope you find this letter helpful in working through how policing has and continues to affect racialized and marginalized communities in Hamilton.

Yours sincerely,

Kojo Dampety

A handwritten signature in black ink, appearing to read "KOJO D", written in a cursive, slightly stylized font.

Appendix

SYSTEMIC RACISM, POLICING AND THE COURTS IN ONTARIO

Summary prepared by Bob Munroe

June, 2020

1. Justice Goodman, a Judge in Hamilton recently wrote that “systemic racism in Canadian society has led to the over-policing and racial profiling of indigenous and racialized minority communities.” Goodman J. also noted that this fact has been accepted by the Supreme Court of Canada (“SCC”) in R v. Le 2019 SCC 34” R v King 2019 ONSC 6851 at paragraph 36 ; R v. Le 2019 SCC 34 (“Le”)
2. Justice Goodman quoted the Supreme Court of Canada saying that “over-policing has led to the ‘continuing social exclusion of racial minorities, encourages a loss of trust in the fairness of our criminal justice system and perpetuates criminalization’ ” Goodman J quoting from paragraph 95 of Le in King 2019 ONSC 6851
3. Ontario Courts have repeatedly examined allegations of anti-black racism, including systemic racism, by police officers in a wide variety of cases including: bail requests; improper arrests; Charter violations; mitigation of sentencing in criminal cases; and, damage claims in civil cases involving police misconduct.
4. In these cases, the Courts have repeatedly accepted that racial profiling occurs and is a day to day reality in the lives of minorities affected by it in their interactions with police officers. David M. Tanovich, “Applying the Racial Profiling Correspondence Test”, 64 Criminal Law Quarterly, at page 359 and footnotes 1, 2, 3 and 4 on page 359
5. Ontario Courts have been discussing systemic anti-black racism for decades. For example, in 1993 a decision of the Ontario Court of Appeal (“OCA”) said: “Racism, and in particular anti-black racism, is a part of our community’s psyche. A significant segment of our community holds overtly racist views.” per Doherty J.A. in R. v Parks, 1993 CanLii 3383 (OCA) at para
6. In 2006, a decision of the Ontario Court of Appeal said: “Racial profiling is wrong ...Police conduct that is the product of racial profiling and interferes with the constitutional rights of the target of the profiling gives rise to a cause of action under the Charter” The Court also observed that the courts accept that “...racial profiling occurs and is a day-to-day reality in the lives of those minorities affected by it” per Doherty J.A. in Peart v Peel, 2006 CanLii 37566 (OCA) at paragraphs 91 thru 94
7. In 2017 in Elmardy v. Toronto Police Services Board, the Ontario Divisional Court (“ODC”) repeated a 2003 conclusion of the Ontario Court of Appeal that “...the attitudes underlying racial profiling can be consciously or unconsciously held and that social science research establishes that racialized

characteristics of black people provoke police suspicion in Toronto” *Elmardy v. Toronto Police Service Board*, 2017 ONSC 2074 at paragraph 15 in reference to *R. v Brown* 2003 CanLII 52142 at paragraph 295

8. In *Elmardy*, the ODC said of the police conduct in that case “...both officers, without any reasonable basis, suspected the Appellant of criminal behaviour ... by the fact that he was black and by their conscious or unconscious beliefs that black men have a propensity for criminal behaviour. This is the essence of racial profiling” *Elmardy* at paragraph 20

9. In December, 2018 the Office of the Independent Police Review Director issued its report “Broken Trust: Indigenous People and the Thunder Bay Police Service” which included a finding that “...systemic racism exists in the TBPS (Thunder Bay Police Service) at an institutional level.” This report and its conclusions were widely published in the media and would have come to the attention of Police Services, the Courts and lawyers in Ontario.

10. In 2019, a Superior Court Judge in Ontario wrote that racial profiling in policing “...continues to be a huge concern” and that “Courts have a responsibility to ensure that racial profiling is not the real motive...” for detention of a person. *R. v. Campbell* 2019 ONSC 430 at paragraphs 79 and 80

11. In 2019, the SCC examined racial profiling and police conduct and in doing so said that “...a common and shared experience of racialized young men: being frequently targeted, stopped, and subjected to pointed and familiar questions.” by the police. *Le* at paragraph 97

12. In 2019, the OCA rejected the legitimacy of police powers being exercised where “...subjectively their decisions are influenced by race or racial stereotypes...” The Court further said: “Where race or racial stereotypes are used to any degree in suspect selection or subject treatment, there will be no reasonable suspicion or reasonable grounds. The decision will amount to racial profiling.” *Paciocco J.A.* in *R. v. Dudhi*, 2019 ONCA 665 at paragraphs 64-66

13. For decades authoritative studies and reports have repeatedly confirmed systemic anti-black and/or anti-aboriginal racism in Ontario - including racism by the police. Over 15 such reports between the 1970’s and 2018 have been identified by the Ontario Human Rights Commission (“OHRC”). These reports include the OHRC report in November, 2018 “A Collective Impact Interim report on the inquiry into racial discrimination of Black persons by the Toronto Police Services” and “The Report of the Independent Police Oversight Review” (2017) by The Honourable Mr. Justice Michael H. Tulloch of the Ontario Court of Appeal.

