

“ALL RIGHTS MATTER”:
A CRITICAL EXAMINATION OF THE ONTARIO HUMAN RIGHTS
COMMISSION’S SYSTEMIC CHANGE INITIATIVES IN POLICING

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A DISSERTATION SUBMITTED TO THE FACULTY OF GRADUATE STUDIES IN
PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY

GRADUATE PROGRAM IN POLITICS
YORK UNIVERSITY
TORONTO, ONTARIO

June 2022

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Abstract

This dissertation examines the Ontario Human Rights Commission's (OHRC) partnership engagement with police services via the use of voluntary Project Charter agreements. Through an analysis of OHRC policy documents spanning from 1962 to 2016, qualitative research with three municipal police services (Ottawa, Toronto, and Windsor) and the OHRC, utilizing methods developed out of the epistemological insights and normative commitments of Critical Race Theory, Feminist Political Economy and Critical Policy Studies, the analysis centres on the duality of law and the race-neutral logics that work to constrain the viability of human rights-driven anti-racist structural change.

This work engages the notion “All Rights Matter” to describe a flattened approach to human rights that restricts focussed consideration of the operation of structural racism. The “All Rights Matter” approach employed within these voluntary Project Charter agreements *obfuscates* areas of institutional inaction or resistance and *deflects* attention away from inaction, or failure, toward addressing structural racism and community concerns of racial profiling and misuse of force. This flattened approach to difference is intimately connected to a diversity management posture favouring business vernacular and rationales over equity.

The five chapters comprising the dissertation reveal the emancipatory limitations of rights claims – vis-a-vis racism in particular – within the Ontario context. Chapters one and two offer theoretical and historical background to the “All Rights Matter” approach. Chapter three attends to the role of policing in reproducing a racially inequitable social

order, the OHRC's partnership-oriented adoption of diversity management, and the settlement agreement that brought about the Ottawa Police Race Data Collection Project. The case studies of the Toronto and Windsor police services examined in chapters four and five illustrate how these partnerships with the OHRC serve as containment strategies, quelling public pressure to address racism within these services.

By way of conclusion, the dissertation underlines the importance of severing human rights approaches from a diversity management framework that extracts value from racialized groups without addressing inequitable racial orders and the pressing need for human rights accountability and legally-enforceable public interest remedies.

For my Gran, Phyllis Brooks

Acknowledgements

I must first express my immense gratitude to my supervisor, Dr. Leah Vosko, for guiding me through “what do you do with an idea?” She has been an incredibly generous and responsive supervisor, who has artfully steered me through the challenges of institutional field work, created opportunities for me to learn and grow, and provided countless hours of guidance, dialogue and support. Thank you to Dr. Barbara Cameron and Dr. Tania Das Gupta for their expertise, ongoing encouragement, and thoughtful insights. I have learned so much from working with this incredible committee of feminist scholars and am overwhelmed by the compassion and support that has been extended to me through professional and parental leaves, bereavements, and a global pandemic.

I also want to extend my gratitude to my research participants and to the many human rights practitioners from whom I have learned. I am additionally grateful for the intellectual guidance and emotional labour of many faculty members and staff at York University and beyond including Dr. Dennis Pilon, Dr. Ethel Tungohan, Dr. Alana Cattapan, Dr. Rebecca Hall, Dr. Tobin LeBlanc Haley, Dr. Rashelle Litchmore, and York Department of Politics administrative staff Marlene Quesenberry, Jlenya Sarra De-Meo, Carolyn Cross and Margo Barretto. I am especially grateful to my friend and collaborator Dr. Laura Pin, who has had an immense impact on my research and my politics.

I was sustained throughout this research by the love and encouragement of friends both inside and outside of academia. Thank you to my dear department mates Jennifer Mussell, Jelena Vesić and Bob Froese for the many coffees and many talks. Thank you to my thoughtful and loyal friends Adriana and Priscilla for consistently treating this

doctorate as a thing worth doing and for being there for me through my many moments of doubt.

I come from a family that deeply values education and community. I give thanks to my grandparents for the paths they forged, to my extended family for their warmth and care, and, in particular, to my aunties for their pride and generosity. I thank my parents for their endless support through a seemingly endless process, and for their guidance, wisdom, and editing skills, which were absolutely indispensable. And I also give love and thanks to my fantastic and brilliant sister, Kelsey, for intellectually challenging me and emotionally supporting me every step of the way.

Most especially, thank you to my wonderful partner, Sarah Jensen – for every idea you made richer, every phrase you helped craft, and every single moment of emotional, intellectual, and material support.

Last, but never least, thank you to my daughter Zadie for all the joyful interruptions.

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List of Acronyms and Abbreviations

African-Canadian Legal Clinic	ACLC
<i>Canadian Charter of Rights and Freedoms</i>	<i>The Charter</i>
Equality in Employment: A Royal Commission Report	Abella Report
Human Rights Project Charter Agreements	Project Charters
Human Rights Tribunal of Ontario	HRTO
Minutes of Settlement	MOS
New Democratic Party	NDP
<i>Ontario Human Rights Code</i>	<i>The Code</i>
Ontario Human Rights Commission	OHRC or the Commission
Ontario Police College	OPC
Ottawa Police Service	OPS
Ottawa Police Services Board	OPSB
Peel Regional Police Service	PRP
Progressive Conservative	PC
Toronto Police Service	TPS
Toronto Police Services Board	TPSB
Toronto Star	<i>The Star</i>
United Nations	UN
Windsor Police Service	WPS

Introduction

“People get their backs up against the wall with certain words, certain language. So you have to be mindful and choose soft words. Because people take it personal, as an attack when it comes to anything race-related. Just the word alone: racism.”

– Windsor Police Service interviewee, October 17, 2016

The unspeakability of racism¹ within the context of Canadian policing and the interrelated preference for *soft* words and *soft* approaches which attend to *all* human rights are of central concern to this dissertation. As a discursive strategy, this preference for softness acts as an impediment to anti-racism interventions which articulate the persistence of racial inequity within Canadian public service institutions, such as policing. As a human rights strategy, softness is marked by the absence of compulsory measures, remedial consequences, and litigated enforcement. A commitment to softness places constraints on both what words can be used and what approaches can be undertaken in the implementation of human rights-driven systemic change initiatives. Further – as articulated by the above interviewee – *softness is constructed in opposition to race-focused critiques and interventions*. In order to avoid engendering both institutional resistance and individual defensiveness, soft approaches favour the celebratory language of diversity and the abstract consideration of all human rights. As I

¹ Sheila Dawn Gill (2000) offers an analysis of how the “unspeakability of racism” blocks the naming of racism within Canadian elite discourse.

will demonstrate, this flattened invocation of *all* human rights within the context of policing – what I term an “All Rights Matter” approach – functions to deflect attention away from public criticism and accusations of racism, and to exercise containment over systemic change requirements.

My project is principally concerned with the systemic dimensions of human rights. There exists a theoretical and a practical tension between the individualizing framework of human rights systems and collectivist anti-discrimination aims. This tension is evident in the context of Canadian human rights legislation, which attempts to ameliorate conditions of disadvantage facing historically marginalized groups within an individual complaints-driven system. The Ontario *Human Rights Code* (hereafter referred to as the *Code*) encourages the implementation of “special programs designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups” (s. 14.1). The operational mechanisms of the Ontario Human Rights Commission (hereafter referred to as the Commission or OHRC) that are aimed at identifying and ameliorating discrimination have traditionally relied on individual claims of episodic instances of discrimination. Yet beyond the case management function of human rights systems, human rights entities within Canada are responsible for the promotion of systemic change *in the public interest*. Through an examination of the OHRC’s partnership work with policing institutions, this dissertation explores the emancipatory limitations and possibilities of the Ontario human rights system’s lesser known, yet increasingly central function, of promoting systemic change.

In exploring the systemic change work of the Commission, my purpose is twofold: first, to illuminate the anti-racist systemic change accomplishments which are

possible through the Commission's Project Charter agreement governance model; and, second, to inform debates regarding the limitations of achieving collectivist anti-discriminatory aims within the parameters of human rights frameworks. Through their systemic orientation, the Project Charter agreements offer compelling case studies on the possibility of attending to collective inequities within the confines of a liberal human rights framework. However, the substantive significance of this change for racialized groups in particular is significantly hindered by the All Rights Matter approach which serves to obfuscate the narrow measures aimed at addressing racism under the limited scope and scrutiny applied through these agreements. As a result, the Human Rights Project Charter agreements entered into by the OHRC evaded the challenge of addressing racism directly, deflecting attention away from the very problems they sought to eradicate.

The Commission is an independent agency mandated to promote and protect human rights. The Commission underwent significant organizational changes in June, 2008 when *An Act to amend the Human Rights Code, 2006* (Bill 107) took effect changing the role of the Commission to no longer have carriage over individual human rights complaints and instead focus proactively on the identification and amelioration of systemic discrimination throughout Ontario. The pre-Bill 107 Ontario human rights system consisted of two entities: the Commission and the Human Rights Tribunal of Ontario (HRTO). The pre-Bill 107 Commission, like other human rights commissions across Canada, had been responsible for the investigation, resolution, or referral of human rights complaints. The HRTO is a quasi-judicial body that reaches determinations on human rights claims based on specialized knowledge and existing case law. While the

post-Bill 107 HRTO largely retained its same functions, the OHRC no longer served as the “gate-keeper” between human rights claims and the Tribunal. Bill 107 also created a third human rights entity, the Human Rights Legal Support Centre, which provides legal assistance to individuals in filing applications at the HRTO and legal representation at HRTO mediations and hearings. In the wake of these changes, the Commission embraced Human Rights Project Charter agreements with select organizations in an attempt to facilitate anti-discriminatory changes within large-scale institutions that have a high volume of human rights complaints. These Project Charter agreements entail the development of time-limited targeted change objectives and reporting mechanisms, with the Commission acting as both an advisor and an auditor for a pre-set period of time. Through these novel arrangements, the Commission sought to address equity and inclusion gaps within these institutions. While in certain ways these agreements constitute a continuation of the public interest mandate of the Commission, which was previously met in large part through the inclusion of systemic remedies in settlement agreements, the ongoing monitoring and partnership arrangement constitutes a significant shift towards a cooperative governance model.

The focus of this dissertation concerns the Commission’s partnership engagement with police services through the use of voluntary Human Rights Project Charter agreements. To date, the Commission has signed Project Charter agreements with four institutions: two municipal police services, the Ministry of Community Safety and Correctional Services, and Ontario Shores Centre for Mental Health Sciences.² The first

² The last partnership agreement of this voluntary nature was entered into in 2016 with Ontario Shores, though the OHRC announced work with the Peel Police to establish a “legally binding plan to address systemic racism and discrimination” (Miller, *Toronto*

three-year Project Charter agreement was formed in May 2007 between the Commission and the Toronto Police Service (TPS). The agreement codified the public interest remedies recommended by the Commission in the resolution of multiple human rights complaints against TPS. The Project Charter model developed through this agreement consisted of an ongoing partnership between TPS and the Commission to identify and eliminate any persisting discrimination in employment and the provision of policing services. In 2011, the Commission entered into a Project Charter agreement with the Windsor Police Service (WPS) modelled after the TPS agreement and released a policy guide entitled *Human Rights and Policing: Creating and Sustaining Organizational Change*. In June 2013, the Commission partnered with the Ottawa Police Service in the collection of race-based data, though, unlike the voluntary Project Charter agreement entered into with the TPS, this project was set out within the context of litigation and was the result of a settlement agreement based on a human rights application put forward by Chad Aiken, a young Black man pulled over by a police officer in Ottawa.

The Commission's focus on policing mirrors the increased public scrutiny facing police institutions within Ontario, in particular, as it relates to manifestations of anti-Black racism. Beginning in 2002, the *Toronto Star* ran a series of investigative articles based on an analysis of police crime data and pointed to a significant disparity in treatment based on skin colour (Rankin *et al.*, 2002). Subsequently, the 2008 Ontario Ombudsman report "Oversight Unseen" pointed to the impotency and complacency of the province's Special Investigations Unit (SIU) – the unit established to investigate

Star, Jan. 15, 2022). The final agreement between Peel Police and the OHRC is scheduled to be reached in 2022.

incidents where civilians are seriously injured or killed in an interaction with the police – and drew specific attention to the SIU’s handling of incidents involving young Black men (Marin & Addo, 2008). Within this same period, several researchers released Ontario-based studies challenging the myth that “a few bad apples” in policing are solely responsible for the practice of racial profiling (Wortley & Tanner, 2003; Tator & Henry, 2006; Wortley & Owusu-Bempah, 2011). The Commission itself released a public inquiry report on *The Human Cost of Racial Profiling*, which discussed extensively Black people's experiences in interactions with the police and perceptions of police bias (OHRC, 2003). Why then, when the Commission began engaging with Ontario police departments in the interest of addressing human rights concerns, did racial profiling not receive explicit focus?

Why, in a climate of public concern and reports pointing to racial profiling in policing, did the Commission adopt an “All Rights Matter” approach in these Project Charter agreements that foreclosed an explicit focus on race and racism? In some respects, this inquiry risks failing to evaluate the efficacy of these agreements by virtue of their own merit by entering into a line of questioning that examines why they are not something they were never intended to be—akin to faulting a boat for not being a better airplane. That said, if the demand for the plane was being made explicitly, and the need for the plane was apparent, why then set about building a boat? Addressing this question requires an understanding of the race-neutral logics that work to constrain the viability of anti-racist structural change and the role of the police in reproducing a racially inequitable social order.

Seeking human rights change within the Ontario police services constitutes a reform effort that, even if successful, in and of itself would not constitute radical transformation or bring about racial justice. Yet, I am guided by Michelle Alexander's (2020: 293, emphasis added) suggestion that "the relevant question is not whether to engage in reform work, but *how*." Reform work which addresses racial discrimination and racial profiling can be part of "movement building" work provided that reform efforts support advocacy work to dismantle mass incarceration and disrupt an inequitable racial order. In examining the OHRC's reform efforts, I treat manifestations of racial discrimination, use of force, and racial profiling within Ontario police services as part of a carceral system that also includes, as identified by Rai Reece (2020), for-profit prison contracts, state surveillance, and the disproportionate incarceration of Black and Indigenous peoples. The Commission's human rights-based institutional interventions into policing were neither intended to, nor capable of, abolishing or dismantling the Canadian carceral system. Nonetheless, the pursuit of racial justice requires that we attend to these institutional interventions given their potential for ameliorating the material conditions of Black, Indigenous and racialized communities in contact with the carceral system, and the risk that these reforms will repair the legitimacy of carceral institutions without addressing structural inequities. This dissertation details *how* demands to address racism in policing can be subsumed by All Rights Matter reforms aimed at repairing—not transforming or dismantling—police institutions.

Conceptual Definitions

All Rights Matter

I use the term “All Rights Matter” to describe a flattened approach to human rights that restricts specific consideration of the operation of a particular form of oppression – and is especially employed to block discussion of racism. This term is a purposeful allusion to the “All Lives Matter” rhetoric which has been deployed – especially amongst those invested in law enforcement institutions – to challenge the Black Lives Matter movement. The Black Lives Matter movement was born out of a denunciation of a legal system that sanctions anti-Black violence and sustains structural racial inequity. Ignited by the 2012 fatal shooting of a Black teenager, Trayvon Martin, and the acquittal of his killer, George Zimmerman, three Black American organizers – Alicia Garza, Patrisse Cullors, and Opal Tometi – began building a movement under this simple, but powerful, three-word phrase (Hillstrom, 2018). In Canada, like in the U.S., this movement rose to prominence and posed a direct challenge to standard policing practices which subjected Black, Indigenous, and other racialized people to disproportionate stop rates and use of force. Through the mobilized insistence that “Black lives matter,” activists sought to draw focused attention to the operation of structural racism and the impact of this racism on Black lives. In opposition to this demand to acknowledge and address structural racism, defenders of the *status quo* espoused the position that “All Lives Matter.” “All Lives Matter” is invoked to neutralize race-based political critique and block criticism of police racism (Kil, 2020). Like the rhetoric “All Lives Matter,” I will establish that the All Rights Matter approach is reflective of a discursive strategy to block dialogue regarding the specifics of anti-Black racism and racism more generally.

The All Rights Matter approach assumes a symmetrical construction of equality-based protections which is inattentive to historical context and results in the flattening of differences. As an institutional approach to implementing human rights measures, the All Rights Matter approach operates on the basis of two related mechanisms: obfuscation and deflection. Given the broad commitment to address *all* grounds of human rights, the All Rights Matter approach is broadly inclusive of multiple forms of difference and equity-based protections. This inclusivity *obfuscates* areas of institutional inaction or resistance, since the broad-based, overarching commitments are purported to satisfy all human rights. As with the analogous claim that it is superfluous to state that “Black Lives Matter” since “All Lives Matter,” this obtuse logic specifically avoids interrogating the ways in which Black lives are not being treated as if they matter or why there is such unwillingness to affirm the value of Black life. The All Rights Matter approach similarly blocks specific attention to the operation of structural racism through the same spurious reasoning. The All Rights Matter approach also allows for a broad range of activities to be captured under the umbrella of human rights change, such that advancements with respect to one ground of human rights *deflect* attention away from inaction, or failure, in another ground of human rights. This mechanism of deflection places equity-based protections in opposition to one another – competing for resources and prioritization. Through obfuscation and deflection, the All Rights Matter approach obscures persistent institutional unwillingness to address – or even discuss – racism.

Diversity Management

The flattened approach to difference set out in the All Rights Matter approach is intimately connected to diversity management strategies. The diversity management approach strives to highlight for organizations the benefits of a workforce composed of individuals from a variety of different backgrounds and identities. Diversity management seeks to extract value from the inclusion of historically marginalized groups based on the logic that including these groups will assist organizations in connecting to a wider market and in generating new competitive ideas by breaking free of homogenous thinking.

Frances Tomlinson and Christina Schwabenland (2010: 103) identify that “diversity is a concept with wider appeal than traditional equal opportunities, since it encompasses differences that apply to everybody, not just to those who can place themselves within a minority or disadvantaged category.” By avoiding discussion of power dynamics and historical disadvantage, diversity management instead stresses that we *all* come into the workplace with different perspectives and personal histories, thus all of us can contribute to a diverse workplace.

The irony of diversity management discourse, however, is that while the broad invocation of difference is used to avoid focused discussions of race, the term “diversity” itself circulates as a watered-down euphemism for race and the integration of racialized groups. Diversity management discourse treats racialized subjects as both perennially *new* and disruptive to the existing social order and operates under the premise that integrating racialized members into existing social arrangements is beneficial for everyone. As argued by Yasmeen Abu-Laban and Christina Gabriel (2008), this orientation towards “selling diversity” reflects a muted commitment to enhancing justice

and instead favours business vernacular and rationales. As evidenced by Wendy Cukier *et al.* (2017: 1054) there has been a Canada-wide discursive shift starting in the late twentieth century and intensifying in the early twenty-first century “from ethics and compliance-based language to diversity management and the competitive advantage of diversity.”³ This emphasis on the competitive advantage of diversity has penetrated multiple sectors and, as expressed by Charles Smith (2010), “swallowed up” the language and practice of “anti-racism.” This discursive shift is inseparable from neoliberal rationales which prioritize profit-maximization and sustain inequitable social relations. As identified by Frances Henry *et al.* (2017: 302) in their study of the myth of racial equity within Canadian universities: “Diversity thinking is preoccupied with ‘managing’ workplace relations rather than with underlying structural issues.” My attention to the invocation of diversity management within the context of human rights and policing builds on these critical analyses of diversity discourse within Canadian institutions.

Finally, my understanding of diversity discourse is informed by Sara Ahmed’s exploration of the institutionalization of the language of diversity in *On Being Included* (2012). Ahmed (2012: 66) cautions that “the fact that diversity is not a scary word is part of the problem: if it is detached from scary issues, such as power and inequality, it is harder for diversity to do anything in its travels.” Like Ahmed, I follow the path of diversity commitments through the institutional implementation of these commitments in order to interrogate what is accomplished under the mantle of diversity. I am interested in demonstrating how diversity as policy discourse signals limited intervention into power-

³ To track this shift, Cukier *et al.* (2017) conducted a study into the shifting patterns of macro-level discourses of diversity within *The Globe and Mail* and Canadian *Employment Equity Act (EEA)* Annual Reports between 1986 to 2013.

based inequities, particularly racial inequities. My analysis connects the deployment of diversity management discourse to the framework of human rights to reveal how the language of diversity acts as an impediment to systemic understandings of human rights protections and requirements by subsuming racism and interlocking structural inequities under the rubric of difference.

Race and Racism

Drawing on Stuart Hall's formative essay "Race, the Floating Signifier" (1997), I treat race as a discursive and relational – not a biological – construct, recognizing that its meaning can never be trans-historically fixed and is instead always historically and socially contingent. Hall's discursive treatment of race avoids essentializing difference, while still recognizing the enduring salience of race as "one of those major concepts which organize the great classificatory systems of difference" (2021: 359). Instructed by Hall's complex treatment of race, I am attentive to how human differences are inscribed with racial meanings within particular social and political contexts.

As articulated by Debra Thompson (2008: 528) within the Canadian context: "Race is not simply about skin colour or morphological characteristics, but rather should be understood as the signifier of a complex set of power relations." I use the terms "racialized" and "racialization" in reference to the ongoing processes of creating and sustaining racial meanings and identity categories. Further, Thompson's (2016: 118) research into the maintenance of racial categorization in Canada is illustrative of how "racial categories remain heavily dependent on official recognition (or lack thereof) by the state." My tracing of the protections afforded under the Ontario *Human Rights Code*

on the ground of race from the *Code*'s inception in 1962 into the twenty-first century elaborates on the role of the OHRC in determining which racialized groups require protection from race-based discrimination and defining what forms of racial discrimination warrant redress.

As I eschew genetic, biological, and physiological definitions of race, I treat the concept of race as bound up in the operation of racism. I draw on Abigail Bakan and Enakshi Dua's (2014: 6) account of racism as "the body of ideas and practices that establishes, maintains, and perpetuates such [race-based] categories of difference, sustained through multiple, varied, and contextually specific social, political, and economic constructions." Given the ubiquity and embeddedness of racism within Canadian institutions, I contrast this expansive and critical understanding of racism with the limited protections and redress afforded by anti-discrimination provisions. In addition, I posit an understanding of racism which functions as an explanatory force that is separate from, though integral to, class relations. As articulated by Paul Gilroy (2021: 2): "Racism is not another layer of misery to be logged and added to the dismal effects of other social processes. It has a constitutive power. It shapes and determines economic and political relations." This attentiveness to race and racism is in contrast to the liberal pretense of racial neutrality, or what Eduardo Bonilla-Silva (2014) describes as "color-blind racism", which serves to perpetuate racial inequality by fetishizing individual choice and rationalizing structural inequity as the outcome of 'raceless' determinations of merit.

Methodology and Methods

Against the flattening of difference and race-neutrality, this inquiry begins from a methodological commitment to the centrality of race and racism within justice-sector institutions and in particular, policing. Accordingly, my methodology is developed out of the epistemological insights and normative commitments of Critical Race Theory.

Drawing on Kimberlé Crenshaw, Neil T. Gotanda, Gary Peller and Kendall Thomas (1995: xiiv), I approach this study first, with an interest in understanding and elucidating how the subordination of racialized people is created and maintained through the law, and second, “a desire not merely to understand the vexed bond between law and racial power but to *change* it.” Further, sparked by the interventions of Yasmeeen Abu-Laban (2007), Debra Thompson (2008) and Nisha Nath (2011) regarding the lack of Canadian scholarship on the political significance of race, this research attends to the implications of public policy – understood as what a state does and does not do – for processes of racialization.

I examine Ontario human right public policy – and anti-discrimination provisions – within the context of colonial and racial social relations which are maintained by structural exclusions and state surveillance. Consistent with contemporary research into race and policing within Canada (Comack, 2012; Maynard, 2017; Ritchie, 2017; Tanovich, 2006) I ground this research within, what Timothy Bryan (2019: 53) named as: “the historical reality that race and racism are foundational to the development of the Canadian nation-state and in the practices of state institutions such as the police.” I do so by foregrounding race and racism within my analysis of the OHRC’s public policy and systemic human rights change efforts. Guided by Carol Bacchi’s (1999) approach to

examining institutional policies as invested in the “production of meaning”, I assess how the OHRC’s evolving – and at times contradictory – policy approach to racism and policing is informed by – *and reproduced* – racialized assumptions regarding criminality, public safety and social relations. Bacchi (1999: 40) places emphasis on policy as discourse, understood as a form of speaking “which sets limits on what can be said.” The treatment of policy as discourse requires historical inquiry into the emergence of both policies and the problems to which these policies are responding. Whereas Bacchi’s approach was developed principally in relation to the structuring discourses pertaining to gender relations, my integration of Critical Race Theory seeks to expose the embedded racial logics contained within the Commission’s policy discourse and problem representation.

Central to Bacchi’s discourse analysis of public policy is the examination of the construction of *policy problems*. As expressed by Bacchi (2012: 21) “what one proposes to do about something reveals what one thinks is problematic (needs to change).” Accordingly, she proposes applying critical scrutiny to policies in order to discern what is being represented as problematic, and what is determined to be *unproblematic* or not requiring change. Bacchi (2012) offers six questions intended to guide critical assessment of problem representation:

1. What is the ‘problem’ represented to be in a specific policy or proposal?
2. What presuppositions or assumptions underpin this representation of the ‘problem’?
3. How has this representation of the problem come about?
4. What is left unproblematic in this problem representation? Where are the silences?
5. What effects are produced by this representation of the ‘problem’?
6. How/where has this representation of the ‘problem’ been produced, disseminated, and defended? How has it been questioned, disrupted, and replaced?

Informed by this set of questions, I apply critical scrutiny to how the Project Charter agreements – entered into by the OHRC and participating policing institutions – translated the ‘problem’ of human rights and policing into the need for diversity management. Building on consideration of how the representation of the problem came about, I attend to the role of public pressure in creating the conditions for a human rights-based policy response in policing. Extending Bacchi’s framework, I utilize these case studies to illustrate how problem representation can serve as a *containment strategy* to simultaneously block and obscure demands for transformative public policy.

I approach the study of Ontario policing institutions from the position of an outsider with limited and controlled access to internal practices and decision-making processes. As has been noted in prior studies involving interviews with police (Brown, 2019; Bryan, 2019; Owusu-Bempah, 2014; Scoggins, 2014), police culture fosters a distrust of outsiders which impedes access to police as research subjects. Even where institutional access is granted, outsider researchers may still encounter difficulties engaging research subjects beyond, what Georgina Holmes (2019: 226) terms, “the institutional script.” Policing institutions can seemingly grant access while still exerting tight control over knowledge production by supplying a limited sample of officers who offer selective narratives and adhere to the institutional script. This challenge has led some researchers to avoid seeking institutional approval⁴ and has created conditions where Ontario research on policing is undertaken primarily by researchers with pre-

⁴ For example, Akwasi Owusu-Bempah’s research into the experiences of Black officers was conducted outside of official approval to avoid creating conditions where officers “felt pressured to portray the police in a positive light” (2014: 171).

existing networks within policing.⁵ I too utilized prior networks to facilitate access to the institutions which I studied.⁶ Given that my networks are based within the field of human rights and not policing, it is worth noting that these connections – while useful in navigating multiple institutional approval processes – did not confer ‘insider status’ within the context of policing, nor did these connections establish a basis upon which to cut through the institutional script. Thus, as an institutional outsider within the field of policing, I embarked on my field research from the vantage point of *studying up*.

As a methodological intervention, studying up is vital to examining how state institutions reinforce inequitable social structures. As identified by anthropologist Laura Nader (1972), conducting fieldwork on socially marginalized populations relies on and reproduces asymmetrical power relations which favour the researcher and limit our understanding of systems and institutions of power. Conversely, as articulated by feminist researcher, Maria Martin de Almagro, (in Holmes *et al.* 2019: 224), studying up requires the researcher to strategically position themselves as “supplicant [...] which means accepting that the knowledge of the person being researched is greater than that of the researcher. This shifts power over to the research participant.” Martin de Almagro describes this strategy as particularly useful in research environments that are hostile to

⁵ Owusu-Bempah (2014) began by approaching Black police officers he knew personally, Timothy Bryan’s (2019) research into hate crime enforcement was facilitated by prior work with the Ontario Association of Chiefs of Police, and Greg Brown’s (2019) research into front-line police work was explicitly enabled by his self-described position as an “outsider insider researcher”, having served as a front-line patrol officer.

⁶ Prior to beginning my doctoral studies, I worked briefly as a Human Rights Officer at the OHRC, and as a Conflict Resolution and Human Rights Consultant within the Ontario Ministry of Community Safety and Correctional Services.

feminist interventions, since the researcher-as-suppliant is viewed as less threatening by institutions.

In engaging with police institutions, I inhabited the role of suppliant, allowing research subjects to educate me on both police institutional practices and share their perspectives on the relative merits of human rights within a policing context. The role of suppliant also informed my approach to access, adopting what Suzanne Scoggins (2014) describes as the recruitment strategy of “any officer, anywhere.” Once I was granted institutional access by the three participating police institutions (Ottawa Police Service, Toronto Police Service, and Windsor Police Service) I interviewed any police personnel willing to speak with me and met with each of them in their preferred location, which was most frequently in their offices or conference rooms (broadly speaking, “on their own turf”). My willingness to speak with any officer available to me provided opportunities to interact with those less directly connected to the Project Charters, who were also less well versed in – and committed to – the “institutional script” regarding the merits of these agreements. I developed an interview guide which invited research subjects to speak first on their own experience and expertise, second on specific details of the Project Charters, and third on any reflections they had regarding the partnership process or human rights more generally. The semi-structured format of the interviews enabled research subjects to guide the discussion and comment more broadly on matters *they deemed* to be relevant to this research. By enabling the research subjects to speak from an authoritative position on their knowledge and perspectives on human rights and policing, I was able to elicit more divergent and nuanced commentary than what was made available through the official documentation of these agreements.

In addition to conducting interviews with police institutions, I interviewed three OHRC staff members who had direct experience working with policing institutions in the design or implementation of Project Charters. This small subset of research subjects was distinct from interviews with police institution staff in that they too were outsiders to policing culture. These interviews provided insight into how OHRC staff positioned themselves in relation to the policing institutions with which they engaged, as well as how they negotiated the constraints of the voluntary partnership arrangement. In addition to discussing their work on the Project Charter agreements, I asked OHRC staff to describe their sense of the limitations of these agreements, the relationship between “diversity” and “human rights”, and the distinctions between legally mandated and voluntary approaches. These accounts revealed complex negotiation between competing institutional priorities, most notably: the aim to foster and maintain positive reciprocal relationships with other public entities and the aim to bring about measurable human rights changes which are responsive to community concerns. I approach this interview data, in view of Sara Ahmed’s (2012: 9) insight that “we can thicken our description of institutions by offering an account of what diversity practitioners are trying to accomplish.” While OHRC staff did not brand themselves as “diversity practitioners,” in the same way as the informants that Ahmed met with in her research into institutional diversity did, OHRC staff worked to attach value to concepts like “human rights,” “diversity” and “equity” within the confines of inequitable institutions.

Guided by the approach that Leah Vosko and the Closing the Enforcement Gap Research Group (2020) took, my analysis of qualitative interviews is in active dialogue with my documentary and policy analysis. I examine OHRC policy documents spanning

from 1962 to 2016, including annual reports, policies and guides, public consultations, organizational reviews, and commissioned reports, and supplement these institutional materials with newspaper coverage, case law and legislation. Collectively, these documents enable a qualitative exploration of process, as well as a conceptual tracing of what Jane Jenson (2015: 541) describes as: “the ideas and discursive constructions shaping policy responses to social structure.” This qualitative analysis of the discursive constructions and policy responses to race and racism advanced by the OHRC enables conceptual tracing of the competing logics underpinning Ontario human rights policy. Additionally, my examination of documentation of purported achievements under the Project Charter agreements is informed by Ahmed’s account (2007: 607) of the politics of documentation wherein “documents create fantasy images of the organizations they apparently describe. The document says, ‘we are diverse’, as if saying it makes it so.” My documentary review is particularly attentive to the schisms between stated commitments and stated accomplishments, as well as documentary absences within the reporting of Project Charter achievements. Ahmed (2012: 10, emphasis in original) identifies that “too much research in this field [diversity] is premised on findings that institutions *want found*: from toolboxes to good practice.” My methodological approach interrogates this politics of documentation through activating a policy analysis focused on problem representation in dialogue with interview data. Collectively, these research methods and foci offer a critique of the *obfuscation* and *deflection* mechanisms embedded within the All Rights Matter approach.

Chapter Outline

In Chapter 1: “Theorizing Rights, Structural Inequity, and Difference in Canada”, I situate my research within theoretical debates regarding the liberal foundations of rights discourse and the emancipatory limitations of rights claims, specifically in relation to racism, and locate this discussion within the context of the Canadian nation state. The first section of this chapter, Race, Rights & ‘The Duality of Law’, establishes that rights exist within a constricted universe, predicated on gendered and racialized relations and argues for the strategic invocation of rights to push against inequitable constrictions in order to reconfigure social relations. The second section, Canadian Paradox of Race Neutrality and the Celebration of Difference, elaborates on the racial mythologies which shape and constrict Canadian policy and legal invocations of difference. Here, I argue that a Canadian attachment to racial innocence and neutrality creates both a need for—*and impediment to*—the integration of anti-racism analysis within human rights law. In the third section, Substantive Equality and Material Inequity, I show how the trajectory of Canadian human rights law demonstrates a capacity to recognize and intervene into collective inequities, yet the expanse of this conceptualization of substantive equality and group rights has been blocked by market-based logic and financial constraints. In the final section, Intersectionality and the Flattening of Difference, I align myself with Critical Race Feminists who argue for a contextual analysis of difference and structural inequities, a position which may necessitate a strategic retreat from intersectionality. Through a review of Critical Race Feminism and Canadian Studies literature, I argue for a strategic and expansive invocation of ‘group rights’ articulated through the human

rights system, while also examining the entrenched race-neutral logics and the limited success of institutionalized intersectional approaches for addressing racism.

My second chapter, “The Ontario Human Rights Commission and the Problematization of Race and Racism”, provides a conceptual tracing of the Commission’s articulation of race-based discrimination from 1962 to 2016. This chapter looks backwards to identify the discursive emergence of the Commission’s systemic approach to human rights as well as the evolving articulation of the Commission’s institutional mandate. The chapter is organized around four sets of competing conceptual logics: civil liberties vs. human rights; systemic inquiry vs. institutional expedience; race relations vs. anti-racism; and enforcement vs. partnership. In the first section, I identify how early approaches to human rights legislation in Ontario attempted to broker the conflicting dictates of civil liberties and human rights by framing anti-discrimination as compatible with economic interests and ensuring minimal disruption to Ontario businesses. In the second section, I trace the rise of proactive enforcement and systemic articulations of discrimination against the constricting force of New Public Management edicts and resource constraints. The Commission’s incomplete transition from race relations to anti-racism is explored in section three. Here, I identify the continuities between a race relations framework and a diversity management framework, and examine the contradictions between the Commission’s articulated understanding of institutionalized racism and its continued legitimization of an inequitable racial order, particularly in relation to standard policing practices. In the final section, I focus on the bifurcated approach to human rights law within Ontario, such that individual complaints are met with firm enforcement strategies while collective inequities are addressed

through cooperative partnership-oriented approaches. This historical inquiry serves to complicate the narrative of progress with respect to racial discrimination within Ontario and to establish the OHRC's recurrent institutional role as a careful *mediator* between transformative justice demands and the *status quo* – rather than a *leader* in the advancement of human rights.

Chapter 3: “Adversaries or Partners?: Human Rights and Policing” builds on my argument in Chapter 2 regarding the Commission's competing – and frequently contradictory – invocations of systemic discrimination, anti-racism and public interest, while focusing specifically on the contradictions of partnering with the police to achieve purportedly *anti-racist* systemic change. To begin, I expose these contradictions through first demonstrating how policing, within the context of the Canadian settler-state, is invested in reproducing an inequitable racial order. Secondly, I establish how the pretense of Canadian racial neutrality creates evidentiary and policy challenges for utilizing human rights law to combat racial discrimination in policing. In section two, I analyse the OHRC's attempts to render racial profiling in policing both legible and actionable within the confines of the Ontario *Human Rights Code* through a close reading of the OHRC's public inquiry: *Paying the Price: The Human Cost of Racial Profiling* (2003). In section three – through a documentary review of the OHRC's annual reports and the OHRC partnership-based guide to *Human Rights and Policing* (2011) and my interviews with OHRC policymakers – I establish how the OHRC substituted a structural anti-racism analysis for a diversity-management approach in the interest of securing partnerships with the private sector and police institutions. In the final section, I draw on my interview data, and a case study of the Ottawa Police Race Data Collection Project, to reveal how

voluntary human rights initiatives can paradoxically impede anti-racism change. This discussion sets the stage for the final two chapters which provide an in-depth examination of the Project Charters as containment strategies to quell public pressure and evade Human Rights Tribunal Orders.

In Chapters 4 and 5, I draw on interview data and documentary reviews to demonstrate how the OHRC's Human Rights Project Charters were employed by the participating policing institutions to contain demands for anti-racist institutional change. In Chapter 4: "The Toronto Police Service's Evasive Maneuver," I establish that Toronto Police purposefully framed the Project Charter agreement to be inclusive of "all rights" – rather than focused on race and racism – and then utilized this agreement to cloak existing institutional practices in the veneer of human rights. Throughout the Project Charter process, the Toronto Police Service clung to pre-existing conceptual logics and standard policing practices, while publicly professing a commitment to human rights and anti-racism. In so doing, the Project Charter served as a temporarily-successful containment strategy which enabled the Toronto Police to evade Human Rights Tribunal orders and to manage its public image. Similarly, in Chapter 5: "The Windsor Police Service's Diversity Washing," I demonstrate that under the Human Rights Project Charter, the Windsor Police pursued a strategy of diversification that was unresponsive to community concerns of racial profiling and misuse of force. Through the Project Charter, Windsor Police reconfigured community criticism as calls for increased representation in policing and increased police presence in community. The Windsor Police then employed the Project Charter as defense against continued community pressure to attend to racism in policing.

Taken together, these chapters explore both the limitations and possibilities of utilizing human rights law to advance racial justice. These Project Charter agreements between Ontario police services and the Commission offered the potential for advancing group rights by assuming a systemic, rather than individualistic, approach to human rights institutional change. Yet the actual initiatives pursued under these agreements belie the limits of applying *soft* responses to institutionalized racism in policing which lack the coercive power of the law. The All Rights Matter approach pursued through these initiatives is soft in its inculcation of policing and markedly unresponsive to community demands to specifically address racism and racial profiling. Instead, the Project Charters served to obfuscate the persistence of institutionalized racism in policing through the promotion of diversity management strategies. Ultimately, this research establishes the need to sever human rights approaches from diversity management discourse that seeks to extract value from racialized groups without addressing inequitable racial orders and establishes the ongoing need for human rights accountability and legally-enforceable public interest remedies.

Chapter 1: Theorizing Rights, Structural Inequity and Difference in Canada

The “task is not to discard rights, but to see through or past them”

- Patricia J. Williams (1991: 164)

Patricia J. Williams (1991) describes rights as existing within “a constricted universe.” Within the Canadian context, this constricted universe is the product of White settler-colonialism, the enslavement of Black people, and xenophobic immigration policies which have served to establish an inequitable socioeconomic racial order. What can be gained through the invocation of *human* rights within a national context which has rendered racialized others as less than human in law and public policy? I am interested in how human rights can be strategically employed to challenge the Canadian institutional and legal prioritization of White social and economic prosperity. This invocation of rights is not obtuse to the exclusionary liberal foundations of human rights, rather it is decidedly cognisant of—and disruptive to—the founding principles of legal liberalism.

In this chapter, I situate my research within theoretical debates regarding the liberal foundations of rights discourse and the emancipatory limitations of rights claims, specifically in relation to racialized groups, and locate this discussion within the context of the Canadian nation state. I argue for the utility of a strategic invocation of ‘rights’ for the purposes of advancing substantive anti-racist change. In doing so, I examine the foreclosures required by the adoption of human rights discourse and the expansive

capacity of this discourse to push against or beyond the limitations prescribed by legal liberalism. David T. Goldberg (1993: 1) describes liberalism “as modernity’s definitive doctrine of self and society, of morality and politics.” The normative dominance of liberalism is fuelled by a Eurocentric presumption of the universal applicability of Western values, as well as liberalism’s pretence towards equality, recognition, and accommodation. Yet, as acknowledged by Canadian communitarian liberal scholar Charles Taylor (1994: 62), liberalism cannot truly operate under a commitment to blanket tolerance since “liberalism is also a fighting creed.” As a fighting creed contending with difference, Taylor cautions that liberalism can only grant recognition to collective identities where these collectives do not pose a challenge to the central tenants of liberalism. Taylor’s acknowledgement of the limitations of liberalism with respect to difference sets him apart from the prevailing Canadian claim to harmonious multiculturalism protected by a national commitment to human rights.

My theoretical exploration into the potential for human rights to ameliorate or dismantle structures of racism is divided into four sections. In section one, I review the arguments against invoking human rights for the purposes of advancing social justice and draw on Critical Race Theory to establish the “duality of law” (Aylward, 1999) in its capacity to both sustain and challenge racial oppression. I emphasize this duality to push against deterministic accounts of human rights that foreclose the possibility of utilizing human rights to redress collective inequities. In recognition that rights exist within a constricted universe, in section two, I argue that within the Canadian human rights context, public institutions have reflected a paradoxical attachment to both race neutrality and multiculturalism. These attachments serve a national pretense of racial innocence

which obscures institutional recognition of a historically and legally entrenched inequitable racial order. In the third section, I review the emergence of a substantive equality framework in Canadian jurisprudence which allows for the recognition of group rights and the use of systemic change initiatives to address historical inequities. I argue, however, that market-based logics and financial constraints have recurrently sought to undo or restrain these systemic initiatives. In closing, I locate contemporary human rights within the popularity of neoliberal diversity rhetoric to expose how flattened approaches to difference and depoliticized intersectionality subsume anti-racism within identity-based inclusion strategies which are inattentive to the operations of power structures. I conclude by arguing for a strategic use of rights to advance anti-racism within the context of the Canadian nation state by pushing against entrenched race neutral logics and more contemporary diversity rhetoric, and instead insisting on recognition of the enduring salience of race and racism in Canadian law and public policy.

Race, Rights & The Duality of Law

In arguing for the strategic invocation of human rights to challenge institutionalized racial oppression, it is first necessary to review the intimate connection between Canadian human rights law and foundational liberal legal principles such as the rule of law, formalism, neutrality, abstraction and individual rights. In so doing, I draw on theorists such as Wendy Brown (1995) and David T. Goldberg (1993) to enunciate how the constitutive principles and dualisms of liberalism are drawn on the basis of gendered and racialized binaries. Read together, the work of Brown and Goldberg serves to elucidate how the rights and liberties conferred on the liberal subject are premised on

gendered and racial segregation which cast particular subjects out of the scope of legal protection. Rather than view the explicit sexism and racism of the fathers of liberalism as antiquated prejudices which can be divorced from the purported merits of liberalism, Brown and Goldberg insist that these exclusions are still operable within modern day application of legal doctrines and the social organization of liberal democracies – such as Canada and the United States. I employ Brown and Goldberg to establish the embedded exclusions of liberal legalism, including the exclusionary differentiations central to *neoliberalism*. Yet, my account of human rights seeks to look beyond what I view to be overly deterministic accounts of legal liberalism in order to incapsulate what Carol Aylward (1999: 34) refers to as the “duality of the law,” accounting for both “its contribution to the subordination of Blacks and other people of colour and its transformative power.”

The legal subject under liberalism is the individual, independent of community and family relations, and abstracted from all localized and historical contingencies. Liberalism aspires towards universal principles which apply to “all human being or rational agents” (Goldberg, 1993: 5). Yet this abstracted universal liberal subject is constructed on the basis of gendered and racialized differentiations that elevate the particularities of a White, masculine, European worldview to the status of the universal. Thus, despite liberalism’s expressed commitment to egalitarianism, racial exclusions have been foundational to the construction and perhaps more importantly, the denial, of liberal personhood. Consequently, Goldberg (1993: 28) asserts that: “The concept of race has served, and silently continues to serve, as a boundary constraint upon the applicability of moral principle.” Goldberg’s examination of the racialized boundaries

invoked by the foundational liberal theorists⁷ is instructive for not only recognizing that the rights guaranteed by liberalism were never intended to be conferred to “Negroes” and other racialized subjects, but further that these rights and entitlements presumed the operation of racial boundaries which prioritize White economic and social prosperity.

The rights provided for by legal liberalism have not only failed historically to be universally applicable, but the limited applicability of these rights has also been constructed on the basis of racial differentiation. This racial differentiation – and the accompanying material inequity – entails significant restraints on the emancipatory power of invoking rights within liberal democracies where the racialized denial of rights entitlement is already firmly entrenched. As expressed by Goldberg (1993: 36): “Rights exist and empower, if at all and even where they claim universality, only on the basis of some socially constructed and civil system already established by a specific process of politics and law.” If the power of rights is predetermined by the social and historical context within which these rights are invoked, then—within the context of White settler-

⁷ Goldberg provides the following examples of the explicit racialized exclusions articulated by liberalism’s founders:

- “Locke could conclude that in formulating a concept of *man* for himself, an English boy would rationally fail to include Negroes.” (1993: 28, emphasis in original)
- “Hume concluded, ‘In Jamaica they talk of one negro as a man of parts and learning; but tis likely he is admired for very slender accomplishments, like a parrot, who speaks few words plainly.’” (1993: 31)
- “‘Negroes’ in Kant’s view are the most lacking of all ‘savages’ [. . .] ‘So fundamental is the difference between races of man, and it appears to be as great in regard to mental capacities as in color. . . . The blacks are vain in the Negro way, and so talkative that they must be driven apart from each other by thrashings.’” (1993: 32)
- “While Mill thought that social subjects in the early nineteenth century should be committed to abolition, he insisted that slave owners ought to be compensated for their lost investment: Slaves were considered to be like property appropriated by the government for public benefit.” (1993: 36)

colonial liberal democracies—the emancipatory power of rights is circumscribed by pre-established racial hierarchies. Glen Coulthard (2014: 47) maintains that these pre-established colonial relations present an intractable challenge to employing, and seeking to transform, “the legal and political discourses of the state” in that these discourses are “backed by and hopelessly entwined with the economic, political, and military might of the state itself.” The entrenchment of these colonial conditions and racial hierarchies, however, is obscured by liberalism’s pretense of universality and race-neutrality. Thus, under liberalism “race is irrelevant, but all is race” (Goldberg, 1993: 6) in that race heavily determines social, economic, educational and justice system outcomes and yet the application of the law is imagined to be apathetic to racial differentiation.

This obfuscation of the operation of race is intensified by the rise of neoliberalism—marked by privatization, deregulation and inequality—as racialized social relations become subsumed within market relations. Goldberg (2009: 341) identifies that under neoliberalism “race is purged from the explicit lexicon of public administrative arrangements and their assessment while remaining robust and unaddressed in the private realm.” This simultaneous purging and reinforcement of race allows for individual instances of expressed racial prejudice to be met with condemnation, while embedded racial inequities intensify. Nancy Fraser’s (2016: 167) differentiation between exploited and expropriated accumulation is instructive here in recognizing that: “far from being sporadic [. . .] expropriation has always been part and parcel of capitalism’s history, as has the racial oppression with which it is linked.” Whereas exploitation involves the exchange of labour for wages through a contractual relationship, Fraser describes expropriated accumulation as the *confiscating* of capacities and resources. Furthermore,

these processes of accumulation require a *legal framework* which, as identified by Fraser (2016: 170), serves to “guarantee property rights, enforce contracts, and adjudicate disputes.” Thus, under neoliberalism, racial oppression is facilitated by legal apparatus and entitlements which protect both exploitative and expropriative economic relations.

Neoliberal ideology prescribes a retreat from social welfare investments and instead redirects public funds to security and control functions in the interest of restraining and preventing systemic disruption. Accordingly, Goldberg (2009: 346) describes the neoliberal state as functioning like a “traffic cop [. . .] invested in directing and ordering flows of goods, people, information, capital.” The traffic cop state is principally concerned with securing private assets and maintaining social order. Under the traffic cop state, those subjects constructed as threats to the social order are subject to surveillance and force. This threat assessment relies on racial differentiations – derived from the same racial logics which conferred and denied liberal personhood – while insistently denying the legal salience of race. As detailed by Michael C. Dawson and Megan Ming Francis (2016: 32), the rise of a *neoliberal* ideology “redirects attention away from the havoc caused by the intertwined history of white supremacy and capitalist economic structures” by instead stressing the virtues of free markets and excessive consumerism. Neoliberalism valorizes the economic ascendance of racialized individuals (in particular high-profile Blacks like Barack Obama or Jay-Z) as evidence of the contemporary irrelevance of racism.

Attending to Wendy Brown’s critique of the redemptive potential of liberal rights is particularly instructive in considering the role of the state in the invocation of rights claims. Brown (1995: ix-x) asks: “what are the perils of pursuing emancipatory political

aims within largely repressive, regulatory, and depoliticizing institutions that themselves carry elements of the regime (e.g., masculine dominance) whose subversion is being sought?” Brown is critical of attempts to render social injustices actionable by law through the invocation of rights as these attempts must appeal to the state and law-makers as the arbiters of justice. For Brown (1995: 27) this serves to legitimize the law and the state as “appropriate protectors against injury” and obscures the role of the state in sustaining that injury. Further, Brown expresses concern that this appeal to the state to address social injustice reifies social identities such that historically marginalized groups must define themselves in relation to their marginalization in order to receive limited redress and meager provisions from the state, and artfully conceals the state’s own investment in perpetuating this marginalization.

Brown is additionally reticent to cast social injuries as legal violations since this reconfiguration potentially depoliticizes social movements by individualizing the injured and the perpetrators. Brown (1995: 158, emphasis in the original) contends that the nature of liberal rights perpetuates this individualization: “the motion of rights is to push away or push away from – *against* others, *against* the state, *against* incursions, limitations, or encroachments upon our autonomy.” The individual liberal subject is premised on a negative construction of liberty that equates freedom with the absence of restrictions. This critique is specifically aimed at *formal* equality protections which reinforce a social order built on gendered and racial subordination and differentiation. Brown portrays legal liberalism as *deliberately* ill-equipped to contend with structural oppression since it restricts its field of vision to individual instances of injury or mistreatment and conceals the machinations that render particular subjects as more vulnerable to injury or exclusion.

Like Goldberg, Brown (1995: 97) maintains that the “liberatory or egalitarian force of rights is always historically and culturally circumscribed.” This inherent contingency of rights renders them susceptible to existing structures of power despite their pretense towards the universal. In this way – recalling Nancy Fraser’s insight that capitalist accumulation requires an accompanying legal framework – legal rights *may* serve to entrench rather than disrupt existing social structures. Yet, under *neoliberalism*, human rights laws also constitute a form of regulation that stymies the unbridled operation of the market and offers limited protection against discrimination. Writing on neoliberalism (over two decades after her critique of rights in *States of Injury*), Brown (2019: 13) identifies that “deregulated markets tend to reproduce rather than ameliorate historically produced social powers and stratification.” The attack on social regulation and equality provisions under neoliberalism is reflective of the measured, yet still discernible, impact on market forces of being held accountable to anti-discrimination and human rights provisions. The backlash against human rights and anti-discrimination provisions⁸ by neoliberals speaks to the disruptive potential of rights claims and anti-discrimination state regulation, even if the emancipatory potential of rights is perpetually tempered and contained by existing social stratifications.

Brown’s theoretical challenge to the invocation of rights for the purposes of pursuing emancipatory projects includes empirical juridical examples which are heavily located within the context of the United States. As I will come to demonstrate through my review of the emergence of a substantive equality framework in Canadian jurisprudence,

⁸ See for instance Ezra Levant’s *Shakedown: How Our Government is Undermining Democracy in the Name of Human Rights* (2009).

the trajectory of rights within the Canadian context has produced fissures within liberal legalism and created space for contextual legal analysis of inequities. Whereas Brown (1995: 66) claims that equality rights under liberalism render “juridical equivalents the denial of employment to an African American, an obese woman, and a white middle-class youth festooned with tattoos, a pierced tongue, and fuchsia hair”, human rights entitlements within Canada have been recurrently invoked with reference to structural inequities. Janine Brodie (2008: 151) points to the Canadian experience as revealing “spaces of friction, possibility, and resistance” within dominant liberal discourses and political rationalities. Specifically, Brodie articulates how the rise of social liberalism within the post-war period in Canada both reinforced an “inequitable and gendered citizenship regime” and created conditions for new forms of political mobilization. Brodie’s (2008: 160) account of the women’s equality infrastructure within Canada reveals both the possibility of strategically employing “state intervention to mediate structural inequalities” as well as the centrality of legal equality as a site of “contestation for ascendant neoliberal political rationalities.” The Canadian experience offers a complex example of the contradictory and paradoxical role of the state as a regulator of inequity.

A central contradiction of the Canadian liberal democratic state is that it relies on the persistence of structural inequalities while professing a foundational commitment to equality. Formative feminist critiques of the liberal state have stressed the state’s investment in maintaining structural inequality while simultaneously professing neutrality. For Catherine MacKinnon (1989: 162-3), this has significant bearing on our ability to rely on the state to address social inequities.

Objectivity is liberal legalism's conception of itself. It legitimates itself by reflecting its view of society [. . .] It ensures that the law will most reinforce existing distributions of power when it most clearly adheres to its own ideal of fairness [. . .] no one who does not already have them [freedoms] socially is granted them legally.

In this way, the law functions to legitimate the state's own investment in racialized and gendered divisions of power and then conceal this investment from view. For MacKinnon, combating sex-based subordination requires the explicit invocation of feminist jurisprudence which is decidedly *not neutral*. Employing the law as a tool for equity requires challenging the law's ostensible neutrality and instead smuggling into the law a substantive equity framework which recognizes race and gender as legally salient.

As I have reviewed, there is a deep tradition within critical scholarship that views legal liberalism as premised on exclusions. The central dispute lies in the extent to which these underlying exclusions preclude the possibility of utilizing liberal legal entitlements in the emancipatory struggle for social justice. Here, I turn to the contributions of Critical Race scholars, such as Patricia J. Williams and Carol Aylward, to elucidate the potential of rights as a strategic political mechanism to confront racial oppression. Williams (1991: 152) describes the argument "that rights are disutile, even harmful" as trivializing the experiences of Black Americans (as well as other historically marginalized groups) by rendering the – albeit limited – protections provided by rights as collectively insignificant. Whereas marginalized White Americans may already be well acquainted with the emancipatory limitations of rights and their inability to address significant material inequities, Black Americans whose recent history includes being rendered legally illegitimate through the denial of rights are positioned to appreciate the impact of rights attainment from a distinct historical vantage point. Accordingly, Williams (1991:

159, emphasis in original) claims that the United States' "worst historical moments have not been attributable to rights *assertion*, but to a failure of rights commitment." Williams does not portray the institution of formal rights as the end of Black Americans' emancipatory struggle, but rather avers that rights offer a political mechanism through which the denial of need can be confronted.

Whereas anti-liberal critiques of rights discourse depict rights as inherently individualistic and steeped in private property relations, Critical Race scholars illustrate how the utility and meaning of rights can be brought under contestation. This revision of the potential of rights discourse is acutely attentive to the boundaries circumscribed by legal liberalism, but maintains that these theoretical boundaries do not foreclose the possibility of employing rights strategically. Williams advances a Wittgensteinian argument about how rights have been imbued with particular meanings based on liberal definitions of personhood, but these meanings have been challenged and changed through the evolving use of rights discourse. Crucially for Williams (1991: 159) "the problem with rights discourse is not that the discourse is itself constricting but that it exists in a constricted universe." Combating these constrictions cannot thus be limited to the legal sphere, since the law itself is being shaped by a pre-existing *and evolving* social order. The invocation of "rights" to contest structural inequities within the confines of the law, is simultaneously a strategy to contest the legal confines themselves.

Turning to the Canadian context, informed by the work of legal scholar and Critical Race theorist Carol Aylward, I argue for the duality of law – recognizing both its contribution to sustaining structural inequities and its transformative power. Aylward stresses the need to reconstruct the law such that it is pushed beyond legal liberalism's

erroneous pretense of race-neutrality and resistance to systemic analysis. The duality of law with respect to rights discourse entails recognition that rights are both indeterminate and essential in the struggle for racial equity within the constricted universe of the Canadian liberal state. For Aylward, Critical Race Theory offers a pathway beyond existing rights analysis and Critical Legal Studies' critique of the liberal legalism's legitimization of an inequitable social order, towards a contextual analysis that takes into account the legal salience of race and the systemic operation of racism. This recognition of the duality of law allows for a critique of Canadian investment in legal liberalism, while simultaneously appreciating how human rights law can recognize and redress racial oppression. Williams (1999: 20) is mindful that legal liberalism is embedded with a structural preference "to maintain the existing political, social and economic status quo." Accordingly, employing rights discourse strategically requires a conscious and contentious redefining of legal meanings – such as the reconceptualization of equality from formal to substantive.

While mindful of the individualism and privatization of liberal rights explicated by Goldberg and Brown, I mobilize an approach to human rights which recognizes both its capacity to entrench and protect the existing social order as well as its capacity to morph and extend beyond its liberal origins. Being cognizant of the underlying tendencies of liberal legalism allows for a tactical employment of rights as a necessary, *but never sufficient*, condition of social transformation. As articulated by Didi Herman (1993: 40):

To say that rights are difficult, complicated tools for social change does not mean that the struggle for their acquisition is doomed or that 'real issues' are being obscured. At the same time, an unreflexive seeking of rights and yet

more rights may not bring about the changes to social relations many of us would like to see.

Given that rights exist within a constricted universe, struggles for transformative justice must simultaneously seek to ameliorate the conditions of oppression within this universe – a task for which rights are particularly well equipped – and *transform the universe itself*, which can never be accomplished through rights alone. Returning to the work of Brown (2000: 231) for one final caution, she asserts that “rights almost always serve as a mitigation – but not a resolution – of subordinating powers.” In invoking rights within the constrictions of Canadian liberalism, it is imperative to maintain watch on what remains unresolved within the trajectory of human rights advancement (including settler-colonialism, exploitative and expropriative capitalist accumulation, and White supremacy) while not trivializing the role of human rights protections in mitigating the harms and practices of institutional racism.

Canadian Paradox of Race Neutrality and Multiculturalism

The utility of rights to challenge racial inequities is complicated in the Canadian context by an attachment to racial innocence and neutrality which creates both a need for, and impediment to, the integration of anti-racism analysis within human rights law. Further, even in the absence of explicit attention to race, the progressive impact of Canadian human rights legislation is suspect (Fudge, 1987; Glasbeek and Mandel, 1984). While Canadian anti-discrimination legislation has existed for almost a century, human rights within Canada only gained constitutional status in 1982 through the *Canadian Charter of Rights and Freedoms*. As argued by Fudge and Glasbeek (1992: 52), because of “the abstract, universalistic nature of the *Charter* rights, not-so progressive groups also

have been able to use the *Charter*.” Examples of this include conferring individual rights and freedoms to corporate entities and protecting the freedom of speech rights of hate-groups. Yet, as averred by Didi Herman (1993: 30) for many belonging to groups which have been historically cast outside of liberalism’s promise of equality, “the *Charter*’s potential represents a huge advance over slow and grudging parliamentary reforms.” Herman depicts the *Charter* as a complicated legal tool for advancing equity, which can be utilized strategically to combat embedded structural exclusions within the existing fabric of the law. Similarly, Carol Aylward (1999: 173) argues for the deployment of a Critical Race Litigation strategy which is firstly “aware of the history of racism in Canadian society and the role it plays in the law” and secondly, strategic in its use of legal mechanisms, such as the *Charter*, in identifying the relevance and operation of race and racism in a given circumstance. The arguments advanced by Herman and Aylward are not inattentive to the Canadian pretense of objectivity and fairness but claim that the law can be challenged and expanded in the service of equity-driven social change. To do so, Critical Race Litigation strategies must contend with Canadian mythologies of race neutrality, which trivialize racial difference to fit within the scheme of multiculturalism and construct legacies of racism as extrinsic to Canadian nationalism.

Canadian race neutrality is founded on the erasure of the salience of race and racism in Canadian nation-building. In Critical Race Theory literature this erasure is commonly referred to as “colour-blindness.”⁹ Aylward (1999: 76) writes that: “While the

⁹ In an effort to avoid ableist terminology, I prefer the language of “race neutrality” to that of “colour-blindness.” I remain theoretically indebted to articulations of “colour-blind racism” and its prevalence within the Canadian legal context (for instance Aylward, 1999 and Xavier, 2021).

doctrine of ‘colour-blindness’ has promoted the myth that racism is no longer a factor in American society, the same doctrine has promoted a prevailing myth in Canada that racism was never a factor in Canadian society.” Critical commentators of national attempts to construct a unified pan-Canadian identity have noted that despite Canada’s origins as a White settler-state built on racial-exclusivity and assimilation, late-century (and onward) Canadian political discourse has eschewed discussions of race (Abu-Laban, 2017; Coulthard, 2014; Nath, 2011; Thompson, 2008). Constance Backhouse (1999: 274), in particular, has challenged the “false mythology of ‘racelessness’ that has plagued the Canadian legal system for so long” and instead stresses the Canadian legal system’s contribution to maintaining White supremacy. Similarly, Eva Mackey (2002: 174, emphasis in original) describes Canadian legal liberalism as dependent on “its ability to construct itself as *not cultural* (in that it is not presented as the project of one cultural or ethnic group), but as *universal and rational*.” Evoking the law to address racism is stymied by legal liberalism’s simultaneous investment in defending its own White British colonial legacy and its pretence of universality which construes references to race as irrational, culturally specific, and preferential.

Given these raceless tendencies in both Canadian politics and law, advocates for social justice who employ litigation-based strategies must openly contest the legal system’s facade of neutrality and objectivity. Critical Race Litigation strategies work to identify and confront these race-based blockages. Aylward uses the example of the Supreme Court of Canada decision in *R v. S (RD)* [1997] 3 SCR 484 (“*RDS*”), where the appellant successfully invoked section 15 of the *Charter* to argue that:

To be capable of detecting racism, one must be conscious of colour, race, and racial interactions because s.15 was not restricted to a formal notion of

equality, it was *not satisfied by the notion of equality as sameness*. Judicial analysis which ignores the possible racial dynamic of a situation will perpetuate racism . . . (1999: 100, emphasis added)

This *Charter* challenge took issue with the contention that the principles of judicial neutrality and objectivity required that the deciding judge hear evidence on whether or not racism exists in Canadian society before determining whether or not race may have played a factor in a Black youth's interaction with police. In deciding in favour of the appellant in *RDS*, the Supreme Court set out that a "reasonable person must be an informed person" and as such "a reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community" (*R. v. S. (R.D.)*, 1997, para. 111). Further, by dismissing the claim that the existence of racial discrimination should be treated as a disputable fact, the decision rejected the myth of Canadian racelessness and instead stretched the confines of legal rationality towards a recognition of the social salience of race.

Empirical-based scholarship on post-*RDS* caselaw points to the limited implications of this decision within the context of the settler-colonial Canadian legal system. Sujith Xavier (2021: 386) undertook a review of post-*RDS* caselaw to determine if *RDS* created opportunities for more "antiracist and contextual judging" and concluded that: "First, the evidentiary threshold to establish bias based on a predisposition to an outcome is high, even though the evidentiary standard is a balance of probabilities. Second, judges that adopted an antiracist perspective face judicial backlash." Xavier (2021: 386) takes these findings to be indicative of an enduring commitment to "the Canadian judiciary's colour blindness" which pervades over determinations of the

operation of bias to the exclusion of anti-racist analysis and contextual consideration of the operation of racism in the law. Given Canada's claims to national innocence and racial neutrality, Carmela Murdocca (2013: 169) describes the consideration of systemic racism in the law as both "a necessary juridical process" and "a troubling strategy." Murdocca's (2013: 169) analysis points to the limited consideration within Canadian jurisprudence of how systemic racism is embedded *within law enforcement*, and reveals instead an invocation of race *within sentencing* that "serves to reinscribe the racialization of certain bodies that are marginalized and deemed degenerate." The limited legacy of *RDS* reflects what Sheila Dawn Gill (2000) has articulated as the "unspeakability of racism" under Canadian liberalism. Gill evidences her account of the unspeakability of racism by detailing the Manitoba's Legislative Assembly's 1995 determination that the word "racist" was "unparliamentary language" in response to Oscar Lathlin's use of "racist" to describe the impact of provincial government policy on Indigenous communities. This incident was replicated in 2020 with the expulsion of Jagmeet Singh from the Canadian House of Commons when he applied the term "racist" to his fellow MP Alain Therrien's refusal "to support an NDP motion dealing with systemic racism in the RCMP" (Zimonjic, CBC News, June 17, 2020). The unspeakability of racism functions within Canadian legal and political institutions to block claims of racism.

The troubled legacy of the *RDS* decision is further evidence of the *Charter's* limited record of anti-racist advancement and the intractability of settler colonialism within the Canadian legal system. Legal scholars, such as Pamela Palmater (2014) and Kerry Wilkins (1999), have argued that the invocation of *Charter* rights in the advancement of Indigenous sovereignty is especially fraught since appealing to *Charter*

rights serves to legitimize the authority of the Canadian state and obfuscates the state's legislated investment in the elimination of Indigenous Peoples' nationhood and land rights. In his review of the twenty-five years since the institution of the *Charter*, Tanovich (2008: 656) claims that the "Charter of Whiteness" has had "very little impact on racial injustice in Canada" in that the courts have continued to demonstrate an unwillingness to account for the impact of systemic racial discrimination in various criminal justice processes including jury selection, bail proceedings and police stops and searches. Yet, Tanovich (2008: 661) does not take this limited success as evidence that social justice advocates should restrict themselves to extra-legal strategies to advance racial equity, but rather claims that since some of "the most harmful and lasting effects of racial injustice are caused by the criminal justice system" combating the structural racism embedded within this system is necessary to mitigate harm. This paradoxical challenge of both accounting for the fact that the law is instrumental in perpetuating racial injustice but also required in the resistance to this injustice is at the heart of Critical Race Litigation strategies. Critical Race Litigation requires continually pushing the law to recognize race and racism as operational both within the structures of the Canadian legal system and within the particulars of a specific case.

The unspeakability of racism within Canadian legal and political institutions is intermeshed with national narratives surrounding multiculturalism and Canadian exceptionalism. Incessantly constructed in contrast to the U.S., Canadian nationalism has congealed around the metaphor of the mosaic (versus the melting pot to the south) wherein diversity is embraced and celebrated. As described by Debra Thompson (2008: 540), the "classic melting pot-versus-mosaic metaphor, inaccurate though it may be, has

firmly implanted a Utopian myth about the presence and potential of multiculturalism in the national psyche.” According to this Canadian mythology, unlike American nationalism – where belonging is contingent on assimilation – Canadian nationalism welcomes newcomers and allows for the presence and celebration of a plurality of cultures and traditions. Multiculturalism has been legislatively enshrined into the fabric of Canadian nationalism and embedded into the *Charter* itself (section 27). Notwithstanding its authoritative endorsement of difference, as explicated twenty years ago by Himani Bannerji (2000: 31), multiculturalism slyly serves “as a way of both hiding and enshrining power relations.” Bannerji’s account of Canadian state multiculturalism is instructive for connecting this embracing of difference within the context of capitalist industrial growth and the accompanying reliance on migrant labour from hitherto racially undesirable nations (such as those that had been historically subject to head taxes and controlled entry). State multiculturalism sought to legitimize the presence of these racialized entrants through a diversity management strategy. As argued by Yasmeen Abu-Laban and Christina Gabriel (2008: 12), the market orientation underpinning the “selling diversity” approach to multiculturalism is reflective of a muted commitment to enhancing justice and instead is informed by “new rationales that put stress on the language of business.” Multiculturalism fits within the operating logics of both diversity management and liberal pluralism, in that it depoliticizes difference by treating racialization and ethnicization as natural processes which produce difference – *and conflict* – rather than seeing these processes as themselves the product of embedded national hierarchies, market relations, and power dynamics.

Multiculturalism holds a paradoxical relation to the logic of liberal race neutrality; in that it concurrently purports to treat ‘race’ as morally irrelevant while treating skin colour as a proxy for differences in culture and perspectives. This convoluted distancing of colour from race is made possible through the discourse of diversity – which evades explicit discussion of racism and racialization in favour of celebrating visible, and ostensibly benign, differences. As stated by Bannerji (2000: 30), under Canadian multiculturalism “colour was translated into the language of visibility.” With the advent of the term “visible minority”, differentiation is naturalized as a product of visibility¹⁰ as opposed to a consequence of socially-constructed relations of power. Nisha Nath (2011: 169) stresses that the crucial insight provided by Bannerji’s account of multiculturalism is that the Canadian state is occupied not only with “the claiming of ‘identity’” but also the “assigning of identity.” Abu-Laban (2014: 402) further elaborates that this assignment of identity constrains analysis of race and racism by rendering it “secondary to ‘culture’” in policies or policy-making processes. In this way, state multiculturalism and diversity management discourse serve as an alibi for inaction since the activities and funding associated with multiculturalism and diversity are offered as evidence that further resources need not be expended towards addressing racism and racial discrimination.

Diversity is also a branding strategy. Miriam Smith (2009: 831) depicts Canada as *selling*

¹⁰ The centrality of visibility within multiculturalism has not ebbed over time. Despite international criticism (UN Working Group Report, August 2017), the term “visible minority” still appears in the state’s lexicon for employment equity and census data. Further, the 2020 heritage campaign video released by the federal government for Multiculturalism Day (retrieved here: <https://www.canada.ca/en/canadian-heritage/campaigns/multiculturalism-day/video.html#a1>, August 12, 2020) encapsulates multiculturalism by displaying a myriad of faces in multiple shades of skin colour. Notably every non-White face (regardless of shade) is tagged in the video as “dark complexion.”

“itself as an exemplar of diversity whether it is the advent of same-sex marriage or the multicultural marketing of the national brand.”

In her analysis of multiculturalism as a discursive disavowal of “racialized differentiation”, Eve Haque (2012: 22) likewise argues that multiculturalism policy “performs the domestic task of management and containment of the Other within the nation.” The subsumption of anti-racism under the paradigm of multiculturalism, functions as a diversity management discourse which forecloses race-based analysis. Diversity-speak is celebratory, appealing, and depoliticized (Ahmed, 2012; Failler, 2018). As such, it necessitates the distancing of disruptive or polarizing narratives built on analyses of race and class. Tania Das Gupta (1999: 190) describes state multiculturalism as a means for “integrating minorities into the ideology of meritocracy” in that it assumes an equality of opportunity without providing for an “equality of condition.” In essentializing difference and evading considerations of material inequities, Canadian state multiculturalism pursues the objective of harmonious race relations with negligible attention to racial oppression. Multiculturalism qua race relations seeks to integrate the differentiated Other without interrogating the relational and inequitable construction of racial categories.

Gerald Kernerman (2005) has termed the contested management of difference within the Canadian political community as “multicultural nationalism.” Under multicultural nationalism diversity is embraced, but limits to this diversity are perpetually monitored and enforced. As Kernerman (2005: 96) describes, multicultural nationalism “constructs ‘Canadians’ as not only liberal but also as the guardians of liberal values in the face of the illiberal potential of the other.” Drawing on Kernerman’s work, Angela

Failler (2018: 376) connects the project of “multicultural nationalism” to the national memorialization of Canada’s human rights journey (as showcased at the Canadian Human Rights Museum) within a “depoliticized framework of cultural diversity.” This depoliticized narrative of the progressive journey of liberalism and human rights is constructed as evidence of Canadian diversity and exceptionalism, an exceptionalism which must then be safeguarded against illiberal Others.

The safeguarding of purportedly race neutral liberal values against the incursion of visible Others is at the heart of supposed challenges of diversity. Mainstream Canadian scholarship on multiculturalism reflects a preoccupation with these *challenges of diversity* – largely dominated by the disciplinary prominence of liberal scholars Will Kymlicka and Charles Taylor. Kymlicka (1998) portrays the liberal democratic values and ideological commitments of the Canadian state as largely fixed and allows for cultural accommodation only within the confines of these non-negotiable norms. While Kymlicka is optimistic about the potential to publicly reconcile cultural claims within liberal representative democracy, Taylor (1994) is explicitly concerned that the “politics of difference” pose a threat to liberal values framed as “the politics of universal dignity.” Additionally, multiculturalism advocates Augie Fleras and Jen Leonard Elliott (2002: 24) further this construction of difference as a threat to liberal values in proclaiming that “the challenge is to affirm diversity without holding back equality.” Since *multicultural* beliefs are juxtaposed with Canadian liberal values, the celebration of difference must be balanced with the protection of these non-negotiable values.

Commentators on the construction and management of difference within Canadian nationalism have described how, through the evasion of race-conscious

analyses, the discourses of diversity and multiculturalism allow for the contradictions of legal liberalism to remain shrouded by the Canadian mythology of equality and colour-blindness. As articulated by Malinda Smith (2003), the ‘race manners’ of Canada suppress the naming of racism while the permissible discourses on difference obscure recognition that “race matters” within the Canadian state. Consequently, the racialized contradictions of liberalism and liberal values (such as equality) are concealed in that, as averred by Smith (2003: 110): “Canadians have been shaped both by support for the principle of equality and, at the same time, by political and legal support for inequality among diversities.” Diversity management discourse feeds a pluralist liberal narrative about Canadian nationalism wherein difference is accepted as positive so long as this difference is authorized and contained. This pluralist narrative is necessarily silent¹¹ on the racialized dynamics of the prescribed limits set by the White settler state. As Eva Mackey (2002: 152-153) describes: “the proliferation and institutionalisation of diversity in liberal ideologies such as ‘multiculturalism’, limit authorized forms of difference to those which do not threaten the project of nation-building and the making of national identity.” In this way diversity management discourse is both a containment strategy and a concealment strategy: through the limited and prescribed *celebration of diversity* the boundaries of desirable difference are established and maintained; and through the national *performance of diversity* racially structured inequity is obscured.

¹¹ Though this silence is periodically interrupted by slippages into racialized language, such as former Prime Minister Stephen Harper’s invocation of the term “old-stock Canadians” during a Leaders’ Debate in the 2015 National Election. (CBC News, September 18, 2015).

My argument for the strategic use of the law to combat the operation of racism is thus dependent on the ability to sever the discourse of human rights from the discourse of diversity. As captured by Nisha Nath, Ethel Tungohan and Megan Gaucher (2018: 621) “words like ‘difference’ and diversity recode and depoliticize words that refer to structures of power, dominance and the processes underscoring systemic forms of oppression.” This recoding of racial difference as diversity serves national mythologies of racial innocence and blocks interventions into structural racism. Engaging in Critical Race Litigation within the context of Canadian liberal legalism requires a conscious disavowal of the unspeakability of racism which is sustained through the discourses of diversity and multiculturalism. Strategically exploiting the duality of the law – its capacity to both contribute to and contest racialized oppression – requires actively pushing against liberal race neutrality and individualism. Within the Canadian context, there is an additional need to push against uncritical multicultural nationalism (Kernerman, 2005; Failler, 2018) in which racism is constructed as a problem extrinsic to the Canadian nation-state. Accordingly, employing human rights as a strategy to contest manifestations of the Canadian racial order requires engaging a substantive equality framework that is capable of naming, evidencing and disrupting systemic racial discrimination.

Substantive Equality and Material Inequity

Utilizing human rights in the push for substantive equality involves the analytic challenge of making the law *see* and respond to collective inequalities. This challenge is complicated by both the precepts of liberal legalism – such as the primacy of the

individual – and material inequities required by capitalist expansion – such as the exploitation and expropriation of racialized workers. The trajectory of Canadian human rights law has demonstrated the expansive capacity of the law to recognize and intervene in collective inequities, as well as the counterforce of constraining reformist efforts of liberal law and policymakers to confine these expansions through both legal and extra-legal means. A critical component in the expansion of substantive justice frameworks is the legal recognition of historically marginalized *groups*. These groups are constituted by a shared history of oppression and are afforded recognition through Canadian human rights legislation in reference to the protected grounds of discrimination (such as race, sex, disability, etc.). By attending to the constrained universe within which human rights are operationalized and shaped by market-based logics and financial constraints, the limitations of a legal substantive equity framework can be both elucidated and contested.

The recognition of group rights and historical redress is antithetical to many of the foundational liberal commitments which structure Canadian human rights law. Celebrated Canadian legal scholar and lead author of the first draft of the Universal Declaration of Human rights, John Humphrey, was staunchly opposed to an expanded articulation of human rights and depicted substantive equity measures as a perversion of human rights principles. In Humphrey's (1970: 434) minority report for the Royal Commission on the Status of Women, he explicitly registered his disapproval of quota-based programs and other legislative or policy-based attempts to address historical inequity which he referred to as "compensatory treatment." Humphrey states "By compensatory treatment, I understand privileges extended to make up for bad treatment in the past. To advocate it is tantamount to saying that two wrongs make a right."

Similarly, Canadian lawyer and civil liberties activist Alan Borovoy (1999: 24) – who was critical in advocating for the establishment of the OHRC – lamented that the trajectory of human rights driven by equality-seekers has been moving away from civil liberties and towards anti-liberalism and “reverse discrimination.” He goes on to say: “innocent white males should not now be made to suffer for sins committed by guilty white males.” These foundational individualistic conceptions of discrimination and human rights protections have ceded significant juridical authority to substantive equality articulations.

As charted by Colleen Sheppard (2010), legal definitions of equality and discrimination in Canada shifted dramatically in the 1980s flowing from the recognition of adverse effect discrimination – wherein ostensibly fair and equal rules and practices produce inequitable and discriminatory impacts – and the institutionalization of a systemic discrimination framework, largely propelled by the *Equality in Employment: A Royal Commission Report* (Abella 1984, hereafter the “Abella Report”). Sheppard (2010: 27) reviews how whereas “the first legal wave of equality regulation” presumed that “the equal treatment of all individuals would suffice to secure social equality”, the approach has since evolved as “group-based differences began to be recognized as a legitimate basis for remedial initiatives.” Sheppard cautions against uncomplicated narratives of expansive progress in Canadian human rights and instead contends that the individualism and private property relations which underpinned the first legal wave of equality regulation continue to distort attempts to pursue substantive equality through the law. Specifically, Sheppard points to the symmetrical construction of the enumerated grounds such that men and women are equally entitled to protection from discrimination based on

“sex” and Blacks and Whites are equally entitled to protection from discrimination based on “race.” In this way, the enumeration of anti-discrimination entitlements obscures the historical and ongoing structures of domination that sustain the subordination of groups in relation to each ground.

In contrast to the persistence of formal and ahistorical constructions of anti-discrimination based protections, the language of the *Charter* has aided in both legal and policy shifts towards the recognition of group-based differential treatment. Specifically, section 15(2) of the *Charter* applies the weight of the constitutional approbation to employment equity initiatives by explicitly endorsing “any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups.” Legal scholar Camylle Tremblay (1999: 6-82) asserts that Canada’s employment equity program is intimately tied to its human rights scheme in that the program “is based on the premise that a non-representative work force is indicative of possible systemic discrimination.” Through tracking the representation rates of the workforce in relation to a selection of the enumerated grounds, employment equity legislation purports to identify and address enduring workplace inequalities. Section 15 of the *Charter* also provides grounds for juridical recognition of systemic discrimination, though recalling Xavier’s (2021) review post-*RDS* caselaw, there continues to be a reluctance within the Canadian legal system to affirm the existence of, and apply systemic remedies to, structural racism.

Addressing structural racism and historically entrenched inequities within the Canadian context is further complicated by a tepid adoption of data-based strategies to track and rectify racial disparities and disproportionalities. Though Sheppard points to the constitutional authorization of employment equity measures through the *Charter* as

evidence of the legal entrenchment of a substantive equality framework, the specific policy limitations adopted in the Canadian approach to employment equity reflect a persistent unwillingness to address historically entrenched racial hierarchies. Abigail Bakan and Audrey Kobayashi's (2007) exploration of the compromised Canadian version of affirmative action illustrates how the modifications made to the policy in anticipation of political backlash served to weaken the policy and led to the adoption of a less effective incremental strategy. In order to discursively distance Canadian employment equity from American debates around "reverse discrimination" and "quotas", the Canadian approach to group rights preferred soft enforcement. Bakan and Kobayashi (2007: 162) contend that the "strategic accommodation" of market-based concerns adopted by the Abella Commission "failed to advocate forcefully for accountable practices, or to achieve specific numeric targets." Instead, the Abella Commission ceded to neoliberal backlash, which invoked the rhetoric of meritocracy and individual rights. As described by Eduardo Bonilla-Silva (2014: 83), American resistance to affirmative action invoked the hallowed liberal virtue of individualism "as a justification for opposing policies to ameliorate racial inequality because they are 'group based' rather than 'case by case.'" The Canadian approach to employment equity evaded the challenge of overcoming resistance to numerical quotas by pursuing a more voluntarist approach to addressing underrepresentation which had limited consequence for the private sector. This decidedly more passive approach to *affirmative* action is further evidence of the continued efficacy of invoking individual rights based arguments to delimit and constrain systemic human rights measures.

The mollified approach to employment equity has had particular consequences for racialized members of the workforce for, as identified by Tania Das Gupta (1996), the constrained application of the federal employment equity scheme limits the reach of the policy such that it fails to apply to the very sectors of the workforce where racialized workers are most heavily concentrated and exposed to exploitative and expropriative conditions. As identified by Cynthia Cranford and Leah Vosko (2006) the restricted application of the employment equity scheme attends only to “good jobs” that fit within the perceived “standard” employment relationship, including full-time, permanent, standard hours. Returning to Nancy Fraser’s (2016: 168) contention that capitalism requires the expropriation of racialized “others” as a “necessary background condition for the exploitation of ‘workers,’” the constrained gaze of the Canadian employment equity scheme leaves untouched both the exploitative employment relations that persist outside of the “standard employment relationship” and the continued expropriative confiscating of racialized labour.

The disregard extended to racialized sectors of the workforce through the employment equity system is reflected in the benchmark standard for representation in the federal public service. Representational disparities are calculated on the basis of “workforce availability (WFA)” versus “labour market availability (LMA)” which entails that “additional criteria are applied to the LMA population, for example, education levels, citizenship, and National Occupational Classification code comparisons” (Treasury Board of Canada, 2019). This has particular consequences for racialized workers who represent 21.3% of the entire labour market, but are only listed as comprising 15.3% of

the available workforce for the federal public service.¹² While the employment equity scheme purports to address achievement gaps in the labour market through educational initiatives, this adjusted benchmark reflects an unwillingness to be held to account for the racialized divisions within the labour market and the contribution of these divisions to what Grace-Edward Galabuzi (2006) has termed Canada's "economic apartheid."¹³ Barbara Cameron's (1996: 75) research into the Canadian federal government's labour market training programs further illustrates this divide by noting that the state's equality-driven interventions into the labour force have reflected a perennial neglect of the "bottom end of the labour market, dominated by low-paid, insecure, and increasingly 'non-standard' jobs in the service sector." As such, the systemic disregard for the bottom end of the labour market operates to ensure that employment equity interventions that seek to promote substantive equity are inconsequential to the continued exploitation and expropriation of racialized workers.

The efficacy of employment equity policies in remedying racialized exclusions in the workforce is further compromised by the use of the category "visible minorities" which conflates racial and ethnic minorities into one category – those marked by not being White – and obscures the persistent and disproportionate exclusion of Black Canadians. This categorization has been the subject of international criticism, including by the UN Working Group on People of African Descent (August 2017) that expressed

¹² See 2018-2019 Employment Equity Report released by the Treasury Board of Canada Secretariat as part of the "way forward"

¹³ Galabuzi places particular emphasis on the impact of failing to recognize the credentials of internationally educated professionals and tradespeople such that "highly skilled immigrants find themselves unable to convert educational attainment into comparable job status and labour-market participation rates" (2006: 130).

concern that “the category ‘visible minority’ obscures the degrees of disparity in treatment and specific human rights concerns of African Canadians” and described Canada as having “a serious lack of race-based data and research, which could inform prevention, intervention and treatment strategies for African Canadians.” By avoiding the collection and analysis of disaggregated race-based data which would offer concrete information on racialized workplace disparities, the employment equity scheme is able to portray a more inclusive and diverse account of the federal public service workforce.¹⁴ Debra Thompson’s (2016: 116) research on the Canadian census is instructive for understanding the political decisions and ideological commitments which shape racial legibility: the work of “taking the changing, unruly, and politically contested concept of race and creating stable, identifiable categories to be used as the basis of law and policy.” The Canadian census has shifted repeatedly in its construction of racial categories in service of competing national imperatives, preferring intermittently racial versus ethnic classifications, inconsistently classifying the children of interracial partnerships, and pursuing both White purity and Indigenous erasure through conflicting schemes. Consequently, legislation, policies, and programs that seek to address systemic racialized inequities, must contend with the challenge of creating concrete racial categories such that these categories are meaningful within the context of human rights institutions and anti-discrimination initiatives. The clustering of racialized groups under the invented

¹⁴ Notably, the Treasury Board included a commitment in the 2018-2019 Employment Equity report to “collect subgroup data to better understand the challenges faced by Black Canadians in the federal public service” as part of the “way forward.”

category of “visible minority” obscures the operation of structural racism and thereby stymies institutional efforts to advance substantive equality.

The capacity for human rights legislation to advance substantive equality is further constrained – or enabled – by the scope of remedy permissible in the redress of systemic discrimination. Legal scholars Gwen Brodsky, Shelagh Day and Frances Kelly (2017: 6) contend that the transformative purpose of human rights legislation authorizes human rights tribunals to provide “remedies that are aimed at the elimination of group patterns of discrimination.” Yet human rights tribunals have been stymied in their attempts to order institutional remedies targeted at eliminating group patterns of inequality by respondent arguments, and select Supreme Court of Canada rulings, which have reinforced an exclusively “corrective” form of remedy.¹⁵ Brodsky, Day and Kelly (2017: 33-34) argue that:

The premise that human rights are exclusively corrective, as distinct from transformative and preventative, flows from an old private law model of rights [. . .] that has been superseded by contemporary human rights legislation. [. . .] It is based on the assumption that a return to the *status quo ante* is an adequate remedy. In cases of systemic discrimination, this is never true.

While Brodsky, Day and Kelly aver that this “old private law model of rights” has been *superseded* by contemporary human rights legislation, their analysis of recent rulings also exemplifies the enduring force of the private law model. Under the private law model, corrective, not transformative, remedies are adequate in addressing discrimination since the social order is fundamentally just and thus acts of discrimination are considered

¹⁵ In particular, Brodsky, Day and Kelly dissect the implications of the S.C.C. 2012 *Moore* ruling in which the systemic remedies ordered by B.C. Human Rights Tribunal were not upheld.

aberrant and discrete. This account of discrimination is inadequate for addressing group-based inequities as these inequities are embedded into norms and practices that sustain and reinforce inequitable outcomes frequently without explicit reference to the enumerated grounds of discrimination.

The contrasting articulations of human rights protections with respect to group rights is reflective of the indeterminable promise offered by Canadian human rights legislation, particularly with respect to the rights of racialized groups. The constraining efforts of those committed to individualistic legal liberalism and capitalist labour arrangements have been influential in maintaining the boundaries of systemic initiatives, such as employment equity. As described by Yasmeen Abu-Laban (2002: 462), Canadian liberalism is attached to the value of “difference blindness” which produces policies and legislation that “overwhelmingly stress individual as opposed to group rights.” This is compounded by the specific challenges of racial legibility through which governments can either obscure or illuminate racial disproportionalities and disparities by choices made in the collection and analysis of data reliant on racial differentiation between groups. Yet, even the limited adoption of employment equity within Canada, as well as the constitutional authorization of systemic institutional remedies, points to the transformative possibility of human rights legislation. This possibility of even limited transformation makes the terrain of institutional human rights, within the context of broader political struggles to define group rights, in the words of Joan Sangster (1995: 145): “a contest worth entering.” Central to this contestation is a recognition of both the state and the law as dynamic, multifaceted, and at times, contradictory.

Intersectionality and the Flattening of Difference

The contradictions and schisms within the liberal state, and between state institutions, open up space for advancing anti-racist transformation. Yet, working within a legal framework for instituting substantive equality requires vigilant monitoring of the potential liberal and neoliberal slippages which reduce would-be anti-racist efforts to what Barbara Cameron (1996) has described as mere “symbolic equity.” The aforementioned Canadian attachment to race neutrality and racial innocence creates conditions in which anti-racist analysis is under constant threat of being recoded as benign through diversity management. In the following discussion, I draw on Rachel Luft’s (2009) insightful account of intersectionality *qua* diversity as a “flattening of difference” which prevents race-based interventions from entering into the processes which create and sustain racial inequities. In order to confront these race neutral logics, anti-racism strategies must not only insist on the salience of race, but they must also draw attention to the structurally distinct and institutionally-embedded operation of racism.

The recognition that racism – as expressed by Paul Gilroy (2021) – has constitutive power is productive for considering how racism shapes and determines both economic and political relations. Interventions into the operation of racial discrimination which neglect economic constructions of difference will affirm a *status quo* which is reliant on racial differentiation while insistent on the political irrelevance of race. The interconnectedness of race and class formation is insisted upon by many Critical Left scholars such as Himani Bannerji (2005: 149) who asserts that “as it stands, ‘race’ cannot be disarticulated from ‘class’ any more than milk can be separated from coffee once they are mixed.” However, whereas Bannerji takes this interconnectedness as a basis to assert

the disutility of invoking an exclusively race-based analysis or applying the concept of intersectionality to illuminate the interplay of *distinct* social relations, Patricia Hill Collins and Sirma Bilge (2016) argue that from the beginning, intersectional analyses have enabled complex theorization of interlocking structural inequities.¹⁶ Guided by Critical Race scholars, such as Collins and Bilge (2016: 201), I maintain that there is merit to distinctly “referencing similar phenomena [that] are not readily reducible to one another.” Nevertheless, Bannerji’s critique of intersectionality does converge with a concern expressed by many anti-racist feminist scholars invested in the use of intersectionality as an analytic tool, namely that particular deployments of intersectionality essentialize and flatten differences *qua* identities (Ahmed, 2012; Collins and Bilge, 2016; Luft and Ward, 2009). As articulated by Rachel Luft and Jane Ward (2009: 12): there has been a “dilution and misappropriation of intersectionality” such that the concept has been emptied of its structural analyses and social justice commitments.

Whereas intersectionality as an analytic lens and a political tool is aimed at articulating and combating the operation of structural oppressions, intersectionality under neoliberalism has become, as described by Sirma Bilge (2013: 407) “diluted, disciplined, and disarticulated.” Within the constricted universe of neoliberalism, intersectionality has emerged as – what Kathy Davis (2008) termed – a “buzzword.” As a buzzword with which to reference different differences, intersectionality has become intermeshed with the popularity of diversity management rhetoric. Critical Race theorists who employ intersectional analysis have noted that “the term ‘diversity’ often serves as a surrogate for

¹⁶ In accounting for intersectionality’s “beginning” Collins and Bilge (2016: 67) review the “Black Feminist Statement” offered by the Combahee River Collective which focuses on “how systemic oppressions of racism, patriarchy and capitalism interlock.”

intersectionality” (Collins and Bilge, 2016: 169) and that “the distinction between diversity and intersectionality remains blurry” (Luft and Ward, 2009: 14). This blurriness is facilitated by the severing of intersectionality from its foundations in Black Feminist thought and the reduction of intersectional practice to an additive model of reified identities. Sara Ahmed describes this blurred framing as follows:

Diversity is often used as shorthand for inclusion, as the ‘happy point’ of intersectionality, a point where lines meet. When intersectionality becomes a ‘happy point,’ the feminist of colour critique is obscured. *All differences matter* under this view. (2012: 14, emphasis added)

As defined at the onset, diversity management rhetoric presupposes democratic conditions within which ‘all differences’ are equated, without addressing or dismantling the structures which produce conditions of inequity. Without reference to the systemic oppressions of racism, patriarchy and capitalism, “all differences” can be held out as deserving of recognition – but not structural intervention – by the Canadian state.

The construction of difference under multicultural nationalism has specifically evaded structural consideration of inequities, preferring instead to explore the limits of cultural recognition and accommodation within the framework of the liberal state. Glen Coulthard (2014) persuasively argues that the terms of recognition are largely set by the colonial state and operate symbolically in concert with ongoing material dispossession. Diversity management rhetoric fits within the contours of this liberal recognition framework in that it reduces anti-racism calls for systemic intervention to representational demands, which can be met with little disruption to the processes of capitalist accumulation which produce and sustain the racial apartheid named by Grace-Edward Galabuzi (2006). In response to this pluralist account of difference, Himani Bannerji (2000: 131–132) points to the failure of liberalism “to make any distinction

between different kinds of differences, those which could be called cultural diversities and those structured through power relations, and which could be encoded as gender, ‘race’ and class.” A failure to distinguish amongst differences creates a flattened account of difference which fits neatly within the representational aims of diversity management, while precluding a contextual analysis of how racialized differences are materially consequential and structurally reproduced.

This *all differences matter* version of intersectionality is detached from Kimberlé Crenshaw’s formative articulation of intersectionality where she employs the term to discuss how Black women within the United States are subjected to “multiple subordinations” by virtue of being both female and Black. Crenshaw (1991:1252) describes “women of color [as] situated within at least two subordinate groups that frequently pursue conflicting political agendas.” Rigid articulations of patriarchy and racism that rest on an understanding of men as oppressors/women as oppressed and White as oppressors/Blacks as oppressed neglects both the “double subordination” facing Black women and the ways in which White women and Black men can participate in systems of oppression. As a consequence, analyses that neglect intersectionality fail not only to account for the interlocking relations of racism and patriarchy, but further provide only partial accounts of one mode of domination. More recent scholarship, in particular Bridget Anderson (2019) and Leah Vosko (2022: 144), on “differential inclusion” within labour and migration policy has established that inclusion can still entail “gradations of subordination, discrimination, and segmentation” which is obscured by aggregate categories of difference.

Thus, despite the insistence by foundational Critical Race theorists, such as Crenshaw and Collins, that intersectionality is invested in analyzing and addressing power relations, intersectionality has also flourished as a companion concept to diversity management. Sirma Bilge (2013: 409) refers to this form of depoliticized intersectionality as “ornamental intersectionality” wherein the operation of structural oppressions is concealed by the adoption of equity-infused language which purports to attend simultaneously to multiple differences - “valorizing difference without consequences, recognition without redistribution.” To the extent that intersectionality has been associated with inclusion and good practice, the recitation of a commitment to intersectionality serves as a nod to social justice commitments frequently in the absence of critical praxis. Collins and Bilge (2016: 131) identify that the “decoupling of intersectionality from social justice” is particularly detrimental when intersectionality is made to function as a form of “whataboutism”¹⁷ which shifts analysis and policy focus away from a sustained exploration of a particular oppression towards a more palatable invocation of difference. Bilge (2013: 420) argues that intersectionality as critical praxis “does not create a shopping list of categories that can be deployed to shut down

¹⁷ Dykstra (2020) describes ‘whataboutism’ as a political deflection strategy to shift discussions by raising a different issue. Dykstra considers ‘whataboutism’ to be tied to the rhetorical argumentative technique of “tu quoque”, Latin for “you also.” Dykstra argues that a “misapplied cycle of “tu quoque” and “whataboutism” is paralyzing because it avoids truly confronting the complex tangled principles and hypocrisies this type of pursuit inherently must address” (2020: 12).

Within a specifically anti-racist context, Marie Beecham (2020) describes the term “whataboutism” as deploying the question “What about [insert topic that I would rather talk about]?” to shift focus away from racism (such as from “Black Lives Matter” to “All Lives Matter”). “It’s a method of discrediting someone’s argument by asserting that a different issue is more important” (October 1, 2020, accessed through:

<https://www.mariebeecham.org/>)

discussions of specific oppressions.” Nonetheless, the blurriness of the relationship between diversity and intersectionality under neoliberalism enables the *all differences matter* form of intersectionality as a rhetorical and political tool to avoid focused consideration of a specific structural inequity, such as racism.