14. The SCC observed in October, 2018 that “A striking feature of these reports is how the conclusions and recommendations are so similar to studies done 10,20 or even 30 years ago” *Le* at paragraph 96

15. The Courts in Ontario are or ought to be well aware of these many reports. The SCC has confirmed that "...the research now shows disproportionate policing of racialized and low-income communities" Le at paragraph 97

16. Despite the language of Court decisions and Government reports about racial profiling by police, the rules of evidence and onus/burden of proof in Courts can make it difficult to prove racial profiling or anti-black racist motives by police.

17. It is highly improbable that police officers will admit to racial profiling or race bias in Court. Police officers are more likely to deny and/or fail to recognize anti-black and anti-aboriginal racial biases in their Police Services: see for example a recent Tweet by Inspector Treena MacSween of the Hamilton Police Service ("HPS") that "I would NEVER work for a service that turns a blind eye to prejudice in any form." Twitter "tweet" by @TMacSween370 June 27, 2020

18. That being said, while not admitting racial bias or systemic race bias in his own police service, Chief Girt of the Hamilton Police Service wrote recently on behalf of the Hamilton Police Service: "We recognize and acknowledge that racism; racial profiling and other biases exist in policing." Twitter "tweet" by @HamiltonPolice attaching letter signed by Chief Girt June 2, 2020

19. Notwithstanding the recognition that "...racial profiling occurs and is a day-to-day reality in the lives of those minorities affected by it", the SCC also observed that that it is still open to prove in a specific case that "...something that often occurs did not actually happen in the particular case..." leaving open the door for evidence from police officers denying racist motives which could overcome allegations of anti-black racism. Le at paragraph 80

20. Court decisions have acknowledged that racist motives of police officers must usually be proven by reasonable inferences drawn from circumstantial evidence. *Elmardy v. Toronto Police Services Board* 2017 ONSC 2074 [DIV. CT.] per H. Sachs J., at paragraphs 16 and 17. David M. Tanovich: *Applying the Racial Profiling Correspondence Test*, 64 *Criminal Law Quarterly*, at pages 361 through 377.

21. The SCC has said that "Evidence about race relations ... can be proven by direct evidence, admissions, or by the taking of judicial notice ... The need to consider the race relations context arises even in cases where there is no testimony from ... any witnesses about their personal experience with the police. Even without direct evidence, the race of the accused remains a relevant consideration..." The many reports (see paragraphs 9 and 13 above) "will clearly form part of the social context when determining whether or

not there has been an arbitrary detention contrary to the Charter" based upon race bias. Le at paragraphs 83, 95 and 106

22. An additional hurdle in court arises from the "onus/burden of proof". The burden of proving anti-black or anti-indigenous racist motives by the police remains on the person raising the issue in Court.

For example, a Court required that a black man stopped by the police had the onus of proving that it is more probable than not that the motive for the stop was that he was a black man. *R. v Brown* 2003 CanLii 52142 (Ontario Court of Appeal per Morden J) at paragraphs 7 through 11

23. The difficulty of proving racist motives and systemic racism as the reason for police activity and possible solutions for this difficulty have been analysed by University of Windsor law professor David Tanovich in his article “Applying the Racial Profiling Correspondence Test”. The Courts, including the SCC, have repeatedly referred to professor Tanovich’s article. Here is a brief summary of Prof. Tanovich’s argument in the article:

- Racial profiling (bias) is a reality in policing in Canada and in crime decision making by police. Page 359
- Twenty-eight judicial and tribunal decisions provide material for use by lawyers advancing racial profiling arguments. Page 361 and Appendix “A”
- Circumstantial evidence showing a correspondence between police actions and racial profiling can lead to a finding that conduct is motivated by racial profiling. Page 361
- Racial profiling may be established with circumstantial evidence and using reasonable inferences drawn from factual indicators supporting a conclusion that police conduct was racially motivated. page 361, footnote 12, page 362
- Indicators of racial profiling are recognized in literature which can assist a court in drawing inferences. page 362 quoting Peart
- Manifestations of racial profiling may include: using race as part of a criminal profile; heightened surveillance and “checks” of racialized individuals; using discretionary power and minor statutory powers to justify criminal investigations of racialized people; using ambiguous behaviour as incriminatory; using race to target an individual on a purported match to a known suspect; over-reaction with unjustifiable use of excessive force. pages 362 through 368
- Indicators for proving racial profiling include circumstances where experience shows racial profiling exists such as: carding; street checks; searches based on race; excessive arrests and excessive use of force. page 369
- Courts have rejected a reverse onus argument presented by the African Canadian Legal Clinic that the burden of proof in racial profiling cases should fall on the police to show that it did not occur. page 370

- A reverse burden of proof was rejected by the Court of Appeal in 2003 because while the Court accepted that racial profiling occurs it was unable to assess whether or not this was the norm. page 370
- Evidence available since 2003 shows the disproportionate scope of police intervention with black people including carding and street checks. Data available between 2010 through 2017 confirms this for Toronto, Peel, Waterloo, Hamilton (11-14% of the street checks v 3% of the population), London, Ottawa, Montréal and Halifax. pages 370 through 374
- This evidence shows that it is time to revisit the “reverse-onus” concept rejected in 2003. at page 373
- Judges should begin with the presumption that there is evidence of racialized stereotypes in the exercise of police discretion involving racialized individuals. pages 373,374
- Lawyers have not been active in raising racism and racial profiling and ought to raise racial profiling in appropriate cases using the framework set out in the article. pages 377 through 379
- Lawyers ought to raise race-based Charter claims and advance more racial profiling arguments.