Sustained consideration of the operation of racism within Canada is already bounded by the above-noted “race manners” of Canada which suppress the naming of racism. Canadian Critical Race scholars have identified that this non-naming of racism under the rise of neoliberalism has contributed to the erasure of anti-racist policies and practices resulting in what Akua Benjamin (2002: 188) described as “social and legal banishment of anti-racism from the body politic” and Charles Smith (2010: 9) decried as the “disappearance” of the word anti-racism and its practice. Frances Henry *et al.* (2017: 20) refer to this evasion of anti-racist analysis and praxis as a consequence of the ‘diversity trap,’ “whereby race is e-raced as a mechanism of oppression and becomes simply a manifestation of difference.” Thus, the banishment and erasure of anti-racism is aided by a pluralist revision of intersectionality, which authorizes a turning away from racism in order to attend to other differences and intersections.

The conflation of intersectionality with diversity results in the flattening of difference. By treating all differences as equally deserving of consideration at all moments of analysis and policy development, this form of intersectionality neglects the structural foundations of intersectional thought and reduces intersectional praxis to diversity rhetoric. Sara Ahmed (2012, p. 195, n 18) notes that the slippage towards diversity creates the conditions for a de-emphasis on race in that “when hearing about race and racism is too difficult, intersectionality can be deployed as a defense against hearing.”

Similarly, Rachel Luft (2009: 109) identifies the flattening of difference as particularly corrosive for anti-racism work since the impact of race neutral and “postracial”¹⁸ logics necessitate that the “first and most laborious step” of anti-racism intervention is asserting and explicating the operation of racial “(structural, experiential, cultural) difference.” Since this denial of difference – or drive to reach a post-difference state – is not operational in all forms of oppression, the labour of naming and demonstrating the persistent impact of racial difference requires distinct strategies and analysis which need not be extended to all intersecting oppressions.

This proclivity for intersectionality to be transformed into diversity and ‘e-raced’ is exacerbated in the context of institutionalizing intersectionality. Olena Hankivsky and Renee Cormier (2011: 218) suggest that public policy should embrace intersectionality, as “no social problem that policy attempts to address can be seen as the product of one axis of discrimination or one homogenous group” and applying intersectional analysis and practice to public policy “reveals the limitations and exclusionary nature of traditional methods of creating policy.” They argue that intersectionality as a mainstream policy approach holds promise in so much as it would require policymakers to consider and evaluate how multiple dimensions of equity structure how policy is experienced and accessed. However, Hankivsky and Cormier (2011: 226) also note in their review of some of the existing efforts to integrate intersectionality into public policy: that in a multistrand equity framework it is not clear how this process adequately accounts for policy representation of those “most marginalized in terms of human and financial

¹⁸ David Goldberg argues postraciality “rather than expressing the end of racism, conceals within its conceptual erasure of race the driving mode of contemporary racist articulation” (2015: 152).

resources and their relationships to formal power structures of politics.” Given that Canadian public policy has been stubbornly inattentive to race and racism, the risk that a mainstream intersectional policy analysis will reflect a preference for other domains of difference is great. Attentive to the constraints inherent in neoliberal institutions, Collins and Bilge (2016: 87) hold that “intersectionality’s institutional incorporation also requires attending to both continuities and breaches between the ways that intersectionality has been understood and practiced at different stages of its development in different national and institutional contexts.” This entails watching for when the language of intersectionality is invoked to justify a flattened approach to *all* difference without attention to those marginalized by structural oppressions which have been left unchallenged.

The predisposition towards race neutrality and the flattening of difference is evident in the symmetrical extension of human right entitlements which premise the protected grounds of discrimination on an abstract entitlement to equal treatment based on race, sex, disability and so on, without regard to the fundamentally asymmetrical operation of racism, sexism/heterosexism, ableism. Additionally, human rights are extended on the basis of identity categories – not interventions into acknowledged structural inequities –and as such rely on what Patricia Hill Collins and Sirma Bilge (2016) refer to as “shortcut terms” which make no mention of unjust relations of power. Abstract human rights are reliant on the particular social contexts within which they operate to imbue them with meaning and force. Collins and Bilge (2016: 201) suggest that the turning away from power relations can be observed in the “hollowing-out of meanings of rich scholarly traditions that have long been associated with processes and

systems of social inequalities – for example, capitalism, colonialism, racism, patriarchy, and nationalism – and replacing them with shortcut terms of race, class, gender, and nation.” According to this observation, when the “ism” drops away nuanced consideration of the impact of unjust systems of power may be lost. My scan of Hankivsky and Cormier’s (2011) review of intersectional models for public policy revealed only two instances of “isms” being referenced (one instance of racism and one of colonialism) and no references to patriarchy or capitalism, despite over twenty instances of “gender”, thirteen instances of “race” and seven instances of “class.” This may be indicative that the mainstream models of intersectionality are relying on stable identity categories rather than exploring relational identity-formation through the operation of power.

In order to attend to the specific manifestations of racism within a particular context, Sirma Bilge (2013: 420, italics in original) argues that “thinking intersectionally includes the possibility that *stepping back from intersectionality* may in some cases work as a strategy of empowerment for subordinated groups”. Rather than a tool to encapsulate *all* differences in the creation and evaluation of public policy, this approach to intersectionality insists on paying focussed attention to those most impacted by the operation of inequitable systems of power within a given social and historical context. The structurally embedded operation of racism, along with the mystification of racism furthered by claims to race neutrality and postracialism, entails that anti-racist resistance requires analysis and tactics tailored to its specific operation. The discursive popularity of diversity management within neoliberal institutions exacerbates the challenge of attending to race and racism specifically as both intersectionality and diversity rhetoric is

invoked to position all differences as deserving of equal attention. As articulated by Sara Ahmed (2012: 14) in her exploration of racism and diversity in institutional life: “There is labour in attending to what recedes from view.” Accordingly, contextual analysis of difference and structural inequities may require a strategic retreat from intersectionality in order to bring race and racism into view.

Conclusion

Informed by Critical Race Feminism and Canadian Studies literature, I eschew an ahistorical construction of rights and instead argue for the strategic invocation of rights which is attentive to the material constraints of the Canadian political and economic context. While legally entrenched human rights are descended from a liberal tradition which prioritizes the individual as the field of analysis and insists on abstract equality in the absence of equal material conditions, the trajectory of human rights within Canada reflects the capacity for this framework to expand towards the recognition of systemic inequities and group rights. This expansion has included legal recognition of the social reality of racism in Canada (especially in *RDS*), ordering institutions to implement systemic remedies to address the conditions that gave rise to discriminatory impacts, and authorizing employment equity policies that seek to ameliorate collective conditions of inequity. Notwithstanding this capacity for expansion, the predisposition of human rights towards formal equality, individualism, and race neutrality is a recurrent source of constraint. Thus, the strategic invocation of rights requires a feminist political economy analysis of how systems of inequity are sustained through differential inclusion and an analytical differentiation of differences to enable race-based analysis. Operationalizing

human rights for social justice within the context of neoliberalism requires combatting the rhetoric of diversity which seeks to placate and diffuse equity demands by flattening difference into a scheme in which *all differences and all rights matter* and sustained attention to racism is foreclosed.

Chapter 2: The Ontario Human Rights Commission and the Problematization of Race and Racism

“Rights are what the law says they are, the law on this point has changed dramatically.”

- James Walker (1997: 320)

OHRC policy has been a crucial source of interpretive guidance on what Ontario law has to say about human rights entitlements. In 2021, during the OHRC’s virtual celebration to commemorate its 60th anniversary, Executive Director and Chief Counsel Raj Dhir described the OHRC as having been “built on the dedication and sacrifices of people who challenged the *status quo* as individuals, and as members of larger communities.” Dhir went on to detail how the OHRC has been involved in expanding both the grounds of discrimination and the types of discrimination prohibited by the Ontario *Human Rights Code*. This depiction of the OHRC as invested in human rights advancement which presents a *challenge to the status quo* stands in contrast to the OHRC’s persistent role as *mediator* in both individual and systemic human rights disputes. As a government institution entrusted with the duty to “protect the public interest,” the OHRC has recurrently interpreted the “public interest” as necessitating harmonious public relations over disruptive human rights advocacy. Through this historical inquiry into the OHRC’s policy approaches to race and racism, I establish that the OHRC has not consistently sat at the helm of advancing equity rights, but instead has acted as a careful mediator between transformative justice demands and the *status quo*. This conciliatory role has acute consequences for the OHRC’s partnership arrangements with police.

In examining institutional policies as invested in the “production of meaning” to assess how the OHRC’s evolving approach to racial discrimination sought to broker a resolution to competing conceptual logics and advance an understanding of human rights as compatible with prevailing socioeconomic relations, I draw on Carol Bacchi’s (1999) What is the Problem Represented to Be (WPR)? approach. Bacchi (1999: 206) maintains that, as some “social problems have a tendency to reappear in different historical periods, it is useful to identify contrasts and similarities in the shapes given to them at these times.” Accordingly, this chapter is organized around four sets of competing conceptual logics: civil liberties vs. human rights; institutional expedience vs. systemic inquiry; race relations vs. anti-racism; and partnership vs. enforcement. Embedded within these competing conceptual logics is a tension between legal liberalism and more expansive conceptions of human rights. This tension is lodged centrally within the OHRC’s problem representation of race and racism. I demonstrate that despite the individualizing tendencies of liberal rights frameworks, the Commission has repeatedly sought to expand its mandate and policies beyond formal equality rights in the interest of redressing historical inequities and challenging systemic racial discrimination. Yet, the Commission’s social justice capacity has also been limited by neoliberal logics that demand fiscal restraint and soft law strategies.

Bacchi’s WPR approach is particularly useful in examining state responses to racial discrimination because it draws attention to “what does *not* get problematized” in existing policy proposals and problem formations (1999: 60, emphasis in original). This historical inquiry into the OHRC’s construction of the problem of race and racism is acutely attentive to how the various boundaries of problematization have allowed for structural racism to persist without recourse to the provincial institution entrusted with advancing human rights. Inspired by James

Scheurich's (1997: 102) policy archaeology approach, I closely examine the evolution of OHRC policy to demonstrate how the range of "credible policy solutions" advanced by the OHRC are constrained by a tepid adoption of substantive equity frameworks and an affirmation of a "liberal social order." I eschew a unified account of the Commission's policy legacy, such as the narrative of progress offered by the Commission itself, and instead draw attention to conceptual contradictions and tempered human rights advocacy efforts. In so doing, I review official Commission documents (such as annual reports, press releases, and policies) as well as external commentary on the Commission's practices (including policy consultation papers, print press, institutional reviews, academic journals, doctoral dissertations and records of legislative debate). While the OHRC's contradictory policy positions are visible within official Commission documents, analyzing external commentary, in particular the Hansard indexes and institutional reviews, elucidates how the OHRC was non-responsive to community calls to intervene in the operation of structural racism beyond individual case management and frame the problem of racism more broadly. This historicized policy analysis accounts for the Commission's splintering of enforcement tools, such that systemic change strategies are detached from more concrete complaint management tactics, and the policy diffusion amongst multiplying grounds such that there is a diminished focus on attending to race and racism.

Early Anti-Discrimination Legislation (1940s-1960s): Civil Liberties vs. Human Rights

The establishment of the OHRC and anti-discrimination legislation is described within institutional narratives as the result of a "sharpened appreciation of the meaning of freedom" (Hill and Pollock, 1967:194). Writing in 1967, the first Ontario Human Rights Director Daniel G. Hill and the first Assistant Deputy Attorney General E. Marshall Pollock (1967: 194) depicted

human rights legislation as emerging from a provincial recognition that “a person is not free, if, by reason only of his particular race, colour or creed, he is denied employment or access to services and accommodation which are normally available to the public.” This framing of human rights entitlements reveals both the centrality of race to early human rights provisions and the emphasis on the overarching compatibility of anti-discrimination with prevailing liberal values. The rights guaranteed by the early *Human Rights Code* were based on a conception of freedom as the absence of discriminatory impediments within the existing social order with no positive obligation on employers or landlords to remove discriminatory barriers beyond refraining from explicit racial exclusion. Central to this framing of human rights as compatible with civil liberties was a restricted scope of protections such that these rights presented a minimal disruption to private business. The early *Code* and the inaugural Commission sought to address the problem of racial discrimination while maintaining a commitment to civil liberties and minimum economic disruption. This commitment, in turn, established an institutional predilection towards conciliatory and education-based policy measures over strong enforcement.

Prior to the 1940s, the right to be free from racial discrimination in Ontario was legally subservient to the right to be free from restrictions placed on individuals or private businesses. Courts upheld the freedom of individual business owners to discriminate on the basis of race in deference to the principles of individual liberty and freedom of commerce. In his 1976 review of Canadian human rights legislation, Ian Hunter (1976: 24) observed that “by 1940, it was clear that Canadian courts regarded racial discrimination as neither immoral nor illegal, and apart from a tenuous claim to breach of contract in special circumstances, the victim of discrimination could obtain no redress, however flagrant the discriminatory act.” Thus, the Ontario *Racial*

Discrimination Act of 1944 marked a significant departure from judicially sanctioned racial discrimination.

The passage of the Ontario *Racial Discrimination Act* of 1944 is reflective of a shift beginning in the 1940s from the inviolability of civil liberties to an emerging commitment of human rights. Dominique Clément (2012: 10), whose work charts the evolution of human rights systems in Canada, stresses that despite the modern ubiquity of human rights in Canada “what is most notable about postwar public discourse in Canada is that the term ‘human rights’ was rarely employed.” Instead, civil liberties, construed as freedom from state interference or coercion, held precedence in both law and public opinion. This freedom to wield individual racial prejudice in contracts, accommodation, and employment was challenged by the impact of the second world war and the emergence of a codified understanding of racism, as elucidated by the United Nations in the Universal Declaration of Human Rights. James Walker (1997: 197) points to an emerging ideological consensus amongst the Allied Nations, against the racist doctrines advanced by Nazism, that “every human individual had rights which must not be violated.” Within the Ontario context, this ideological commitment resulted in the passage of the *Racial Discrimination Act* (1944: s 2) which set out that the prohibition of discrimination on the basis of race must “not be deemed to interfere with the free expression of opinions.” Beyond the principled significance of legally forbidding racial discrimination, the *Act* held limited consequence for the established racial order within Ontario in that the application of the *Act* was minimal and a *laissez-faire* legal approach predominated in most cases where prohibitions against discrimination were tested.

The advancement of legislative protection from racial discrimination required a coalescence of advocacy from those groups facing blatant exclusion in public life. Lita-Rose Betcherman

(1975) depicts mid-1940s Ontario as littered with signs proclaiming: “No Negroes”; “No Jews or dogs”; and “Gentiles Only.” While the 1944 *Act* outlawed these blatant expressions of bigotry—in principle, if not in practice—discrimination in accommodation, employment and services remained legally permissible. The permissibility of these forms of discrimination was justified through a combined rationale of the racial inferiority of particular groups and the civil liberty-based entitlement to freedom of association, taken as the freedom to *disassociate* in public and private with those deemed racially undesirable. Carmela Patrias and Ruth Frager (2001: 5) describe pre-1944 Ontario as dominated by reified racial categories “that made Jews pushy and self-serving, and ‘Negroes’ and ‘Orientals’ ill-suited for adaptation to Canada.” Ontario also contained enclaves which maintained Jim Crow-like segregation practices, such as Dresden. In his historical account of Dresden and anti-discrimination mobilization, Ross Lamberston (2001: 64) describes how these stigmatized communities formed a human rights policy network comprised of “various churches, different ethnic organizations (including Jewish, Polish, Chinese, Japanese, and black), several women's groups, and a number of non-communist trade unions” and lobbied Progressive Conservative Premier Leslie Frost for the passage of fair employment and accommodation practices laws. Robert Howe and David Johnson (2000) also credit human rights activists with successfully pressuring Queen’s Park to enact specific and incrementalist anti-discrimination legislation, such as Canada’s first *Fair Employment Practices Act* in 1951 and the *Fair Accommodation Practices Act* in 1952.

Yet Howe and Johnson (2000) also offer a more structurally attentive account of why anti-discrimination legislation was palatable to Conservative politicians of the 1950s and 60s. The demographics of the province were shifting rapidly due to post-war immigration, which heightened the electoral appeal of human rights legislation. Similarly, Ross Lamberston (2001)

cautions against understanding the incremental human rights advancements of this period as the result of pluralistic social forces alone, since the impending necessity of migrant labour and the desire to contain more transformative equity demands created conditions where human rights were both politically and economically advantageous.

For Leslie Frost, the world was turning to democracy rather than communism for the protection of human rights, and anti-discrimination legislation in Ontario could therefore combine both practical politics and ideological warfare — stealing some of the thunder of Ontario's communist MPPs as well as demonstrating the virtues of 'democratic freedom.' (Lambertson, 2001: 67)

As Ontario grew increasingly reliant on non-Anglo immigration, employment, and consumerism for economic growth, flagrant race-based discrimination posed a potential impediment to this growth. While immigration into Canada was still explicitly restricted on the basis of race and ethnicity, the provisional integration of racialized workers into the workforce was increasingly recognized as economically expedient. Additionally, the human rights protections set-out in early legislation presented no challenge to racial hierarchies within the workforce and attendant precariousness. Tania Da Gupta's (2007) research on racism and the labour movement points to the co-constitutive arrangements of precarious citizenship and racialized labour segregation which remained unchanged in the wake of anti-discrimination legislation. Thus, the introduction of qualified equality legislation was useful for reinforcing the growing participation of previously excluded groups within the labour market, without challenging the embedded racial stratification of the market.

The Ontario *Human Rights Code* introduced in 1962 was the first of its kind in any province to incorporate all existing anti-discrimination prohibitions into a single powerful overarching legislation. Dominique Clément (2012) described the Ontario *Code* as a "landmark achievement" in that it combined effective enforcement mechanisms, such as specialized investigators and

constructive remedies, with a public education mandate. While the Anti-Discrimination Commission was brought into existence in 1958, prior to the *Code* Daniel Hill (1969: 391) describes the Commission's primary task as simply being to "publicize all human rights legislation in Ontario." The 1962 legislation greatly expanded the administrative significance of the Commission in that it imbued the newly named Ontario Human Rights Commission with the legislative authority to investigate, resolve and issue decisions on human rights matters. Whereas previous anti-discrimination legislation contained limited enforcement mechanisms, the *Code* recognized the administrative significance of tasking an institution with the responsibility for promoting human rights compliance and responding to human rights violations.

The original grounds of discrimination prohibited in Ontario reflected the legislation's genealogical ties to the *Racial Discrimination Act*, namely: race, creed, colour, nationality, ancestry or place of origin (Ontario, 1961/62). While 'sex' was not included amongst the original grounds, the legislation encompassed earlier prohibitions on wage discrimination between male and female employees. The *Code* prohibited discrimination on the basis of the defined "grounds" in the areas of public services, apartment buildings, employment practices, membership in trade unions and advertisements for employment. The *Code* also contained exclusions which stipulated that the protection from discrimination did not extend into private homes and exclusive not-for-profit religious, philanthropic, ethnic, fraternal or social organizations, nor did it apply to employers with fewer than five employees and apartments with fewer than six independent dwelling units. Such exclusions reflect the persistent protection of private interests against state incursion and mandated racial inclusion. For instance, Ian Hunter (1976: 48) points to the anomaly of the small apartment exemption in that "human rights legislation prohibited discrimination in large apartment complexes where [. . .] high rents disqualify many minority

group tenants” and yet it did not apply to “that kind of lower cost urban housing where economic necessity compels the urban immigrant or the Indian to seek accommodation.” This exceptionalism of private spaces served to maintain the pre-*Code* racial stratification in the areas ostensibly protected by the Code, namely employment and accommodation.

Notwithstanding the persistent exceptions in the legislation, the *Code* introduced a new means of recourse to those facing racial exclusions in employment and housing in Ontario which held particular significance for the *administrative access to rights*. As described by human rights lawyer Pearl Eliadis (2014: 69), the human rights regime set out in the *Code* “offered a different approach from earlier, criminal-oriented statutes” and “allowed an end run around the faint-hearted judiciary of the mid-twentieth century.” Whereas those seeking to oppose racial discrimination pre-*Code* were beholden to a judicial system that had demonstrated little regard for racial inequity, the Human Rights Commission offered an arena where those facing racial discrimination could bring forward complaints without requiring the assistance of a lawyer. According to Eliadis (2014: 70), the human rights advocates of the 1950s “saw commissions as a way of moving from criminal prosecution to investigating cases in an administrative context and to actively promoting rights in the public and private sectors.” Rather than simply pushing for human rights laws that are then interpreted and enforced through the pre-existing judiciary system, the introduction of commissions allowed for the investigation and promotion of human rights by specialists armed with administrative legal powers. The *Code* set out that the Commission “may inquire into the complaint of any person that he has been discriminated against contrary to this Act and it shall endeavour to effect a settlement of the matter complained of” (Ontario, 1961/62: Para. 12). If the Commission was unable to reach a settlement, then the matter could be referred to a board of inquiry for investigation. Through imbuing the

Commission with the power to inquire into complaints, the *Code* set about to establish a meaningful pathway for justice that was accessible to those facing discrimination.

The Commission's caseload of the 1960s was dominated by complaints brought forward by racialized individuals facing exclusions in the areas of employment and housing. While the formal protection from racial discrimination set out in the *Code* was potentially applicable to members of any race, including those racialized as White, this protection was most meaningful for those racialized groups within Ontario that were routinely subject to exclusions. Human Rights Director Daniel Hill (1969: 396) described "colour discrimination" as the primary problem of discrimination and described this form of discrimination as afflicting "Negroes, native Indians, Chinese, and new immigrants from India and Pakistan whose numbers are increasing in urban areas." The race-related grounds inherited from the *Racial Discrimination Act* (namely: race, creed, colour, nationality, ancestry and place of origin) allowed for conceptual differentiation between various forms of racial discrimination. This differentiation allowed for distinctions, such as race-based discrimination applied to multi-generational Black Canadians versus anti-immigrant sentiment applied to new immigrants of specific nationalities, however, in practice these grounds were regularly conflated.

The conciliatory nature of early human rights legislation is captured by Walter Tarnopolsky's (1968) metaphor of the "iron hand within the velvet glove." Tarnopolsky averred that human rights legislation should present an opportunity for reassessment and reform by pursuing a persuasive and conciliatory approach, however, it should also be poised to employ enforcement powers if necessary. Yet, the "iron hand" of the Commission was seldom employed, as the Commission's dominant response to complaints of discrimination was to seek resolution through settlement. R. Brian Howe (1991: 792) describes the early Commission as placing emphasis "on

bringing parties together and settling complaints amicably.” In the timespan of 1962-69, Hill (1969: 392) reported that the Commission “investigated, settled, dismissed or referred over 12,000 formal, informal, and miscellaneous complaints and inquiries” but only 50 of those complaints were ever referred to a board of inquiry to investigate. In his account of the work of the Commission, Hill (1969: 392) portrays the small proportion of complaints sent for investigation as an achievement reflective of a conscious policy choice to pursue amicable resolutions over findings of guilt: “Such procedure is predicated on the thesis that confrontation and accusation tend to reinforce the discriminatory attitude.” This aversion to adopting a disciplinary approach to human rights administration is emblematic of two fundamental presuppositions which informed the work of the early Commission: First, a belief that public education and consciousness-raising is an essential element of human rights administration; and second, a belief that an incrementalist and moderate approach was needed to advancing human rights change.

While the Commission was primarily responsible for resolving human rights complaints, institutional resources were also dedicated to public educational efforts and building a human rights culture within the province. This responsibility of the Commission was set out in Section 8.c of the original *Code* which tasked the Commission with the responsibility to “develop and conduct educational programmes designed to eliminate discriminatory practices related to race, creed, colour, nationality, ancestry or place of origin” (Ontario, 1961/62). Accordingly, the Commission engaged in media appearances and community engagement in order to broaden the awareness of the human rights throughout Ontario. Public education was also seen as a vehicle for addressing prejudice and bigotry through persuading employers and service providers to jettison, what Hill (1969: 397) termed as “irrational views” regarding races and nationalities.

This public education approach to anti-discrimination represents the problem of discrimination as the product of individual prejudices which can be eradicated through consciousness-raising and moral arguments. Key to this public education model, is the premise that human rights are compatible with—not disruptive to—classic liberal governance.

The early *Code*, like the anti-discrimination legislation that preceded it, sought to maintain a balance between human rights and civil liberties – understood as freedom from government incursion. Ross Lamberston (2001: 68) depicts Ontario’s mid-century anti-discrimination legislation as promoting “human rights at the expense of the traditional right of freedom of commerce, but in a limited fashion.” While the 1961 *Code* enabled financial sanctions to deter discriminatory practices, it limited the amounts of the fines to \$100 per individual and \$500 per corporation. While these fines were subsequently raised in 1969, they were still far from prohibitive, as Hill (1969: 394) observed that some individuals or businesses could elect to retain their discriminatory policies and treat the fine as “merely a license to discriminate.” Howe and Johnson (2000:11-10) describe the Ontario business community as having been quickly allayed that there was “little reason to fear the legislation: the grounds of discrimination were relatively narrow, maximum fines were small, and the role of the Commission was limited largely to responding to complaints and settling these complaints through conciliation.” Thus, despite the 1961 *Code* having since been hailed as “pioneering” (Hunter, 1976: 27) and “landmark” (Clément, 2016: 76), the legislation introduced minimal financial repercussions such that discriminatory employers and landlords were able to carry on with their standard practices whilst being only moderately encumbered by human rights obligations.

The legal coalescence of civil liberties and human rights in Ontario was premised on an understanding of discrimination as restricting the individual freedom of those subjected to it.

Rationale for the necessity of human rights legislation was articulated in relation to “the meaning of freedom” (Hill, 1969), the need to secure “fundamental freedoms” (Clément, 2012) and the assertion that the “fundamental freedoms” and “rights of man” must be extended to every person in our society (Tarnopolsky, 1968). Within this context, civil liberties associations were key advocates for anti-discrimination legislation and administration. Civil liberties advocate Alan Borovoy (1999: 38), who in 1961 lobbied with the Jewish Labour Committee for the passage of the *Code*, claimed retrospectively that the “mainstream position of blacks and Jews was essentially universalist – liberal to the core.” Those advocating for the *Code*, sought to demonstrate that discrimination constituted, as stated by Howe (1991: 787), “a contradiction of Canadian liberal values” in that it imposed special and unjust barriers on those subject to discriminatory policies and practices. Walker (1997: 321) identifies that the “same rhetoric of individual rights” was expanded under human rights legislation to include “the rights of the citizen to be protected by the state against displays of racial discrimination.” This discursive positioning served to ensure that human rights legislation was palatable to those already invested in liberal constructions of personal freedom and equality of treatment. Yet the purported congruence of human rights with civil liberties also served to restrain the transformative capacity of human rights legislation in that human rights enforcement consciously sought minimal disruption to private relations.

The Commission of the 1960s was reflective of what Pearl Eliadis (2014: 73) has termed a first-generation system whereby people are able to file complaints with few formalities and without entry barriers. While first-generation human rights systems throughout Canada were responsible for both administering human rights legislation and promoting human rights through public initiatives, processing complaints accounted for the bulk of their work. As described by

Howe and Johnson (2000: 15) the role of the early Commission was “mainly to respond to individual complaints” as it “had little proactive power, and few positive functions apart from a general public education and advisory role.” Individual complaints thus provided the sole means through which the Commission was empowered to intercede in discriminatory practices as without an individual complaint the Commission lacked the legislative authority to investigate or intervene beyond public education initiatives. This approach to human rights enforcement was consistent with the ongoing commitment to civil liberties, in that, as identified by Jennifer Tunnicliffe (2013: 447): “By requiring citizens to bring forward complaints, the legislation minimized government interference in the private interactions of individuals and businesses, allowing only those who allegedly violated the *Code* to be affected by public policy.” The limitations of this individualized approach to human rights advancements motivated calls for legislative amendments and expanded powers for the Commission.

As the limited efficacy of the “velvet glove” approach to the administration of human rights became increasingly evident, the Commission sought to move beyond its role as mediator towards an expanded enforcement capacity. Howe (1991: 763) describes the Ontario human rights movement mobilized in the late 1960s as driven by two broad objectives: “One was to enlarge the scope of human rights protections and the other was to expand the role and responsibilities of the Commission, making it a more pro-active and affirmative agent of rights.” During this period, the Commission was a key architect in the mobilization effort pushing for the expansion of human rights protections. The Commission sought to expand the provincial significance of human rights both through educational initiatives which raised the profile of the Commission’s work and through assuming a more proactive role in human rights enforcement than was initially set-out in legislation. Writing in 1968, human rights legal scholar Walter

Tarnopolsky (1968: 573) detailed the administrative constraints of requiring that human rights investigations be initiated solely “by the person claiming to be aggrieved,” as was the case with the early *Code*. For instance, those facing discrimination in public accommodation may not have had the means to demonstrate that they were subject to discriminatory treatment, especially if their interactions with a discriminatory employer or landlord were confined to an isolated incident. Tarnopolsky (1968: 574) saw this as an evidentiary challenge in which “proof” of discrimination could only be obtained “if a person who is not a member of the group discriminated against is willing to testify and can, immediately after the victim's discrimination, obtain access to the same accommodation or employment.” Without explicit legislative backing, the Commission initiated the practice of ‘testing’ to identify perennial discriminators and overcome this evidentiary barrier to substantiating claims of discrimination.

Despite the largely reactionary orientation of the early *Code*, the Commission of the late 1960s was active in initiating a public inquiry approach which departed from its overall restrained administrative model. Tarnopolsky (1968: 573) described the OHRC of the 1960s as “by far the most active in Canada.” The Commission aligned itself with community organizations and advocates interested in rooting out racial discrimination in the province and testing organizations known for engaging in racially discriminatory practices. As affirmed by civil liberties advocate Alan Borovoy (1967: 14): “Test cases are set up in the interests of documented proof [. . .] The proponents of test cases are not trouble makers. They are trouble finders.” Former OHRC employee and human rights lawyer Kim Bernhardt (as quoted in Eliadis, 2014: 73) described testing as emblematic of the activism of the early Commission: “people would go into the community to look at apartments and test the availability of housing for minorities, and into the practices of employment agencies that were reportedly screening people

out based on their racial background.” While testing proved resourceful and effective, this practice departed from the strict dictates of the *Code* – to process individual complaints – and relied on the initiation of Commission staff and community allies. Accordingly, the Commission sought amendments to the *Code* which would legislatively embolden the Commission to challenge discriminatory practices more actively throughout the province.

In contrast to the Commission’s active efforts for human rights expansion, the Progressive Conservative government of the day adopted, what Ian Hunter (1972: 236) termed: a “philosophy of gradualism” to human rights advancement in the decade following the *Code*’s enactment in 1962. The *Code* was amended four times within this first decade, amendments included: incrementally reducing the exceptions allowing for discrimination in accommodation based on the size of the apartment and discrimination in employment based on the size of the workplace; increasing the maximum fines for contravention of the *Code*; and prohibiting reprisals against those who exercised their rights under the *Code*. These modest advancements were also accompanied by the introduction of administrative and procedural restraints which sought to limit the expanse of the Commission and sanctity of human rights protections. The precedent-setting 1969 *Bell* case established that human rights inquiries were subject to judicial review. While judicial review of determinations reached by administrative bodies is consistent with the dictates of natural justice, as articulated by Tarnopolsky (1968: 583), this led to circumstances where the determinations reached by tribunals, composed of members with considerable expertise, are reviewed “by a single judge having no specialized knowledge of the subject matter of the legislation, and sometimes even a hostility to its objectives.” This hostility is exemplified by the statements made by the presiding justice in the *Bell* case (as quoted in Howe, 1991: 796): “It is important that the rights of a middle-aged white Canadian be protected

as those of a young, black, Jamaican tenant. And perhaps it is time that this was made clear.”

This judicial edict is characteristic of the prevailing formal equality approach of the court system, which countered the growing social rights sought by the Commission with an insistence on the primacy of individual rights and state neutrality.

Tarnopolsky’s metaphor of the iron hand inside the velvet glove presents an aspirational account of early human rights legislation in Ontario. In actuality, the effort to blend the conceptual commitments of both civil liberties and human rights entailed that the early *Code* had limited enforcement powers and the Commission lacked the “iron hand” required to compel institutions to relinquish discriminatory practices. Instead, the Commission was functionally reliant on the “velvet glove” approach to cajoling human rights violators towards human rights compliance through public education and mediation. The early *Code* conceived of racial discrimination as individualized prejudice committed by identifiable human rights violators who should, optimally, be persuaded to behave differently (i.e., better). Yet, the limitations of relying on voluntary compliance became apparent to the Commission in its administration of human rights complaints, and, as such, the Commission began to disrupt the established boundaries of human rights enforcement by initiating proactive investigative strategies (“testing”) and seeking expanded legislative authority to hold respondents accountable. Informed by Bacchi’s (1999) and Scheurich’s (1997) denaturalization of policy problems, this examination of the OHRC’s initial individualistic approach to the problem of racial discrimination in Ontario, and the ensuing efforts in the 1970s to expand human rights legislation beyond such narrow origins, reveals that the Commission’s foundational compromise between civil liberties and human rights was unsustainable in the face of the emergence of a systemic approach to the pursuit of equality and

the attendant necessity to revise existing articulations of the “policy problem” of racial discrimination.

Human Rights Reform (1970s-1990s): Systemic Approach vs. Fiscal Expedience

By the 1970s, the OHRC had developed an institutional appreciation of the limitations of relying on persuasion and conciliation in the advancement of human rights. Further, the delicate compromise between civil liberties and human rights became harder to sustain in the context of a rising appreciation that discrimination is perpetuated by ostensibly neutral policies and practices.

The OHRC’s 1977 *Life Together* report articulated that:

. . . the Commission’s experience in administering the *Code* during the last fifteen years demonstrates that the most pervasive discrimination today often results from unconscious and seemingly neutral practices which may, none the less, be as detrimental to human rights as the more overt and intentional kind of discrimination. These discriminatory practices perpetuate the discriminatory effects of past practices. (1977: 33)

This expanded articulation of discrimination created a fissure between the OHRC and those invested in maintaining the *status quo*. Here, I take up how the *Life Together* report recommendations contested both *traditional liberalism*, in that the systemic approach to discrimination was purported to be “unfair to individuals” (Howe, 1991: 789) by prioritizing impact over intent, and *neoliberalism*, in that the proposed “expanded role for the state in protecting the rights of its citizens” (Tunncliffe: 2013: 461) was perceived to be contrary to market interests and invited “unwarranted state intervention in private enterprise” (Howe and Johnson, 2000:154). In so doing, I reveal the irreconcilability of a substantive approach to human rights administration with the dictates of formal liberalism and the financial constraints of neoliberalism. This irreconcilability resulted in the OHRC’s moderate adoption of substantive equity frameworks (as seen in the policy boundaries established around affirmative action

measures in the *Life Together* report) and a chronic absence of adequate resourcing which impeded the OHRC's capacity to wield its enforcement powers.

The *Life Together* report was released in 1977, following a year-long consultation which included three hundred written briefs, seventeen public meetings and commissioned research (OHRC: 1977). Dominique Clément (2016: 111) describes this process as “one of the most widespread consultations on human rights law in the 1970s.” Through these public consultations the Commission sought to mobilize public support for a more robust, responsive and influential human rights system. The Commission was also seeking to highlight how inadequate resource allocation was limiting the capacity for the Commission to intervene in human rights violations. In the introduction to the report, the Commission (1977: 9) stressed that there was “a serious discrepancy between the Commission's legal responsibilities and the limited resources available to it to meet these responsibilities.” In her review of public debates over human rights legislation in the late 1970s, Jennifer Tunncliffe (2013: 461) highlights that this call for additional resources and expanded state protection conflicted with the prevailing political-economic logic of the day: “Economic conditions in the late 1970s had inspired the growth of a political discourse in Canada and abroad that focused on fiscal restraint, less public expenditure for social services, and a reduced government role in the daily welfare of its citizens.” By pushing for an increasingly interventionist approach to human rights administration, the Commission positioned itself in opposition to the primacy of business interests and the neoliberal retreat from so-called state paternalism.

The Commission's push for expansion faced countervailing pressure from the legal community and the private organizations and businesses that sought to restrain the Commission's authority. As described by Howe (1991: 1976), this counter pressure reflected a discrepancy in

civic principles “between liberal values such as personal freedom and procedural fairness, on the one hand, and the encroaching power of the state, on the other, as represented by the Human Rights Commission and boards of inquiry.” The further the Commission pushed to reconstitute itself as a transformative institution with a significant role to play in social and economic relations, the more it attracted criticism and backlash from those invested in the maintenance of traditional liberal values and individual freedom. In response to the growing influence of human rights commissions across Canada in the 1970s, legal scholar Ian Hunter (1976: 21) penned a critique of the commissions’ “paternalism and uncompromising egalitarianism.” Hunter (1976: 29) took particular objection to the “reasonable cause” section of the British Columbia *Human Rights Act*¹⁹ of 1974, which he characterized as demonstrating “a disturbing insensitivity to the particular rights of an employer.” The reasonable cause was reflective of growing appreciation amongst human rights practitioners that discrimination is frequently embedded within existing practices and institutions, and that advancing human rights requires disruption to these same institutions.

The OHRC’s 1977 *Life Together* report signaled a more sophisticated treatment of discrimination than that which was hitherto reflected in Ontario human rights legislation. Tunnicliffe (2013: 457) identifies that “the focus on the institutional and systemic²⁰ nature of discrimination underscored a new understanding of the role of human rights public policy.”

¹⁹ This section of B.C.’s human rights legislation affirmed “the existence of systemic discrimination in the form of patterns of behaviour or institutional practices that exacerbated the disadvantages of marginalized communities” and prohibited “all forms of discrimination unless the respondent could demonstrate reasonable cause” (Clément et al. 2012, 21). In 1984, the Social Credit government repealed this *Act* and replaced it with legislation that only targeted individual acts of discrimination.

²⁰ The term “systemic discrimination” is not used in the *Life Together* report, instead the report refers to “institutionalized and historical patterns of discrimination” (1977: 33). The OHRC did come to use the term “systemic discrimination” the following year in its inaugural annual report.

Rather than treating discrimination as primarily the result of intentional and isolated acts between individuals, *Life Together* enunciated the structural and historical dimensions of discrimination. In recognition of the enduring impact of historical discrimination, the report recommends that the *Code* be amended to allow for complaints to be filed by a “class of persons” rather than solely by individuals. This recommendation marks an ideological departure from the liberal human rights tradition of treating individuals as the primary unit of focus and viewing rights-bearers as atomized entities. A ‘class of persons’ complaint against a single employer would allow for holistic investigation of the *collective* discriminatory impact of a particular policy or practice, as well as alleviate the individualized burden of filing a complaint against a large discriminatory entity.²¹

Yet, even when articulating the “institutionalized and historical patterns of discrimination” the commissioners in *Life Together* (1977: 35) still distanced themselves from more powerful, but unpopular, anti-discrimination measures in the U.S., such as quota-based affirmative action, and asserted that “equality of opportunity is the goal.”²² The report positions quota-based hiring schemes, which aim to rectify historical discrimination through requiring employers to hire a set number of candidates from a historically underrepresented group, as antithetical to human rights and tantamount to “reverse discrimination.” The term “reverse discrimination” itself belies an individualistic understanding of discrimination, wherein attempts

²¹ Notably, this remains an identified inadequacy in current Ontario human rights legislation. Jean-Simon Schoenholz’s (2017: 692) comparative study on the availability of group litigation strategies in Ontario vs. B.C. finds that “the absence of formalized group litigation procedures appears to be associated with difficulties of litigating claims of systemic discrimination.”

²² The report is instead enthusiastic about an Alberta initiative which was “designed to ensure the employment of qualified Indians over a ten-year period in all parts of the oil-sands development” (1977: 35) through funding educational opportunities, without any accompanying consideration of the impact of oil-sands development on First Nations or the broader relationship between resource extraction and Indigenous sovereignty.

to rectify the absence of people from historically *disadvantaged* groups are portrayed as unfair if they place individual members of historically *advantaged* groups at a disadvantage (thereby reversing the direction of the discrimination). These cries of “reverse discrimination” frequently lack an institutional or historical understanding of patterns of discrimination (now referred to as a systemic understanding of discrimination) since they fail to appreciate the ways in which the “historical” discrimination which favoured the advantaged group continues to reinforce this advantage even in the absence of explicitly preferential rules or policies.

The tension between the Commission’s systemic and individualistic understanding of human rights is particularly acute in *Life Together*’s discussion of racism. The report (1977: 58) describes the barriers facing “visible minorities” in employment and housing as dynamic and recurrent, and avers that these barriers persist “even when their educational achievement, occupational level, and economic status are on a par or are superior to those of whites.” Consequently, the report’s description of racial discrimination reflects a burgeoning systemic understanding of racism as distinct from economic inequality and cultural distinctiveness. The report is careful to stipulate that racism subjects racialized Ontarians from various economic backgrounds and migration experiences to similar exclusions. Yet, the report (1977: 58) does not offer any differentiation between racism and racial discrimination, and claims that “racial discrimination is by no means confined to whites.” While discrimination can notionally occur in any direction, racism requires structures of advantage and disadvantage which are premised on racial hierarchies and accordingly are not easily reversed. Writing during the same year as the *Life Together* report, Daniel Hill (1977: 23) distinguished between racial prejudice (a state of mind) and racial discrimination (overt or covert act) and stated that the “the primary target of human rights legislation is discrimination, not prejudice.” The Commission’s articulation of

racial discrimination in *Life Together* lacked an account of the broader structures of race and racism, or the prevalence of racial prejudice.

Despite the *Life Together* report signaling an emboldened institutional approach to human rights advancement, the commissioners (1977: 58, emphasis added) still exert themselves to demonstrate reasonableness, balance, and objectivity with respect to racial discrimination by reflecting on experiences with “people who seek to hide incompetence or unreliability behind their membership in a minority group” and recounting “*many* situations in which members of one minority group are applying discrimination against another minority group or *against the white majority*.” These examples serve to validate articulations of racial discrimination as individual injuries which can be perpetrated by members of any race, completely divorced from relations of power. While the report (1977:58) acknowledged that in a cumulative sense “it is the members of racial minority groups who are bearing the brunt of racial discrimination,” this individualized portrayal of racial discrimination avoids consideration of the structural dimensions of racism and the resultant systemic pattern of racial discrimination. This is reflective of the pervasiveness of the Canadian attachment to racial neutrality, even in the context of systemic discrimination and human rights.

Notwithstanding this predilection for race neutrality, *Life Together* also gave particular attention to race as a central ground within human rights legislation. The report (1977: 59) insisted that “the necessary addition of new grounds to the *Code* must not be allowed to deflect the Commission from its important continuing responsibility in the area of race.” At the time of the report, race and colour based complaints accounted for just under 60% of the Commission’s caseload. Examples of racial discrimination offered within the report frequently referenced the police, which accords with Hill’s (1977:41) contemporaneous claim that “there is not a human

rights commission in Canada that has not had Indians complain about police harassment, blacks complain of rough treatment or Asians complain of racist name-calling by police.” In stressing the need for investment in public education, *Life Together* (1977: 41) offers the example of police officers questioning black drivers (“Whose car is this?”) and calls for human rights to be incorporated into all police training programs. The report (1977: 57) also highlights public concern about the racially discriminatory behaviours of law enforcement, referencing a submission by the Jamaican-Canadian Association that expressed that “when black suspects are sought, every black person who comes within view of a law enforcement officer is stopped.” In this way, the *Life Together* report serves to implicate policing in the need to address racial discrimination.

The centrality of racial discrimination to the work of the Commission was expressed in the report (1977: 56) as extending beyond the volume of race-based concerns: “there can be no doubt that race-related issues are central to the work of the Commission and must remain a major priority in this work.” Accordingly, in order to retain a dedicated focus on race within the context of an expanding mandate, the commissioners recommended expanding the authority of the Commission “to develop and conduct community, race and ethnic relations programs” (Recommendation 20 b, 1977: 96) and the establishment of a subdivision within the Commission to be “focused on complaints involving race, nationality, ancestry, and place of origin” (Recommendation 67 b, 1977: 104). Through their recommendations, the commissioners affirmed both the distinctness of the operation of racial discrimination and the urgency of responding to the racial dimensions of human rights. Reflecting on the experiences of some southern jurisdictions in the United States, the report (1977: 55) expressed apprehension over the expanding scope of the *Code* and the *problems of diffusion*: “If the Code is broadened too much,

there is a danger that the Commission would be required by law to handle complaints under so many categories of discrimination that it might not be able to deal effectively with even the most serious problem areas, for example racial discrimination.” Thus, the report anticipates the challenge of effectively intervening into practices of racial discrimination under a piece of legislation that broadly attempts to address a wide range of discrimination without adequate resourcing.

The *Life Together* report repeatedly returned to the significance of resourcing and detailed the consequences of the ongoing fiscal constraint under which the Commission had been forced to operate, including a large backlog of complaints and an inability to deliver on public education. The commissioners (1977: 11) lamented that: “The best legislation in the world is rendered useless if resources are not provided to put it into action.” Accordingly, the report called for greater investment in Ontario’s human rights system and an expanded mandate. These expansionary aims of the commissioners conflicted starkly with the ascendancy of neoliberalism across Canada in the late 1970s. As described by Alvin Finkel (2006: 281) “the underlying argument of neo-liberalism was that Canadians had become too reliant on state handouts for their well-being and required the discipline of market forces to smarten them up.” Neoliberalism champions deregulation in the interest of market flexibility and thereby seeks to disencumber private industry from state-based mores and regulatory regimes. Conversely, the work of the Commission depends on the public acceptance that there are non-negotiable rights and entitlements (such as the right to be free from discrimination) that are subject to enforcement by the state and require the state to intercede in the realm of private industry. The report (1977: 14) also sought to restrain the unfettered rights of the employer and instead introduce the legal primacy of human rights (Recommendation 5) over economic interests to counter the “Canadian

common law tradition [. . .] protect[ing] the right of businessmen to operate as they please and to serve whom they please.” Thus, at a moment when Canadian public policy was shifting from liberalism to *neoliberalism*, *Life Together* positioned itself as divergent from both by virtue of its collectivism and its demand for greater state intervention and resourcing.

Reflecting a growing institutional assertiveness, the Commission published its first independent annual report the year after *Life Together* was released.²³ In this inaugural annual report (1979:4), the Commission further articulated its historical understanding of discrimination and introduced the concept of *systemic* discrimination in relation to its work: “The blatant and overt discrimination of years past has been partly replaced by the systemic discrimination through which minorities and women are denied educational and employment opportunities.” Crucially, the Commission understood systemic discrimination to be within the purview of its own work and the *Code*. This entailed a shift in the Commission’s complaint management approach such that the investigation of complaints included considerations of discriminatory impact through examining patterns of exclusion. The Commission (1979: 8) also affirmed its support of (non-quota based) affirmative action programs “to enable qualified or high potential members of minority groups and women to enter the work force in jobs where they have traditionally been excluded.” This support for human rights-based interventions into the underrepresentation of historically marginalized groups signaled greater interjection into economic relations.

The *Life Together* report placed strong public pressure on the provincial Progressive Conservatives to revise the 1970s *Code* but it was not until 1981 (three years after the release of the report) that the government introduced a new comprehensive human rights bill – Bill 7, *An*

²³ Previous annual reports were included in the Ministry of Labour's annual reports.

Act to revise and extend Protection of Human Rights in Ontario. Bill 7 adopted the commissioners' recommendation to give the *Code* primacy over all other provincial legislation and added age, "handicap", family status, marital status and record of offences to the list of prohibited grounds of discrimination (Ontario, 1981).²⁴ Bill 7 garnered a strong reaction from both those supportive of an expanded human rights system and those reticent of the encroaching powers of human rights into hitherto private and financial spaces. Tunncliffe (2013) reports that more than two-thirds of the briefs that were submitted to the Standing Committee responsible for overseeing Bill 7 were either explicitly in favour of the amendments or wanted the government to go further. Yet the bill still attracted significant backlash on behalf of business interests. By imbuing the *Code* with precedence over other legislation, the amendments affirmed the primacy of human rights protections over competing interests, such as those driven by business imperatives. In response, the Ontario Chamber of Commerce (as reported in Tunncliffe, 2013: 464) claimed that Bill 7 would "give the Human Rights Commission unprecedented power to interfere in the operations of Ontario businesses and place impractical and unnecessary restrictions on employers, thereby obstructing a company's ability to make profits and hurting the Ontario economy." The lobbying efforts on behalf of business interests were successful in scaling back the enforcement and inquiry powers of the human rights system at the committee stage of the legislation (Howe, 1991; Tunncliffe, 2013). Yet these objections did not thwart the overall expansion of the human rights system to include the addition of new protected grounds, the affirmed primacy of the *Code*, and the shift from negative to positive rights.

²⁴ Notably, Bill Davis' Progressive Conservative government opted not to include legal protection for "sexual orientation" in this bill as was recommended in *Life Together*.

Consistent with the Commission's newly pronounced commitment to tackling systemic discrimination, the updated *Code* reflected an understanding that both individuals and groups had a right to equality not merely an individual right to be free *from* discrimination. Tunnicliffe's (2013: 463) research draws particular attention to the use of the wording "Every person has a right to..." in place of "No person shall..." as recognition of "citizens as rights holders." Though the updated *Code* (Ontario, 1981) did not explicitly reference systemic discrimination, section 10 expressly prohibited "constructive discrimination" wherein the rights of a person are infringed if the person is subject to a "requirement, qualification or consideration" that is not in itself discriminatory "but that would result in the exclusion, qualification or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member." This acknowledgement that seemingly neutral or uniform rules and requirements can produce unequal outcomes based on prohibited grounds under the *Code* codified an understanding that discrimination is not limited to discrete, individual, and aberrant instances of inequality, but can instead be built into standardized practices. Howe (1991: 798) details that this expansive new *Code* violated a prevailing "conservative liberal ethic" of the 1980s which objected to any affirmative action measures on the basis of equal opportunity and proclaimed that "the recognition of systemic discrimination would be unfair in that employers could be found guilty of discrimination – even though they did not intend it." In addition, Howe (1991: 799) describes these "forces of restraint" as "leaving their mark on policy" in that the procedural formalities imposed on the Commission set limits on its ability to investigate systemic claims. Yet, crucially the 1981 *Code* amendments sought to shift understandings of human rights from solely *equality of treatment and opportunity* to *equality of outcome*, thereby shifting the

determinants of discrimination from *the intent of a rule or action* to *the impact* on members of a protected group.

Despite imbuing the Commission with increased investigatory and enforcement powers, the Commission's ability to accomplish its ambitious mandate was heavily restrained by under-resourcing. Tunnicliffe (2013: 467) describes that the “most significant criticism of the *Human Rights Code, 1981* was that it contained no provisions to increase the budget of the Commission.” The decision not to increase the Commission's budget—despite its increasing caseload—effectively rendered the Commission incapable of delivering on the proactive, systemic approach which was otherwise facilitated by the new *Code*. This constraint was characterized by Howe and Johnson (2000: 70), as a “double-edged development” such that “at the same time as the need for budgetary resources was increasing, fiscal restraints were placing limits on the growth of human rights budgets.” Consequently, the social impact of human rights systems was significantly restrained despite their expanding mandates and nation-wide shifts towards the adoption of substantive equality frameworks. These substantive equality frameworks were subsequently bolstered, in large part, by former Ontario Human Rights Commissioner Rosalie Abella's²⁵ 1984 *Equality in Employment: A Royal Commission Report*.

Howe and Johnson (2000: 124) report that in the 1980s, many human rights commissions “moved away from their traditional focus on individual cases in favour of the more elaborate and proactive systemic approach.” Within the context of complaint management, the proactive systemic approach requires that when assessing the merits of a complaint of discrimination, commission investigators look for patterns of exclusion and consider whether or not unintended

²⁵ Rosalie Abella was an Ontario Human Rights Commissioner at the time of the *Life Together* report and became a Justice of the Supreme Court of Canada in 2004.

and unarticulated institutional biases are contributing to these patterns of exclusion and individual experiences of discrimination. Moving beyond a complaint management focus, the proactive systemic approach emboldens commissions to *initiate* public inquiries into human rights matters. As explained by Abella (1984: 9): “Rather than approaching discrimination from the perspective of the single perpetrator and the single victim, the systemic approach acknowledges that by and large the systems and practices we customarily and often unwittingly adopt may have an unjustifiably negative effect on certain groups in society.” Abella’s articulation of systemic discrimination departs significantly from an individualized conception of human rights violations as anomalous acts which can be rectified through discrete remedies that apply only to the specific circumstances of the complaint. Intervening in the systems and practices that sustain systemic inequities requires human rights commissions to both focus on their public interest functions and evaluate individual cases within the context of social inequities.

In view of the shifting conception of human rights protections, the New Democratic Party government of Ontario established an independent taskforce on the Ontario human rights system led by human rights and labour relations lawyer Mary Cornish. Cornish (1992: 2) recommended substantive reform of the Ontario human rights system in the interest of addressing the “outdated and wrong” treatment of human rights as an individual problem. A central recommendation put forth in the Cornish Report (1992: 47) was that the Commission should “explicitly recognize that systemic discrimination exists and that positive action must be taken to overcome the historical and present discrimination.” In order to achieve greater enforcement of human rights and specifically address systemic discrimination, the report recommended that the OHRC no longer have carriage of human rights claims – which would instead be handled by the ‘Equity Rights

Tribunal.’ The report (1992: 35) suggested that through the removal of its complaint-management function, the Commission (to be renamed ‘Human Rights Ontario’) would be enabled to “promote equality on a broad scale by taking forward key systemic cases and by carrying out other proactive initiatives.” The proposed reforms sought to rectify historical inequities through imbuing the *Code* with a positive obligation to achieve equality rights for historically disadvantaged groups and the recognition that the “right to equal treatment requires that positive measures be undertaken” (recommendation 5). This proactive approach was to be achieved through diverting the Commission’s resources from complaint-processing to systemic interventions (such as public education and inquiry) and empowering groups to advance human rights claims with the assistance of the Commission or a related organization with special expertise in the area.

In direct contradiction to the insights from the Cornish Report, the 1995 Progressive Conservatives (PCs), under Mike Harris, campaigned on – what Howe and Johnson (2000: 127) describe as – a platform to put “an end to systemic programs.” A central tenet of the party’s “Common Sense Revolution” was the abolishment of equity-driven institutional measures that sought to track workforce inequities or rectify historical injustices through legislated state action. As detailed by Howe and Johnson (2000: 127), the PCs took the position that “systemic approaches to combatting discrimination were themselves discriminatory, and resulted in reverse discrimination, and corroded good race, ethnic, religious, and gender relations.” Following the election, the PC government swiftly withdrew from equity initiatives: eliminated the Employment Equity Commission, dismantled the Anti-Racism Secretariat, and cut the budget and staff of the OHRC (Howe and Johnson, 2000; Hucker, 1997; Kempthorne, 2013; Trickey, 1997). As articulated by Alan Sears (1999: 91), the PCs sought to reconfigure Ontario into a

“lean state” by reducing state support of social reproduction and removing regulatory burdens on businesses. Under this reconfiguration, market flexibility demands limited protections and benefits for workers, including the protection from discrimination which the Commission was responsible for safeguarding. In the interest of ushering in this new “lean state,” Pearl Eliadis (2014: 86) remarks that the PCs “shelved the [Cornish] report” as an “expensive idea” that was incongruent with fiscal expediency. While the Commission itself was not abolished by the PCs, its institutional priorities shifted from addressing systemic discrimination to expedient case management.

The austerity measures ushered in by the PCs were not auxiliary to institutional racism, but instead served to exacerbate racial inequities and rendered racialized workers particularly vulnerable to exploitation. Sears (1999: 105) highlights that the Harris government’s elimination of equity legislation and funding cuts to the OHRC corresponded with “the turn towards harsher punishment” which results in “the intensification of racist policing and the criminalization of people of colour.” Without recourse to equity legislation or an effective human rights system, racialized Ontarians were rendered more susceptible to workplace exclusions while simultaneously subjected to the Harris government’s criminalization of poverty.²⁶ Jean Trickey (1997: 119) claims that the Harris government promoted the “resurgence of racism” in Ontario through the “wholesale dismissal of anti-racism initiatives” and an investment in policing at the “forefront of the enforcement of the Common Sense Revolution.” This deliberate dismantling of state institutions charged with addressing structural racism drew criticism from impacted

²⁶ Tator and Henry (2006) describe the criminalization of poverty as declaring certain acts that are more likely to be committed by poor or homeless people, such as begging and being in public places, to be crimes.

community groups, such as the Toronto-based African Canadian Legal Clinic (ACLC). In a 2002 *Report on the Canadian Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination*, the ACLC highlighted that

. . . downsizing of OHRC limited its ability to investigate complaints of discrimination and address issues of concern to African Canadians. Leaving issues of discrimination and equity in employment and other spheres to the purview of the Commission also meant that there was no systemic approach to addressing the systemic problem of discrimination in the workplace. (2002: 65-66)

A systemic approach to addressing racial discrimination presented both a regulatory burden to businesses as well as fiscal burden for government which was ideologically incompatible with the PC's commitment to pursuing a lean state.

Under the leadership of Harris government appointee Keith Norton, the OHRC of the late 1990s adopted New Public Management (NPM) techniques explicitly prioritizing expediency and private sector productivity, which left limited space for addressing systemic discrimination. Alison Griffith and Dorothy Smith (2014: 5) define NPM as involving “the imposition of managerial regimes modelled on those already operative in the sphere of private enterprise” including the use of explicit and measurable standards of performance for public sector organizations. The conceptual commitment underpinning NPM is that the fiscally-oriented managerial strategies employed within the private sector should be imported into the public sector to reduce waste, cost and inefficiencies that are taken to be rampant within the public sphere. In demonstration of this measurement-driven approach, Chief Commissioner Norton (March 27, 2001) proudly proclaimed that in his then five-year tenure, the Commission had resolved more cases than it opened and had reached ‘a current caseload’ where the average and median ages of active complaints were less than twelve months old. This achievement responded to a perennial complaint against the Commission that the human rights process was so delayed as

to make it ineffective.²⁷ Yet this push for expediency neglected corresponding community calls for inquiries into institutional patterns of exclusion.

In accordance with the institution of NPM techniques, the Commission's annual reports of the late 1990s and early 2000s reflect a preoccupation with expediency by offering quantitative performance measures to demonstrate the Commission's swift approach to processing complaints. During this period, "systemic discrimination" appears to slip from the Commission's lexicon and is scantily mentioned in accounts of the Commission's activities. As Howe and Johnson (2000: 126) identify: "Studies of this kind are costly, time consuming, and often highly controversial, in that they seek to describe the social patterns of entire groups rather than the explicit behaviour of particular individuals." While the Commission continued to profess a commitment to advancing human rights through the development of public policy, the policies of this period reflect an individualistic orientation in the conceptualization of discrimination. In line with the dictates of NPM, the annual reports of this period contained an "accountability framework" which established and reported on organizational performance, including the promotion of mediated settlements and the targeted reduction of both the use, and length, of investigations.

In so doing, the NPM approach adopted by the Commission in this period subordinated broader public interest approaches in case management to expediency. This accorded with the broader political transformation of the Ontario public service. As David Clark (2002: 786) remarks, NPM was part of a "far-reaching political project to reduce the role of government in the Ontario political economy." Whereas the Commission of the late 1970s was developing a

²⁷ For example, the 1993 Ombudsman Special Report of Roberta Jamieson (1993: 2) found that "case openings had outpaced case closings for several years."

substantive equity approach that was consciously disruptive to standard employment relationships – or recalling the words of *Life Together* (1977: 14) contested the “right of businessmen to operate as they please and to serve whom they please” – the 1990s Commission’s adoption of NPM reflected an institutional acceptance that its role was primarily to resolve aberrant instances of human rights violations. This institutional focus on individual case management came at the expense of more disruptive and transformative inquiries into Ontario business practices.

The period of 1970s-90s Ontario human rights reform reflects a curtailed adoption of a systemic approach to human rights. The expanded capacity to intervene into collective inequities sought by the *Life Together* report (1977) and the human rights advocacy role sought by the Cornish Report (1992) proved incompatible with the province’s enduring commitment to individual liberty and economic interests. Whereas the Commission took steps towards espousing a systemic articulation of discrimination, albeit while refraining from a structural articulation of racism, the fiscal restraints and NPM approaches imposed on the Commission during this period establish that there are institutional repercussions for the OHRC intruding into economic relations and seeking broader social transformation. In particular, Harris’s “Common Sense Revolution” took aim at programs and institutions throughout the Ontario Public Service that were orientated towards intervening into collective inequalities. Consequently, the OHRC’s institutional activities were reconfigured in adherence to the expediency-based demands of NPM. The OHRC has been a central site of contestation regarding the possibilities of state intervention into collective inequities. Within the context of this contested terrain, OHRC was reconfigured to align with the provincial government’s priorities at the expense of expansive and progressive human rights policy.

OHRC Racial Discrimination Policy (1975-2007): Race Relations vs. Anti-Racism

The Commission's institutional preoccupation with mediating between competing articulations of the public good has had particular consequences for the institution's representation of the problem of racial discrimination. While race-related grounds have been central to the OHRC's mandate, the OHRC has vacillated between understanding this mandate as requiring institutional intervention into practices and processes that sustain racial discrimination and an understanding of its institutional role as cultivating and maintaining harmonious *race relations*. Writing in 1992, Audrey Kobayashi (1992: 7, emphasis in original) described "race relations" as a "euphemism for the fundamental problem of *racism*." Drawing on the work of Robert Miles (1982), Kobayashi depicts Canadian articulations of race relations as founded on an erroneous belief of equanimity between naturally-occurring "races" which obscures both the processes of racialization and the brutal histories of racist oppression. Here, I review the OHRC's *incomplete* transition from framing the problem of racial discrimination as an issue of race relations to forging a systemic analysis of racial inequity. Recalling Bacchi's (1999) focus on both the presuppositions and the effects of problem representation, this review shows how the Commission's foundational attachment to liberalism and its prioritization of conciliation and public harmony permeates its articulation of, and shapes the scale of interventions pursued in response to, racial discrimination.

Notwithstanding the centrality of race-related grounds to the formation of the OHRC, Wilson Head's report (1975: 206) on the perception and practice of discrimination against Blacks in Metropolitan Toronto found that "the Commission does not have a very high 'visibility' rating during this period of rising racial tensions." Head described Black study respondents as viewing the Commission as limited by its position as a government agency, which has particular

implications for the Commission's capacity to address discrimination in state institutions, such as the police. Head (1975: 217) expressed that the Commission's ability to hold the police accountable for racial discrimination was an area of acute concern for Blacks, as the "police are accused of a considerable amount of discriminatory treatment of black citizens, including harassment and discrimination." Head's 1975 report called on the Commission to employ community relations workers to connect with "Black and other ethnic groups" to address discrimination at the local level. Former OHRC Chief Commissioner, Ena Chadha (*Toronto Star*, October 23, 2021), reports that there are records from 1977-79 that reveal that the OHRC was "actively working with ethnic communities to document discrimination by the Metropolitan Toronto Police Force," including identifying that "72 per cent of complainants were Black." The need for emboldened and dedicated focus on race-related complaints also found expression in the 1977 *Life Together* report's call to codify a Race Relations Division.

The OHRC Race Relations Division²⁸ was established in the amendments contained in the 1981 *Code*, which set out that the Division's functions would include *any functions* of the Commission "relating to race, ancestry, place of origin, colour, ethnic origin or creed that are referred to it by the Commission and any other function referred to it by the Commission" (Ontario, 1981: Ch 27). James Walker (1997: 333) describes the introduction of the Race Relations Division as indicative of "movement away from a complaints-based program to something far more proactive." Yet, despite the Race Relations Division's (Ubale, 1982: 7) professed appreciation for the "systemic nature of racism"—and the mounting calls for the

²⁸ The division was created in 1979 prior to the 1981 *Code*, but only became a legislative requirement in 1981.

OHRC to intervene in racialized police violence²⁹—the model of institutional change adopted by the Division was decidedly *voluntary, conciliatory* and premised on *societal goodwill*. This model restrained explicit critique of institutional practices towards racialized communities, in particular in policing. Further, as expressed in the Division’s title, the *Race Relations* Division prioritized relationship-building both amongst disparate racial groups and between these groups and public institutions.

In his public communication on the anticipated work of the Division, *Working Together: Strategy for Race Relations in Ontario*, the first Race Relations Commissioner Bhausahab Ubale extolled his understanding of racial discrimination as a consequence of racial disharmony, for which all parties involved bear a measure of responsibility. Ubale (1982: 44) averred that: “Race relations is not a one-way street. It requires adjustments on both sides; all groups in society must co-operate to bring about harmonious relations.” Ubale’s framing of the problem as the result of disunity, not as systemic discrimination, greatly informed both the structure and objectives of the Division. In lieu of enforcement, Ubale (1982:15) proclaimed that: “Essentially we see ourselves as mediators, conciliators, educators and facilitators.” While the wording of the 1981 *Code* allowed for the Division to take on *any* of the functions of the Commission connected to race and related grounds, the Division was structurally divided from the enforcement arm of the Commission (namely the “Conciliation and Compliance Division”) which was responsible for processing complaints. In the absence of any enforcement capacity, the Race Relations Division set about to attain the “voluntary compliance” of the institutions with which the Division

²⁹ See for instance, Ena Chadha’s account of Black Torontonians’ mobilization following the 1979 death of Albert Johnson (*Toronto Star*, October 23, 2021).

engaged. As “conciliators” and “mediators” the Division sought to monitor and resolve racial conflicts within the province from a position of neutrality.

This attachment to neutrality entailed that the Division approached racial conflicts from the vantage point of ostensible objectivity, even where the parties involved held radically disparate positions of institutional power. For instance, when exploring the problem of ‘Police-Minority Relations’, Ubale (1982: 29) noted that “members of the community are still distrustful of the police, and *vice versa*.” This flattened account of mutual distrust fails to contrast the relative power positions of racialized community members and police officers, and is devoid of any consideration of the “institutionalized and historical patterns of discrimination” referenced in the *Life Together* report (1977: 33). The work of the Division was aimed at the promotion of pluralism rather than combatting racism. Consequently, the Division (1982: 30) focused on the importance of education as a means of “sensitizing the police force as a whole to the special problems of a multi-racial, multi-cultural society.” While the Division expressed support for affirmative action measures intended to address historical racial disadvantages, the overall tenor of the Division’s work veered away from interventionist strategies and toward the promotion of harmony and goodwill. Ubale (1982: 15) cheerfully declared on behalf of the Division that: “We are convinced that most people in Canada are not racists” and evidenced this claim by citing the adoption of “ethnic minority children” and interracial marriages and friendships. In accordance with this optimistic take on racial relations in Ontario, the Division (1982:15) set out its own objective to draw on “the enormous reservoir of goodwill in our midst in order to create social harmony.” This confidence in the power of goodwill to advance racial equality was determinative in the Division’s tactics and resource allocation.

The Race Relations Division came into formation during a period of increased focus on institutionalized or systemic discrimination as reflected in the 1981 updates to the *Code* and Commission's annual reports. Yet this recognition that discriminatory systems perpetuate inequity—while adhering to seemingly race-neutral rules—found limited expression in the activities of the Race Relations Division. The 1982/83 Commission annual report (1982/3: 63-64) acknowledged two problem areas facing the “climate of race relations in today's Ontario”; first, “conflict and tension at the community level;” and second, “concerns about racism within the major institutions of our society, such as schools, the media, business and industry and the criminal justice system.” Despite this acknowledgement of the institutional problems perpetuating “race relations” challenges, the reported (1984: 64) work of the Division aligned with its stated orientation towards conciliation over institutional interventions, in that it “devoted much of its resource to improving the race relations climate at the neighbourhood and community levels.” While the Division (1982: 45) did identify areas of institutional focus (such as Business, Industry and Labour, the Criminal Justice System, and the Media) the approach to addressing racism in these institutions was to “facilitate the development and strengthening of racism-remedying mechanisms within these sectors.” In practice, this approach entailed that the Division sought to build community relations through establishing committees and offering consultative support.

Within the area of criminal justice, the Division's efforts reflected a preoccupation with training and public education as the solution to racial disharmony, with the Division (1985: 26) claiming that “police training is an integral part of race relations work.” This emphasis on training, however, simplifies the problem of institutional racism within the criminal justice system by assuming that educating individual officers about ‘race relations’ will translate into

improved community interactions even in the absence of any structural adjustments. As it neared the end of its decade-long existence, the Division (1987: 27) increasingly espoused public education as part of a “proactive strategy” that “recognizes the need for all institutions in Ontario to assume responsibility for promoting harmonious race relations.” This broad public education focus shifted the work of the Division even further away from its limited direct intervention into instances of alleged racial discrimination or racial conflict. In 1987, the Commission (1987/88 Annual Report: 7) was reorganized to create a Systemic Unit “to enable a proactive approach to systemic discrimination” and the Race Relations Division was dissolved.

As the Commission retreated from an explicit institutional focus on race, there was growing insistence on the need for state responses to racism in Ontario. The New Democratic Party (NDP) ran on an equity platform in the 1990 provincial election, which included a pledge to undertake anti-racism initiatives. Following their election into office, the NDP established the first Ontario Anti-Racism Secretariat (OARS) on April 3, 1991. The establishment of the Secretariat signaled a governmental shift from ‘race relations’ paradigms to anti-racism frameworks. As described by Eric Kempthorne (2013: 67) in his doctoral research into state anti-racism in Ontario: “the paradigm which existed under the banner of ‘race relations’ came into popular use mainly as a tool to convince Ontarians to try to work to understand each other better, as well as raising issues of equal access to institutions, and working to end discrimination and stereotyping.” Conversely, the state anti-racism paradigm treats racialized disparities as a product of racism and recognizes the onus on the state to respond. The state anti-racism which was emerging in the early 1990s in Ontario was congruent with the growing appreciation that—rather than primarily discreet and episodic—discrimination is more frequently systemic and already embedded in state institutions.

Though the creation of OARS suggested that the government was willing to intervene into institutionalized racism in the Ontario Public Sector and beyond, the actual impact of the Secretariat during its first year was minimal. Prior to May 1992, Kempthorne's research (2013: 92) points to a lack of "significant anti-racism initiatives in the form of concrete policies and programs" undertaken by OARS. The NDP's anti-racism initiatives were propelled into more direct action in 1992 by what came to be known, contrastingly, as the "Yonge Street Riot" or the "Yonge Street Uprising" – a rally organized by the Black Action Defence Committee in response to both the acquittal of the California police officers involved in the L.A. beating of Rodney King and, what Carl James (2019: 48 n. 19) refers to as the "brutality of police in the Greater Toronto Area", and specifically "the fatal shooting of Raymond Lawrence (twenty-two years old)." In the wake of this protest, Stephen Lewis was appointed as Premier Bob Rae's 'Race Relations Advisor' and charged with the task of undertaking swift consultations with racialized communities for the purpose of crafting a report with recommendations on how to best respond to racism in Ontario (the "Lewis Report", 1992). The Lewis Report was created hastily over the course of a month based on more than seventy meetings with individuals and groups in Toronto, Ottawa and Windsor. The report reinforced the need for an anti-racism framework over more milquetoast race relations paradigms, it also explicitly named "anti-Black racism" as being of urgent concern and placed further emphasis on the need for anti-racism in the criminal justice system. Lewis (1992: 2) declared that: "Just as the soothing balm of 'multiculturalism' cannot mask racism, so racism cannot mask its primary target" – namely, the Black community. Lewis provided institutional and political credibility to the pre-existing recommendations voiced by Black and other racialized communities regarding both which sectors required anti-racism interventions and what sort of interventions were required. Toni Williams (2001: 204) describes

the Lewis Report as having presented the demands of Black and racialized communities in ways that “fit into the political discourse of the time.” Firstly, departing from the framework of ‘race relations’ Lewis recognized ‘systemic discrimination’ as a pervasive feature of Ontario society; secondly, he named anti-Black racism a particularly urgent concern; and thirdly, he brought the entire criminal justice system into focus.

The Lewis Report was extremely influential in both prioritizing the anti-racism agenda and establishing the government’s approach to anti-racist organizational change. The first section of the report identified the Criminal Justice System as a sector in vital need of anti-racist intervention, with a particular emphasis on the Metro Toronto Police, who Lewis (1992:4) described as believing that they were responding to “clear patterns of criminality” rather than acting out institutional racism. Conversely, as argued by Kempthorne (2013: 110), the Lewis Report heeded the “diagnostic framing of racism in policing” offered by racialized communities which “indicted and villainized both individual actors within the system, as well as the more general organizational cultures in various areas of criminal justice.” Consistent with the OHRC Race Relations Division’s over-reliance on public education as the solution to structural racism, the Lewis Report recommended that police be provided with enhanced anti-racism training. Yet, the Lewis Report also extended beyond training to recommend increased community/civilian oversight and a race relations audit.

Given the expedited timeframe for the report, Lewis frequently deferred to existing processes for responding to institutional racism and sought an integrated approach for responding to racism, which was to be the responsibility of OARS. Lewis (1992: 36) also recognized that the OHRC is “a centerpiece of public policy in the pursuit of race relations complaints, and in the potential to conduct inquiries into evidence of systemic racism” but did not offer any specific

recommendations regarding the work of the Commission. These anti-racism consultations conducted by Lewis ran concurrently to province-wide consultations on the Human Rights System led by Mary Cornish. Lewis (1992: 36) met with Cornish to harmonize the recommendations and stated in the report that “my assumption is that the Commission will be altered in some important ways by the Cornish report [. . .] and I’m not worried about any potential clash in direction.” The absence of prescriptive recommendations for the Commission in the Lewis Report reflects the expectation that there would continue to be an Anti-Racism Secretariat that would coordinate the province’s anti-racism efforts and that the Cornish Report recommendations would be heeded, resulting in a more systemically-oriented human rights system.

At the time of the Lewis Report and the Cornish Report, human rights commissions across the country were reporting patterns of higher dismissals for human rights complaints alleging racial discrimination.³⁰ Susan Steffan’s (1999: 2 – 10) review of race complaints in Ontario in 1991-92, revealed that these complaints were being vetted out of the complaint management process at higher rates and in particular, Boards of Inquiry were “appointed less frequently in complaints based on race than in any other category” at a rate of just 2.9 percent. In its 1991-92 Annual Report (1992: 30), the OHRC acknowledged that: “Race cases are some of the most challenging to prove at a Board of Inquiry. Rarely is any direct evidence of racial discrimination

³⁰ Susan Steffan’s 1999 review of “Human Rights Commissions and Racial Discrimination” reports that after the Canadian Human Rights Commission discovered an “unsettling trend in the way in which it dealt with cases based on race” (1999: 2 – 9) it sought to examine whether this same trend was observable amongst the provincial commissions. Though Steffan cautions that the “dearth of available data on the exact path that race cases take at Commissions” allows for only very general conclusions, she does find that “cases involving complaints of racial discrimination tend to be dismissed more often than complaints based on other grounds” (1999: 2 – 13).

found for complaints of this type.” In view of these concerns, the OHRC commissioned an internal report on *The Handling of Race Discrimination Complaints at the Ontario Human Rights Commission* which was prepared in 1992 by Donna Young, an external human rights and labour arbitration lawyer. Young (1992: 3) concluded that, based on her examination of the treatment of race-based complaints, “that individual and systemic racism exists at the Commission.”

Young reviewed reported decisions by the Board of Inquiry, as well as case documentation prepared by Commission staff, in order to identify patterns in the treatment of racial discrimination complaints which would help to account for their relatively low success rate. In the report, Young (1992: 6) detailed a set of “assumptions which impede proper treatment of race complaints” including: the belief that racism is abnormal; the belief that the complainant lacks objectivity; and the belief that complainants are exaggerating the harm they experience. Young’s report drew on anti-racism scholarship to demonstrate the limitations of strictly adhering to formal liberalism in the application of legal principles with respect to investigating complaints of racial discrimination. For example, Young (1992: 9) averred that “in the human rights context, once we have established that social and systemic racism is the norm and not the exception, the legal presumption of innocence is inappropriate at the investigatory stages of race discrimination complaints.” Young insisted that Commission investigators must recognize that systemic inequality entails that racism permeates social institutions and that social relations are not equal unless proven otherwise. Only by accepting this premise of unequal racial power relations are investigators able to adequately assess, and then collect the necessary evidence to support, claims of racial discrimination. Young (1992: 18) was also critical of the Commission’s ‘Policy Statement on Racial Slurs and Harassment, and Racial Jokes’ (1989), which she described as

“merely descriptive” and incapable of guaranteeing “that cases of racial slurs can be officially dealt with.” The policy focused on demonstrable statements of racial prejudice, rather than more covert forms of discrimination which are more typical in cases of racial discrimination.

In the covering memo attached to the Donna Young report (1992: ii), OHRC senior leadership stipulated that “the recommendations have not been endorsed” and “there will be no formal release of the report to the media.” Yet, as addressed in Judith Keene’s (1993) article for the *Toronto Star*, the report became fodder for press debates on the legitimacy of human rights. Additionally, human rights officers Dora Nipp and Lisa Taylor (1994: 2) described the report as provoking “a flood of commentary with respect to procedural review, training initiatives, and resource packages.” Resultantly, Nipp and Taylor (as part of an internal Anti-Racism Subcommittee on Race Cases) developed the internal OHRC *Guidelines and Recommendations for Dealing with Race Cases from Intake to Board of Inquiry* (1994). In it Nipp and Taylor (1994: 7) asserted that “racism is not an aberration” and offered examples of the failure of OHRC investigators to identify racial prejudice, consider the lived experiences of members of *Code*-protected groups, or examine the adverse impact aspects of the complaint. In response to these failures, Nipp and Taylor (1994: 25) recommended strategies for employing a “substantive equality analysis” which departs from a “‘formal’ approach to equality [which] is based on treating ‘everyone the same.’” The *Guidelines and Recommendations* created by Nipp and Taylor (1994: 27) stressed that it is “the Commission’s role to highlight society’s legal obligation to remedy the inequities experienced by those who are historically disadvantaged.” This document reflects that for human rights officers concerned with intervening into institutional responses to racism, a systemic approach to investigations is indispensable in the processing of race-based complaints. This systemic approach to dealing with race cases was endorsed by the

then-Chief Commissioner Rosemary Brown and communicated to Commission staff in the form of two-day training sessions based on the *Guidelines and Recommendations* which were delivered to more than one hundred participants, consisting of decision-makers and case management staff (OHRC Annual Report 1994-95). Yet, there is little evidence that the 1994 *Guidelines and Recommendations for Dealing with Race Cases from Intake to Board of Inquiry* left an imprint on the Commission's approach to race complaints, in that the NPM performance framework implemented soon after contained no measure by which the quality of the investigator's analysis was considered. Instead, under NPM, the primary measure of success was the pace and volume at which cases were dispatched.

Notwithstanding the Commission's robust exploration of racial discrimination and the processing of race complaints set out in the Young (1992) and Nipp and Taylor (1994) reports, in 1996 the OHRC publicly released its *Policy on Racial Slurs and Harassment and Racial Jokes*³¹ which only contained minor alternations to the 1989 OHRC policy by the same name and reflected the same standard conceptualization of racial discrimination as individual acts and utterances that was critiqued in the Young Report. This short nine-page policy (OHRC, 1996a: 1), contained minimal consideration of power relations (limited only to the discussion of corporate responsibility and vicarious liability) and conflated racial discrimination with racial harassment by only providing examples of unwanted racial comments rather than exploring differential treatment or patterns of exclusion. The policy set out that "racial harassment through slurs, jokes or behaviour intended to demean a person because of his or her race, is discriminatory. Even when meant as a joke, racial comments are derogatory and may be

³¹ The Commission had already created similar policies for the other most commonly listed grounds: Disability (1995), Sexual Harassment (1996) and Sexual Orientation (1990) – a prohibited ground as of 1986.

humiliating.” The types of discriminatory practices conceptualized within this policy involve easily identifiable perpetrators committing explicit acts of bigotry. The policy contains no reference to “systemic discrimination,” “power relations,” or “patterns of treatment” and is not reflective of the “substantive equality analysis” espoused in the 1994 *Guidelines and Recommendations for Dealing with Race Cases from Intake to Board of Inquiry*.

The Commission’s institutional evaluation of racial discrimination was reignited at the beginning of the new millennium and the policy work undertaken during this period reflects an effort to re-examine its handling of race related complaints, as evidenced in a 2001 discussion paper entitled: “An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims.” The OHRC (2001: 5) discussion paper recognized that intersectionality has “particular implications for race or race-related cases” in that complaints based on racial discrimination are particularly difficult to substantiate and so the racial aspects of multi-ground based complaints are most frequently neglected. In this paper, the OHRC (2001: 10) acknowledges that: “In a single ground focused approach, the strategic decision as to where to place the ‘evidentiary focus’ of the claim is often based on which grounds are more ‘palatable.’” This single ground focus has particularly adverse consequences for race complaints, since as Bill Black (2004: 22) identified “the fact that race discrimination may attract a higher degree of social stigma than discrimination on some other grounds, such as age, may make it harder to prove a case in two ways.” First, perpetrators are more careful to hide race discrimination and second, investigators and tribunals apply a higher standard of proof since acts of racism are considered to be so socially reprehensible. The discussion paper (2001: 28) calls for a contextual approach to understanding the interaction of multiple grounds which entails applying an analysis that encapsulates “the discriminatory stereotypes; the purpose of the legislation, regulation or

policy; the nature of and/or situation of the individual at issue, and the social, political and legal history of the person's treatment in society." The Commission's early engagement with intersectionality in this discussion paper avoids a flattening of difference approach which would entail treating all named grounds as equally relevant throughout the analysis. Instead, the proposed *contextual* use of intersectionality avoids homogenized treatment of non-White groups by considering how the race-related categories interact together to produce unique experiences of racialization.

Two years following the release of the intersectionality discussion paper, the Commission released an inquiry report on racial profiling - *Paying the Price: The Human Cost of Racial Profiling* (2003, referred to throughout as the *Racial Profiling Inquiry*). In it, the Commission characterizes the report as fulfilling part of its mandate, beyond the handling of complaints, to advance human rights policy and engage in public education. Reminiscent of the work of the Race Relations Division, the report reflects the Commission's (2003: 5) commitment to be perceived as objective and neutral in its approach to human rights: "At the same time as raising public awareness, it is also the Commission's desire to bridge the divide between those who deny the existence of racial profiling on the one hand and the communities who have long held that they are targets of racial profiling on the other." This commitment to neutrality limits the official approach to racial profiling, in that the Commission (2003: 4) refused to use the accounts it collected to substantiate the existence of racial profiling in particular institutions and instead stressed that the report does not target any particular "system in society, e.g. the police." This reluctance on the part of the Commission to use its investigative capacities to corroborate accounts of racial profiling resulted in a paradoxical limitation of the inquiry: it lacked the specificity necessary for it to be used for institutional change by those devoted to combatting

racial profiling and was charged with being insufficiently evidenced by those invested in denying the existence of racial profiling.

While neither the discussion paper on intersectionality, nor the inquiry into racial profiling offered a robust account of racism, they were both important precursors to the Commission's more deliberative policy engagement on race and racism in 2004.³² The Commission convened a Policy Dialogue on October 6-8, 2004, in order to support the development of a policy on racial discrimination and racism, and published discussion papers from the participating researchers. OHRC Policy Director, Shaheen Azmi, (2004: 3) describes the collection of articles as representing "a significant contribution to the public discussion of the important role that human rights principles and legislation could and should play in the ongoing struggle to overcome racism." The researchers pushed the Commission to revise their policy approach to racial discrimination by understanding that racism is not aberrant (Henry, 2004); moving beyond a single-ground approach (Rummens, 2004); utilizing international human rights instruments in order to integrate economic and social rights in the protection against racial discrimination (Mégret, 2004) and attending to the systemic dimensions of racial discrimination in employment (Agocs, 2004). Bill Black (2004) was particularly prescriptive in advising the Commission on how to address the lower success rate of racial discrimination complaints through incorporating many of the strategies identified in the 1992 Young Report, including expanding individual complaints into systemic complaints, incorporating intersectionality, and reviving the practice of "testing" in appropriate circumstances to validate complainants' accounts of racial discrimination. Black's strategies reflected an overarching theme in the Race Policy Dialogue

³² Tator and Henry (2006: 194) credit the *Racial Profiling Inquiry* as leading to "a new and important initiative within the commission itself: the development of a new OHRC Policy document on race."

Papers, namely that the Commission ought to eschew an episodic approach to race-based complaints and instead develop a holistic response to both individual and systemic racial discrimination by adopting an anti-racist framework. As described by Carol Tator (2004: 30): “anti-racism as a guiding organizational framework suggests a commitment to examine not only programs and practices but also the ideology motivating those programs and practices.” Researchers also drew attention to the limitations of utilizing anti-discrimination laws to challenge racism, since the law itself is implicated in racialized power structures and serves to obfuscate power imbalances through the semblance of formal equality.

The resultant policy, the *Policy and Guidelines on Racism and Racial Discrimination* (2005a), reflected a significant evolution in the Commission’s engagement with the ground of race since the 1996 *Policy on Slurs and Harassment and Racial Jokes*. The 1996 policy reduced all discussion of racial discrimination to individual acts of harassment. This 1996 policy was rendered obsolete by the more nuanced 2005 policy³³ that delineates between racism (which it describes as a “wider phenomenon than racial discrimination”) and racial discrimination (which is legally prohibited by the *Code*). The policy further distinguishes between various forms of racism and racial discrimination, including racial profiling and racial harassment. The policy (OHRC, 2005a: 1) clearly incorporates a number of the insights offered in the Race Policy Dialogues, including the unequivocal affirmation of the presence of racism within Ontario: “racial discrimination and racism must be acknowledged as a pervasive and continuing reality as a starting point to assessing how the *Code* applies and what can be done to address them.” This entailed a policy-shift within the Commission from seeking evidence to validate claims of racial

³³ Other than minor revisions made in December 2009 to address legislative amendments resulting from Bill 107, the 2005 *Racism and Racial Discrimination* policy has not been revised or replaced.

discrimination to the Commission actively assuming responsibility for challenging racial discrimination through various *Code* mechanisms, beyond the processing of complaints.

The OHRC's *Policy and Guidelines on Racism and Racial Discrimination* (2005a: 7) contextualize racial discrimination within the "legacy of racism in Canada" and maintains that "we must be aware of the events of the past in order to address contemporary manifestations of racial discrimination and racism." Accordingly, the policy explicitly references the racist legacies of the *Indian Act*, Black enslavement and segregation, Japanese internment, and racially-exclusive immigration policies and practices. This contextual framing runs counter to the symmetrical race-based protections set out in the *Code* which premise the protected grounds of discrimination on an abstract entitlement to equal treatment based on race without regard to the fundamentally asymmetrical operation of racism. In attending to the historical and institutional operation of racism, the policy establishes a framework for anti-racism within the contours of human rights. Yet, while the policy (2005a: 46, emphasis added) endorses the language of "anti-racism" and pushes for the acknowledgement "that racism exists in Canadian society and in its institutions," it also advances the claims that anti-racism "promotes the equity and diversity goals of organizations and institutions and makes *good business sense*." The professed compatibility of anti-racism with "good business" imperatives contradicts a structural understanding of racism wherein the exploitation and expropriation of racialized communities is recognized as integral to capitalist relations. Thus, even as the Commission stretches its articulation of racial discrimination to encompass structural racism, it recurrently invokes the logic of diversity management.

Critically, the 2005 policy also set out how the Commission would approach identifying *systemic* racial discrimination through exploring three considerations: numerical data; policies,

practices and decision-making processes; and organizational culture. There is particular emphasis placed on the significance of numerical data and the policy takes the position that there is a strong onus on organizations to perform statistical analysis where a *prima facie* case of discrimination is made. Further, the policy (2005a: 46) prescribes that the Commission “will seek data collection and analysis as a public interest remedy in litigation and settlements.” This recognition of the significance of racial data collection reflects an emboldened institutional stance by the Commission to not simply rely on individual evidence (or lack thereof) of racial discrimination, but instead require organizations to conduct inquiries into patterns of disproportionality or under-representation. This emboldened stance attracted ire from some right-wing commentators following the release of the policy, who accused the Commission of “not understanding how labour markets work” and pushing “politically correct orthodoxy” (Loney, *National Post*, 2005). The policy also attracted critique from community-based anti-racism advocates, such as African Canadian Legal Clinic Director Margaret Parsons who faulted the Commission with promulgating a “form of denial” about racism by only describing practices and not people as racist (Keung, *Toronto Star*, 2005). In addition, anti-racism and anti-poverty advocates Avvy Go and Micheal Kerr (*Toronto Star*, 2005) decried the policy’s differentiation between ‘systemic’ and ‘subtle’ racism, since “racism in contemporary Canadian society is almost always subtle in nature.” These anti-racism advocates described the policy as “best regarded as a work in progress” in that it signaled the Commission was adopting an approach to racial discrimination that recognized the linkages between individual discriminatory acts and institutional racism, but continued to place the burden of evidencing racism on individual complainants.

The systemic articulation of racism in this updated policy was influential in the most significant government inquiry into racism and policing during this period – the Ipperwash Inquiry into the Ontario Provincial Police shooting of Chippewa protester Dudley George. The *Final Report of the Ipperwash Inquiry* (2007: Part I, 644) relied on the policy’s definition of racism in stating that “intention or lack thereof does not affect the characterization of the conduct as racist if it otherwise fits the criteria set out by the Ontario *Human Rights Code*.” Additionally, the inquiry report further relied on OHRC policy in determining that the collection of “race-based statistics” can be necessary in monitoring discrimination and attending to historical inequities. Following the release of the *Ipperwash Inquiry* report, Chief Commissioner Barbara Hall (2007/2008 Annual Report: 8) wrote to the Premier to offer the assistance of the OHRC in implementing aspects of the report that related to Ontario’s *Human Rights Code* such as the “definition of racism, as well as the importance of data collection in bias-free policing.” The influence of the 2005 *Racism and Racial Discrimination* policy on the Ipperwash Inquiry demonstrates the interpretive force of the OHRC’s policy approach to racial discrimination as well as the Commission’s institutional influence in defining racism within Ontario.

The OHRC’s evolving approach to racial discrimination has recurrently reflected a pluralist worldview which is inattentive to the structural dimensions of racism. The effects of this pluralist approach on racial discrimination are most evident in the legacy of the 1979-1987 Race Relations Division, which approached racial conflicts within the province from a position of neutrality and “goodwill.” Conversely, the 2005 *Racism and Racial Discrimination* policy offers a marked departure from the race relations paradigm and moves Commission policy towards an articulation of racial discrimination which is historically contextual and systemically informed. While it may be tempting to read the Commission’s evolving approach to racial discrimination as

a story of continual progress, the preceding analysis has shown that the Commission persistently failed to heed community calls to intervene in racial discrimination at a local level (particularly in relation to policing in Toronto) and neglected to implement contemporaneous institutional recommendations regarding the handling of race-based complaints (such as the Young and Nipp & Taylor reports). As will be demonstrated further, in the wake of the 2005 *Racism and Racial Discrimination* policy advancements, the OHRC increasingly resolved itself to the role of “partner” in provincial human rights matters, which entailed prioritizing relationship-building over enforcement and favouring diversity management discourse over anti-racism frameworks.

OHRC Institutional Reform (2003-2012): Enforcement vs. Partnerships

The Conservative “Common Sense Revolution” came to an end in Ontario in 2003 with the election of a Liberal government, headed by Dalton McGuinty, who won the election under the banner: “Choose Change.” Kendra Coulter (2009: 37) argues that the Liberals “sought to be seen as kinder than the Conservatives yet just as ‘fiscally prudent’” which resulted in “a combination of progressive language and neoliberal evaluative or accountability criteria.” The Liberals’ enthusiasm for “progressive language” comfortably aligned with a renewed focus on human rights administration, yet the corresponding commitment to fiscal prudence signaled an extension of the Conservative’s prioritization of expediency and economic restraint. Coulter (2009: 38) describes the McGuinty government as engaged in “neoliberal obfuscations” which “effused conciliatory, pragmatic language” with budget reductions and privatization. It is within this context of neoliberal transformation, coupled with progressive rhetoric, that the Ontario human rights system was reconfigured. While the OHRC gained an institutional mandate which was ostensibly reoriented towards tackling “systemic” discrimination, the institution lost much of its

human rights enforcement role and corresponding budget. The systemic change initiatives of the reformed OHRC reflected the Liberals' conciliatory pragmatism in that the OHRC pursued institutional partnerships and espoused a business case for engaging in human rights to the detriment of its recently articulated anti-racism policy framework.

There had been heightened attention drawn to the function and structure of human rights commissions across the country following the 2000 *Report of the Canadian Human Rights Act Review Panel* (La Forest report), which stressed the need for commissions to attend to systemic discrimination and contemplated the advantages of the 'direct access model' for human rights enforcement. Under the direct access model, applicants or complainants would submit claims of human rights violations directly to the adjudicative tribunal. The direct access model was proposed as an alternative to the 'gatekeeper model' in which human rights commissions are responsible for processing and investigating human rights complaints and have the authority to determine which complaints merit referral to a full hearing. Critics of the 'gatekeeper model' – such as human rights lawyers Mark Hart and Geri Sanson (2005) – claim that this model produces institutional conflicts between commissions' dual roles as both decision-makers and advocates for human rights. Further, they assert that the cumbersome case management function of commissions prohibits them from acting in a proactive way to promote human rights. Like the Cornish Report released almost a decade prior, the La Forest Report called for a separation of state functions in the protection of human rights, such that the arbitration of human rights complaints would be conducted separately from the promotion of human rights through education and public initiatives.

Faced with the prospect of massive restructuring, the OHRC initiated a public consultation into the human rights process beginning with a discussion paper entitled: *Reviewing the Human*

Rights System (2005b) which was publicly released in August 2005 along with the invitation to respond to a questionnaire on the strengths and weaknesses of the current system. Through this initial discussion paper, the Commission attempted to both frame the contours of the debate and advance concerns regarding the adequacy of the Commission's funding and institutional independence. The subsequent consultation report was released only a few months later in October 2005. In it, the Commission again stressed ongoing resource challenges and pushed for the need for further consultation prior to the government instituting any reforms. A central theme in the OHRC consultations on the human rights system was the current system's limited capacity to engage in systemic human rights issues through an individual complaint-based system. The OHRC (2005b: 13) framed its limited ability to intervene into systemic issues in relation to diminished resources, while also maintaining that the OHRC's continued involvement in the "resolution of individual complaints may provide opportunities for the resolution of systemic issues." Through public consultation, the Commission (2005c: 58) concluded that though "there was general agreement that any reform must strengthen the ability of the human rights system to deal with systemic issues, there was divergence of opinion as to how this could best be done." While several submissions argued that there is a fundamental tension between the Commission combatting systemic inequities and dispatching individual complaints, staff of the Commission asserted that through the processing of individual complaints they are able to effect public interest remedies and thereby advance systemic change.

During this period of intense scrutiny and possible restructuring, the Commission (2005b: 3) increasingly invoked its public interest mandate to pursue systemic change and "further human rights in the province of Ontario" on the basis of section 29 of the *Code*. As articulated by former Commissioner Keith Norton (2003): "the Commission has a legal authority and social

responsibility under section 29 of the Ontario *Human Rights Code* to inquire into incidents leading to tensions in a community and to undertake public education initiatives to address the issue.” Though the Commission’s powers provided for in section 29 existed since the 1981 *Code* amendments, the Commission made scant use of these powers during the era of NPM reforms and quantitative performance measures. Yet, in the context of fundamental human rights system reform, the Commission raised section 29 as a basis both for engaging in inquiries into the human rights system and as an example of the *current* legislation’s capacity to further systemic change. The Commission’s engagement on the *Safe Schools Act* was held up as an exemplar of the Commission’s capacity to harmonize its dual functions of human rights advancement and complaint-management. The Commission relied on findings from its public inquiry into racial profiling, as well as individual complaints brought forward under the *Code*, to verify the discriminatory effect of safe school legislation on racialized students and students with disabilities. The Commission (Annual Report 2005-06) describes having “initiated complaints against the Ministry of Education and the Toronto District School Board, alleging that the application of the ‘safe schools’ provisions and related discipline policies was having a disproportionate impact on these students.” These complaints were subsequently settled with the parties agreeing *to explore* race-based data collection to monitor for disproportionate impact.

The Commission’s capacity to attend to systemic issues was voiced as a central concern by groups on both sides of the debate surrounding Bill 107 – the *Human Rights Code Amendment Act, 2006*. Those opposed to the proposed restructuring maintained that complaint management by the Commission (referred to in the Cornish Report as ‘gatekeeping’) was inseparable from public interest interventions. Public servant François Larsen (as quoted in Eliadis, 2014: 95) maintained that “Gatekeeping allowed the commission to keep its finger on the pulse through

complaints and to understand what was actually happening on the ground.” The ACLC opposed the proposed restructuring of the human rights system on the basis that it would remove institutional support for African Canadian complainants facing anti-Black racism. In addition, the ACLC (2007: 33) claimed that by “bifurcating the Commission’s functions, Bill 107 makes an artificial distinction between the individual and the systemic in race based cases” as “rarely will there be an individual complaint of anti-Black racism that does not have systemic issues.” Conversely, proponents of the amendments, such as Mark Hart and Geri Sanson (2005), maintained that proactive systemic initiatives should be undertaken by a separate institutional body that does not have carriage of human rights cases, as the processing of individual complaints may be incongruent with seeking broader human rights transformation. In her doctoral research on the role of law as a tool in struggles against social inequalities Karen Schucher (2014: 327) frames the debate as follows: “it is my view that supporters of ‘direct access’ were more focused on claimant access to legal process than on the social goals that might be achieve[d] through this access, whereas opponents of ‘direct access’ were more focused on achieving social goals than on achieving access to legal process.” While proponents of Bill 107 described the Commission’s gatekeeping function as oppositional to systemic initiatives, the nature of the systemic human rights achievements which would be enabled through the transformed system were left nebulous.

Pearl Eliadis (2014: 94) describes the “long and acrimonious public debate” over the Bill 107 reforms as having “almost tore the human rights community apart.” While there was broad agreement that the existing system required reform, stakeholders differed significantly in terms of what changes were warranted, particularly in relation to the Commission’s existing gatekeeping function. The McGuinty government – invoking the rationale of efficiency –

purported that the legislative changes were necessary in order to address the perennial backlog of complaints and implement the recommendations of multiple human rights reports (such as the La Forest and Cornish reports). Attorney General Michael Bryant (December 5, 2006 press release) boasted that Bill 107 would "modernize and strengthen Ontario's human rights system, and bring [Ontario] in line with the United Nations' standards for human rights enforcement." Supporters of the legislation lauded the direct access model for removing the institutional barriers to a public hearing and the procedural repetitiveness of having a complaint first assessed by the Commission and then the Tribunal. Direct access was seen as potentially promising for both complainants, who would not have to overcome the administrative hurdle of having their complaint referred to the Tribunal by the Commission,³⁴ and by respondents, who sought an expedited process that could potentially dispatch cases more efficiently. The existing legislation already provided for the rejection of 'frivolous and vexatious' complaints, but frequent respondents (like police services) hoped that the shift to direct access would abbreviate the process of dismissing purportedly unfounded complaints.

Many community and labour organizations objected to the direct access model laid out in the legislation on the basis that it privatized human rights protections by forcing parties into a formal legal procedure by requiring that complaints be brought to the Tribunal, rather than the Commission. As voiced by the Ottawa and District Labour Council (Hansard, August 9, 2006) during the public hearings of the standing committee: "There is no statutory guarantee within Bill 107 of free legal representation. [...] it's doubtful that [the complainant] will have the same level of resources as the respondent. The bill hands off the advantage, right from the get-go,

³⁴ At the time only 6.3% of all complaints were referred to the Tribunal for a hearing according to the OHRC's 2002-06 Annual Report.

directly to the respondent.” While Bill 107 created a new Human Rights Legal Support Centre, community organizations feared that this legal clinic would fail to provide adequate support to complainants and be faced with the same resource challenges that had plagued the Commission. The pressure of this fiscal restraint could entail that the legal clinic would effectively assume the same gatekeeping function that was being removed from the Commission, since it would be able to determine which cases merited the support of public funds. While this determination by the legal support center would not *formally* extinguish the complainant’s ability to pursue their human rights (as with the Commission’s case-management determinations), Bill 107 opponents argued that this would effectively privatize human rights protections since only those not reliant on public funds would be able to expend the resources necessary to pursue their applications. Recalling Coulter’s (2009) account of “neoliberal obfuscation,” the purported advantages of Bill 107 for the complainants were largely reliant on the ongoing commitment of public funds, of which community and labour organizations rightly recognized to be suspect.

Anti-racism organizations also raised concerns regarding the administrative consequences of the direct access model. Operation Black Vote Canada (Hansard, November 22, 2006) argued that the changes would deny racialized complainants the ability to evidence racial discrimination since they would be denied the Commission’s existing powers of investigation: “What guarantees in law will there be to ensure that cases involving racism and racial discrimination are not summarily dismissed because of alleged lack of evidence?” Both Operation Black Vote Canada and the African Canadian Legal Clinic critiqued the “silo” approach to human rights through which complaint management is divorced from systemic change work. In view of the documented challenges in investigating, evidencing and advancing human rights complaints based on race, OBVC maintained that systemic anti-racism work requires ongoing involvement

in individual, and seemingly unconnected, human rights complaints in order to discern, and intervene into, patterns of racial discrimination.

Bill 107 would establish two specialized Secretariats to attend to two of the most cited grounds of discrimination: disability and race. Paradoxically, the proposed Anti-Racism Secretariat and Disability Rights Secretariat were met with opposition and limited support from the affected communities that these bodies were created to serve. Numerous disability advocacy groups voiced opposition (Hansard, August 8, 2006) to the Disability Rights Secretariat, decrying it to be “toothless tiger” (Psychiatric Patient Advocate Office), devoid of “meaningful enforcement powers” (Canadian Hearing Society), and “a dumping ground for any disability issue” (DisAbleD Women’s Network). Similarly, anti-racism advocates critical of the Commission’s restructuring were not assuaged by the promise of a dedicated anti-racism office with no accompanying investigation or enforcement powers. During the clause-by-clause committee consideration of Bill 107, the sole New Democratic Party committee member, Peter Kormos (Hansard, November 29, 2006, emphasis added), proposed detailed language be added to the bill to explicate the powers and functions of the secretariats: “... if you’re going to put the Disability Rights Secretariat and the Anti-Racism Secretariat in the commission, then have them *do something*. [...] Why else would you even have them there in the commission? Make them functional rather than pure lip service.” The NDP’s motions to imbue the secretariats with explicit investigation and complaint-handling powers were defeated by the predominantly Liberal committee. Instead, the Bill 107 gave the would-be Anti-Racism Secretariat primarily research-related responsibilities in order to:

. . . undertake, direct and encourage research into discriminatory practices that infringe rights under Part I [of the *Code*] on the basis of racism or a related ground and make recommendations to the Commission designed to prevent and eliminate

such discriminatory practices; [and] facilitate the development and provision of programs of public information and education relating to the elimination of racism.

These responsibilities were consistent with the reconfiguration of the Tribunal as the primary body responsible for the *enforcement* of human rights in Ontario and the conciliatory emphasis on public education in the “elimination of racism.”

The secretariats also signaled the prioritization of two specific areas of discrimination, an approach which clashed with the prevailing human rights logic that there was no hierarchy of rights. While the Commission of the 1970s insisted, in the *Life Together* Report (1977: 59), on the distinct importance of “its continuing responsibility in the area of race,” the growing neoliberal diversity management rhetoric of the early 2000s made it increasingly unpalatable to stress the significance of particular grounds at the exclusion of others. Then-Chief Commissioner Barbara Hall opined in an editorial entitled “Class of Rights” (*Globe and Mail*, October 26, 2007), regarding discrimination based on creed, not Bill 107, that: “To adopt a hierarchy of rights would certainly be a radical departure from fundamental international human rights principles, which have recognized individual rights as indivisible and interdependent.” This same argument of the interconnectedness of human rights grounds was raised during the Bill 107 debates as part of an objection to the prioritization of race and disability. The Centre for Equality Rights in Accommodation, (Hansard, November 22, 2006) averred that they were “not comfortable with the hierarchy of rights that the secretariats establish.” While these arguments invoked “intersectionality” as a basis to eschew a single-ground approach, this articulation of intersectionality was severed from its origins in Black feminist legal scholarship which called for greater attention to persistent absences in dominant social justice movements—such as the nonattendance to race within feminism—not the flattening of all difference. Though Chief Commissioner Hall (OHRC press release, April 28, 2006) officially endorsed the creation of an

Anti-Racism Secretariat and a Disability Rights Secretariat within the Commission as “positive developments that could expand the voices of the community and benefit the work of the Commission,” these secretariats were never inaugurated following the passage of Bill 107 and no resources were allocated to specifically address these grounds of discrimination.

Bill 107 – the *Human Rights Code Amendment Act, 2006* – came into effect on June 30, 2008, transforming the Commission into what Pearl Eliadis (2014: 97) terms a “second generation human rights system” – characterized by the institutional shift from making determinations regarding individual human rights complaints to “identifying and ameliorating systemic discrimination throughout the province.” The policy functions of the Commission were bolstered by an express requirement within the new *Code* (sec. 45.5) that the Tribunal consider Commission policies in its deliberations. The new *Code* also strengthened the Commission’s ability to initiate human rights applications with the Tribunal where there was an issue of broad public interest.³⁵ As the preponderance of the Commission’s resources had historically been devoted to complaint processing, the removal of complaint management functions notionally freed-up resources that could be used for systemic inquiries, the initiation of human rights applications, and policy development. Contextually, however, the *Code* amendments took effect in the midst of a global financial crisis and a provincial context marked by, what Robert Hickey (2012: 591) characterizes as: “ballooning public debt and more aggressive government efforts to constrain public expenditures.”³⁶ Resultantly, for the OHRC (Annual Report 2008/09), the

³⁵ Schucher (2014) notes that the original Bill 107 did not provide the Commission with the power to take cases to the Tribunal and these powers were added as amendments following the Standing Committee Hearings.

³⁶ The Commission’s budget was reduced by 50%. Though notably, the funding allocation for the three-pillared human rights system increased from the level of funding provided to the previous commission-based system by approximately 40%. The largest share of this funding was allocated to the newly created Human Rights Legal Support Center (which represents individual

transition to the new human rights system “involved extensive restructuring” and “a significant reduction in staff.” Within the context of this reduced capacity to *enforce* human rights, the OHRC revived its role as conciliator, and pursued inter-institutional cooperation and partnerships.

One of the OHRC’s first orders of business following the passage of Bill 107 was applying the new conciliatory model to reconfigure their relationship with the policing community. Although the OHRC had continually reported efforts to work collaboratively with policing services since its inception, the adversarial nature of the complaint management process combined with a broadly unfavourable reaction of police departments to the 2003 *Racial Profiling Inquiry*, resulted in mounting institutional friction between the Commission and the policing community at large. Unsurprisingly, the Police Association of Ontario (Hansard, August 8, 2006) argued in favour of the proposed direct access model laid out in Bill 107 and stressed that “taxpayers” should be assured that under the new system “only serious and legitimate complaints are being brought forward for review.” Soon after the final version of the bill passed in the Ontario Legislature on December 5, 2006 and the OHRC (2006-07 Annual Report, 1-2) announced that it had entered into an agreement with the Toronto Police Service which was purported to “address systemic change through cooperative work and lead to quicker resolution of individual complaints, better community-police relationships, and serve as a model for the Commission’s outreach with police services across the province.” Though this agreement was entered into prior to Bill 107 coming into force in 2008, the Commission (2007/08 Annual Report: 4) framed this agreement in relation to its new focus on addressing “broad public interest or issues of systemic discrimination” through “outreach, cooperation and partnership.”

applicants) (Schucher, 2014).

The OHRC's new commitment to "partnership" required reconstituting its approach to race and racism. Both the 2003 *Racial Profiling Inquiry* and the 2005 *Racism and Racial Discrimination* policy attempted to couch the need to attend to racism within the rubric of business-friendly diversity language³⁷, yet, in the 2005 policy in particular, the OHRC (2005a: 47) stressed the need to attend to the "specific complexities of racism and racial discrimination" and placed an emphasis on the experiences of racialized persons. For the pre-Bill 107 OHRC this emphasis on the specific complexities of racism entailed a commitment to develop a "Guide to Collecting, Analyzing and Acting on Race-Based Data." In the 2006/2007 annual report, the OHRC (2007: 14) committed to the development of this race-specific guide in order to "build upon the Commission's *Policy and Guidelines on Racism and Racial Discrimination*, which recommends forms of data collection and analysis, such as ongoing monitoring, surveys and evaluation, as key elements of solid anti-racism organizational change programs." While the OHRC professed that the guide would likely be released in 2007-08, the guide was not mentioned in the following two annual reports. Then in 2009, the Commission released its publication *Count Me In: A Guide to Collecting Human Rights-Based Data*, which was co-sponsored by the TD Bank Financial Group and the accounting firm KPMG.

The *human rights*-based data guide abandoned both the focus on race-based data and the framework of anti-racism. The term "racism" only appears once in the main body of the *Count Me In* guide (2009a: 77), as part of a list of diversity initiatives which also included: "human rights and equity training"; "anti-homophobia"; "anti-sexism"; and "bilingualism policies." The

³⁷ The *Racial Profiling Inquiry* (2003) devoted a section to the "economic cost of racial profiling" and the 2005 race policy offered claims that anti-racism policies and measures serve "the equity and diversity goals of organizations and institutions" and make "good business sense" (2005a: 46).

term appears again in the appendix (2009a: 77, emphasis added) describing the “DiverseCity experience” – a project concerned with tracking the diversity in leadership in the GTA – here it is reported that “best practices” included having a “strong communication strategy that emphasizes *benefits to all* [. . .] while not shying away from the *real problems of overt and systemic racism* and discrimination, framing the work in terms of the *business case for diverse leadership* helped to build support.” This stated commitment to not “shy away” from overt and systemic racism appears incongruent with the OHRC’s discursive retreat from racism throughout this guide and the accompanying flattened account of human rights entitlements as being beneficial to all. The *Count Me In* guide is an exemplar of how the OHRC’s partnership approach fit within the broader neoliberal obfuscations of McGuinty’s government and demanded a rebranding of human rights to align with business imperatives.

While Chief Commissioner Barbara Hall (as quoted in Eliadis, 2014: 100) touted a cooperative model of human rights change on the basis that in “doing more education and creating more partnerships” the OHRC would be better positioned to “address systemic issues,” the prioritization of private partnerships came at the expense of the OHRC intervening into previously identified areas of systemic inequities. Whereas the demographic data collection guide was originally set in the annual reports to build on the Commission’s anti-racism work, the co-sponsored *Count Me In* guide instead focused on the promotion of representational diversity at the expense of tracking racial disparities and disproportionalities. The guide makes no mention of the Kingston Police Data Collection Project (2005), which was guided by the OHRC’s own recommendations from the *Racial Profiling Inquiry* and was the first police services race-based

data collection initiative within Canada. The absence of policing³⁸ from the OHRC’s guide to data collection is discordant with the Commission’s stated commitment to assist with the Ipperwash Inquiry’s call to utilize data collection as a tool in “bias-free policing.” Despite the complete inattention to policing within this guide, the OHRC has recurrently positioned the guide as attending to racialized community calls for the collection of race-based stop data. Writing in 2017, OHRC Policy Director, Shaheen Azmi (2017: 7) claimed that in support of 2005 *Racism and Racial Discrimination* Policy’s “call for race-based data collection” and “concrete guidance on how to do this,” the OHRC “developed and released, in 2009, its guidebook *Count Me In: Collecting Human Rights-Based Data*.” Not only does the guide not contain any specific or “concrete guidance” on the collection of race-based data within policing, but there is also limited discussion of *any* considerations that pertain to race specifically (and then mostly around terminology). Instead, race is presented as one among various “dimensions of diversity.”

By virtue of the diversity and business-based justifications offered in the 2003 *Racial Profiling Inquiry* and the 2005 *Policy and Guidelines on Racism and Racial Discrimination*, it would be inexact to claim that the diversity framework underpinning the *Count Me In* guide is antithetical to the Commission’s previous anti-racism work. Instead, the *Count Me In* guide is indicative of the OHRC’s further discursive reorientation away from anti-racism—and the attendant complexities of collecting, analyzing or reporting on race-based data—towards the language of marketability and competitive advantage. In the 2009-2010 Annual Report, the OHRC (2009-2010: 9) stated that “KPMG Canada and TD Bank Financial Group, also served as

³⁸ There are no occurrences of the word ‘police’ in the entire guide, except in two typos where the plural of policy was written as “polices”.

sponsoring partners, providing financial and in-kind assistance to design, print, distribute and launch the guide. Both groups offered supporting narratives of how collecting human rights-based data makes solid business sense. This institutional realignment with the corporate sector and demonstrable efforts to appear amenable to business interests foreclosed the OHRC's anti-racism efforts. Instead, the OHRC embraced the diversity management discourse, offering justifications for data collection such as marketability and social cohesion.

This reorientation towards diversity management informed partnership arrangements beyond the corporate sector. In its 2007/2008 Annual Report, the Commission (2008: 5) articulated that building "partnerships across the human rights system" was central to its new vision and mission. In a section of the 2009-2010 Annual Report entitled "Partners, Partners, Partners!," the OHRC (2010: 8) describes engaging in "race relations" projects with municipalities across the province. Recalling that, for the OHRC's Race Relations Division (1982: 44), race relations were not a "one way street," this return to the language of "race relations" communicates a return to a flattened account of racial disharmony whereby all sides are assumed to bear partial responsibility for racial acrimony. In the era of partnerships, the OHRC vacillated between the language of diversity and anti-racism and invoked "anti-racism" rhetoric without employing an anti-racism approach. This vacillation produced a contradictory institutional approach towards anti-racism, as can be observed in the 2008/2009 Annual Report, wherein the Commission (2008/9: 2) initially declared that: the "discrimination faced by Aboriginal and Black people continues to be rampant and hugely damaging" and described the "treatment of these communities are key priorities for the OHRC" and then makes no further reference to either community in the rest of the 32-page report. The actual prioritization of "Aboriginal and Black people" would require the OHRC to centre these communities in their

partnership work and attend to manifestations of structural racism that disproportionately impact these communities.

Instead, the OHRC melded its purported “anti-racism work” with broader anti-discrimination, diversity and inclusion efforts. In the 2010 *Anti-Racism and Anti-Discrimination for Municipalities* guide, the OHRC (2010: 2-3) describes an anti-racism approach as one which “identifies, isolates and challenges racism” and describes diversity as “the presence of a wide range of human qualities and attributes within a group.” The guide then claims that “racism is highlighted because there is a history of it being ignored and its existence being denied.” Despite the choice to highlight “racism” in the title of the guide, the manual consistently fails to *isolate* the discussion of racism from other forms of discrimination or from broader diversity goals. Consequently, the manual fails to elucidate how racism functions at the systemic or institutional level and instead focuses on strategies to track and promote representational diversity within employment and engage in consciousness-raising inclusion efforts. This absence of institutional analysis has particular consequence for the municipalities manual’s approach to policing. The manual (2010: 2) notes that “municipalities are employers of police,” but offers no specific reflections on addressing racism within policing. Instead, policing services are positioned as public defenders against racism through initiatives that monitor and respond to hate crimes. As examined in Timothy Bryan’s (2019: iii) doctoral dissertation on the politics of hate crime in the Greater Toronto Area, “the policing of hate crime is organized by a system of racial governance that obscures race and racism even as it claims to confront them.” Hate crime within Ontario refers to criminal offences *motivated* by bias, prejudice or hate based on the victim’s real or perceived membership within a protected group, as such, it is restricted to *intentional* acts of racism which are committed in relation to an already criminalized act, such as vandalism or theft.

Bryan (2019: 232) argues that the “adoption of diversity as a central framework for hate crime response has the effect of configuring hate as a problem of individual sensibilities and negative interactions.” OHRC’s manual for municipalities perpetuates this construction of racism as episodic and aberrant—rather than structurally embedded—by restricting the “incidents of racism” to examples of hate crimes requiring police response.

The Commission’s *Inquiry into Assaults on Asian Canadian Anglers* is further emblematic of its *partnership* approach to racism. The Commission (Annual Report 2007/2008) partnered with community groups, law enforcement and municipal governments to develop solutions to address a “number of incidents across south and central Ontario in which Asian Canadian anglers were physically or verbally assaulted while fishing.” Like the guide to municipalities, the inquiry positioned police and other state institutions as responsible for defending the public against racism, not as potential perpetrators of racism. In the *Follow Up Report on the Inquiry into Assaults on Asian Canadian Anglers*, the OHRC (2009b: 25) praises the City of Peterborough for meeting its anti-racism objectives by “identifying barriers to integrating immigrants into the community” and providing a “strong message that racism is not tolerated.” This ‘zero tolerance’ to racism approach, relies on the police and city officials as defenders of the public good and entrusts them with enforcement of human rights. This trust is discordant with the OHRC’s prior inquiry into racial profiling which noted a lack of trust in the police amongst the same communities the OHRC claims to be prioritizing – namely “Aboriginal and Black people.” Given the Commission’s reduced enforcement capacity, securing partnerships with public institutions, like the police, required that the Commission approach these institutions as potential allies in the promotion of human rights, rather than as institutional respondents invested in defending themselves against accusations of human rights violations. In

search for “willing partners,” the OHRC’s retreated from a systemic account of racism that would implicate these same institutions and instead advanced a diversity management narrative.

Bill 107 required that a review into the implementation and effectiveness of the changes be conducted three years after the legislation took effect. Human rights lawyer, Andrew Pinto, a public supporter of Bill 107, was appointed to conduct the review by the Ontario Attorney General. In his resultant 2012 *Report of the Ontario Human Rights Review* (Pinto Report), Pinto (2012, V.i) credited the post-Bill 107 OHRC with engaging in “initiatives aimed at addressing systemic discrimination [such as] negotiating voluntary compliance initiatives with respondent groups, and engaging in policy development, legislative reform activities, and education and outreach initiatives.” Pinto also noted, however, an overreliance on voluntary compliance approaches, at the expense of collective litigation strategies, which limited the forcefulness of the Commission’s systemic interventions. Pinto (2012, V.i) described the Commission as too heavily reliant “on partnership and cooperative strategies to accomplish its objectives” to the exclusion of enforcement strategies, such as applications before the Tribunal. Furthermore, Pinto (2012) described the voluntary compliance approach, adopted post-Bill 107, as requiring the Commission to go “to greater lengths to get buy-in and achieve organizational change.” In this sense, the voluntary compliance approach detracted from the Commission’s role as an *enforcer* of human rights, and redirected institutional resources to the *promotion* of human rights.

This under-utilization of litigation is reflective of a bifurcated approach to human rights law wherein the Commission’s functions are splintered such that individual complaints are met with firm enforcement-based strategies (including litigation) while collective inequities are addressed through soft enforcement or cooperative-based approaches such as public awareness campaigns and education. While the OHRC continued to employ the language of “enforcement”

post-Bill 107, as identified by Schucher (2014: 295), the “assumptions underlying ‘enforcement’ by way of claims resolution are very different from the assumptions underlying ‘enforcement’ by way of research, policy and education.” Whereas individual claims are premised on the need for redress and respondent liability, “research, policy and education” approaches seek instead to gradually ameliorate systemic human rights issues without necessarily finding any individual or institution culpable of human rights infractions. This division risks conceptualizing systemic human rights issues as ephemeral and ubiquitous, rather than institutionally-embedded and actionable. Pinto (2012, V) reported that in order to not be seen as an “enemy of respondents,” the Commission adopted the consensus “that collaboration with respondents is more effective than confrontation” and thus went “to greater lengths to get buy-in and achieve organizational change.” This voluntarist approach to systemic change greatly constrained the Commission’s capacity for effecting human rights compliance and systemic anti-racist change.

Pinto further reported, that as of 2012, there had been no movement toward the establishment of the Disability Rights Secretariat and the Anti-Racism Secretariat as set out in the Bill 107 amendments. Pinto (2012, V) wrote that in his view: “the fact that significant anti-racism and disability initiatives at the Commission have continued, despite the lack of these Secretariats, is significant.” Pinto evidenced this view with reference to the Human Rights Charter Projects which, as will be demonstrated, were decidedly pluralistic in focus and rejected an explicit emphasis on anti-racism. Moreover, while the Commission continued to profess a commitment to anti-racism in this period, this commitment was muted by the prevailing institutional edict that there is no hierarchy of rights. Consequently, the OHRC vacillated between focused interventions into particular disputes (such as the inquiry into the assaults against Asian Canadian anglers) and declarative policy statements that “no rights are absolute

and no one right is more important than another right” and “all rights must be given equal consideration” (OHRC, *Policy on Competing Human Rights*, 2012). Pinto’s laudatory assessment of the anti-racism work of the Commission may be influenced by his belief that the Secretariats, as proposed, unduly established a “pecking order of groups warranting protection under the *Code*” (2012, V). This insistence on the symmetrical status of all *Code* grounds is an impediment to dedicated anti-racism efforts and enables the conflation of diversity management approaches with so-called “significant anti-racism initiatives.” Pinto recommended that the *Code* be amended to reflect this formal equality of grounds and that the Anti-Racism and Disability Rights Secretariats should be eliminated in the legislation. While Pinto’s recommendation has not been implemented and the current *Code* still provides for the establishment of the two Secretariats, to date neither has been created.³⁹

There are echoes of the first Human Rights Director Daniel Hill’s ethic of conciliation in the Commission’s post-Bill 107 adoption of the partnership approach to promoting human rights. Once again, the Commission’s public interventions were structured around the presumption that public education and consciousness-raising are essential to human rights administration and that public and private institutions can be motivated towards making necessary changes in the promotion of human rights. The problem of systemic discrimination was constructed by the OHRC as necessitating the use of partnerships and consciousness-raising. The viability of these policy responses relied on the OHRC adopting a version of human rights change that was palatable to private and public institutions within the broader context of neoliberal transformation. Consequently, the OHRC increasingly espoused a diversity management

³⁹ In 2016, the Ontario Liberal government did create an Anti-Racism Directorate, however, this Directorate was housed in Cabinet (not the Ontario Human Rights Commission) and thus did not have the institutional independence from government envisioned within Bill 107.

approach to human rights which obviates substantive equity frameworks and targeted interventions into the operation of structural racism. Furthermore, consistent with the McGuinty government's appropriation of progressive discourse, the OHRC continued to engage the use of anti-racist terminology in the absence of anti-racist initiatives, thus concealing the institution's inattention to racism.

Conclusion

The indeterminable promise of rights necessitates interpretive guidance. With respect to the right to be free from racial discrimination, a narrow understanding of racism as restricted to individual acts of bigotry greatly restrains the transformative potential of the law. In the evolution of human rights entitlements under Ontario law, the OHRC's case management and policy development functions have been central sites of interpretation and problem representation. In determining what forms of intervention are required to address and evidence racial discrimination as well as creating policies that enunciate what constitutes racial discrimination, the Commission has set the contours of what the 'right to be free from racial discrimination' *means* to communities who are subject to structural racism. What becomes evident is that with respect to racism and racial discrimination, the OHRC has played the role of mediator between transformative justice demands and the *status quo*. The conciliatory approach to resolving human rights disputes, which pervaded during the early years of the Commission, reverberates in the ongoing institutional attempts to render human rights transformation as compatible with economic imperatives. Accordingly, I depict the Commission's policy transition from race relations to anti-racism as stunted and *incomplete*, in that the partnership strategies pursued by the Commission in the wake of Bill 107 are premised on the same voluntaristic strategies and pretense of "goodwill" that informed the Race Relations Division of the 1980s.

Further, as was the case with the Race Relations Division, the partnership strategies entail a splintering of Commission functions, such that systemic change strategies are detached from more concrete litigation or complaint management tactics. Despite articulating a historical and systemic account of racism in the 2005 policy, the OHRC has clung to a pluralist worldview which is incompatible with an understanding of racial discrimination as structurally-reinforced.

Chapter 3: Partners in Change? Human Rights and Policing

“The Charter Projects allow us to create change where change is possible, where the organization buys into it”

- OHRC interviewee, January 12, 2016

The OHRC’s approach to the problem of racism in policing reflects the Commission’s simultaneous – and incongruent – attachment to both race relations and anti-racism frameworks. Framed within the context of race relations, the *perception* of racial profiling breeds disharmony and fractures relations between racialized communities and the police, and thus efforts to address racial profiling are needed to restore trust in policing as a necessary public institution. Conversely, a structurally-informed anti-racist analysis includes consideration of how racism and racialization have been integral to policing and criminalization. In this chapter, I examine the OHRC’s policy documents on race and racial profiling between 2002 and 2012 and review the OHRC’s shifting conceptualization of the pervasiveness of racism within policing and other state institutions. This period includes substantial advancements in the OHRC’s articulation of institutional racism, culminating in the 2005 *Policy and Guidelines on Racism and Racial Discrimination*, and a public inquiry into the impact of the practice of racial profiling in Ontario. The OHRC, however, also diffused the focus on racialized *policing* by presenting racial profiling as a broad social phenomenon which transcends any particular institution. Further, the OHRC framed the need to attend to racial profiling within the market-oriented logics of a diversity management approach emphasizing the social “*price*” and human “*cost*” of racial profiling.

Differentiating between competing interventions into the problem of racism and policing is complicated by a commonality of terminology which obfuscates crucial theoretical disagreements. Nearly all commentators that accept the prevalence of racism within the Ontario justice system agree that the problem is “systemic” and “historically-embedded.” Yet, this broad usage of “systemic” obscures diagnostic distinctions, such as some commentators expressing that the problem of racism is *system-wide* and others employing the same term to argue that racism is *integral to the system*. Given this potential for ambiguity, I employ the language of structural racism over that of systemic racism, in order to convey that racism is structurally embedded within ostensibly neutral institutional arrangements and practices. Similarly, most analysts insist on historicizing the practice of racism within Ontario policing in order to establish that there is a codified legacy of racial inequity within the justice system. These accounts of the significance of this legacy, however, vary between those that view the contemporary racist practices as resulting from unaddressed historical discrimination and those that conceive of contemporary institutions as constructed *in service of an inequitable racial order* that the police work to reproduce and defend. My analysis proceeds from the position of the latter and the recognition that policing is vital to maintaining racial oppression.

In examining the competing conceptualizations of the relationship between racism and policing within Ontario advanced by the OHRC, I draw on Carol Bacchi’s scholarship on problem representation and policy as discourse. Bacchi (2012: 23) stresses that by interrogating problem representation, researchers can interrupt the “presumption that ‘problems’ are fixed and uncontroversial starting points for policy development.” Of particular focus within this chapter is what aspects of policing are rendered unproblematic by the OHRC’s selective policy focus and invocation of “unconscious bias.” My treatment of policy as discourse also engages with Critical

Discourse Analysis in considering how discourses are not neutral, disinterested exercises but rather are embedded in social relations, ideology and power (Fairclough, 2002; Van Dijk, 2003). In approaching policy as discourse, I am attentive to how policy is implicated in the production of meaning beyond the policy document itself. I place my interview data in active dialogue with my documentary review, in order to make visible the conceptual tensions and structural restraints that have impeded the OHRC's application of an anti-racism analysis to the context of human rights and policing. Through close reading of the OHRC's formative documents on racial profiling, human rights and policing (in particular: *Paying the Price: The Human Cost of Racial Profiling* – 2003 and *Human Rights and Policing* – 2011) and interviews with OHRC policymakers, I argue that the OHRC substituted a structural anti-racism analysis for a diversity-management approach in the interest of securing partnerships with the private sector and police institutions.

Police as Reproducers of an Inequitable Racial Order

As an institution mandated to both enforce and *advance* human rights, it is the OHRC's expressed prerogative to adopt an expansive understanding of anti-discrimination protections. This mode of thinking increasingly requires an understanding of systemic discrimination, in which inequitable outcomes are built into the normal way of doing things. Yet, the OHRC's investment in liberal pluralism and business-friendly strategies present an institutional impediment to an explicit and fulsome adoption of a structural anti-racism understanding as to how the police are implicated in reproducing racial inequities. In order to establish the limitations of the OHRC's problem representation with respect to racial profiling, racism and policing, I first review the literature on the racialization of crime to demonstrate how Canadian

policing is invested in reproducing an inequitable racial order. Secondly, I explore Ontario-based efforts to evidence the practice of racial profiling and structural racism in the justice system and reveal how the pretense of Canadian racial neutrality creates evidentiary and policy challenges for utilizing human rights law to combat racial discrimination in policing.

As legal scholar David M. Tanovich (2006: 1) proclaimed, the “colour of justice in Canada is White” in that Black, Indigenous and racialized Canadians are exposed to greater scrutiny, subject to disproportionate police stops, and more likely to be overcharged than their White counterparts, irrespective of their involvement in criminal activity. Racial differentiation has been central to Canadian police departments since their formation in that police departments have stood at the front lines of nation-building efforts, including: the violent land dispossession of First Nations and Métis people; the forced segregation and exploitation of Black people; and the protection of racialized borders around citizenship and freedom of movement. As articulated by Charles C. Smith (2007: 56): “Police forces play an important role in maintaining the status quo and ensuring social distance between divergent groups. This is especially true for societies in which race plays a key role in preserving power and privilege.” This recognition of historically embedded racism within police departments has led these commentators to propose legislative reforms, such as anti-racial profiling laws (Tanovich, 2006), and a “comprehensive anti-racist organizational change process” (Smith, 2007).

Community-led anti-racist mobilization, however, has recurrently challenged the utility of pursuing anti-racism reforms within existing police institutions since these institutions are inextricable from a racially inequitable social order. As explicated by sociologist Richard Ericson (1991: 7), police are “reproducers of order” in that everyday police actions are “directed at reproducing the existing order (the ‘normal or efficient state’) and the order (system of rules)

by which this is accomplished.” Elizabeth Comack (2012: 28) employs Ericson’s insight to describe how police are invested in maintaining an inequitable *racial* order, in that within an economically and racially stratified social order, “poverty and social exclusion are logical outcomes” and so too are the “related problems [. . .] of crime and violence.” Since police are charged with maintaining public safety, the work that they perform is inextricably tied to social constructions of whose safety must be ensured and whose presence is threatening. Accordingly, Comack maintains that policing is fundamentally a “racial project.” Similarly, in her 2017 book *Policing Black Lives*, Robyn Maynard (2017: 6) argues that: “In a society like Canada that remains stratified by race, gender, class and citizenship, state violence acts to defend and maintain inequitable social, racial and economic divisions.” Police services are at the forefront of this state violence.

Tracing the historical racialization of crime provides an important corrective to both pluralist success stories of racial integration within the Canadian state and reductive accounts of racial profiling that describe the practice as resulting from individual officers holding racial bias. Maynard (2017: 19) stresses the genealogical connection between “anti-Black policing in the current epoch” and Canada’s under-researched—and frequently unacknowledged—historical investment in slavery. The surveillance of Black presence in public space by the Canadian state can be directly tied to their resistance to enslavement, as this surveillance was cast as both necessary and justified given the imagined proclivity for criminality (resistance) amongst Black people. Wendy Chan and Dorothy Chunn (2014: 11) describe the Canadian criminal justice system as racialized in that race impacts “which groups are more likely to receive greater police attention, become targets of searches and arrests, receive fair trials, or be over-represented in the correctional system.” Several studies have charted how criminality within Canada was

constructed with explicit or proximate reference to race (Comack, 2012; Maynard, 2017). A brief review of a sample of these studies reflects the centrality of racialization to practices of policing.

Clayton James Mosher's (1998) historical research on systemic racism in Ontario's legal and criminal justice systems between 1892 and 1961 demonstrates that anti-narcotic legislation and its enforcement was specifically directed at Chinese and Black communities. Black and Indigenous offenders were more likely to be imprisoned for drug and public order related offenses, and "disorderly-house" and other public-morals laws were used by police within Ontario cities to control Black populations. Amanda Nettlebeck and Russell Smandych's (2010: 361) research into the activities of the North-West Mounted Police (the predecessor to the Royal Canadian Mounted Police) detail how, in contrast to the historical romanticization of the Canadian Mounties, one of the primary purposes of the NWMP was "to suppress the independence of Indigenous groups as sovereign peoples and bring them within the reach of colonial authority." Further, Chan and Chunn (2014: 21) report that notwithstanding Canada's official endorsement of multiculturalism: "the intertwining of crime control and immigration control is evident in the arming of border guards, the use of high-tech surveillance technologies in policing borders, the prompt removal of non-citizens convicted of a crime, and the automatic detention of migrants who arrive through irregular channels." Taken as a whole, this demonstrates that criminalization, colonization, and racialization were—and continue to be—companion processes within the Canadian justice system that serve to illustrate the logic of the anti-police violence protest slogan: *"the system isn't broken, it was built this way."*

The inextricability of race from criminality informs both articulated policing strategies and tacit policing practices within Ontario. As described by Chan and Chunn (2014: 71), "the bulk of police work for most officers relates to activities that are non-criminal or quasi-criminal,

including public order offences, driving/traffic violations, calls for assistance, and the paperwork associated with them.” These non- or quasi-criminal interactions can be elevated into criminal matters if officers “uncover” criminal activity through applying scrutiny or if – in the course of the interaction – the officers’ authority is challenged or defied. Police officers exercise significant discretion in determining which situations warrant an elevated response and which behaviours warrant additional scrutiny. Tanovich (2006: 83) stresses the instinctual and discretionary nature of police work wherein officers patrol the streets looking for “those who may be ‘up-to-no-good’” and involved in “criminality.” Carol Tator and Frances Henry (2006: 96) depict police culture as constructed on delineations such as ‘we vs. they’ and ‘good vs. bad’ which reproduces itself by training new recruits on “the need to be suspicious of people.” This ingrained suspicion is not evenly applied, and takes the form of anti-Black racism, as multiple studies within Ontario jurisdictions have revealed that Blacks are two to five times more likely to be stopped by police officers than Whites (Cole and Gittens, 1995; Wortley and Marshall, 2005; Wortley and Tanner, 2003).

Scholars critical of the role of police in reproducing an inequitable racial order, caution against reducing discussions of racism and policing to these disproportionality rates. For instance, legal scholar Toni Williams (2001: 213) avers that “equality may be a hollow goal if it means nothing more than a criminal justice system that (mis)treats poor black people no worse than it (mis)treats poor white people.” Yet, against the Canadian mythology of race neutrality, statistics which reveal racial disproportionalities and disparities provide *legally persuasive* evidence in establishing that racial profiling constitutes prohibited racial discrimination. In order for racialized policing to be legible and actionable under Ontario human rights law it must be understood as discrimination. Utilizing human rights law to combat racial profiling requires

demonstrating that racially-inflected policing can be discerned in *aggregate patterns* of policing and by examining *individual police interactions* where there are deviations from standard practice or demonstrably biased exercises of discretion.

David Tanovich's (2004, 2006, 2008) research has been particularly influential⁴⁰ in connecting the practice of racial profiling in policing to legal prohibitions. Tanovich draws attention to police interactions that do not involve pre-identified suspects and thus require officers to select which members of the public to engage, what information to request, and when to initiate searches. Tanovich (2006: 83) describes these interactions as "proactive policing" and claims that this form of "highly discretionary and low-visibility" policing is a "breeding ground for racial profiling, because it enables and masks the use of race as a basis of suspect selection." In the interest of rendering racial profiling legible within a liberal law system, Tanovich (2006: 13) imports liberal concepts such as 'objectivity' and 'equality' into his definition of racial profiling:

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, Aboriginality, 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. Racial profiling operates as a system of surveillance and control.

Tanovich's definition attempts to render racial profiling practices actionable under human rights law by demonstrating that it constitutes grounds-based discrimination. Evidencing this discrimination relies on demonstrating differential treatment by contrasting the treatment of

⁴⁰ Tanovich is cited repeatedly by the OHRC in its 2017 *Research and consultation report on racial profiling in Ontario*, and his interpretation of the "correspondence test" for racial profiling has been successfully invoked in before the Ontario Court of Appeal (*R. v. Sitladeen*, 2021 ONCA 303)

racialized people by the police with the treatment of White people by police, and showing that the level of scrutiny and surveillance applied is uneven. Defining this phenomenon within the constraints of liberalism is fraught, as it presumes the ability to demarcate between those law enforcement activities which are held to be objective, legitimate and raceless, and other forms of surveillance and control that are illegitimate and racialized.

Elizabeth Comack (2012: 28) dismisses the analytic usefulness of the concept of ‘racial profiling’ and instead argues “that the notion of ‘racialized policing’ broadens the focus to encompass the role of police in the wider society; specifically, as ‘reproducers of order.’” Comack (2012: 57) faults literature on racial profiling for having “a decidedly individualized focus; specifically, on the exercise of discretion by individual police officers.” By framing the issue as racial bias in the discretionary authority exercised by police, debates around anti-racist reform can be reduced to a dispute regarding the individual integrity of police officers and the defensibility of their specific actions towards racialized members of the public. At issue is the simultaneous need to account for the full scope of racialized policing—which extends beyond individual instances of police discretion—and the evidentiary burden of demonstrating how particular instances of policing constitute discrimination within the boundaries of human rights law. I continue to employ the language of racial profiling to refer to the heightened scrutiny, surveillance and control applied to Black, Indigenous and other racialized communities by law enforcement, while recognizing that the role of the police in maintaining racial stratification and oppression extends beyond what is legible within anti-discrimination legislation. Within this context, data collection offers a powerful mechanism to both substantiate the specific culpability of individual police officers and demonstrate, in aggregate, the role of the police in perpetuating the criminalization and subjugation of racialized populations.

Despite recurrent instances of police violence against Black and other racialized groups within Ontario, institutional studies cataloguing racial patterns of police interactions have been limited by a refusal by police services to collect and analyse disaggregated race data. In certain instances, this refusal has been ostensibly motivated by attempts to maintain positive “race relations,” such as when in 1989, the Toronto Police Service Board explicitly forbid data collection on race in response to then-Staff-Inspector Julian Fantino’s claim that “based on statistics he had himself compiled, Blacks accounted for most of the crimes in the Jane-Finch corridor, and that it was this criminal element that was responsible for the ‘bad blood between police and blacks’” (Tanovich, 2006: 176). This deliberate paucity of official race-based data enabled Black community accounts of racial profiling to be dismissed by criminal justice authorities as anecdotal. Though there was a formal prohibition on the collection of race-based stop data, this prohibition could not prevent community tracking of the race of those killed by police. Toni Williams (2001: 202) identifies that “between August 1978 and May 1992, Ontario police officers shot one black woman and at least thirteen black men; eight of these victims were killed.” These killings sparked community mobilization and protests which culminated around the May 6, 1992, police killing of Raymond Lawrence in Toronto and the resulting Lewis Report (1992) which called for an investigation into racial discrimination within the criminal justice system in order to establish “official and authorized knowledge” which could then be used as a basis for anti-racism reforms.

The Commission on Systemic Racism in the Ontario Criminal Justice System (hereafter “Commission on Systemic Racism”) was created in order to produce this “official and authorized knowledge” on the racialized manifestations of the Ontario justice system. As recommended by Lewis, the report placed particular focus on the experiences of Black Ontarians and encompassed

the entire justice system. The Commission on Systemic Racism also contracted social science researchers to collect empirical data on the prevalence and perception of racism across the justice sector. The final report was released in 1995 and in it the Commission on Systemic Racism found both “unjustified differences in treatment in policing, courts and prisons and unjustified similarities in treatment that fail to address the distinct needs of some racialized people” (Williams, T., 2001: 210). As evidence of differential treatment experienced by Blacks, the Commission on Systemic Racism (1995: 349) stated that: “More black Metro Toronto residents (28%) than white (18%) or Chinese residents (15%) report being stopped by the police in the past two years [and] more black residents (17%) than white (8%) or Chinese (5%) residents report being stopped more than once in the past two years.” Additionally, the Commission on Systemic Racism found that “black people were disproportionately shot by police in Ontario, with none of the police officers convicted for excessive force” (Chan and Chunn, 2014: 82). Collectively, these findings led the Commission on Systemic Racism (1995: 358) to conclude that “police discretion to stop and question people may produce racial inequality in the number and nature of such contacts.” While the Commission on Systemic Racism’s repeated use of equivocal language (such as “may” and “suggests”) reflects a sustained reluctance to explicitly affirm the prevalence and impact of racism within policing services, the Commission on Systemic Racism’s report still established state recognition that the police, and not the communities they serve, are answerable to this inequity and that institutional change – instead of improved “race relations” – was required.

This affirmation of the prevalence of racism in policing services marked a significant shift in the provincial problematization of race and policing. This shift went from describing racialized communities and the police as mutually accountable for the reciprocal mistrust, to

instructing the police to earn the confidence of racialized communities by demonstrating that “differential stopping of people because of race alone or in combination with other discriminatory factors is unacceptable” (Commission on Systemic Racism, 1995: 358). Further, the report (1995: 395, Recommendation 10.5) recommended that: “the Ministry of the Solicitor General and Correctional Services, in consultation with the police services and local community organizations, develop guidelines for the exercise of police discretion to stop and question people, with the goal of eliminating differential treatment of black and other racialized people.” The report further stated that these guidelines should elaborate on the general standards set out in both the *Charter* and the *Ontario Human Rights Code*. As such, consistent with Tanovich’s formulation of racial profiling, the Commission sought to demonstrate that inequitable police stop practices constitute actionable grounds-based discrimination.

Toni Williams, one of the named commissioners on the final report, subsequently reflected on the Commission on Systemic Racism’s difficulties with integrating a “systemic racism” analysis within the legal framework of individual culpability and demonstrable differential treatment. Williams (2001: 209) described the Commission as employing an “unconscious racism” theory which “continues to explain systemic racism in terms of attitudes, beliefs and assumptions that decision-makers may hold, albeit subconsciously, and rely upon in their daily activity.” This framing tends towards recommendations that “promote consciousness-raising” rather than drastic changes to policing practices, as it is assumed that anti-bias training and added racialized personnel can shift the attitudinal biases held by decision-makers which are infiltrating an otherwise fair institution. Similarly, Comack (2012: 30) articulates that: “From the commissioners’ standpoint, racialization is ‘instilled’ into social systems by the personnel

working within them.” The Commission on Systemic Racism’s final report served to embed this “unconscious bias” framing into provincial policy on racial profiling.

Despite being identified in a Commission on Systemic Racism working paper, by Cuthbert Scott and John A. Aylen (1993), as a significant mechanism in government policy development with respect to justice policy and “racial minorities,” the OHRC gets scant attention in the final report. Indeed, Scott and Aylen’s (1993: 74) review of the participation by “racial community groups” in criminal justice policy development found that the OHRC, as well as the Ontario Anti-Racism Secretariat, were required to “compete with other bodies in government that express opinions about racial minority involvement in policy” with the resulting “effect of diffusing their influence.” The OHRC’s own account of its involvement in the work of the Commission on Systemic Racism is limited to participating in a discussion group. Based on that participation, the OHRC noted in its 1993-4 Annual Report (1993/94: 14): “A preponderant majority of the community groups who expressed their views were strongly opposed to the collection of crime statistics based on race.” This superficial reflection of community concerns around statistics perpetuating racial stereotyping fails to differentiate between racially-disaggregated statistics regarding patterns in criminal activity and racially-disaggregated statistics collected *on the activities of justice sector authorities*. As demonstrated by the findings of the Commission on Systemic Racism, racially-disaggregated statistics provide powerful substantiation of the persistence of racial disparities in social institutions, such as the criminal justice system. In the absence of this substantiation, the racial inequity committed and perpetuated by the justice sector operates largely outside the reach of legal redress, in particular the Ontario *Human Rights Code*.

The significance of statistics for establishing the pervasiveness of anti-Black racism within Ontario's police services became the subject of public debate in 2002, when the *Toronto Star* (hereafter the *Star*) released a series of articles on the singling out of Black [cis] men by the Toronto Police Service. The *Star* conducted an analysis of the TPS's database records of incidents where an individual was arrested or ticketed for an offense dating back to 1996 and disaggregated this data according to the recorded skin colour of the offender.⁴¹ Through a freedom of information request, reporter, Jim Rankin *et al.* (2002), obtained access to numbers that had never before been released "to anyone outside the police community." The *Star* analysis focused on two categories of offences: arrest for simple possession (drug charges) and traffic offences that could only be ascertained following a vehicle stop (termed "out-of-sight" offences).

Simple possession of an illegal drug was chosen for study since it's a relatively minor crime, as opposed to trafficking. That makes simple possession a "high-discretion" charge, meaning police officers at the scene of an arrest, and in a police station, have considerable leeway on how they handle a suspect. [. . .] The *Star* also looked at traffic data, focusing on "out-of-sight" offences such as failing to update a driver's licence or driving without insurance. Police usually discover such violations only after a motorist has been pulled over. And, in the absence of any other charge, it isn't clear why drivers involved in these offences are stopped in the first place. (Rankin *et al.*, 2002)

The *Star* found that in both cases, the data supported the conclusion that Blacks were being treated more harshly than Whites by the TPS. With respect to simple drug possession, the *Star* found that Whites were more likely to be released at the scene than Blacks (76.5% versus 61.8 %) and Blacks were over twice as likely as Whites to be held in custody pending a court appearance (15.5% versus 7.3 %). Additionally, despite constituting approximately 8.1% of Toronto's population (based on census data at the time), those categorized by the police as 'black' constituted 23.6% of those arrested for simple possession. In regard to the out-of-sight

⁴¹ The recorded skin colour options included "white", "black", "brown" and "other."

traffic offences, the *Star*'s analysis revealed that of the motorists ticketed with only this type of offence, those listed as 'black' constituted 34% (a rate more than four times higher the self-reported population of Blacks in Toronto).

While the *Star* articles offered empirical substantiation of Black men's experience of racial profiling, these articles also served to cement an account of racism and policing that was premised on the experiences of Black male youth to the exclusion of women and Indigenous people. This omission was especially perplexing as two of the most explicit publicly-recorded instances of racism and policing in the 1990s involved the TPS's public strip search of a Black woman, Audrey Smith, and the Ontario Provincial Police shooting of an unarmed Indigenous man, Dudley George. As Robyn Maynard (2017: 116) describes, the "imagined victim of police surveillance, harassment and violence is often presumed to be a young Black male" and thus accounts of law enforcement violence that do not match this imagined victim are rendered "unseen." Andrea Ritchie (2017: 26) describes the law enforcement violence against Black women and Indigenous people as "sliding out" of the discussion of racism in policing "because its narrative paths have been so well worn around them." The accounts provided in the *Star* series rarely involved interviews or experiences supplied by women, and while the report details that "Black men, between 25 and 34 years of age, seem to warrant special attention" (in that they were overrepresented in out-of-sight driving offences by a ratio of 5:1) there are no companion statistics offered which reflect the experiences of Black or other racialized women. Similarly, the lack of additional analysis applied to the skin category "other" serves to reinforce the absence of Indigenous experiences from the *Star*'s narratives despite the brief mention that with respect to simple possession "'others' were treated more like blacks" (Rankin *et al.*, 2002). Finally, not surprisingly, based on the metropolitan focus of the paper, the *Star* (Rankin *et al.*, 2002) articles

entrenched the public perception that racial profiling was a particular problem within Toronto: “Nowhere in Canada has debate over keeping, and analyzing, race-based crime data been as angst-ridden as in Toronto - a city boasting of its multicultural identity with a motto declaring diversity its strength.” This centering of Toronto provided an easy deflection mechanism for police services within the rest of Ontario.

Carol Tator and Frances Henry (2006) describe the *Star* series as creating a “discursive event” around racial profiling within Ontario. Rejoinders from both the public and public officials evoked racialized criminality narratives that portrayed Blacks as either inherently or culturally prone to law-breaking and police as racially-neutral. The Monday following the release of the *Star* series, the issue of racial profiling was raised in the Ontario Legislature by NDP MPP Howard Hampton who accused the PC government of ignoring the report of the Commission on Systemic Racism. MPP Robert W. Runciman (Hansard, October 21, 2002, emphasis added) responded, on behalf of the PC government, that “if there are *real problems* out there, this government is prepared to act on them.” Then-Toronto Police Chief Julian Fantino (as quoted in Rankin *et al.*, 2002) responded to these findings by emphatically insisting: “We’re not perfect people but you’re barking up the wrong tree. There’s no racism.” Two mutually reinforcing themes appeared throughout the institutional responses: a *disavowal* of the existence of racism within state institutions and an *avowal* of the social necessity of the institution of policing. In his dissenting response to the statistical methodology and conclusions reached by the *Star*, Criminologist Ron Melchers (2003: 347), stressed the impact of these accusations on police forces: “the issue of racial profiling has become a significant threat to the ability of police to maintain order, ensure public safety, and prosecute those accused of criminal offences.”

Melchers offered no attendant consideration of the impact of racial profiling on Black, Indigenous, and other racialized communities.

As detailed by Tator and Henry (2006), in the months after the *Star* series municipal and provincial authorities engaged in a “discourse of denial” about the operation of racism within policing and sought to discredit the *Star*’s findings by offering competing experts who challenged the statistical methodology and clung to accounts of racialized crime patterns as justifying racialized disproportionalities. The TPS even initiated legal action against the *Star*, based on their own “expert research” which they claimed demonstrated the *Star* report was both erroneous and injurious. Criminal attorney Alan D. Gold (2003: 398 endnote) was “retained by Chief of Police Julian Fantino on behalf of the TPS to make submissions relating to the merits of the *Toronto Star*’s newspaper articles claiming statistical proof of ‘racial profiling.’” Gold argued that the socio-economic organization of society is already racialized which then produces racial differences in poverty and crime rates, consequently the police are *merely responding to social realities* when they apply charges or tickets at racially disproportionate rates. Gold (2003: 395) further claimed that “Valid data regarding claims of racial profiling must include only data where the causation of the police activity is absolutely neutral regarding racial constituencies and incapable of introducing a bias into the data that will be unfairly attributed to the police.” This precondition of racial “neutrality” is impossible to meet and thus, Gold (2003: 398) proposes that the only “objective evidence of profiling” is in outcome measures, such as arrest and conviction rates. In support of this contention, he states: “If the police are wrongly relying on race then that will be reflected in an increase in unsuccessful outcomes.” This claim not only fails to implicate policing practices in the reproduction of the existing racial order or the construction of ‘crime’ –

the reliance on “unsuccessful outcomes” as an objective measure erroneously presumes racial neutrality in other areas of the justice system (such as the courts).

The *Star* series provided a persuasive public record of the racial disproportionalities within Ontario policing, whereas the discourses of denial that were invoked to invalidate the *Star*’s findings reflected the centrality of the police in maintaining the *status quo*. This placed state institutions, such as the OHRC, in a paradoxical position of needing to respond to both the indications of racial discrimination uncovered by the *Star* series and the potential crisis of confidence in police institutions spurred by the *Star*’s findings. In response to this discursive event, the OHRC launched a public inquiry that consciously shifted the conversation away from examining the practice of racial discrimination *within policing*—in the press release of the inquiry, Chief Commissioner Keith Norton (December 9, 2002) described it as “not another study on racism or an investigation of the police services”—and instead focused on the broader *impact* of racial profiling on affected communities. This selective focus allowed the OHRC to demonstrate institutional responsiveness to the *Star*’s call to address racial profiling without challenging the necessity of police in maintaining social order. As will be demonstrated, the OHRC’s problem representation in its *Racial Profiling Inquiry* (2003) was decidedly silent on the structural dimensions of racialized policing and the role of policing in reproducing the inequitable racial order, instead choosing to frame racial profiling as the result of bias.

OHRC’s Framing Racial Profiling as Bias

A driving concern presented in the OHRC’s inquiry in racial profiling was the possibility that racial profiling erodes trust in public institutions. Following the “discursive event” (Tator and Henry, 2006) spurred by the *Star*’s series on racial profiling, racialized communities were

calling on public officials to affirm the existence of racial profiling and demonstrate institutional and legislative responsiveness. As the public institution entrusted with protecting and advancing human rights within the province, the *Star* series placed pressure on the OHRC to consider the relationship between racial profiling and human rights protections. Underpinning the OHRC's (2003: 34) inquiry into racial profiling, was the presupposition that both the practice and the *perception* of racial profiling are injurious to a harmonious and pluralist society, in that they result in a "diminished sense of patriotism, loyalty and national unity." A close reading of the OHRC's public inquiry: *Paying the Price: The Human Cost of Racial Profiling* (2003) reveals how the OHRC's attempts to render racial profiling in policing as both legible and actionable, within the confines of the Ontario *Human Rights Code*, relied on an unconscious bias framework which was both individualistic and restrained in its critique of structural inequities.

In her 2001 critique of the Commission on Systemic Racism, Toni Williams (2001: 208) observed that Ontario public policy on racism within the justice system reflects a preference for the language of unconscious bias over systemic racism, and a founding presumption that the overall "social order is just." This preference is again reflected in the OHRC's (2003: 6, emphasis added) definition of racial profiling 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." This definition presumes the ability to delineate between stereotypes (erroneous generalizations about an entire group) and reasonable suspicion (objective and valid basis to apply scrutiny). The definition is also reliant on a standard of treatment against which to benchmark *greater* scrutiny or *different* treatment. In doing so, this definition of racial profiling takes for granted that the social context in which racial profiling takes place is governed

by objective standards, reasonableness, and fair treatment as a backdrop against which racial profiling can be detected.

Like the report of the Commission on Systemic Racism, the OHRC's *Racial Profiling Inquiry* takes for granted a just social order. Consequently, the inquiry reports that the cost of racial profiling is a loss of confidence in social institutions, such as the police, rather than depicting racial profiling as evidence that the police, and other criminal justice institutions, should not be trusted as providing an equitable administration of the law. Further, the OHRC (2003: 4) diffused criticism of policing institutions by insisting that the report does not target any particular "system in society, e.g. the police." In his critique of the OHRC's framing of racial profiling, sociologist Christopher J. Williams (2006: 7) opposes this "relativist relegation of police profiling to the status of one form among many" given that the police have generated the most public concern of racial profiling and are trusted to exercise state authority. In lieu of addressing these concerns, the inquiry (2003: 5) offered generalizable insights and encouraged all factions of society to "examine our own subconscious biases to see if we ourselves have stereotyped people inappropriately" insisting that "we all have a role to play in combating racial profiling." This conflation of institutional and personal accountability is a product of the OHRC's conceptualization of racial profiling as the expression of prejudice, not societal inequity.

The OHRC (2003: 26) accepted the centrality of police to maintaining social order and lamented that experiences of racial profiling can result "in a feeling of not wanting to go to the police with a problem or not cooperating with the police." Throughout the *Racial Profiling Inquiry*, the OHRC (2003: 28) stressed that the police have a "difficult job" and that "police agencies are negatively impacted in their ability to effectively serve the public by allegations of

racial profiling.” The OHRC’s recurrent avowal of the importance of police is reflective of their shared identification with – what Richard Ericson (1991: 8) describes as – “the values of middle-class respectability.” Tales of ‘good citizens’—whose confidence in the justice system was compromised by racial profiling—dominate the narrative of the report. Whereas the *Star* series featured stories of young Black men being subject to harsher treatment for “simple drug possession” charges, the OHRC focused on personal accounts from ‘respectable’ members of society that were being unfairly grouped with criminals. For instance, the OHRC inquiry (2003: 24) includes “one very moving submission” from a “young school teacher who described being surrounded by police cars, being ordered out of his car in the middle of the street and being asked if he had any drugs or weapons in the car.” In the submission, the teacher talks of being a “law-abiding citizen” who has “worked very hard” and was “humiliated” by the treatment he received from police. In the OHRC’s construction of this story, the fault lies not in the manner in which the police conducted the vehicle search, but that this treatment was applied to the *wrong type of person*. As one of the inquiry participants is quoted as saying:

Some may feel this practice is justifiable because there are a lot of bad people out there and it is relatively easy/convenient to group certain clusters together based on statistics and probability factors, etc. [. . .] Think about the harm that is being done to those who find themselves within a cluster they do not belong in [. . .] and the future cost to society to disenfranchise these innocent citizens? (2003: 217)

This invocation of ‘innocence’ rests on an unarticulated dichotomy between those deserving of police scrutiny—and its attendant violence—and those ‘good citizens’ who ought not to be grouped with those ‘others.’

The OHRC’s preference for telling the stories of ‘good citizens’ constitutes a form of respectability politics wherein racialized others, and in particular Black people, are expected to tightly regulate their behaviour to conform with the dictates of good citizenship in order to be

worthy of the benefits of the state. Michelle Alexander (2020: 282) describes American civil rights advocacy as prioritizing “certain types of black people (those who are easily understood by mainstream whites as ‘good’ and ‘respectable’)” to the exclusion of “the most stigmatized elements of the community, especially those who break the law.” Within the Canadian context, Robyn Maynard (as quoted in Sirvent, 2018) describes her work on *Policing Black Lives* as taking “aim at respectability politics [in that] it argues that we recognize and fight against injustice against all Black folks – not only those perceived as upstanding or law abiding, but also those with real or perceived connections to illicit economies like drugs or sex work.” Conversely, the Commission’s inquiry report focused exclusively on those citizens that it deemed innocent of illicit behaviour and the only references to “drugs” and “prostitution” pertained to how insulting it is for law-abiding citizens to be mistakenly associated with, or falsely accused of engaging in, these illicit economies. The criminal-victim dichotomy which informs the OHRC’s inquiry report fails to employ an intersectional analysis of crime and justice which recognizes that individuals and groups may simultaneously hold multiple identities along the continuum between victimization and criminalization, and that representations of victimization and criminalization are constructed in reference to gender and race. Chan and Chunn (2014: 32, emphasis in original) point to the “but for” phenomenon wherein “men and women who meet all the historical criteria of masculinity and femininity associated with being white, middle class and heterosexual, except for one, [. . . are treated] as if they *do* meet all the normative expectations.” By complying with normative expectations, respectability politics provides an entrance route for those who “but for” one deviation otherwise meet the criteria of “victim” in the criminal-victim dichotomy. It is for these “respectable” and “law-abiding” racialized citizens that have achieved “but for” status that the OHRC expressed concern.

Consistent with the premise that Ontario is a fundamentally pluralist and just society, the OHRC (2003: 51) inquiry report adopted a “business case against profiling” argument which posits that equity and diversity can form “a key component of [. . .] business strategy.” This diversity management argument strives to demonstrate that the goal to address and eradicate racial inequity is not incongruent with capitalist aims. Instead, it is argued that increased diversity can increase profit by appealing to a wider market and generating new competitive ideas by breaking free of homogenous thinking and introducing different perspectives. The OHRC maintained that racial profiling imposes an economic cost on society, since it can damage the reputation of businesses and institutions that are known to engage in racial profiling, resulting in a loss of customers, potential racialized employees, and public confidence. Accordingly, the OHRC (2003: 53) concluded that: “social cohesion is no doubt undermined by racial profiling at a high economic cost to Ontario society.” Yet, this presentation of racial profiling as economically costly tells an incomplete story of racial stratification. Through subjecting racialized groups to surveillance and boundaries that protect property rights, racial profiling serves capitalist interests in that it further racializes criminalization, maintains the inequitable distribution of wealth, and protects social inequality. This connection between racial profiling and economic stratification depends on a structural understanding of racism and inequity, which was foreclosed by the OHRC’s individualized and bias-based definition of racial profiling.

The OHRC (2003: 67, emphasis in original) concludes its inquiry report by offering recommendations aimed at “**all** organizations or institutions that may have a problem with racial profiling” among which the police are the first named. These organizations and institutions are instructed to acknowledge the existence of racial profiling, take steps to monitor and prevent

racial profiling, institute policies and associated timelines to respond to racial profiling, and perhaps most pointedly, “collect data for the purposes of monitoring its occurrence” (2003: 71). This last recommendation is particularly significant as it constitutes an evolution in the OHRC’s stance on race-based data, from the earlier caution against the use of the race-based data within the justice sector towards a more nuanced stance which encourages the collection of data to further the objectives of the *Code*, provided the data is not used to further stigmatize or marginalize a group. This position on race-based data also affirmed the legitimacy of the *Star*’s analysis into racial disproportionalities by emphasizing the role of data collection in monitoring and evaluating claims of discrimination. However, despite offering these substantive recommendations for organizational change, the OHRC (2003: 73) restricted its own institutional commitments to the areas of training, raising awareness, and broadly using its “mandate to hold anyone engaging in racial profiling accountable in accordance with the Ontario *Human Rights Code*.” This final commitment appears disingenuous in relation to the broader inquiry report, since the OHRC consistently refused to use the submissions to hold any particular institution accountable for racial profiling. This refusal was confounded by the OHRC’s decision to decline all anonymous public submissions, thereby restricting the inquiry’s participants to those who already held sufficient confidence in the OHRC’s process to trust that their information would not be inappropriately shared. This ban on anonymous submissions might have been justified, had the OHRC offered more situated and contextual findings regarding *who* is experiencing racial profiling by *which* institutions, however, the OHRC instead placed emphasis on the ubiquity of the phenomenon such that no institution or sector was held accountable under the *Code*.

Despite the severe enforceability limitations of the report's recommendations, the inquiry was successful in demonstrating the OHRC's responsiveness to community concerns regarding racial profiling and, according to Christopher Williams (2006: 2), served to buttress "the public image of the OHRC as a firm ally." Though the OHRC declined to use their findings to substantiate specific claims of racial profiling, the OHRC's (2003: 69) stated view that "the evidence of the existence of racial profiling is incontrovertible" signified a governmental validation of the longstanding claims of racialized communities. Additionally, the OHRC's collected accounts of the trauma caused by racial profiling influenced discussions regarding the psychological impact of this practice on racialized communities and informed future research on racial profiling (Maynard, 2017; Comack, 2012; Smith, 2007; Tanovich, 2006; Tator and Henry, 2006). Further, the OHRC's inquiry expanded the discussion regarding various forms of racial profiling and the communities impacted, in particular 'Aboriginal peoples'⁴² and those from Muslim, Arab and South Asian communities. The OHRC's construction of racial profiling widened the field of vision from the subjects of the *Star* series (namely Black cis men), to include a range of racialized subjects, though the OHRC (2003: 4) still noted that the largest number of submissions came from "persons who identified as African Canadian." By expanding the focus of the institutions implicated in racial profiling practices, the inquiry highlighted how security, customs and border control agents' treatment of Muslim, Arab and South Asian bodies as threats to public safety produced community-wide fears of racial profiling; and tied discussions of racial profiling to the impact of Canadian settler-colonialism.

⁴² In conformity with the Canadian federal government's usage, the OHRC uses the term "Aboriginal" to refer to "Status Indians" who are registered under the *Indian Act*, "Non-status Indians" not registered under the *Act*, Métis people, and Inuit.

Reflective of the diversity management and race relations framework, the OHRC aimed at restoring harmony and public trust through this inquiry into racial profiling. The OHRC (2003: 67) sought explicitly to play the role of mediator in the public debate and “bridge the divide between those who deny the existence of racial profiling on the one hand, and the communities who have long held that they are targets of racial profiling on the other.” Yet, the OHRC was instead reminded of the polemic impact of even-tempered attempts to name racism, for, as Sara Ahmed (2012: 3) suggests, “to account for racism is to offer a different account of the world” in that naming and discussing racism inherently conflicts with an acceptance of the existing order. Thus, notwithstanding the OHRC’s insistence that the *Racial Profiling Inquiry* did not target police, as with the *Star* series, the inquiry was met with significant backlash and denunciation by state and police authorities. Ontario Premier Ernie Eves (as quoted in Tator and Henry, 2006: 130) criticized the process as a “broad sweeping inquiry without making the complainant accountable or identifiable,” and the Minister of Public Safety and Security, Robert Runciman described the inquiry as “bad for police morale.” Toronto Chief of Police Julian Fantino (as quoted in Tator and Henry, 2006: 131) accused the inquiry of portraying “the whole police community as a bunch of racists” and treating the police as the “whipping boys and girls of society for all these other issues.”⁴³ In light of this backlash, Tator and Henry (2006: 196) observed that “one of the unexpected outcomes of the inquiry was that the [OHRC] raised the level of its own awareness regarding the nature, extent, and impact of racism in Ontario.” The inquiry exposed an inherent tension between endeavoring to address systemic racism and

⁴³ Chief Fantino went so far as to file a Freedom of Information request to get the names and details of all those who had provided statements to the OHRC regarding their experiences of racial profiling by police so that he could vet the details. This request was ultimately unsuccessful (Tator and Henry, 2006).

simultaneously touting a business case for diversity premised on the existing social order. In attempting to broker understanding between multiple conflicting parties, the OHRC shied away from advancing a more structural account of racial profiling and developing robust and targeted institutional recommendations for racial equity; yet even the mitigated intervention offered by the OHRC was disruptive to the dominant police narrative that diversity had already been embraced and racial profiling was relegated to a “few bad apples.”

The intermediate pathway through the racial profiling debate, offered by the OHRC’s inquiry, was adopted by one Ontario police department in response to two widely publicized incidents involving the police drawing their firearms against unarmed Black youths.⁴⁴ In May 2003 the Kingston Chief of Police William J. Closs launched Canada’s first ever data collection project into racial disparities in policing, the Kingston Police Data Collection. The data collection project ran from October 2003 until September 2004, during which time officers were instructed to record the race of all those that they came into contact with “in a non-casual manner” either on the street or in a vehicle. The resulting data was then analyzed by Criminologist Scot Wortley and Lysandra Marshall (2005) who concluded that “black residents of Kingston are more likely to be stopped and questioned by the Kingston police than people from other racial backgrounds.” Chief Closs adopted the OHRC’s “subconscious bias” framing to account for the racial disproportionalities uncovered by the data collection project. Closs

⁴⁴ On March 16, 2001, two Black brothers, Mark and Andrew Wallen (aged 17 and 12), were ordered out of their car at gun point by police, handcuffed and placed in the back of a police cruiser in response to a 911 call by a woman who believed the car was occupied by a man who had violently assaulted her in the past. The woman stated during the call “I’m sure there’s not a lot of black people running around in Mercedes in Kingston” (as quoted in Tanovich, 2006: 78). On March 24, 2003, Mark Wallen (then aged 19) was again stopped by Kingston Police when walking down the street. When he failed to take his hands out of his pocket the officer drew his gun and called for back-up (Comack, 2012).

(2005: 5) described the issue as being “not whether I as a police officer have biases but rather what I choose to do with them.” Further, Closs (2005: 15) employed the term “bias-free policing” as a rhetorical pivot away from the language of “racial profiling” and stressed that “whenever I speak about bias-free policing, I speak about an absence of bias in terms of race, ethnicity, age, gender, sexual identity, disability, social and economic status, and all of the areas covered under the provisions of the Ontario *Human Rights Code*.” This shift away from the centrality of race and towards including all grounds appears disconnected from the findings and recommendations offered by Wortley and Marshall (2005), which instead stressed the need for ongoing monitoring of *racial* disparities. This “all grounds” focus is enabled by the bias-based account of racial profiling supplied by the OHRC, since bias as an expression of *individual prejudice* is multi-directional and not unique to race.

The Kingston Police Data Collection project offers an encouraging example as to how the OHRC’s *Racial Profiling Inquiry* can be employed to embolden police leadership to take institutional responsibility for monitoring racial disparities. The Kingston example, however, also reflects how the diversity management framework underpinning the OHRC’s inquiry can be used to *justify these disparities* as a product of unexamined biases which permeate throughout society and apply to multiple grounds. In his report on the project, Chief Closs (2005: 14) references the OHRC’s recommendation for “the collection of data for the purpose of monitoring the occurrence of racial profiling and to identify measures to combat such profiling” and commits to “undergo scrutiny in order to discern whether bias-free policing is in place in our actions as well as in our words.” Nevertheless, Chief Closs also locates the source of these racial disparities in the operation of police officer discretion and bias, which is reflective of the OHRC’s (2003: 6-7) flattened account of difference wherein “anyone can stereotype” and

“anyone can experience profiling.” Accordingly, Chief Closs (2005: 8) asserts: “If you accept my premise that all people have biases, including police officers, we could move beyond denial and argument on this issue and instead focus on preventing biases from surfacing in our decision making as we use our powers and perform our duties.” Since the OHRC’s exploration of racial profiling neglected its structural dimensions, it was congruent with Chief Closs’ explanation that the demonstrated racial disproportionalities within Kingston policing were the product of unaddressed officer bias.

The OHRC did advance an account of the structural dimensions of racism in its updated *Racism and Racial Discrimination* policy (2005a), which was released the same year as the Kingston Police Data Collection Project report. As was demonstrated through a historical inquiry of the OHRC’s approach to race and racism, the updated policy reflected significant advancement in the Commission’s approach to racial discrimination in that it recognized the linkages between individual discriminatory acts and institutional racism, yet this advancement found limited expression in subsequent OHRC policies and practices. The 2005 policy reflected an emboldened approach towards addressing racism in policing in two key aspects: first, the policy integrated the reflections from the *Racial Profiling Inquiry* into its case management functions, thereby explicating how racial profiling constituted legally actionable discrimination; and second, the policy affirmed the significance of numerical data as an indicator of systemic or institutional racism.

A limitation of the *Racial Profiling Inquiry* report was that it was reflective of the OHRC’s bifurcated approach to its institutional functions under the *Code* such that individual complaints are met with firm enforcement-based strategies (including litigation) while collective inequities are addressed through soft enforcement or cooperative-based approaches such as

public awareness campaigns and education. The *Racial Profiling Inquiry* was couched within the OHRC's mandate to advance human rights policy and engage in public education, and as such, refrained from substantiating accusations of racial profiling levied against particular institutions. The updated *Racism and Racial Discrimination* policy (2005a: 19) addressed this limitation by stating explicitly "racial profiling is a form of racial discrimination and can result in complaints to the Commission." The OHRC further noted the challenge of evidencing claims of racial profiling and outlined relevant considerations in determining whether or not racial profiling was a factor in a particular case. These considerations reflected the advice provided to the OHRC by experts who had decried the poor success rate of race-based complaints when compared to complaints citing other grounds (Young, 1992; Black, 2004). The OHRC (2005a: 19). They recognized that racial profiling "can rarely be proven by direct evidence" and therefore investigations into racial profiling must rely on "inference drawn from circumstantial evidence" such as statements indicating stereotyping, deviations from normal practice, discourteous treatment, and differential treatment. Though the OHRC's definition continued to base racial profiling in stereotyping, the policy also integrated an understanding of institutional or systemic racism which is embedded in "organizational and government policies, practices, and procedure and 'normal ways of doing things'" (2005a: 13) and then emphasized the importance of numerical data for "identifying and addressing systemic discrimination" (2005a: 31).

The policy (2005a: 46) prescribed that the Commission "will seek data collection and analysis as a public interest remedy in litigation and settlements." This emphasis on data expanded the OHRC's approach to both the investigation and the resolution of complaints in that it pushed beyond the reliance on individual evidence (or lack thereof) of racial discrimination and instead opened the possibility of requiring organizations to conduct inquiries into patterns of

racial disproportionalities. The policy (2005a: 32) devoted significant focus on utilizing numerical data as an indicator of systemic or institutional racial discrimination and applied this focus to policing in several examples, noting that: “Over-representation of racialized persons in police stops, jails and in other areas of the justice system may be indicative of the practice of racial profiling or other forms of racial discrimination.” The OHRC (2005a: 47) even drew on (albeit obliquely) the Kingston Police Data Collection Project as an example of the need to access external expertise in data collection and analysis in large and complex organizations: “a police force concerned about the perception that racial profiling is a problem initiates a project to collect data about police stops [and through] consultation with an expert who has background in research methodologies and data analysis, a data collection program is designed.”

The updated *Racism and Racial Discrimination* policy effectively illustrated that racial profiling constitutes *Code*-prohibited racial discrimination and thus fell within the case management functions of the Commission. This policy (2005a: 11) further noted that “racism is a wider phenomenon than racial discrimination [. . .] not every manifestation of racism can be dealt with through the current human rights complaint mechanism and process.” The OHRC’s (2005a: 11) differentiation between racial discrimination and racism relies on an understanding of “the social, political, economic and institutional power that is held by the dominant group in society” which is not reducible to the behaviour of individuals. This articulation of racism is broader and more nuanced than the ‘unconscious bias’ framework that governs the accounts provided in *Racial Profiling Inquiry*, yet the OHRC did not revise its definition of racial profiling to reflect this understanding of the “complex, subtle and systemic nature of racism.” Instead, the updated race policy (2005a: 19) reiterates that “racial profiling is, at its heart, a form of stereotyping based on preconceived ideas about a person’s character” and thus differentiates

racial profiling from racism, which the policy (2005a: 13) notes: “should not be treated as aberrant behavior or a set of deviant attitudes on the part of a deviant individual – a so-called ‘rotten apple’ within the system.” This discord between a more reflective understanding of racism, as embedded within a social order, and the OHRC’s treatment of racial profiling, as the operation of individual prejudice, reflects the OHRC’s ongoing institutional challenge of addressing social inequities through voluntary-compliance based strategies and the application of anti-discrimination legislation.

Following the release of the 2003 inquiry report, the Commission (Annual Report, 2004/05) was actively involved in the public discourse on racial profiling and launched a “province-wide ad campaign in mainstream and community media on racial profiling to increase public awareness of the need to eliminate racial profiling.” In calling for an end to the “*e-racing* of racial profiling” in Canadian jurisdictions through denial and avoidance, David Tanovich (2004: 910) relied on the Commission’s public endorsement of data collection to support his argument for the adoption of remedial measures such as “compelling the police to record the circumstances surrounding all stops including the race and ethnic background, age and gender of the person stopped, the reasons.” Furthermore, the Commission began to incorporate findings from the *Racial Profiling Inquiry* into their litigation strategies before the Human Rights Tribunal of Ontario. Specifically, as a party to the Human Rights Tribunal application of Jaqueline Nassiah⁴⁵ (2007 HRT0 14), the Commission argued that the discriminatory treatment of Nassiah constituted racial profiling and “called University of Toronto Professor Scot Wortley

⁴⁵ The substance of Nassiah’s human rights application was “that on February 18, 2003, Richard Elkington, a police officer with the Peel Regional Services Police Board discriminated against her in the provision of a service in the manner he conducted his police investigation into an allegation that she had stolen a bra from a Sears store.” (2007 HRT0 14)

as an expert witness to give evidence about racial profiling, how it is manifested, and how it affects individuals who are profiled.” This case was the first finding of racial discrimination in Ontario to specifically name the social phenomenon of racial profiling. As party to the complaint, the OHRC provided evidence from the investigation to substantiate Nassiah’s claim of race-based discrimination, secured the expert testimony of Wortley to demonstrate how this case constitutes racial profiling, and requested, what the adjudicator described as, “extensive systemic remedies” to address the practice of racial profiling at an institutional level.

Whereas the 2003 *Racial Profiling Inquiry* offered non-enforceable recommendations that were not aimed at any particular institution (such as policing), the Commission’s litigation strategy in *Nassiah* sought to attain public interest Tribunal orders which would *require* Peel Regional Police Services to implement many of the recommendations suggested in the inquiry. These orders could include the development of policies, practices and training that monitor for and prevent racial profiling. While Adjudicator Joachim (2007 HRT0 14) affirmed the phenomenon of racial profiling⁴⁶, she maintained that the remedies ordered in this case should be restricted to “the individual nature of the complaint” and thereby declined to “make any orders with respect to minority recruitment, screening of recruits or the maintenance of race based statistics on police actions” stating that “these remedies are not proportionate to the findings of discrimination [. . .] made in this case.” Accordingly, Peel Regional Police Services was ordered to develop (in consultation with an external consultant) a specific directive prohibiting racial profiling and training materials on racial profiling, but was not required, however, to implement

⁴⁶ Citing the *R. v. Brown* decision in which Morden J. A. stated that the Crown’s concession that the phenomenon of racial profiling existed was “a responsible position to take because...this conclusion is supported by significant social science research” (2007 HRT0 14).

any accountability strategies for monitoring and addressing racial disproportionalities in policing.

Adjudicator Joachim's demarcation of the individual fact scenario from the systemic operation of racial profiling is emblematic of the challenge of effecting systemic change through an individually driven human rights system. This challenge was a central issue in the public debates regarding the institutional transformation facing the OHRC through the introduction of Bill 107—which removed the Commission's complaint management function (as explored in greater detail in the preceding chapter). In the same year as the *Nassiah* decision, the ACLC called on the UN Committee on the Elimination of Racial Discrimination (ACLC, 2007: 33) to recommend that the legislative changes to the Commission's mandate be halted since "Bill 107's dismantling of the integrated process transforms the human rights system in a manner that prevents it from addressing complaints of anti-Black racism in a meaningful and effective way." Yet, as seen in the *Nassiah* decision, the existing system already contained severe limitations regarding the ability to move from an individual complaint of race-based discrimination to a systemic intervention into anti-Black racism.⁴⁷

In order to render racial profiling in policing actionable, the OHRC must treat the practice as legible within the confines of the *Code*—through establishing either individual instances or patterns of differential treatment—but in so doing, the broader role of the police in reproducing racialized social inequities is ignored. Additionally, as seen in the *Nassiah decision*, even in the rare cases where racial profiling can be evidenced within a particular fact scenario,

⁴⁷ The ACLC similarly attested to problems within the existing system, but averred that these problems would be exacerbated by removing the Commission's powers to investigate and prosecute complaints on behalf of individuals.

the Tribunal has been reluctant to apply remedies that extend beyond the specifics of that fact scenario. The OHRC's differentiation between racism and racial discrimination signaled a recognition that many of the structures which reproduce racism within Ontario are beyond the legislative reach of the *Code*. This theoretical intervention (that racism is more complex and embedded than can be addressed through the existing complaints management system) in turn provided an opening for reimagining the existing human rights system, such that it has the capacity to address structural racism. Yet the newly imagined human rights system, brought into existence by Bill 107, further delineated between "systemic" human rights matters and individual enforcement, such that the OHRC's resource capacity for systemic human rights *enforcement* (as opposed to *promotion*) was significantly reduced. Accordingly, the advancements offered by the updated *Racism and Racial Discrimination* policy (2005a) found little expression in the enforcement activities of the OHRC, as the release of the 2005 policy coincided with the institution's pivot away from combative enforcement strategies towards a model of amicable partnerships.

Partnering with Policing – the Advent of Human Rights Project Charters

The OHRC's Human Rights Project Charter Agreements (hereafter 'Project Charters') with Ontario police services were born out of a sustained public criticism of the practice of racial profiling within policing and mounting public evidence of racial disproportionalities in policing services. Despite this context, the Project Charters entered into with TPS in 2007 and WPS in 2010 were decidedly pluralist in focus. The partnership approach set out in Project Charters is an extension of the OHRC's institutional *Code* functions (section 29.f, emphasis added), which include the responsibility: "to *promote, assist and encourage* [...] organizations, groups or

persons to engage in programs to alleviate tensions and conflicts based upon identification by a prohibited ground of discrimination.” Historically, the Commission has sought to advance human rights by pursuing public interest remedies through legally-enforceable orders or settlements. Public interest remedies are forward-working legal orders, or agreed upon terms of settlement, that seek not only to repair the damage done to individual complainants, but to shift the institutional conditions that led to the inequitable treatment. Conversely, with these Project Charters agreements, the participating institutions voluntarily, and jointly establish the terms and time-limited target change objectives. Through a close reading of the OHRC’s policy guide on *Human Rights and Policing* (2011) alongside my interviews with OHRC staff, I establish that the Commission’s preference for partnerships necessitated a diluted approach to human rights enforcement, a disengagement with anti-racism practices, and an investment in diversity management strategies—a mode of operating which I refer to as an “All Rights Matter” approach to human rights and policing.

The partnership model enabled the OHRC to reconfigure its relationship with participating policing services, from that of legal adversary to that of value-aligned partner. The Project Charters established that the OHRC could act as a cooperative resource for police services. While the OHRC formally retained the unfettered mandate to pursue human rights through litigation, the establishment of these agreements involved prioritizing relationship-building with police services through affirming the necessity and positivity of their work. The OHRC construed these relationships with police as crucial to building a human rights awareness within policing. As expressed by one OHRC policymaker, building these cooperative relationships is key so that the OHRC “can be seen as [providing] reliable sources of guidance for organizations that historically would have distrusted us” (OHRC 1). By establishing that the

OHRC can be a trusted resource for policing institutions, it is hoped that the OHRC will then be invited into the crafting of internal policies and processes. OHRC staff further elaborated that over the course of establishing the Project Charter committees, a lot of time was spent building a human rights awareness amongst committee members with the expectation that this human rights awareness will then be built into institutional structures.

Through the use of Project Charters, the OHRC sought to engage these police services in in-depth organizational change by becoming involved in institutional processes which are difficult to access or effect from an external vantage point:

So, the Project Charter kind of work, brought the Commission squarely into the context of what the organizations do, and provided input into all kinds of issues and questions in the structuring of the project work and in the long-term, helping them structure long-term kind of approaches and structures for addressing human rights issues and maintaining human rights systems and practices. (OHRC 1)

Whereas public interest remedies, reached through a settlement or a Tribunal order, frequently lack detailed implementation plans, the purported merit of the Project Charter approach is that the OHRC gains access to, and can guide the development of, internal procedures such that they become more tailored and robust. OHRC credited the Project Charter agreements as creating “basic structures of a proper human rights system that weren’t there before” (OHRC 1).

OHRC staff also articulated challenges in pursuing human rights objectives through a cooperative agreement in which police leadership retains the ability to direct the focus, set the priorities, and assign resources:

So there’s a prioritization process, [. . .] And there may have been in the case of a large organization with a history of human rights issues and litigation – you could have dozens of issues that you identify, [but] that you know you will not be able to address in three years simply because it is not possible given the available resources to address them in three years [. . .] So, what do you pick? (OHRC 2)

This recognition of the impact of prioritization underscores that, even where there is a formal commitment to attend to “all rights,” institutional prioritization and preferred areas of focus will determine which initiatives receive resourcing and targeted change efforts. Accordingly, the commitment to an All Rights Matter approach does not entail that all rights will be granted consideration. Within the context of policing, this has particularly adverse consequences for initiatives aimed at racial profiling:

Right, so you have to have a unified, committed leadership. And if they do not want to tackle a specific human rights issue that is a significant limit on the ability to address structural inequalities. And so, I’ve seen that when it comes to resistance to collecting race-based data from the Toronto Police Service. And that, you know, it flows from leadership because that’s where the instructions come from. (OHRC 3)

The work undertaken within the context of the Project Charters remains subject to the priorities being set—and the instructions being issued—by police leadership. These instructions reinforce the boundaries of human rights change and allow for the absencing of race from institutional prioritization.

Though the priorities and terms of the agreements are set by police leadership, in consultation with the Commission, the implementation of Project Charters are carried out through joint sub-committees consisting of staff from the participating police institution and the OHRC. As observed by Sara Ahmed, (2012: 130) “a committee structure can participate in creating the illusion of a commitment.” While the committees themselves are offered as evidence by participating institutions of the value and resources being poured into human rights, the utility of these Project Charters in addressing structural inequities is constrained by the institutional will and priorities which are established beyond the structure of the Project Charter committees. In this way, the articulated commitments to “all rights”—as well as the ostensible balanced focus between the areas of employment and service-provision—enable the police services to pursue

pre-existing priorities while publicly espousing a commitment to all human rights. OHRC staff identified, that “most organizations, all of them in fact, primarily are really interested in their employment side. And our interest was primarily the service side” (OHRC 1). Within the context of policing, a focus on service includes addressing concerns of racial profiling, use of force, and public complaints of discrimination, whereas the employment focus concerns internal complaint processes and efforts to address representational gaps within police forces. Despite the Commission stating that their interest was primarily on the service side, the initiatives undertaken within the context of these agreements overwhelmingly focus on the diversification of the workforce and the establishment of internal policies and procedures. As such, the broad scope of the agreements belies the selective focus of the change initiatives actually being pursued.

The prioritization process is reflective of the police retaining ownership of the change process and establishing the scope of the human rights change. As one OHRC staff member identified:

. . . often in organizations people will say ‘yeah, I agree with human rights, and human rights is important, I agree we should do this.’ But then you come up against something that’s more important in the organization [. . .] It’s easy to be committed if you have no competing priorities. But what do you do when you have them?
(OHRC 2)

Whereas the OHRC publicly positioned human rights and policing practices as fundamentally congruent, Commission staff who worked on the sub-committees with police institutions demonstrated an appreciation for how human rights commitments run counter to the conceptual logics of policing and then lose out in the process of relative prioritization. These logics place emphasis on the command and control functions of policing, and thereby authorize police to retain particular practices as central to their mandate, regardless of the discriminatory impacts.

For instance, while the police practice of carding⁴⁸ was becoming increasingly implicated in discussions of racial profiling, OHRC staff identified that “police very strongly feel that they need to card in order to do the work that they do [. . .] that’s their understanding of how they do their work, and they’re not open to looking at other ways to do their work that don’t involve that” (OHRC 2). OHRC staff described these institutional commitments as creating “walls” that block human rights change. The examples offered by OHRC staff of when they attempted to breach these “walls”—such as addressing the practice of carding or collecting race-based statistics—elucidate the institutional *unwillingness* to address structural racism within the parameters of the Project Charter.

The OHRC codified its approach to human rights initiatives within policing with the release of its guide: *Human Rights and Policing: Creating and Sustaining Organizational Change* (2011). The OHRC (2011: 7) describes the guide as flowing from the institution’s three-year partnership arrangement with the Toronto Police Service and the Toronto Police Services Board and states that the goals of the guide “are to share some of the lessons learned, and to encourage and support other police services in their work on human rights organizational change.” Consistent with the OHRC’s 2009 *Count Me In* guide to human rights data collection, the *Human Rights and Policing* guide is steeped in the language of diversity and inclusion. Further, the diversity framing espoused in both guides emphasize an attentiveness to *all differences* and *grounds*. The guide positions diversity as both the rationale for engaging in human rights organizational change and the method for achieving that change:

“As Ontario becomes more diverse, all parts of society—including police services—must respond to meet the changing needs of a changing population. Applying an

⁴⁸ Carding refers to the policing practice of questioning the public and recording the information gathered in a police database for investigative or information purposes.

inclusive human rights lens is key to successfully preventing and resolving future conflicts.” (2011: 4)

“The principled human rights approach elaborated in the guide can help police services better serve the needs of Ontario’s increasingly diverse communities, and draw on the strengths of police services’ own internal diversity.” (2011: 5)

Throughout the guide ‘diversity’ is positioned as new and potentially disruptive—the product of a changing population which then produces new conflicts. Paradoxically, diversity is also touted as the solution to addressing these conflicts, since the increased representation of (those referred to in the guide as) “minority groups” within policing is anticipated to address human rights concerns. Diversity is converted into a point of institutional pride, which in turn protects the institution from accusations of racism.

The OHRC (2011: 12) naturalizes public concerns with policing by presenting the essence of police work as inherently conflict laden: “Police provide a vital function that often brings them into conflict with members of the public.” This treatment of criticism against the police as inevitable, undercuts public concerns against the police by suggesting that these concerns are an inescapable consequence of enforcing public order within a diverse context. Further, the purported need for police institutions to embrace diversity is reflective of their role in reproducing the social order and enforcing Canadian values, including the symbolic importance of multiculturalism to Canadian nationalism (Abu-Laban and Gabriel, 2008; Kernerman, 2005; Bannerji, 2000). As Timothy Bryan (2019: 203) articulates, within policing “the diversity approach is also anchored in Canadian multiculturalism. Since multiculturalism is constructed as a national value, policing in a way that upholds diversity works to support the nation’s larger commitments to multiculturalism.” Through the companion national narratives of diversity and multiculturalism, complaints of racism by state authorities are rendered anomalous. This accords with Sara Ahmed’s (2012: 45) observation that “when diversity becomes a view of

the nation, racism not only recedes but becomes understood as a distortion of the truth (it does not express our truth).” In addition, the purported breadth of diversity forecloses sustained attention to any particular ground or equity-seeking group. The OHRC’s (2011: 46) guide defines diversity as “the presence, in an organization or a community, of a wide range of people with different backgrounds, abilities and attributes including ethnicity, race, colour, religion, age, gender and sexual orientation.” This definition of ‘diversity’ is largely descriptive in that it identifies a range of differences amongst people and offers no consideration of which differences have particular salience within the context of human rights.

The language of diversity and human rights appear in tandem throughout the guide, whereas the language of anti-racism only appears three times outside of the glossary and then always within a list of other relevant frameworks. While the glossary distinguishes between anti-racism, cultural competence, equity, and human rights; this differentiation does not find expression in the guide where anti-racism principles are absent and human rights, inclusion, and diversity are discussed interchangeably. The guide (2011: 21, emphasis added) states that “focusing on human rights to deal with *challenges of diversity* and concerns about equity and fairness in policing is a natural ‘vision’ fit” since human rights legislation contains both “persuasive and inspiring values” and “legal obligations.” The OHRC reiterates the legal underpinnings of the duty to accommodate within the guide, but resorts to diversity management discourse to address the purported challenges between police services and ‘minority communities.’ This discourse utilizes, what Joyce Bell and Douglas Hartmann (2007) term, diversity “happy talk” to sell policing institutions on the positive benefits of undertaking human

rights organizational change.⁴⁹ This sale, however, appears to be contingent on the OHRC's de-emphasis on race.

I asked the OHRC policymakers I interviewed to reflect on the relationship between human rights and diversity management frameworks.⁵⁰ Probing policymakers' own reflections on the conceptual underpinnings of the OHRC's engagement with policing is instructive, not for uncovering the true institutional *intent* of the Commission, but instead for examining any schisms between the conceptualization of human rights and diversity present within policy documents and the articulated understandings of these conceptual logics offered by policymakers. This line of inquiry revealed disparate accounts of the dictates of the diversity management framework and the compatibility of these dictates with human rights work.

So diversity touches on many many things that may have no connection, or a marginal connection, to human rights and equity. And, being aware of that is key because we're trying to guide people to human rights work. And *diversity can be human rights works*, if it's conceived of as such. So, we would say if diversity is not informed by human rights it could very well be meaningless or marginal kind of work. (OHRC 1 – emphasis added)

Human rights work, yes. Anti-discrimination work, yes. Mostly the work has not been referred to by either party as anti-oppression or anti-racism work. [. . .] *But we never present the goal of our work as diversity*. [. . .] Diversity tends to mean anything to whoever is saying it, first of all. And for many people in the general population and in many organizations, diversity tends to refer to thinking nice about other people. Respecting other people at the most superficial level [. . .] organizations that focus on diversity sometimes will go fairly far down the human

⁴⁹ For example, *Human Rights and Policing* trumpets (all emphasis added):

- “When a comprehensive change strategy is used, small and large police organizations can *benefit* from any attempt to create an organization that can vigilantly address human rights” (2011: 18)
- “Human rights improvements *benefit police staff as much as members of the general public*” (2011: 26)
- “Human rights organizational change can help build this kind of *positive relationship between police and all of the communities they serve*” (2011: 9)

⁵⁰ Interviewees were specifically asked: “what do you see as the relationship between ‘human rights’ and ‘diversity’? Do ‘human rights’ and ‘diversity’ call for the same organizational change strategies?”

rights road and the only reason they don't talk about human rights is because *diversity sells better*, but for a lot of organizations, in common parlance, it's just nice to do stuff. (OHRC 2 – emphasis added)

Well, diversity is more about representation whereas human rights is about discrimination that can include more than diversity. So I'm aware of those sort of issues, [. . .] I can say that human rights is more than just diversity, so if a diversity office only combats its issues from a diversity perspective, then yeah, then there will be an issue. (OHRC 3)

While all three accounts reflect an awareness of the potential superficiality of “diversity work,” they differ in the extent to which they purport to reconcile the limitations of diversity with the more substantive demands of human rights. The discordance of these accounts is consequential. Firstly, the OHRC (2011: 23) itself proclaims the importance of not using terms and frameworks interchangeably in its guidance to policing institutions since this can create “confusion and conflict in change efforts.” Secondly, while all three policymakers noted elsewhere in their interviews the challenges of discussing anti-racism within the context of partnering with the police, the *incompatibility* of anti-racism and diversity management frameworks is obscured by the framework of human rights, which seeks compatibility with both. Finally, if the use of a diversity management framework is considered by the OHRC to be a calculated compromise necessary to *sell* policing institutions on the advantages of pursuing human rights change then discrepancy amongst policymakers entails a lack of institutional clarity regarding what has been compromised.

There is a further disconnect in the *Human Rights and Policing* guide between the context for human rights interventions into policing institutions and the organizational change template provided. As part of the contextual overview of the complaints and allegations raised against policing institutions, the OHRC (2011: 13) reports that in 2007 “applications against police services boards accounted for 4% of all active human rights applications, making them the

largest single sector for human rights complaints in Ontario.” The preponderance of complaints was race-related (62%), followed by disability (30%). As examples of the types of complaints, the guide offers anonymized instances of actual complaints which are recognizable when read in connection with past Commission documents, such as the *Racial Profiling Inquiry* (2003). The OHRC (2011: 9) notes that some of these complaints have not been proven, but stresses that “complaint processes are a vital part of the commitment to human rights in Canadian society” and suggests that the complaints offer insights that could guide policing institutions in organizational change.

The examples provided include instances of racial profiling and the use of racial slurs by police but attempt to encapsulate a wide spectrum of complaints which are not limited to the ground of race. This entailed expunging racial details from examples where race had been a salient feature. As an example of “degrading or rude treatment during arrest or detention” the guide (2011: 14) describes an instance of a “female suspect being strip searched on the street.” This description appears to reference the 1993 “late-night street corner strip search of a Jamaican woman named Audrey Smith” which is detailed by Andrea Ritchie (2017: 7) in her research into police violence against Black women and women of Colour. Ritchie describes Audrey Smith being approached by two Toronto Police Service officers who “told her she ‘looked like a drug dealer’ and proceeded to strip-search her right there on the street, in full view of protesting passersby.” Including this example, without reference to Smith’s race, ancestry or ethnic origin, perpetuates the erasure of police violence against Black women and reflects a failure to move beyond single-ground narratives towards the incorporation of intersectional analysis. Recall, that a decade prior to this guide, the OHRC (2001: 5) released a discussion paper recognizing that intersectionality has “particular implications for race or race-related cases” in that complaints

based on racial discrimination are particularly difficult to substantiate and so the racial aspects of multi-ground based complaints are most frequently neglected. The human rights and policing guide contains no consideration of how the various grounds intersect and resultantly issues pertaining to sex, disability (especially mental health) and sexual orientation are constructed as areas of competing priority, or other dimensions of diversity, discrete from the operation of racism.

The guide offers a contextual overview of complaints facing policing institutions which describes the majority of complaints as relating to services provided to the public. Notwithstanding this observation, the guide favours employment-related strategies for organizational change that prioritize representational diversity within police forces and stress the role of senior leadership. The OHRC (2011: 40) recommends completing a staff census to identify representational gaps and then pursuing “targeted recruitment efforts to attract under-represented group members.” Further, the guide (2011: 36) lauds the TPS for publicly stating that “a more representative police service is an essential affirmation of human rights values, and a key way to develop capacity to better serve a very diverse city with many different human rights issues.” This is reflective of a diversity management framework which focuses on increasing the presence and *visibility* of racial and ethnic minorities. Representational diversity risks tokenizing Indigenous and racialized staff by expecting them to fit into existing institutional norms and then speak for absent members of their under-represented groups. This has the dual effect of othering Indigenous and racialized staff by expecting them to symbolically fill the representational void (between the composition of the community’s population and the composition of the police force) and placing additional burdens on these Indigenous and racialized staff since their presence is expected to quell community concerns.

The guide does offer recommendations for addressing concerns related to police service delivery, however, the balance of these recommendations favour engagement strategies over accountability mechanisms. Where the OHRC offers recommendations that attend to accountability, these recommendations rely on utilizing existing complaint mechanisms, under the *Police Service Act*, and employee performance management tools to identify human rights concerns. These strategies involve placing significant confidence within the existing policing leadership and their commitment to holding staff accountable. This confidence is unreflective of the OHRC's own findings in the 2003 *Racial Profiling Inquiry*, where community members reported a lack of trust and independence in the police complaints system. By presuming the fundamental compatibility of human rights and policing, the OHRC's approach takes for granted that a "human rights lens" can be added onto existing police procedures and complaint processes without significant alteration.

The OHRC's partnership approach to organizational change is premised on "committed and involved leadership" and the report contains several quotes from Ontario policing services leadership pledging their investment in human rights. The President of the Ontario Senior Officer's Police Association, Anne McConnell, (2011: 8) is quoted as stating that: "Our members respect individual rights in an increasingly diverse society and support systems that foster and sustain inclusive police services and prevent human rights violations before they happen." Within McConnell's claim that police association members *already respect* "individual rights" within "an increasingly diverse society" there is no identification of a problem that needs to be addressed. This claim is emblematic of the attestations of human rights commitment offered throughout the guide in that police leadership repeatedly purports that support for human rights is *already in place*. In this way, as observed by Sara Ahmed (2006: 12), statements of diversity and

human rights commitments “might work to block rather than enable action, insofar as they block recognition of the ongoing nature of 'what' it is the organisation is committed to 'opposing.'”

Though the OHRC guide on human rights and policing claims to offer strategies for organizational *change*, throughout the guide policing is presented as already in alignment with human rights. Accordingly, what remains to be done under this diversity-management strategy is for the police to expand their outreach efforts to *publicize* the policing institutions’ commitment to human rights through community newsletters and diversity-related events.

The misalignment of policing practices with a systemic approach to human rights is still evident within the guide, in relation to those initiatives that police leadership refuse to undertake. The guide (2011: 41) notes that the collection of human rights data in service delivery is valuable “to assess patterns of racial profiling” but the TPS opted to “not implement it, noting that the TPS had already acknowledged racial profiling and steps to address it were already underway.” This brief acknowledgement of the decision to not collect data relevant to identifying and addressing racial profiling, belies the merits of a diversity management framework delimited by diversity “happy talk” as the *unhappy* or polarizing areas of human rights are avoided. Further, the encapsulation of all manner of differences under the diversity management framework disguises what measures are *not* being undertaken to directly address the problem of racial profiling by shifting focus to the measures in place to promote diversity and address human rights concerns more broadly. The only initiative listed in the guide that specifically tackles “racial profiling” is an e-learning training module for police officers developed by the TPS. No details regarding the length, content or rollout of this training are provided and there is no clear nexus between this isolated training effort and human rights accountability mechanisms. Instead, the racial profiling training appears to constitute a consciousness-raising effort that seeks to

address the behavior of individual officers through prompting them to examine their own bias. This emphasis on training accords with Toni Williams' (2001: 208) earlier observation, that the preference for the language of unconscious bias over systemic racism is reflective of the founding presumption that the overall "social order is just."

The happy diversity discourse espoused in the OHRC's approach to partnering with police was advanced at the expense of anti-racism measures and accountability. As a result, the OHRC's positioning of human rights and policing as fundamentally complementary, obfuscated the public criticisms facing Ontario policing services which gave rise to need for human rights *change*. These criticisms circulated primarily around claims of racial profiling. Rather than attend to this criticism directly, the OHRC'S guide to *Human Rights and Policing* reconfigures the "problem" facing the police as the inherent challenge of providing a "vital" social function that brings them into conflict with an increasingly *diverse* public. According to this reconfiguration, diversity is both a problem facing the police and the *solution* to that problem since effective diversity management strategies are purported to improve police-community relations and strengthen police institutions. The shift from anti-racism to diversity management elides the use of specific strategies to monitor and address racial disproportionalities in policing and subsumes all prohibited grounds under an All Rights Matter approach.

"Police Leaders [. . .] Don't Want To Be Told What To Do" – Strategies of Containment

The Project Charter agreements with police—by virtue of being untethered to human rights complaints and absent of any enforceability mechanisms—operated under the soft law device of voluntary compliance. The voluntary nature of this compliance is triply beneficial to

the police institutions. First, as a discursive strategy, *voluntary* change communicates institutional good will and abets the reimagining of the institution as progressive with respect to human rights. Second, the soft enforcement mechanics of a voluntary agreement enable both the establishment, and the maintenance of, the boundaries to change. As owners of their own change process (voluntarily agreeing to work with the Commission) these institutions control what form of human rights change is permissible. Finally, by entering into agreements voluntarily, police institutions seek to evade determinations that they have done anything wrong. Proactive change processes serve as documented proof of human rights compliance which can be provided as counter-evidence to claims of discriminatory practices and human rights violations. Further, even in instances where claims of discrimination are found to be substantiated—such as before the Human Rights Tribunal of Ontario (HRTO)—these voluntary agreements can be, and have been, invoked to avoid mandatory public interest remedies. In juxtaposing a case study of the Ottawa Police Race Data Collection Project with the Project Charter agreements, I reveal how voluntary human rights initiatives can paradoxically impede anti-racism change.

In my interviews with police, I heard repeatedly that voluntary agreements were more “palatable” precisely because these agreements allowed police to retain autonomy over their own institutional change processes and were not subject to external enforcement:

. . . police leaders like to be the ones to tell people what to do, they don’t want to be told what to do. So, if it’s something that is voluntary participation, it is much more palatable. (WPS 2)

You would like to not have to be told [. . .] how to act or how not to act, or what is proper or what is not proper. [. . .] especially in our profession [. . .] I think I know my people pretty well in this business, and I don’t just mean Windsor, in that we’re defensive. We don’t like to be accused. (WPS 3)

I think when something is imposed on a service provider, it has very little value because there’s no understanding of where it comes from. Or it’s a very reactive understanding, like Nicole filed a complaint, they agreed with her, *now we have to go*

do all this crap. So, it's very linear, and it doesn't afford opportunities for growth or understanding, or engagement. So, this approach to me is high value because *it doesn't force you to do more or less than what you like to do*. (TPS 4, emphasis added)

This differentiation between “reactive” and “proactive” measures obscures the context of these agreements as arising out of public complaints and accusations of racial profiling. Whereas, a complaint-driven response may lead to legally-enforceable public interest remedies—requiring the police to “*do all this crap*”—voluntary change agreements ensure that the police retain the ability to determine “what they would like to do.” The nature of the agreements reflects that what the police *would like to do* is engage in public image campaigns and efforts to diversify the service and what they *would not like to do* is engage in race-based initiatives that bring the conduct of police officers under scrutiny.

In the Project Charters being examined, senior police leadership retained their authority to set the institutional limits of the systemic change and used this authority to prevent police from being compelled to record racial details of who they stop and investigate. Prior to these agreements having been reached, Ontario legal scholars invested in challenging racial profiling, such as David Tanovich (2004: 919), had averred that race-based data collection is “one of the most significant steps that can be taken to address racial profiling.” The OHRC had also publicly advocated for the collection of data to monitor and combat the occurrence of racial profiling in its 2003 inquiry report. The OHRC's efforts to include race-based data collection in the Project Charters was met with explicit resistance by senior police leadership:

I'm all for improving our processes, but let's not push an agenda that is counter-intuitive. [...] we had some very intense discussions, [...] particularly on data collection and stops and this and that. I pushed back on stops and there was a reason I pushed back and we thought it was pushing another agenda, quite honestly. (TPS 1)

Additionally, an expressed merit of the voluntary Project Charter agreements from the perspective of the policing institutions was the avoidance of mandated data collection.

. . . obviously what's different is we choose what we want to review. When it's mandated, we have no choice. You know, Ottawa Police Service is an example, right? [...] So, they were mandated to do data collection, so they did the two-year vehicle stop data collection project, and so that would be something that they didn't have a choice about. So, I think that's one of the main differences. (WPS 9)

As I will detail further, the Ottawa project was *not* mandated, but agreed upon through a legally-binding settlement. Yet, this erroneous impression that the Ottawa data-collection project was mandated offers insight into what police leaders understood themselves to be avoiding through voluntary human rights Project Charters. These Project Charter agreements offered a mechanism by which police institutions could contain what sort of institutional change was required of them to meet legislative human rights commitments.

Ottawa is the capital of Canada, located in Southern Ontario, along the Quebec provincial border, and approximately 150 kilometers away from Kingston, which was the site of Canada's first race-based data collection project in policing. Unlike the Project Charter agreements entered into by WPS and TPS, the Ottawa Police Service (OPS) did not embark voluntarily on an organizational change initiative with the OHRC. Instead, the OPS reached a settlement agreement with the OHRC as a result of a human rights complaint filed by Chad Aiken. Aiken, a Black man, who was 18 at the time of the incident, was stopped by Ottawa police on May 29, 2005, while driving his mother's Mercedes-Benz. Aiken filed a complaint with the OHRC on July 5, 2005, alleging that he was stopped for no valid reason and had been subject to "discrimination, racial profiling and systemic anti-Black racism" (HRT0 2019). In accordance with the pre-Bill 107 process, the complaint was investigated by the OHRC and then referred to the HRT0. In July 2010, on the first scheduled hearing date, the parties (Aiken, the OHRC, and

the Ottawa Police Services Board) entered into a settlement agreement which resolved all but one issue referred to as “the data collection question.” Both the OHRC and Aiken were seeking an agreement requiring the OPS to collect data that would capture and track racial disproportionalities in policing. Whereas, the OHRC was satisfied with the requirement that the police be required to report on the race of drivers involved in traffic stops, Aiken, however, argued for an expanded data collection project which would also include pedestrian stops. Heedless of Aiken’s disagreement with the proposed resolution, the OHRC and the OPS “entered into an agreement in April 2012 with respect to the issue of data collection, which established a pilot project for the collection and analysis of data relating to vehicle stops” (2019 HRTO 934). The OPS then sought (and was temporarily awarded) dismissal of Aiken’s complaint before the Tribunal on the basis of the settlement with the OHRC, this dismissal, however, was subsequently set aside following judicial review and was remitted back to the Tribunal for hearing in 2015 (*Aiken v. Ottawa Police Services Board et al.*, 2015 ONSC 3793).

In the wake of the signed agreement, the OHRC (May 4, 2012) publicly reported that they had entered into a settlement with the Ottawa police which “requires the OPS to collect data for at least two years” and further requires the OPS to share the data with the OHRC for analysis and recommendations. The OHRC described the agreement as a continuation of their approach to *working with* Ontario’s police services, such as Toronto and Windsor. Yet, wherein the Project Charter agreements entered into with the abovementioned police services were unsuccessful at persuading them to engage in data collection, the Ottawa settlement insured that data collection was a legal requirement. In announcing the settlement, OHRC positioned data collection as mutually beneficial for police and communities:

Collecting race-based data about police stops is recognized around the world as one of the major tools available to help police services address allegations of racial

profiling, and is an important step forward in Ontario. People in every community need to feel confident in their police services. Collecting data can help police operate in an open way that can help earn the trust of the communities they serve. (OHRC, Annual Report 2012- 2013)

The OHRC positioned the collection of race-based data as a confidence-building exercise that helps the police by creating clear measurements and encouraging “bias-free policing.” Whereas the Project Charter agreements—which were structured on the basis of *all grounds* with no specific measures focused on race—were purported by the OHRC to address racism, the OHRC positioned the stated aims of the race-based data collection project as ostensibly neutral. Instead of claiming that the data collection would advance anti-racism or address racial profiling, the agreement between the OHRC and OPS aimed at addressing “*allegations* of racial profiling.” This equivocating settlement language is incongruent with the OHRC’s prior institutional position, set out in the 2003 inquiry report, that racial profiling undoubtedly exists.

As a term of the settlement agreement, the OHRC committed to withdrawing from the remainder of the *Aiken* proceedings, thus signalling the Commission’s satisfaction that the issues of public interest are adequately dealt with through the Minutes of Settlement (MOS). Distinct from the Project Charters which were broad in focus, the MOS entered into by the OHRC and the Ottawa Police Services Board (OPSB) contain one single initiative: data collection. The data collection initiative prescribed in the MOS required that officers record their perception of the race of the driver in all traffic stops for a two-year period. This observational recording approach mirrors the methods set-out in the only prior Canadian policing race-data collection initiative (the Kingston Police Data Collection project which established that Black residents of Kingston face disproportionate stop rates) but departs from the Kingston study by virtue of the refusal to include pedestrian stops. The MOS (2012, emphasis added) names “underlying values” informing the data collection initiative, including the commitment that the purposes of the

settlement are “to advance the study of data collection in policing within Canada, provide policing services in a manner that is consistent with the *Code*, address the concerns and perceptions of minority communities, and *not to disparage the OPS, OPSB or individual officers*.” In accordance with this commitment not to disparage individual officers, the MOS specifies that the data collected will not include the names of individual officers which thereby prevents the data from being utilized to substantiate specific allegations of racial profiling by a particular officer or from being utilized as a performance measurement tool.

For the Ottawa Police, the commitment to not disparage the service or individual members was tied to an institutional unwillingness to admit to the practice of racial profiling.⁵¹

As articulated by one OPS staff member:

. . . all along we were trying to reassure our members that this was not being done for any punitive reasons [. . .] The interesting thing for me is when I have individual conversations, there are some of the key leaders and stakeholders [. . .] that believe that the project was a huge waste because what it should have done, is it should have proved whether or not Chad Aiken was racially profiled. [. . .] When you enter into a settlement, it’s not about the proving or the disproving, right? (OPS 1)

A motivating factor for entering into settlement agreements is that it allows institutions to dodge findings of fault or explicit determinations of racial discrimination. As Karen Schucher (2014) describes, most human rights settlements do not include admissions of fault and most settlements are not made available to the public. Prior to the *Aiken* settlement, the OPS was already facing intense scrutiny for its treatment of Black people in Ottawa and was engaged in multiple initiatives to address these *allegations* of racial profiling. In 2004, Ambassador Bar and Grill co-owners Kazeli Chiteta and Harbi Gabad Mohamoud brought forward a human rights complaint

⁵¹ In 2003, when then Deputy Police Chief Larry Hill publicly acknowledged that officers in Ottawa are not immune to stereotyping people according to race, his comments were immediately met with denial and anger from his colleagues and the Ottawa Police Association which asserted, instead, that they don’t take any part in racial profiling (Tanovich, 2004).

against the Ottawa Police alleging that they were subjected to racial profiling and excessive force stemming from an incident in which police responded to a 911-call claiming that there were Black men with guns threatening the caller. OPS officers handcuffed and arrested all of the Black men (and not the one White man) present, despite not finding any guns or illegal activity. While an internal investigation cleared all of the officers of racial profiling and police brutality, Chiteta and Mohamoud's complaints were forwarded to the Tribunal by the OHRC on the basis that there was sufficient evidence to indicate that the complainants were subject to unequal treatment and discrimination based on race and intersecting grounds (as reported in McCooey, *Ottawa Citizen*, November 1, 2005). As with the *Aiken* settlement, the OPS avoided findings of racial discrimination and racial profiling before the Tribunal by entering into a settlement which required them to develop a policy on racial profiling.

While the Ottawa Police Service's commitment to develop a policy on racial profiling stemmed from the Ambassador Bar and Grill incident, the development and release of the policy came following the unlawful arrest, detention and assault of a 27-year old Black woman (SB)⁵² in September 2008. The Ottawa Police initially stopped SB suspecting that she might be a sex worker and subsequently arrested her for public intoxication only after she challenged the police officers as to why they had questioned her. SB was taken into custody, where she was violently kned in the back, forced to the ground, strip-searched by mostly male officers, and then left half-naked in a cell before being released several hours later. As argued by David Tanovich (2011: 138):

⁵² Though this woman's name was highly publicized at the time of the incident, she subsequently sought and received a publication ban. In respect of her wishes and her right to privacy (which was already violated by the judge's decision to make the video of her assault public) I am refraining from using her name.

Gendered and racialized violence [. . .] provide the only reasonable explanation for why the conduct of the police in this case departed so substantially from the minimum standards for a reasonably conducted strip search. This departure permitted the officers to use the strip search as a sexual weapon and a form of punishment to further her humiliation and degradation.

The incident spurred intense scrutiny of street-level policing in Ottawa and revealed similar instances of police violence towards detainees, such as a 2009 incident in which Special Constable Melanie Morris (one of the officers involved in SB's arrest) kicked an Indigenous man as he was being dragged into a cell (*CBC news*, December 1, 2010). Contemporaneously, the organization POWER (Prostitutes of Ottawa Work Educate and Resist) released a report (Bruckert and Chabot, 2010) detailing discriminatory treatment of Ottawa-area sex workers by Ottawa Police and issued a request to the OHRC⁵³ to intervene into this systemic discrimination by conducting a public inquiry. The request (Galldin and Roberston, December 1, 2010) outlined how Ottawa-area sex workers are subject to institutional and intersecting discrimination (based on prohibited grounds of race, ethnicity, gender, and disability) and argued that a public inquiry by the Commission could result in recommendations for harm-reduction strategies, community-engagement and comprehensive training for Ottawa police members. The OHRC never issued a public response to this request and to date the only mention of sex workers in Commission materials are in reference to “negative stereotypes” that are applied to groups protected by the *Code*.⁵⁴

⁵³ This request for a public inquiry was issued by Karin Galldin and Leslie Robertson of Galldin Law. Karin Galldin reports that they never received anything in the form of a response from the Commission (private correspondence).

⁵⁴ For example, the OHRC's most recent policy on racial profiling describes that “Indigenous and racialized women and transgender people may be profiled in gender-specific ways as suspected shoplifters, drug users, drug couriers or sex workers” (OHRC, 2019) and in the OHRC's report of mental health and addiction, they relay that “one addictions worker described negative stereotypes about women with addictions – they are assumed to be sex workers” (OHRC, 2012)

It is within this context that the OHRC pursued an agreement which excluded pedestrian stops and focused exclusively on traffic stops. The settlement agreement was immediately critiqued by Aiken's counsel (McLeod quoted in *CBC news*, May 4, 2012) who identified that the experiences of someone like SB, "would not be counted in the police data because she was stopped while walking in downtown Ottawa." By accepting the compromise that the data collection initiative would be limited to traffic stops, the Commission turned away from the intersectional consideration of street-level racial profiling concerns. As argued by Carl James, (1998: 62) in relation to the experiences of Black youth: "for pedestrians, particularly those with no alternatives, the street, or more specifically, the sidewalk, is [. . .] an integral part of daily living and a part of cultural life." The OHRC's neglect of those citizens reliant on public spaces, like the street, is embedded into the data collection initiative through the exclusive focus on drivers. This focus diverts attention away from—and obscures—police interactions which occur with pedestrians in the street. Tanovich (2004: 918) describes street-level stops as creating "fertile ground for profiling because they are 'low visibility' encounters." This low visibility is perpetuated by strategies that neglect the racialized policing activities that target sex workers, under-housed people and those for whom the street is part of daily living—such as harassment, carding, public strip searches, and starlight tours (Bruckert and Chabot, 2010; Comack, 2012; Maynard, 2017).

In speaking of the compromises that the OHRC undertook within the context of the *Aiken* settlement, OHRC staff noted that the settlement discussions are confidential and described the data collection project as being established within "the dynamics of litigation:"

Yeah, so the dynamics of litigation involve trade-offs and negotiating agreements at mediation, you have to think of the risks of proceeding vs. what you're able to obtain

at a table. And there are different considerations for organizations on the other side.
(OHRC 3)

Mediated settlements reflect a strategic calculation on the part of all parties involved based on factors such as: the likelihood of a finding of discrimination; the prospect of systemic orders; and the associated cost of proceeding to the Tribunal. As seen in the Adjudicator's determination on remedies in *Nassiah* (2007), the HRTO has demonstrated a reluctance towards requiring that the police collect race-based data even where claims of racial profiling have been substantiated. This reluctance on the part of the Tribunal results in tempered expectations on the part of the Commission as to what they can embed into systemic change settlements. While a mediated settlement is described by the Tribunal⁵⁵ as a "voluntary" process – by virtue of the dynamics of litigation – there is a coercive element wherein the impending threat, and uncertainty, of Tribunal orders provide an incentive to reach a more favourable agreement "at the table." Yet, unlike the Project Charters—which were entered into voluntarily, structured collaboratively, and adopted based on institutional will—the terms of the Ottawa data collection project became legally binding by virtue of it being a settlement agreement before the Tribunal.

Despite the Ottawa Race Data Collection Project being tethered to a human rights complaint, both Ottawa Police and the Commission initially framed the work as a collaborative partnership agreement. OHRC Chief Commissioner Barbara Hall (Press Release, May 4, 2012) described the project as "another exciting step forward in our work with Ontario's police services" and connected this project to the Toronto and Windsor Project Charters. Ottawa Police Chief, Charles Bordeleau, (OPS report to the OPSB, March 23, 2015) described the police

⁵⁵ Adjudicators Michelle Flaherty and Leslie Reaume describe that the core principle of mediation at the HRTO is that "it is voluntary and parties maintain their right to reject a settlement offer and have their matter adjudicated. Parties sign an agreement confirming their voluntary participation in the process" (2017: 374).

service as “committed to working collaboratively” with the OHRC and operating from the shared belief that “race based data collection is part of an organizational approach to ensuring bias-free policing services.” In addition, Ottawa Police held the expectation that having undertaken this data collection in consultation with the OHRC, the OHRC would then act as an ongoing partner in improving public relations. This partnership arrangement was difficult to sustain, however, in the wake of research findings by Lorne Foster and Lesley Jacobs (2016) which revealed that Black and Middle Eastern drivers were stopped at significantly higher rates than would be expected based on their population (2.3 times more and 3.3 times more respectively).

The report on the Ottawa Race Data Collection Project was authored by the same York University researchers who conducted the evaluation of the Windsor Police Project Charter – Lorne Foster and Les Jacobs, along with Bobby Siu. Foster and Jacobs (2016: 51) refrained from concluding that the racial disproportionalities revealed through the project prove racial profiling—a concept they describe as “vague or ambiguous at times” —and instead maintained that the results offer a “correlational (not causational) relationship on race and incidents of traffic stops.” In his remarks to the press, Ottawa Police Chief Bordeleau stressed that the researchers did not reach a conclusion that the police had engaged in racial profiling and instead suggested that the variances were reflective of “increased deployment in high-priority neighbourhoods, which are more ethnically-diverse” (as quoted in Yogaretnam, *Ottawa Citizen*, October 24, 2016). In contrast to these accounts, the OHRC (2016) released an unequivocal public statement describing the research findings as “alarming” and “consistent with racial profiling.” The OHRC stressed that while racial profiling cannot be proven through a quantitative study alone, courts and tribunals have recognized the need for circumstantial evidence and inference in findings of indirect racial discrimination. Accordingly, the OHRC (2016: 4.1) stated that the “high

disproportionalities found in this report are strong circumstantial evidence of the existence of some form of racial profiling.” In addition, the Commission (2016: 4.2) refuted Chief Bordeleau’s explanation of the disproportionalities, claiming that “a police deployment strategy that leads to greater traffic stops for racialized people in ‘high crime’ areas may itself be a form of systemic racial profiling.”⁵⁶ This *public* analysis of how institutional policing practices create and sustain racial disproportionalities was absent from the OHRC’s partnership-driven Project Charter work.

The juxtaposition of the Ottawa Race Data Collection Project with the Project Charters reveals the structural limitations of a partnership model which relies on the OHRC’s continued public endorsement of policing practices in order to sustain the relationship. Ottawa Police expressed feeling betrayed by the Commission’s public assertion that the disproportionalities were emblematic of racial profiling:

Right, so that one for us was a really hard pill to swallow. In that, you know, we worked so hard to get people engaged and excited and interested and participating and doing this, and to be reassured, reassured, reassured that it is not being done for the purposes of proving or disproving [. . .] And I think that’s something the Commission needs to really [. . .] think about. That if you’re going to enter into Charter Agreements and [. . .] you want organizations to participate in what we believe to be some really good ways to influence systemic change. How do you do that, and *not then slam them, or pull the rug out from underneath them*. Because that’s going to make it really hard, I think, for others to see it as viable. (OPS 1)

Ottawa Police entered into the data collection project with the expectation—and the Commission’s reassurance—that the project would not disparage the service, but instead would

⁵⁶ This recognition that deployment itself contributes to racial disproportionalities was noted by one Ottawa Police Officer I spoke with: “We shouldn’t be encouraging sending a traffic unit [. . .] the thing is that every single minority that runs through a stop sign, that is being pulled over and ticketed, none of these people driving have the money, [. . .] but the people in other neighbourhoods, in affluent neighbourhoods they go through stop signs, they don’t slow down in a school zone, and nobody is there, you know.” (OPS 3)

stand as confirmation of the service's commitment to bias-free policing and human rights. Yet, unlike the documentation of human rights commitment which abounded in the work of the Project Charters, the collection of race-based data unearthed patterns of inequity that could not be easily excused without calling into question standard policing practices.

The requirements of the Ottawa Police data collection project engendered resentment and backlash from frontline officers. In an unpublished research report that was commissioned by the OPS to gauge the impact of the project on frontline officers, researchers Greg Brown and Phillip Primeau (as reported by Tumilty, *Metro News*, 2017) stated that officers described themselves as “de-policing” —reducing their interactions with the public to avoid being accused of racial profiling. This practice of de-policing was colloquially referred to as FIDO amongst OPS officers, an acronym for “fuck it, and drive on.” One OPS staff member stated:

. . . it was being referred to as the FIDO project [. . .] With the membership there's a very negative connotation when you mention the project [. . .] when you have buy-in, there's a culture shift, but there's been no culture shift, it's not happening. (OPS 3)

As will be shown with the Project Charters, the evaluation reports suggest a low-level of awareness amongst frontline officers that the human rights institutional change work was even taking place. Conversely, the Ottawa Race Data Collection Project was inescapable for frontline officers and met with more explicit resistance. In a follow-up report on the data collection project, conducted by Foster and Jacobs in 2019, there was found to be a 35% decline in the overall number of stops for traffic violations in the five years the data collection project was in place and a persistence of the same racial disparities throughout this five-year period. The decline in overall stops supports the claim that the project has contributed to a conscious decrease by frontline officers engaging in “proactive policing,” yet the persistent racial disparities offer counter-evidence to the claim, made by Greg Brown (2019: 416), that there has

been a pendulum shift away from over-policing racialized groups. Despite the resistance of frontline officers, and the lack of “culture shift”, the impact of the project permeated throughout the service.

The dynamics of litigation informed the OPS’s continued commitment to the Race Data Collection Project. The HRTO ruled on the final component of the Aiken’s 2005 complaint in 2019. In that ruling, the adjudicator, Mark Hart, declined to make any order requiring the Ottawa Police to expand the race-based data collection beyond traffic stops (to include pedestrian stops) or requiring the Ottawa Police to continue data collection (the decision notes that Ottawa Police continued to do so voluntarily past the two-year period stipulated in the settlement). In his decision, Hart (2019 HRTO 934) expresses that he has “every confidence that the project will continue” based on Ottawa Police having demonstrated “ongoing commitment to anti-racism organizational change and addressing systemic racial bias through a number of initiatives, again with public consultation, reporting and accountability.” Amongst the initiatives offered as evidence of respondent’s commitment to anti-racism, the adjudicator made note of racial profiling materials developed in partnership with the Law Enforcement Accountability Project (led by David Tanovich), yet failed to note that these materials were also developed within the dynamics of litigation⁵⁷ or to confirm that these materials were being incorporated in operational practices.⁵⁸ Thus, the Ottawa Police were able to evade binding orders requiring them to do more

⁵⁷ As detailed above, these materials were developed as part of a settlement stemming from the Ambassador Bar and Grill incident

⁵⁸ In my interviews with OPS staff, I heard that though they developed “probably the best policy for policing on racial profiling in the world” in 2011, its impact has been minimal in that “it’s supposed to be reviewed every two years. We’re in 2017 and it has not been reviewed. It has accountability measures, but I’m not sure if anybody is following up on that. [. . .] on paper we have some really fantastic policies and procedures, I’m not sure if it’s translating into action in the proper way” (OPS 2).

comprehensive data collection (such as including pedestrian stops) by demonstrating a willingness to voluntarily engage in human rights initiatives.

Like the Project Charter agreements, the Ottawa Race Data Collection Project was an organizational containment strategy undertaken to avoid more comprehensive mandated anti-racism initiatives. Yet, unlike the Project Charter agreements—which involved no legal mechanism to compel or ensure human rights compliance and instead relied on institutional willingness—the Ottawa Race Data Collection Project was tied to a binding mediated settlement and exposed patterns of racial inequity that called into question standard policing practices. The Ottawa case is a complex example of first, the necessity of the dynamics of litigation in order to compel specific anti-racism initiatives, and second, the ability to evade more comprehensive mandatory measures through demonstrations of institutional voluntary and discretionary compliance. This case is also illustrative of how, for the participating policing institutions, partnering with the Commission is undertaken with the expectation that the Commission will legitimate the institution's human rights efforts and shield the institution from public criticism. Examining this case in relation to the Project Charter agreements reveals that voluntary human rights partnerships can have the paradoxical impact of impeding human rights accountability, particularly in relation to anti-racism and policing. Given policing institutions sustained unwillingness to be told “what to do”—as well as their demonstrated reluctance to engage in race-specific measures—external accountability mechanisms are necessary in order to elucidate, and compel responsiveness to, racial disproportionalities in policing. In order for the OHRC to fulfill its mandate to advance the public interest and intervene in contexts of systemic racial discrimination, it is necessary to move beyond voluntary compliance measures to achieve certainty and enforceability.

Conclusion

Reflective of its mandate under the Ontario *Human Rights Code*, the OHRC has been central in defining public policy on racism and policing within Ontario, particularly since the release of its 2002 inquiry into the impact of racial profiling. This inquiry signified authoritative acknowledgement of the practice of racial profiling. Through the 2003 inquiry report, the OHRC broadened the scope of discussions regarding racial profiling, in recognition of communities who had been hitherto neglected in public accounts – namely, Indigenous communities and those subject to Islamophobia. The OHRC further advanced public policy on the manifestations of institutional racism with the release of the 2005 *Policy and Guidelines on Racism and Racial Discrimination* which affirmed the need to collect race-based data within institutions with a history of race-based complaints. Yet, the OHRC's contributions to institutional accounts of racism and racial profiling have also been accompanied with containment mechanisms that have served to obscure sustained scrutiny on policing as a primary sector involved in racial profiling and reinforced an unconscious bias framework which individualizes racism and favours consciousness-raising strategies over accountability instruments. These containment mechanisms were informed by an underlying liberal logic operative within the OHRC which rendered the existing social order largely unproblematic and racial discrimination by public institutions as predominantly aberrant.

Chapter 4: The Toronto Police Service's Evasive Maneuver

*The Commission also continued a major initiative to work with the Toronto Police Services Board (TPSB) and the Toronto Police Service (TPS) to support the TPS in identifying and responding to human rights issues and concerns, both within the organization and in its services to the public. In July 2007, the three parties signed a Human Rights Project Charter, which formalized a three-year collaborative project **to enhance realization of human rights and anti-racism in TPS.***

- Ontario Human Rights Commission Annual Report, 2007/2008

At the time of this inaugural agreement, the Toronto Police Service (TPS) and the Toronto Police Services Board (TPSB) – the first institutions to enter into a Project Charter agreement with the OHRC – were facing multiple human rights complaints, primarily related to claims of racial discrimination. In the context of these complaints, the OHRC had been seeking forward-looking public interest remedies⁵⁹ before the HRTO to “promote compliance” with the *Code* (section 45.3). The Project Charter agreement provided an opportunity for the participating institutions to reconstitute their relationship from that of legal adversaries towards becoming value-aligned partners. Reflective of the political shift in the province, from the Common Sense Revolution led by the Conservative Harris government to the “neoliberal obfuscations” (Coulter, 2009) of the Liberal McGuinty government, the leadership of the Toronto Police took a centrist turn from the hardline conservatism of Julian Fantino to the community policing approach of Bill Blair. Whereas Fantino accused the OHRC of erroneously depicting Toronto officers as a

⁵⁹ Section 35 of the Ontario *Human Rights Code* enables the OHRC to apply for an order to “promote compliance” with the *Code*, including an order which directs “future practices.”

“bunch of racists” and legally disputed the *Toronto Star* reporting on racial profiling, Chief Blair (as quoted in Freisen, 2005) came into his role stating: “the only way to fight the problem of racism in our service is by addressing it as part of the organizational culture.” Despite Blair’s public avowals and the centrality of race and racism to the context of the first Project Charter, however, Toronto Police purposefully framed the agreement to be inclusive of “all rights.” This shift, from *fighting racism* to promoting *all human rights*, enabled the TPS to utilize this agreement to reconfigure both the problem facing the service and the relationship between policing and human rights.

For the TPS, the Project Charter provided a containment strategy to manage the multiple demands for institutional change. Throughout the Project Charter process, the TPS clung to standard policing practices while publicly professing organizational change driven by a commitment to human rights and anti-racism. In order to elucidate the mechanisms of this containment strategy, I draw on my interviews with TPS staff, press coverage, the public reporting of the Project Charter, and final evaluation reports. I consider first, the context of the Project Charter—*what necessitated this public policy response and how was this response framed?*—in relation to the TPS’s representation of their own impetus for engaging in human rights “change,” arguing that though the TPS was driven to engage in human rights efforts in response to racism, the decidedly All Rights Matter approach minimized the centrality of race and racism within the agreement. Secondly, I examine the boundaries of the TPS’s institutional willingness to engage in human rights change and relinquish standard policing practices, whilst exploring: *what was accomplished and what was prevented through the Project Charter agreement?* Finally, I demonstrate how the TPS employed the Project Charter as a containment strategy to evade public interest remedies from the Human Rights Tribunal and defend their

institutional reputation against claims of racism and racial profiling, through exploring: *what practices were preserved and what changes were blocked by virtue of this agreement?* Beyond providing an account of the limited accomplishments of this particular partnership arrangement, this case study provides clarification as to the weaknesses of soft law approaches in combating racism.

Toronto Police Project Context – *What is there to change?*

Toronto is the most populous and most diverse city in Ontario, and in Canada, and operates under the municipal motto: “Diversity, Our Strength.” Toronto is also the capital city of the province of Ontario and the central hub for most Ontario Public Service institutions, including the OHRC. OHRC Chief Commissioner, and former Toronto City Mayor, Barbara Hall (OHRC Annual Report, 2006/2007: 1) positioned the Toronto Police Project Charter as arising out of the legislative changes to the mandate of the OHRC and as part of an institutional shift towards focusing on “the big picture,” “proactive research,” and “cooperative work.” The agreement between the OHRC, TPS and TPSB was announced as a ‘Human Rights Project Charter’ which would establish a joint working group with representatives from each participating organization who would “identify human rights issues, design response plans and direct initiatives, and measure and report publicly on progress” (OHRC Annual Report, 2006/2007: 20). At the time that the OHRC entered this agreement, there were several complaints against both TPS and TPSB alleging discriminatory treatment based on race for which the OHRC continued to hold carriage. In announcing the adoption of the Project Charter agreement, the OHRC insisted that “nothing in the agreement prevents the Commission from continuing to enforce Ontario’s *Human Rights Code* and seek public interest remedies in resolving complaints filed against the TPS or TPSB” (Annual Report, 2006/2007: 20). Yet, as

the post-Bill 107 OHRC sought increasingly to effect “big picture” organizational change through cooperative measures, massive reductions to staffing and budget hampered the OHRC’s investigation and litigation capacities. Furthermore, mandated public interest remedies against the Toronto Police were demonstrably impacted by this voluntary initiative with the OHRC.

In speaking to the context for the first Project Charter agreement with the Toronto Police, OHRC staff framed the transition taking place at the Commission as necessitating a new approach to the work. Additionally, OHRC staff identified limited success in effecting human rights organizational change through public interest remedies arising out of individual complaints:

The Toronto Police Service one arose in a context of many human rights complaints, litigation between the two of us on many issues, and the fact that we were going, you know, we were striving for better results in remedies. Public interest remedies would come and they would go and they wouldn’t necessarily make any big change. So we were looking for things, something new that could maybe create better prospects of success. (OHRC 1)

The new approach adopted by the Commission was contingent on the cooperation of the partnering institutions and as such, this reliance on cooperation enabled the participating institutions to set the boundaries of these agreements.

The TPS and TPSB quickly constructed a narrative in which the presence of this agreement provides evidence of a pre-existing commitment to human rights exhibited by the service:

Inherent in the Human Rights Project Charter is a recognition by the OHRC of the good work being undertaken by the TPSB and the TPS to promote human rights in all aspects of the Service. We are encouraged both by this recognition and by the willingness of the OHRC to sit with us as partners and provide their expertise with respect to challenging racism in organizations. (TPSB minutes, 2007, March 22)

This claim, that the Project Charter constituted a recognition by the OHRC that the TPS was already engaged in “good work,” is incongruent with the historically adversarial relationship between the TPS and the OHRC, as well as the preponderance of human rights complaints filed against the TPS with respect to employment and services. What is evident in this claim is that the TPS entered the Project Charter agreement with an appreciation of how partnering with the OHRC would be advantageous towards the rebranding of the TPS as an institution that was *already* committed to human rights, and whose commitment was recognized and validated by the OHRC. These TPSB meeting minutes further reflect that the challenge of responding specifically to “racism” was invoked both by the OHRC and the TPSB as informing the context of this partnership arrangement. The TPS and TPSB were seeking to repair the reputational damage caused by the first *Toronto Star* series on racial profiling in the TPS, and the Project Charter agreement offered a ready counter-narrative to the race-based criticisms facing the service. Yet, in setting out the work to be undertaken within the context of these agreements, the TPS tactically turned away from race and racism.

Toronto Police staff recognized the Project Charter agreement as an opportunity to exert control over the type of human rights change being demanded and to establish their own prerogative for human rights work.

At the time there were many Tribunal complaints *based on race* that were filed against the Toronto Police. And in many cases the systemic remedies that were being requested were duplications. And I said there must be a better way of addressing this. Because you can’t keep asking us, for example: ‘and do training, and do training.’ Can we do an omnibus approach? (TPS 4, emphasis added)

As captured in the above passage, TPS sought to construct an agreement that would channel the systemic remedies and institutional change demands facing the TPS into an “omnibus approach.” Whereas systemic remedies which are attached to a specific human rights complaint are

constructed to reflect the operation of discrimination within the context that gave rise to the complaint, the “omnibus approach” advanced by the TPS is generic by design. As such, it is consciously inclusive of “all grounds” and inattentive to specific manifestations of racism and racial profiling.

Beyond the legal context of multiple Human Rights Tribunal complaints, Toronto Police were also motivated by a desire to improve “community relations.” As with the flattened discourse of “race relations,” “community relations” for the TPS involved restoring trust in policing as a necessary public institution and addressing the *perception* of racial profiling. The Project Charter was framed as advantageous to the TPS to the extent that the TPS could improve “community relations” without being subject to an overly invasive “human rights agenda.” As I heard plainly from a senior TPS official:

We knew why we were there, but you needed to get that buy-in [. . .] I’m all for improving our processes, but let’s not push an agenda that is counter-intuitive. I know this organization and I know if our members see the Project Charter as pushing a human rights agenda for a purpose they don’t see how it’s going to assist in community relations, they go ‘oh yeah?’ I need them to really believe in it. (TPS 1)

This TPS official elaborated that the “counter-intuitive” human rights agenda to which the TPS objected included the push, by the OHRC, to collect race-based statistics. TPS staff described themselves as successfully pushing back against the OHRC’s attempt to concretize race-focused measures in the agreements, and instead prioritized initiatives that would assist in community and public relations.

TPS staff were explicit in describing that the expanded ‘all grounds’ focus was introduced by them, and not the OHRC: “The Commission was very focused on race. I was able to persuade my Chief at the time to talk to them about we want all human rights issues” (TPS 4). The Commission’s focus on race was reflective of the substance of the human rights complaints

facing the TPS, as well as a groundswell of attention and concern regarding the practice of racial profiling. The Ryerson University Diversity Institute's (2014: 2) evaluation report of the Project Charter described the "genesis" of the agreement as arising out of the context of racial profiling: "Prior to the advent of the Project Charter, the Board and the Service were dealing with a number of issues, for example 'Driving While Black,' the use of lethal force against individuals suffering from mental illnesses, and the use and collection of race-based statistics." Despite this genesis, the project objectives contain no mention of anti-Black racism, mental illness, use of force, or race-based statistics. The Project Charter offered a strategy to address the reputational damage facing the service in relation to these issues, but the agreement itself did not constitute a recognition by the TPS that these issues necessitated any substantial institutional change.

The four-page Project Charter agreement between the TPS, TPSB and the OHRC was signed on May 17, 2007, and the terms of the agreement adhered to Toronto Police's desire to move beyond race to encompass "*any possible discrimination* in the hiring and employment of TPS members and in the delivery of services by the TPS" (2007, emphasis added). By expanding the focus of the agreement to include all grounds in both employment and service provision, the TPS evaded specific focus on concerns of racism or racial profiling. While the terms of the Project Charter agreement specified that the human rights project was not "an admission of liability" to any of the identified areas of concern, this evasion from even naming racism as an area of concern obscured what issues were being targeted by the "change" to be undertaken through this agreement. Working within an anti-racism framework begins with affirming the institutional presence of racism and the need for affirmative measures to directly challenge the policies and practices that sustain it. Rather than framing the Project Charter (2007) as a point of departure from past practices, the agreement described TSP and TPSB as *already engaged* in

“organizational change initiatives aimed at protecting and promoting human rights and equity.” As such, the TPS entered into the agreement with the OHRC from the standpoint of consolidating existing work and diversity commitments, not engaging in anti-racism driven systemic change. Notwithstanding the absencing of race and racism from the language set out in the agreement, the OHRC consistently described the partnership agreement as primarily targeting racism.⁶⁰ This incongruence regarding the centrality of racism to the Project Charter work enabled Toronto Police to offer this agreement as part of its community relations strategy and as evidence of its responsiveness to concerns of racism, without actually having to engage in explicitly anti-racist work.

Rather than attend to racism, the apparent focus of the Project Charter (2007:3) is on the diversification of the TPS to reflect “the diversity of the City of Toronto.” Within the TPS, the Project Charter was led through the Toronto Police “Diversity Management” Unit—plainly connecting the human rights approach of the Project Charter to the extractive logics of diversity management. Though racism is not named as a specific area of concern in the TPS Project Charter, “racial profiling” is referenced in two instances in the agreement—exclusively under the purview of training.⁶¹ The training objective (2007:4) included: “training members of the TPS, to reinforce or enhance their understanding of what constitutes racially biased policing, racial profiling, racial discrimination and harassment, disability discrimination and harassment, or any

⁶⁰ For example, the OHRC’s annual reports claim that the “OHRC’s work on *racism and racial profiling* has been a driving force in its partnership with the Toronto Police Services Board on the Toronto Police Charter Project” (2009/2010) and describe the purpose of the agreement as follows: “enhance realization of human rights and *anti-racism* in TPS” (2007/2008) and “develop appropriate initiatives to prevent and *eliminate racism* and other forms of discrimination” (2008/2009) – all emphasis added.

⁶¹ This aligns with Ahmed’s observation that “racism” rarely entered into her conversations with diversity practitioners and “only in discussions of diversity training was racism mentioned at all” (2012: 142).

other violation of the Ontario *Human Rights Code*.” Yet, even within the context of training, the discourse of diversity is dominant and the need for continued “diversity training” is espoused as a method for ensuring that members of the TPS “provide policing services in a manner which is anti-racist, non-discriminatory, professional, respectful, tolerant, inclusive and ethno-culturally sensitive” (2007:4). The expectation that *diversity* training can ensure *anti-racist* service delivery is incongruent with the TPS’s refusal to take-up anti-racism outside of the context of training. Additionally, training on racial profiling is only specified in the agreement for “new recruits” and to be provided to current Service members “where necessary.” This provisional commitment to addressing racial profiling through training is a product of the cooperative approach of the agreement, which constructs the TPS’s existing practices as largely unproblematic and only in need of refinement.

The approach set out in the Project Charter agreement is premised on consensus and institutional autonomy, which establishes that the OHRC holds no authority over the TPS and TPSB by virtue of the agreement. The model of consensus adopted within the Project Charter agreement (2007) sets out that the working groups and project sponsors will *attempt* to achieve objectives by consensus, but in the event that this cannot be achieved, “the parties will agree to disagree on the particular issue and carry on with the rest of their work.” Additionally, the agreement established that “the TPSB and TPS are owners of their own change process” (2007) which entails that the TPSB and the TPS are able to establish institutional ‘no-go zones’ where the Project Charter and the OHRC are not permitted to venture. OHRC staff identified in retrospect that these ‘no-go zones’ allowed for human rights issues to remain unaddressed despite the presence of the Project Charter agreement:

So, there’s a misconception about Project Charters, it’s that they are going to be the solution to all human rights issues in the organization [. . .] But, the truth is the

organizations themselves are the owners of their own change process [. . .] There may be human rights issues that the organization is unwilling to deal with in the context of Human Rights Project Charters. (OHRC 3)

In the case of the TPS, this institutional unwillingness was directed towards the same concern that provided the initial impetus for the Project Charter agreement, namely, racial profiling and differential treatment of racialized groups.

I thought honestly the Commission was too focused on getting the data, the racialized persons being inordinately stopped [. . .] That was one of the key pieces that we had tense conversations about. It was a bit of a lightning rod. Data collection. Why? (TPS 1)

The consensus model, set out in the agreement, allowed the TPS to refuse any initiatives aimed at identifying and tracking the practice of racial profiling within the service, while still retaining the public relations benefits of partnering with the OHRC. Thus, the terms of the agreement allowed the TPS to *signal* a willingness to undertake human rights change while preserving its own institutional prerogative.

The centrality of race and racism to the context of the Project Charter is evident in the repeated references to fight racism espoused by both TPS and OHRC leadership, however, the movement away from addressing “race and racism” is apparent from the onset of the Project Charter agreement. The TPS’s desire to include “all grounds” in the agreement was intimately tied to their unwillingness to entertain initiatives that would intervene directly into racial profiling or track racial disparities in policing. Instead, the language of anti-racism within the agreement is subsumed within an incommensurate diversity management framework and enumerated alongside vague commitments to: “respect”, “tolerance”, and “ethno-cultural sensitivity.” The broad framing of the agreement obscured the TPS’s unwillingness to be held accountable to anti-racism institutional objectives. The Project Charter agreement further obfuscated the need for “change” within the context of the Toronto Police since it was employed

by the TPS as verification that the Service was already engaged in “good work” and that further assessment and review was required to determine the necessity of human rights initiatives. This All Rights Matter approach to institutional human rights change evaded the necessity of crafting a public policy response to racism and instead framed the TPS as already in alignment with human rights precepts.

Toronto Police Project Charter 2007-2010 - *Boundaries of Willingness*

In reviewing the accomplishments and limitations of the Toronto Police Project Charter, I return to Sara Ahmed’s (2007: 607) insights regarding the politics of documentation wherein “documents create fantasy images of the organizations they apparently describe.” Documented diversity efforts offer *claims* about what an institution is doing in the promotion of institutional diversity, but these documents fail to reflect actual institutional practices. Instead, these documents serve as auditable performance indicators that help craft a narrative that the institution is committed to diversity and equality work. In recognition of the politics of documentation, I treat the auditable accounts of the TPS’s human rights work undertaken within the context of the Project Charter not as objective record-keeping but rather as part of the strategy of containment advanced by the TPS. This approach to the politics of documentation involves attending to the silences and absences contained within these documents and considering these documents in conversation with additional research data (such as interviews and press coverage) to elucidate boundaries of the TPS’s institutional willingness to engage in human rights change. In examining what was accomplished and what was prevented through the TPS Project Charter agreement, I interrogate two documents in particular: the TPS’s own Final Report (released October 2010) and the commissioned evaluation report completed by the

Diversity Institute at Ryerson University (released in 2014). These two accounts of the Project Charter process both offer laudable assessments of the overall change process yet provide windows into the blockages and boundaries of institutional willingness towards human rights change.

In its own Final Report (2010: 8), TPS claims that the “true impact” of the Project Charter “will not be felt or fully realized and appreciated until many years after when future members can declare that ‘any discrimination which may have existed [. . .] has been eliminated.’” Both the TPS and the OHRC retrospectively positioned the work of the Project Charter as creating the long-term foundations for human rights change and setting the TPS on a course of ongoing human rights progress, rather than a short-term strategy with easily observable impacts within the three-year timeframe of the agreement. Correspondingly, TPS leadership spoke of the Project Charter as aiding in the organizational trajectory towards building a more inclusive and diverse organization. “The organization has moved forward, and the Project Charter was a big part of that—in the hiring practice, in the way we work with one another, with our relationships with communities, our training, our education, our discipline piece behind the scenes” (TPS 1). The accomplishments of the Project Charter were repeatedly framed as attitudinal, in that the TPS is purported to have undergone an organizational culture change towards increased understanding of, and respect for, human rights. Additionally, TPS staff believed that the agreement was productive to the extent that it assisted in shifting the public’s perception of policing.

The work undertaken within the framework of the Project Charter was organized into four priority areas (Accountability; Learning; Public Education; and Recruitment, Selection,

Promotion & Retention) which were then driven by a sub-committee comprised of both TPS and OHRC staff members.



Figure A: TPS Project Charter Team, *A Celebration of Progress* (2010)

Of the four priority areas, only Public Education reflects a dedicated focus to the area of service, whereas the other three areas primarily concern employment practices. The TPS Final Report (2010: 8, emphasis added) parenthetically describes the area of Public Education as relating to “media and communication” and describes the task of this sub-committee as developing “a comprehensive *communications strategy* that highlights and promotes TPS human rights and anti-racism initiatives within the Service and to the community.” Throughout the Final Report, references to “anti-racism” only appear when coupled with “human rights” thereby obfuscating the extent to which – if any – initiatives are held out to be specifically responsive to concerns of racism. Instead of a “public education” strategy which could include informing the public of their rights in interactions with the police, the TPS engaged in a “communications strategy” aimed at informing the public of the TPS’s commitment to human rights. In particular, the TPS claims to have disseminated a “comprehensive media insert” on “Fair & Equitable Policing” to approximately 460,000 Toronto households.



Figure B: TPS Media Insert on “Fair & Equitable Policing” (2009)
featuring OHRC Policy Director Shaheen Azmi

As seen in Figure B – the “Fair & Equitable Policing” insert prominently showcased the service’s partnership with the OHRC as evidence of its commitment to human rights and equity. This public relations campaign reflects the TPS’s own self-assessment of the problem facing their service, namely, that the problem is *not* that the police are engaged in unfair or inequitable practices, the problem is that the *public* needs to be better informed about how fair and equitable the police already are. The media insert features Chief Blair (2009) addressing himself to “the vast majority of you who are law-abiding citizens” and seeking to convey that the police are implementing strategies to create a service “more reflective of the community we serve.” Throughout the media insert, there is a preference for describing the police as committed to “diversity” and “cultural competence” rather than “anti-racism.”⁶² Through this communication

⁶² The term “anti-racism” never appears in the 8-page insert, though there is a commitment to an “e-learning program which will address racial profiling and racially-biased policing.”

strategy the TPS position existing policing initiatives as in alignment with the service's human rights commitments and as though these initiatives are *sanctioned by the OHRC*. In particular, the Project Charter is showcased alongside two intensive area-based policing strategies which targeted non-White Toronto neighbourhoods for increased police visibility and interventions: the Toronto Anti-Violence Intervention Strategy (TAVIS) and the School Resource Officers (SRO) program. Both of these targeted police strategies have been widely criticized for the criminalizing of Black and racialized youth, and subjecting low-income, Black and immigrant communities to hyper-surveillance practices and military-style raids (Saber, 2017; Madan, 2016). This media insert illustrates that not only did the TPS employ its partnership arrangement with the OHRC to shift focus away from addressing concerns of racism, they also employed their association with the OHRC to reframe their existing initiatives as "fair and equitable."

Reading the TPS's Final Report in relation to the Project Charter promotional materials serves to highlight the disconnect between what was touted and what was undertaken. In a *Celebration of Progress* (2010: 3) handout released by the three partnering institutions (OHRC, TPS, TPSB), the Accountability Sub-Committee is credited with reviewing TPS governance "to ensure compliance with the *Human Rights Code*, to increase awareness and compliance within the Police Service, and to capture information from human rights complaints for analysis and reporting." Yet the details of the Final Report reflect that in many instances few, if any, modifications were applied to existing human rights-related policies. For instance, the TPS (2010: 41) reported that "it was determined that the Board's Race & Ethno-cultural Policy did not need to be revised at this time." This two-page policy, which was approved by the Toronto Police Service Board in 2006, states that practices that "may be racist [. . .] will not be tolerated" but provides little guidance with respect to what practices constitute racism or how these

practices will be identified, tracked, addressed, or prevented. This declarative claim, that racist practices will not be tolerated, may also serve to block recognition of racism in so far as it is understood to entail that that which is tolerated is therefore not racist. Amongst the accomplishments listed under the Accountability subcommittee in the TPS's Final Report (2010: 77) is the determination that, having reviewed Board policies, there are "no barriers noted at present." Through the Project Charter process, the TPS gained confidence in its own human rights compliance, without modifying most of its policies to become more human rights compliant.

Where there were improved accountability processes and practices put in place, these changes were facilitated by external legislative requirements which *compelled* the TPS to institute changes, such as requirements under the *Accessibility for Ontarians with Disabilities Act* (AODA), which the TPS was required to implement by January 1, 2012, and complaint management processes introduced by the *Independent Police Review Act, 2007*, which created new complaint reporting requirements and the Office of the Independent Police Review Director in October 2009. Thus, while TPS staff reported that one of the key accomplishments of the Project Charter was the creation of "a system that tracks complaints" (TPS 3), the context for this accomplishment includes the implementation of a new province-wide police complaint-oversight body. Additionally, whereas the TPS's Final Report (2010: 85) describes the centralization of human rights complaints as having been "concluded, approved and operational", the Diversity Institute's evaluation report (2014: 30) describes the complaint data collection methods as "disjointed" and producing "fragmented data" which hinders the use of this data for systemic trend analysis.

Given the emphasis on building human rights awareness and attitudinal change, the training subcommittee was framed as integral to the human rights change strategy. As expressed in my interviews with TPS staff, the TPS had been repeatedly ordered to “do training” (TPS 4) in the wake of findings of discrimination. TPS staff were critical that these mandated training orders failed to recognize the training efforts already underway and to take a holistic approach to embedding human rights into the institution. The learning programs pursued under the Project Charter (2010) were organized around the creation of a learning plan that addressed: “1. A human rights framework that can be used as a foundation for training / learning programs” and “2. ‘Racial profiling’ or ‘racially-biased policing.’” The embedding of a human rights framework throughout the training of both “uniform and civilian members” was offered by TPS staff as one of the paramount examples of the success of the Project Charter:

I think the biggest result is an increased sort of literacy with respect to human rights [. . .] And instead of viewing human rights as an ‘okay now you’re taking a human rights course,’ it became mandated that it would become a part of every course in some way, and you actually have to call out in the course training standard how it’s being addressed within that course. So, the idea is every time a civilian member or a sworn member takes training of any kind there’s a human rights component to it. It’s a part of everything we do. So, those are some big changes, systemically, yeah. (TPS 3)

. . . the type of training that the service [now] does around I’ll say human rights or D&I [Diversity & Inclusion] is so omnibus and so multi-pronged, [. . .] it’s a long road to get cops to appreciate, you know how, if you can’t use a gun you fail? Well, if you don’t get human rights, you fail. They get it now, they get it now. (TPS 4)

Whereas, prior to the Project Charter, human rights content was delivered as a one-off discrete training session, the omnibus approach purported to embed a human rights lens into all aspects of policing. The omnibus approach also entailed that human rights, diversity and inclusion were conflated into one approach. The Learning Sub-Committee developed “Human Rights 101, Learning Objectives” which detailed the human rights content to be incorporated into various training modules. These learning objectives were largely reflective of the human rights principles

and concepts promoted by the OHRC, including differentiating between different types of discrimination (systemic, direct and constructive), intent versus impact, and substantive versus formal equality. Yet, the learning objectives also contain framing that significantly departs from past education and outreach work done by the OHRC.

The TPS Learning Objectives (2010: 95) contained multiple references to the so-called human rights concept of “reality versus perception” and applied it specifically “to the issue of Racial Profiling including concepts of ‘isms’ and ‘phobias.’” The emphasis on this distinction—particularly in relation to racial profiling—reflected an enduring unwillingness by the TPS to give adequate credence to reported experiences of those subjected to racial profiling by the police. Further, this distinction runs counter to the OHRC’s own (2003: 10, emphasis added) inquiry report on racial profiling which averred that: “Regardless of whether profiling can be proven to occur in any given context, the widespread *perception* among racialized groups that it is occurring is cause for concern.” In defining discrimination within the context of public education materials, the OHRC (*Human Rights at Work*, 2008) has identified that determinations of discrimination and harassment contain both subjective and objective elements in that human rights law takes into account how conduct is experienced by the person being harassed and how it would be viewed by a “reasonable person.” Recall that following the Supreme Court of Canada ruling in *RDS*, Courts have recognized that within the context of the Canadian justice system a “reasonable person” must be taken to be aware of the history of discrimination and social reality of racism. The TPS’s invocation of a non-existent human rights principle of “reality versus perception,” in the context of human rights training alleged to be addressing concerns of systemic racism, reflects the broader preservation of standard policing practices and beliefs throughout the Project Charter initiatives.

The learning initiatives with respect to racial profiling, in particular, lay bare the conceptual logics which were untouched by the human rights change ushered in by the Project Charter. The Human Rights 101 e-learning module (2010: 96) contains a component on “racially-biased policing” which frames racial-profiling as the result of unchecked bias and stereotypical assumptions instead of “actual behaviour” or “information about suspected activity.”



Figure C: Sample screen shot of Human Rights 101 – E-learning module (2010)

As I’ve argued in relation the OHRC’s definition of racial profiling, this delineation between criminal profiling and racial profiling legitimizes existing policing practices and neglects how constructions of criminality are informed by racialization. Further, this distinction, in tandem with the TPS’s reliance on their own ability to differentiate between perception and reality, serves to cement the police’s confidence in their own objectivity. This confidence in the police’s ability to act on behavioural observation, and not racial bias, was expressed by one of the TPS Project Charter leaders as a rationale for not needing race-based data:

I draw back on my own personal experience, I've been on the road, I've stopped persons of all descriptions, believe me. The first thing that draws your attention is the activity, maybe it's just lack of skill of driving [...] you don't know who the person is, often until you've come up beside them [...] you don't know often until you've really approached the vehicle. (TPS 1)

Whereas, both community perception and data collection have supported a determination that Black and racialized drivers are stopped at disproportional rates, this TPS leader's "reality" was that police traffic stops are based on objective assessment and he was unwilling to collect any information that could offer counterevidence to this reality.

The reframing of the focus of the training from "racial profiling" to "racially-biased policing" is emblematic of the TPS's conceptualization of racism as the result of unchecked biases. As described by Jessi Lee Jackson (2018: 51) in her analysis of implicit bias training for police: "While racism may be the implicit 'main point' of the training, the replacement of race with bias has consequences. 'Bias' is a term used to reflect individual prejudice." Whereas a structural understanding of racism considers how the institution of policing perpetuates socioeconomic racial inequity, an understanding of racism through the lens of individual prejudice negates the impact of inequitable power relations and systemic analysis. When systemic human rights issues—or what the Human Rights 101 Training refers to as "isms" and "phobias"—are reduced to expressions of bias, it becomes easier to treat experiences of racism as "perception" and biases as ubiquitous. As I heard from one TPS leader:

White people do not have a monopoly on racism. Which people seem to perceive and believe. I'll tell you, I know as many Black people who are just as racist and they can't stand anybody else if they aren't Black. But they aren't racist, cause they're not White? That fallacy.

For me, this project opened my eyes but, again, it was something I was already attuned to. Other people weren't. They're being challenged [. . .]

"I'm not prejudice"

Well you have bias.

"No, I don't"

Well, I'm going to show you or prove to you that you have bias.
Everybody has it and that's just the way it is. (TPS 2)

The presentation of bias as something that “everyone has” obscures the specificity of the relationship between racism and policing, and treats racism as one prejudice amongst many. Additionally, this bias framework facilitates the view that Black people are “just as racist,” since racism is seen to be operating exclusively in the context of individual interactions and not through institutionally sanctioned differential treatment and racialized constructions of criminality. Notwithstanding the espoused commitment to build “human rights and anti-racism initiatives” by both OHRC and TPS leadership, the human rights learning program objectives, created under the Project Charter, contain no learning objectives aimed at understanding or addressing racism, and present human rights principles as consistent with existing policing practices rather than necessitating organizational change.

In contrast to the TPS's unwillingness to collect data with respect to racial disproportionalities in the service's interactions with the public, the Recruitment, Selection, Promotion and Retention Sub-Committee (2010: 50) articulated the need for a data evaluation system which would enable the TPS to assess “its demographic makeup” and establish a baseline against which progress could be measured. With respect to recruitment, the sub-committee (2010: 9) described themselves as focused on attracting “women from diverse communities” – with “diverse communities” being used as a euphemism for racialized groups. The subcommittee's progress report (2010: 61) identified a central barrier in attracting these racialized female applicants to be “entrenched (anti-police) cultural beliefs” wherein these “diverse communities” fail to recognize policing as “a noble or viable occupation.” In order to address what the sub-committee terms “cultural bias” against the police, the TPS (2010: 59, emphasis added) reports to have “made continuous efforts to *re-educate* and position: 1. Policing

as a viable career option. 2. TPS as an employer of choice.” The re-education efforts set up under the Project Charter included focus groups and community meetings aimed at “female applicants from diverse backgrounds” and the creation of promotional materials that feature racialized people as police. This strategy—which seeks to fold members of an “outgroup” into existing organizational structures—is premised on a perception of the problem as a lack of diversity, as opposed to a structurally antagonistic relationship between racialized communities and the police. As such, the lack of diversity within the TPS is cast as the fault of racialized communities—the cultural (anti-police) bias—which needs to be overcome through re-education.⁶³

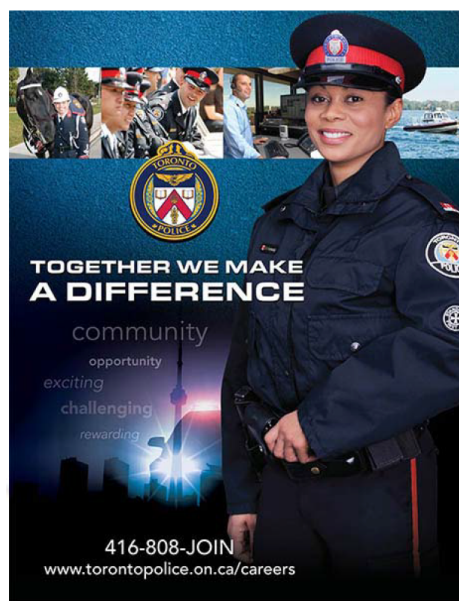


Figure D: TPS promotional imagery distributed in Sway magazine and TPS website (2009)

⁶³ This casting of the problem as cultural bias against the police is pernicious throughout ‘diversifying policing’ literature and Canadian police services. As expressed by Edmonton Police Service Diversity Recruitment Coordinator Moly Penner in the *Canadian HR Reporter*: “Many immigrants have had bad experiences dealing with police in their home countries and don’t necessarily recognize Canada’s officers as ‘good guys’” (Dobson, March 23, 2009).

In identifying the issues that produce a lack of diversity within the TPS, the Project Charter was primarily premised on the need for accommodation and support, rather than the removal of inequitable barriers or practices. While the Project Charter did *name* the need for “barrier elimination,” it set out to accomplish this objective through the current employment systems review. The resulting suggestion set out in the TPS Final Report (2010: 68) from this examination of the existing employment systems review was that there be “minor changes to the wording for some of the recommendations [. . .] to ensure that they are written from an anti-racism perspective as opposed to just considering equity and diversity.” This passage of the report offers an encouraging differentiation between “anti-racism” and “equity and diversity,” which is largely absent from the report on the whole. Yet, the claim that an anti-racism perspective can be applied retroactively to the recommendations of an already completed employment systems review by making “minor changes to the wording” reflects that, for the TPS, anti-racism commitments are primarily rhetorical and require little amendment to existing institutional processes.

Even in instances where the TPS Final Report (2010: 67) identifies processes as reproducing a lack of diversity, the problematization focuses on the “diverse communities” rather than the processes: “there is evidence that promotion processes and the systems that support them, including mentoring, are not as accessible to some racialized and marginalized members.” This representation of the issue does not call into question the criteria used to determine who is suitable for a promotion, instead it suggests that additional support is needed in order for the existing promotional processes to be more accessible to racialized and marginalized members. This cultural deficit model constructs “racialized and marginalized members” as needing added assistance in order to succeed, rather than examining the extent to

which the institution itself is inhospitable towards members marked as “diverse” by virtue of their race, gender, sexuality or religion. Accordingly, the Project Charter established Internal Support Networks (ISNs) for groups historically underrepresented within the TPS, including those from “Black”, “South Asian”, “Filipino”, “LGBT”, “East Asian”, “Aboriginal” communities, as well as “Women.” The TPS Final Report (2010: 70) described these ISNs as having the following bulleted objectives: “Assistance in recruitment;” “Mentoring of members;” “Increasing promotions and developmental opportunities for members;” “Social and community involvement.” Thus, the institutional expectation is that—through the establishment of these ISNs—members of historically marginalized groups will take up the work of guiding other marginalized members through institutional processes and attract members of their communities through recruitment and public engagement initiatives. This institutional practice has been described as “cultural taxation” (Joseph & Hirshfield, 2011) where additional responsibilities are placed on marginalized members of an organization to satisfy diversity commitments. The emphasis on recruitment and social community involvement underscores that these initiatives are aimed at improving the TPS’s *public image*, rather than fundamental institutional transformation.

As a public image campaign, the Project Charter resulted in some notable successes. During the three-years that the Project Charter was in place, the Toronto Police Service was named as one of Canada's Best Diversity Employers (2008, 2009, 2010).⁶⁴ In 2011, Chief Bill Blair was profiled in “Diversity Journal” wherein he lauded the Project Charter as having established a “legacy of greater awareness of, and commitment to, human rights issues” (March 22, 2011). Furthermore, Ryerson University’s Diversity Institute (Cukier *et al.*, 2014: 35)

⁶⁴ This ranking is conducted by Mediacorp and involves reviewing the “diversity and inclusiveness initiatives” of those employers that apply to be selected under Canada’s Top 100 Employers project (Canada’s Top 100, n.d.).

reported that the Project Charter resulted in “positive change in public perceptions of the Service and human rights.”⁶⁵ There is a significant disconnect, however, between the official accolades garnered by the Project Charter, and the lack of community awareness of both the Project Charter itself and the professed human rights transformation of the TPS. In a four-page handout entitled “Human Rights Project Charter: A Celebration of Success” (2010: 3), the TPS and the OHRC jointly claim that the Project Charter will benefit the Police Service and the city of Toronto, in that “the community will have more confidence as the TPS deals with a number of controversial issues, including racially biased policing. This will lead to an improved relationship between the Police Service and Torontonians of all backgrounds.” Yet, the Diversity Institute’s evaluation of the Project Charter found that none of the community members they spoke with were aware of the Project Charter (even those that held volunteer positions with the TPS) and many of the internal TPS respondents believed that the majority of TPS members would not know of the Project Charter’s existence or its initiatives.

The commissioned evaluation report (2014: 55) completed by the Diversity Institute offers, at times, a mitigated account of the accomplishments of the Project Charter, in that it finds that “direct causal links between the implementation of the Project Charter and behavioural changes in the Service cannot be established.” The report (2014: viii), however, is mostly enthusiastic about the Project Charter as a “unique collaborative approach to addressing human rights issues in policing.” Like the OHRC’s guide on policing, the Diversity Institute positions

⁶⁵ The data the Diversity Institute relied on to reach this conclusion is based on the TPS Environmental Scans telephone survey of Toronto residents, which indicated a decrease in the number of “community members who believe TPS officers targeted members of minority/ethnic groups for enforcement” – from 23% in 2001 to 17% in 2011 (2014: 76). There is no indication that the Diversity Institute independently verified this data. Additionally, the reported perceptions of police bias are not disaggregated by race, which has been shown by Wortley and Owusu-Bempah (2009) to reveal statistically significant variance.

diversity as both a challenge facing the police⁶⁶ and the solution to this challenge.⁶⁷ The Diversity Institute explicitly applies a “business case for diversity” to the context of policing which is described as supplemental to human rights and premised on there being “competitive benefits to effectively managing diversity within the police workforce”—among which is the benefit of “mitigating legal and reputational costs” (2014: 5). Under this logic, the public image of diversity protects the institution from reputational damage and accusations of racism. Despite noting that the Project Charter arose in the context of issues around racial profiling and racial discrimination allegations, the Diversity Institute’s evaluation report does not contain a single reference to “racism” and provides no particular consideration of “anti-racism initiatives.”⁶⁸ Notwithstanding this lack of differentiation between human rights initiatives and explicitly anti-racism initiatives, the report (2014: 37) does note that interviews with community members expressed concern about the “lack of impact on racial profiling” and concludes that “the Project Charter had little impact on the Service’s relations with young Black males.” Yet, this reported failure is couched within a broader narrative of human rights progress and the success of mainstreaming diversity.

The selection of the Diversity Institute as the external reviewer of the Project Charter reflected the turning away from racial profiling concerns over the course of the three-year agreement. The Diversity Institute is part of a self-described entrepreneurial business school, the

⁶⁶ “Toronto’s uniquely diverse population. With 51% of Toronto residents born outside of Canada, over 160 languages spoken, 230 different ethnic origins, and a wide array of cultures comes a unique set of challenges with respect to policing” (Cukier *et al.*, 2014: 3).

⁶⁷ “Many police services have recognized the importance of diversity in policing and have made concerted efforts towards becoming more sensitive to human rights issues and more representative of the increasingly diverse populations they serve” (Cukier *et al.*, 2014: 4).

⁶⁸ The term “anti-racism” appears 13 times in the report and always alongside human rights, for instance “the Project Charter’s focus on human rights and anti-racism” (Cukier *et al.*, 2014: 24).

Ted Rogers School of Management. In a previous policy guide on human rights based data collection, the OHRC (2009a: 72) described the Diversity Institute's research specialty as "diversity in the workplace and developing and evaluating policies and programs to improve practices in organizations." This prioritization of *workplace* diversity was reflected in the evaluation report (2014: 36), which placed emphasis on the "increased frequency and scope of targeted recruiting to underrepresented groups, increased attraction of diverse groups to civilian entry-level positions, and increased success of female applicants in achieving senior-level uniform positions." The Diversity Institute report does not problematize how this instrumental invocation of diversity relates to the Project Charter's non-responsiveness to community racial profiling concerns. Further, the Diversity Institute's report (2014: 21, 3) accepts the rationale that "financial and resource constraints" prevented the TPS from implementing initiatives (such as an inclusive design review, confidential employee database, and improved exit survey) and that "municipal budget constraints may have shifted the strategic priorities of the Service and diverted resources and personnel from Project Charter initiatives." The Diversity Institute's report offers no critical assessment of the claims of financial and resource constraints and draws no adverse conclusions from the de-prioritization of human rights initiatives within the budget relative to other institutional activities.

The Project Charter offered a systematic approach to engage in a review of human rights practices within TPS and TPSB. Staff from the OHRC stated that the project allowed for integrated changes to policy and processes that they had been unable to achieve through settlement negotiations or Tribunal orders. TPS staff maintained that the process enabled an attitudinal shift regarding support for human rights within the service and an overall recognition of the value of human rights amongst TPS staff. These laudatory assessments, however, are

necessarily silent with respect to racism and racial profiling. In order for human rights initiatives to be palatable for the Toronto Police, these initiatives had to be configured as compatible with existing police practices such that issues like carding, use of force, and race-based data collection were shielded from the work of the subcommittees. Additionally, a detailed review of the documented accomplishments claimed under the Project Charter reveals that the TPS repeatedly reached the conclusion that existing practices were unproblematic or required only minor revision. The lack of change or anti-racism work accomplished under the TPS Project Charter is obscured by the efforts devoted to the communication strategies which served to promote a diverse image of the TPS and block race-related criticisms. The “all rights matter” approach pursued by the TPS enabled them to craft an institutional narrative of human rights progress, while abstaining from instituting accountability mechanisms and metrics which could reveal the extent of systemic inequities.

Containment Strategy: *Blockages and Diversions*

For the TPS, partnering with the OHRC provided the Police Service with human rights legitimacy which could be invoked in response to community criticism. The Diversity Institute reported (2014: 38, emphasis added) that “the OHRC has stated that, in full recognition of the significant challenges and concerns that still remain regarding issues about racial profiling, *the Service is a national leader with regards to diversity and human rights initiatives.*” This attestation of human rights leadership diminishes recognition of enduring systemic inequities and diverts focus away from addressing the “significant challenges and concerns” that remain with respect to racial profiling and structural racism in policing. The Project Charter offered the TPS a ready response to public criticism regarding racial profiling without requiring the Service to

implement any accountability measures to track or address the practice of racial profiling. Additionally, the partnership work with the OHRC provided the TPS with a defence against the imposition of public interest remedies before the Human Rights Tribunal. As such, the Project Charter was employed as a containment strategy by the TPS in order to defend itself against public criticism and block anti-racism driven institutional change mandates.

The TPS's newly formed alliance with the OHRC coincided with the 2010 *Toronto Star* redux into racial profiling. This 2010 series reignited scrutiny of racial disproportionalities in policing, with particular attention to the practice of carding. Carding refers to the policing practice of questioning members of the public and recording the information gathered in a police database for investigative or informational purposes. As described in the *Toronto Star* (Welsh, Feb 8 2010) series: "Officially called 'Field Information Reports,' the collection of names, addresses, acquaintances and skin colour on small, white cards is a longtime investigative practice used by all Toronto police officers." Repeating the 2002 investigation approach, the *Toronto Star* filed a freedom of information request for all contact cards ("208 cards") filed between 2003-2008 and conducted a race-based analysis of this carding data. The analysis (Rankin, Feb 6 2010) revealed that: "Although blacks make up 8.4 per cent of Toronto's population, they account for three times as many contact cards." The 2010 series expanded the account provided in the 2002 report by demonstrating that beyond the racial disproportionalities in traffic stops and simple possession, Black Torontonians have been subjected to disproportionate surveillance and documentation by the police, even when there is no reason to suspect criminal activity. Toronto Police officials, including police union president Mike McCormack (as quoted by Rankin, Feb 6 2010), defended the practice of carding as "invaluable" in crime investigations, as it provided police with a database of the known associates and

frequented locations of persons of interest within particular neighbourhoods, which can then be used to identify suspects or verify alibis. Additionally, Police Chief Bill Blair (as quoted in Comack, 2012: 54) maintained that the practice constituted “good police work” and provided a means for police officers to “get to know” a neighbourhood. Nonetheless, Blair (as quoted Rankin, Feb 6, 2010) acknowledged that “racial bias is a problem in policing, as it is elsewhere in society” and affirmed that the TPS and TPSB were taking measures to address it.

The partnership arrangement with the OHRC figured prominently in the Toronto Police’s defense against the *Star*’s findings. In the same article identifying the racial disparity, the *Star* reports (Rankin, Feb 6, 2010) that TPS have “embarked on a unique partnership with the Ontario Human Rights Commission to improve human resources practices, and how police serve the public.” Chief Human Rights Commissioner, Barbara Hall, is quoted (Rankin, Feb 6, 2010) as lauding Chief Blair for standing up to his peers and acknowledging that “racial profiling exists within the Toronto Police Service.” Correspondingly, the TPS received a much more favourable treatment in the *Star*’s 2010 report in comparison to the 2002 series. In an editorial entitled “Police evolving on race profiling” (Feb 15, 2010), Chief Bill Blair is distinguished from his predecessor Julian Fantino for his “clear recognition of the problem” and “firm determination to fix it.” Blair’s acknowledgement of racial bias and human rights positioning served to insulate the police from further critique and calls for institutional change. Recall that in 2005, Kingston Chief of Police, William Closs, employed the “all people have biases” rationale to account for racial disparities revealed through the Kingston Police’s data collection initiative. Though the acknowledgement of racial bias signals progress from the discourses of denial espoused by Fantino, this acknowledgement also serves to naturalize findings of racialized policing and favour consciousness-raising strategies which lack accountability mechanisms.

The evasion of accountability is particularly concerning in the context of the HRTO, which is imbued with the power to order forward-looking public interest remedies in order to ensure compliance with the *Code*. In *Forrester v. Peel (Regional Municipality) Police Services Board et al*, (2006 HRTO 13), Adjudicator Mary Ross Hendriks stated that even where there is evidence of voluntary and discretionary respondent compliance, public interest remedies are still necessary to achieve certainty and enforceability. Nevertheless, the Tribunal refrained from applying enforceable remedies against the TPS and TDSB since there were already voluntary institutional human rights efforts underway. In the case of *Phipps v. Toronto Police Services Board* (2009 HRTO 1604), a Black mail-carrier, Ronald Phipps, was found to have been subject to racial profiling by Toronto police officer Michael Shaw. Phipps sought remedies requiring the TPSB to implement practices to prevent a recurrence of the type of racial discrimination he experienced, but Tribunal Adjudicator Kaye Joachim ruled that:

[60] While I accept that the form of racial discrimination that I found occurred in this case is likely not an isolated incident, *I find that the remedy requested by the applicant or any remedy to ensure future compliance, is not warranted in this case.* Since 2005, the TPS, through the TPSB and the Chief of Police have initiated a series of actions to reduce the occurrence of racial discrimination in policing. Their uncontested efforts are set out in Schedule A attached to this Decision. *In light of these initiatives, I find that no remedy to ensure future compliance is required.*” (2009 HRTO 1604 – emphasis added).

Schedule A, submitted by the TPSB, detailed the efforts undertaken to address “diversity issues” with significant emphasis placed on the Project Charter. The TPSB invoked the Project Charter as evidence of their commitment to diversity *and anti-racism*, and presented evidence of diversification efforts which obscured the specific challenges of addressing anti-Black racism or the practice of racial profiling.⁶⁹

⁶⁹ For instance, the TPSB describes having had “much success” at recruiting individuals from diverse background and evidences this claim by stating that 545 (approximately 50%) of their

In the case of *Maynard v. Toronto Police Services Board* (2012 HRT0 1220), Toronto Police Officer Ryan Baker's decision to trail and point his firearm at Rawle Maynard, a young Black man driving his father's BMW, was also found to constitute racial profiling. Again, the Adjudicator, Leslie Reaume, was called upon by the complainant to apply broad public interest remedies including: the retention of independent experts to develop an anti-racial profiling policy or directive; a policy review with respect to use of force and racialized groups; consideration of racial bias and use of force in officer performance reviews; and race-based data collection relating to use of force. Adjudicator Reaume, however, declined to issue any of these remedies and instead wrote:

[207] Although I appreciate the seriousness of the conduct experienced by Mr. Maynard and the potential for that conduct to arise from systemic racial bias, *I decline to exercise my discretion to order the public interest remedies sought by Mr. Maynard on the basis of the evidence before me. To do so could cause interference with the collaborative work of the Commission and the TPSB. There was insufficient evidence that the work of the Commission and the TPSB together is incapable of bringing about the changes that Mr. Maynard is hoping to see in policing in Toronto.* [. . .] I have determined that it is appropriate to follow the decision in *Phipps*. In that case, which involved the same respondent, the Tribunal recognized that since 2005, the TPSB has been involved in a series of actions to reduce the occurrence of racial discrimination in policing. As was the case in *Phipps*, those efforts are contained in the uncontested statement of facts filed by the TPSB in this proceeding. (2012 HRT0 1220 – emphasis added).

This decision makes explicit that, despite the Project Charter's inattentiveness to racial profiling, the presence of this agreement was a direct impediment to ordering specific public interest remedies to address structural racism within the Toronto Police Service, even in the period after the Project Charter had ended. Further, in *Maynard*, the OHRC sought an order requiring that the TPSB bring the circumstances of the complaint and decision to the attention of the Project

graduates since 2006 are "Aboriginal, visible minority and/or female officers" without differentiating between or among these equity-seeking groups (2009 HRT0 1604).

Charter Learning Sub-Committee to consider the development of a written directive dealing with non-discriminatory responses to gun-calls. Adjudicator Reaume (2012 HRTO 1220 para 202) declined to make this order stating that it was “not necessary” since the “Commission, whose mandate is the promotion, protection and advancement of human rights, is a signatory to Project Charter and is in the best position to urge the TPSB to undertaking initiatives which would address the findings in this Decision.” This request and determination reflect the OHRC’s limited authority to set the agenda or ensure compliance under the voluntary conditions of the Project Charter agreement.

Ironically, both *Phipps* and *Maynard* were cited in Andrew Pinto’s *Report of the Ontario Human Rights Review* (2012, fn 75) as examples of the Commission “successfully interven[ing] in cases involving racial profiling” in that the Commission assisted in articulating how racial bias could be inferred based on the behaviour of the police officers. Despite both of these cases offering seemingly progressive findings of how racial profiling can be surmised, even in the absence of direct evidence of racial bias, these cases also reflect a failure of the Ontario human rights system to offer systemic interventions into racial profiling and policing. This failing was abetted by the Project Charter agreements with police, as I heard explicitly from one OHRC staff member: “Project Charters have been obstacles to the Tribunal ordering public interest remedies” (OHRC 3). Through embracing a collaborative and voluntary approach to broadly defined human rights change, the TPSB was successfully able to persuade the HRTO that enforceable orders to respond to specific use of force and racial profiling concerns were superfluous. Thus, despite the OHRC’s insistence at the onset of Project Charter agreements that nothing within the agreements prevent the institution from pursuing public interest remedies or intervening in HRTO cases where there are matters of public interest, in practice, these agreements served as

replacements for – not supplements to – mandated public interest remedies which ensure enforceability, certainty and specificity.

In addition to impeding public interest remedies, the pursuit of voluntary partnership agreements had an adverse impact on the Commission’s litigation activities. As described in Pinto’s review (2012, B.2.), the post-Bill 107 OHRC operated on the belief “that collaboration with respondents is more effective than confrontation.” Pinto reported that this prioritization of partnerships has resulted in a low intervention rate into cases before the Tribunal, with the Commission intervening in less than 1% of all HRTO applications and only initiating three applications before the Tribunal under section 35 of the *Code*.⁷⁰ This prioritization of voluntary compliance measures—over litigation or public inquiry—is reflected in the OHRC’s repeated choice not to intervene into applications involving racial profiling and the Toronto Police. Markedly, the OHRC elected not to intervene in two contemporaneous substantiated cases of racial profiling against the TPSB in which subjects of racial profiling were not Black men. In *McKay vs. Toronto Police Services Board* (2011 HRTO 499), Toronto Police Officer Christopher Fitkin was found to have subjected Garry McKay (who is described by the HRTO as self-identifying as an Aboriginal man) to racially biased policing⁷¹ and in *Abbott vs. Toronto Police Services Board* (2009 HRTO 1909), Toronto Police Sergeant Stephen Ruffino was found to have subjected Sharon Abbott to discrimination based on an intersection of the grounds of

⁷⁰ Section 35 sets out that one of the functions of the Commission is to apply to the Tribunal in matters that concern the public interest and to obtain orders that promote compliance with the *Code*

⁷¹ McKay was temporarily arrested by Fitkin on suspicion of riding a stolen bicycle and was subsequently told to produce a receipt for the bicycle he was riding and subjected to multiple criminal records searches.

gender and race.⁷² Both of these cases expanded legal recognition of the operation of racial profiling, yet neither resulted in public interest remedies aimed at future compliance or propelling institutional change efforts. The Commission's failure to intervene in these cases is reflective of the prioritization of particular subjects of racial profiling (i.e., Black men) at the expense of an intersectional or decolonial analysis. Additionally, the institutional preference for voluntary compliance measures over litigation is to the detriment of applying enforceable measures to address racism in policing.

The partnership arrangement with the OHRC served to authenticate the TPS's commitment to human rights both before the Tribunal and within the press. The OHRC lauded Chief Blair for acknowledging racial profiling but applied little public scrutiny to the TPS's unwillingness to track racial disparities in policing. In the OHRC's *Human Rights and Policing* guide (2011: 41), the TPS's refusal to collect data that would enable them "to assess patterns of racial profiling" within the context of the Project Charter is glossed over by the claim that: "the TPS had already acknowledged racial profiling and steps to address it were already underway." In the same guide (2011: 40), the OHRC praised the TPS for being "one of the most successful services in hiring members of under-represented groups" without elaborating on which groups are considered to be "under-represented" or contextualizing this claim within the demographic composition of Toronto. While the TPS was being applauded by the OHRC for embracing human rights, the TPS and the TPSB were actively seeking to minimize their accountability to the *Code* by arguing before the HRTTO that complaints of racial profiling ought to be dismissed if the substance of the complaint has already been investigated under the *Police Service Act* (an

⁷² Abbott was arrested and handcuffed by Ruffino while delivering newspapers in the early hours of the morning.

investigative process in which police departments frequently investigate their own public complaints).⁷³ Though the OHRC intervened in this matter before the HRTTO to argue against the TPS's requests for dismissal—and in favour of an expansive interpretation and application of the *Code*—throughout its annual report (2011-12) the OHRC continued to extoll the virtues of partnering with the TPS and applying a “human rights lens” to “every part” of the service. In this way, Toronto Police enjoyed the reputational benefits of partnering with the OHRC without being beholden to the anti-racism initiatives the OHRC sought to encourage and promote.

Conclusion

For the TPS, the Project Charter Agreement offered a containment strategy that was efficacious as both a legal tactic and an approach to reputation management. The All Rights Matter framing of the agreement obscured the TPS's resistance to addressing racial profiling directly, while offering auditable evidence of institutional human rights efforts. The persuasiveness of this human rights documentation is reflected in the HRTTO's repeated satisfaction that additional public interest remedies are not warranted since the TPS and TPSB have already demonstrated a commitment to human rights. In this way, the soft law measures of the Project Charters were employed as an alternative, and not a compliment, to enforceable forward-looking legal requirements. Though anti-racism was repeatedly invoked in the messaging surrounding the TPS Project Charter, the decidedly pluralist orientation of the

⁷³ Despite the HRTTO having previously dismissed complaints that had been investigated under the *PSA*, in 2013 an HRTTO panel denied the TPS's and TPSB's requests to dismiss multiple applications alleging racial discrimination on the basis that the substance of the human rights applications had not been “appropriately dealt with” (see *Claybourn v. Toronto Police Services Board* 2013 HRTTO 1298)

initiatives evaded race-specific measures or legally enforceable change initiatives. The Project Charter served to cement a narrative that Toronto Police were *already* responsive to racial profiling concerns and *already* in alignment with human rights commitments such that standard policing practices could continue.

Chapter 5: The Windsor Police Service's Diversity Washing

In February 2011, we began a joint initiative with the Windsor Police Service, Windsor Police Services Board and Ontario Police College to address policing and human rights issues, and ultimately to prevent discrimination and racism.

— Ontario Human Rights Commission Annual Report, 2010/2011 (emphasis added)

The same year that the Windsor Police Service (WPS) entered into a Human Rights Project Charter agreement with the OHRC, Windsor Chief of Police Gary Smith “abruptly” resigned from his role amidst allegations of police brutality and a report from the Ontario Ombudsman that Smith had failed to cooperate with the province’s Special Investigations Unit (Powell, *Toronto Star*, Dec 22, 2011). The following year, his successor, Al Fredrick, launched “Project Accountability” —a twenty-seven-point plan aimed at addressing problems in the service—and declared that the “current status quo is not the path forward for the Windsor Police Service” (as quoted by *CBC News*, Jan 6, 2012). It was in this context of a commitment to break from past practice, that the WPS pursued human rights institutional change. My examination of the work done under the WPS Project Charter, however, demonstrates that the All Rights Matter approach adopted by the Windsor Police conversely served to *enshrine the status quo* by framing existing practices as already in alignment with human rights and misrepresenting the central problem facing the service as a lack of diversity.

For the Windsor Police, the Project Charter provided a containment strategy to deflect community criticism of racism and police brutality. Through a review of the contemporaneous press coverage, as well as my interviews with WPS staff and documentary review of Project

Charter reports and materials, I trace how the problem of police misconduct was reconfigured as a need for diversification. As with the TPS agreement, I first consider the community context of the WPS Project Charter, as well as the institutional pressures which provided the impetus for engaging with the OHRC, and ask: *What necessitated this public policy response?* Secondly, I identify how the Project Charter served to reinforce, rather than challenge, the *status quo* within Windsor Police. In doing so, I explore *what was rendered problematic (requiring change) and what was rendered unproblematic (not requiring change) through the Project Charter agreement?* Finally, I demonstrate how the WPS employed the Project Charter as a containment strategy to deflect attention away from claims of racism and police misconduct, and instead focus on the challenges—and merits—of diversity. Here I explore the effects produced by treating the problem of racism as a problem of diversity and ask: *What practices were preserved and defended by virtue of this agreement?* This case study serves to illuminate how an All Rights Matter approach to diversity and human rights can obscure an institutional unwillingness to address racism in policing.

Windsor Police Project Context – “We could always do better”

Windsor is a significantly smaller city than either Ottawa or Toronto, with a population of less than a quarter million, and is situated along the United States border across from Detroit, Michigan at the “busiest international border crossing between Canada and the United States” (Foster and Jacobs, 2015: 22). Windsor policing narratives focus on the distinctiveness of Windsor from Toronto and Detroit, and from American racial tensions in policing more broadly. From the onset of the Project Charter, there was a disconnect between the OHRC and the WPS with respect to the centrality of addressing racism within this agreement. The OHRC (Annual

Report, 2010/2011: 21) proclaimed that the “joint initiative” would help address human rights issues and “ultimately to prevent discrimination and racism.” The OHRC also presented the Project Charter in connection to its 2003 *Racial Profiling Inquiry*,⁷⁴ suggesting that this partnership arrangement was responsive to the concerns raised in that inquiry report as well. Yet, as I heard from OHRC staff (OHRC 1), WPS “weren’t as attentive to the race issues” in that WPS “had just gone through training around racial profiling” stemming from a past human rights complaint of racial profiling and were instead interested in improving community relations. WPS staff described the decision to embark on the Project Charter agreement with the OHRC as an opportunity to “update what was in place” (WPS 5), explore the ways in which “we could always do better” (WPS 7), and improve on what was already “a very good culture internally” (WPS 1). These glossy reports on the state of policing in Windsor prior to the Project Charter diverge significantly from the criticisms facing the police force at the time, which included “several high-profile [human rights] cases, as well as allegations by the Ontario Ombudsman that the Windsor Police Service both delayed and failed to report numerous incidents involving police misconduct” (Foster and Jacobs, 2015: 12). Thus, while the WPS was credited with having initiated the human rights partnership with the OHRC, they did so in reaction to multiple publicized incidents relating to police brutality, human rights violations and racial profiling.

Amongst the “high-profile” incidents that received national press, the CBC (Oct 16, 2012) reported that:

Sept. 2009 – Const. Brad Snyder assaulted a man in handcuffs. He eventually pleaded guilty to assault. He was docked 120 hours pay and ordered to make a

⁷⁴ On the same page of the Annual Report (2010-2011: 21) where the OHRC describes “taking the police charter to Windsor”, the OHRC alludes to its 2003 inquiry “into racial profiling in policing, education and other sectors” and claims that the inquiry “caused a flurry of media attention and much-needed discussion on race issues in Ontario.”

\$2,000 donation to charity. Five officers, other than Snyder, were disciplined under the *Police Act* for their involvement in the case but the discipline was not revealed.

April 2010 – Det. David Van Buskirk attacked a legally blind doctor and later pleaded guilty to assault causing bodily harm. The attack was caught on surveillance video. In 2012, Van Buskirk was sentenced to six months jail.

Furthermore, in 2012, one year into the Project Charter agreement, a video surfaced of Constable Kent Rice kicking and punching a non-combative Black man in the stairwell of a housing complex.⁷⁵ While two of these highly publicized incidents of police violence involved the police assaulting racialized citizens, racial profiling and racism were largely absent from the press narratives regarding the incidents which instead focused on the use of force and misconduct allegations.⁷⁶ This absence of race and racism from the press narratives was discordant with accounts of Windsor policing offered by University of Windsor students. In 2008, students brought forward allegations that they were “harassed, subjected to racial slurs, assaulted, and intimidated by the officers” (Millar, *MacLean’s*, February 13, 2008) and organized a campus protest against “racially motivated police brutality” (Puzic, *Windsor Star*, February 15, 2008) stemming from an incident at the University of Windsor where almost thirty police officers were dispatched to a student party attended by mostly Black students. Following this incident, the Windsor Police faced multiple applications before the Human Rights Tribunal which were settled confidentially, without publicly disclosing any measures undertaken to address racism and racial profiling in Windsor policing. Crucially, none of these incidents were mentioned in the background provided in the Project Charter agreement.

⁷⁵ Rice was subsequently found guilty of assault for the incident but was able to keep his job as a police officer after pleading guilty to dishonourable conduct.

⁷⁶ With the notable exception of Constable Rice’s defence lawyer claiming that assault victim Gladson Chinyangwa was antagonizing the police by accusing them of racism (Chen, *Windsor Star*, Aug 8, 2013).

Instead, Windsor Police framed the context of the agreement (2011, emphasis added) as building on existing efforts to improve community relations: “The Windsor Police Service (Service) and the Windsor Police Services Board (Board) for many years have *been open to the concerns* brought forward by various ethnoracial, cultural and faith organizations and communities.” As with the Toronto Police agreement, the focus on “community relations” relies on a flattened account of the relationship between police and community that fails to contrast the relative power positions of racialized community members and police officers. This conception casts community concerns relating to race, culture and faith as interchangeable manifestations of difference. Despite the WPS’s desire to reproduce the model of the Toronto agreement, the WPS also approached this human rights change work from the vantage point that the problems facing TPS were not facing the WPS, in particular in relation to race and street checks.

We didn’t have the issues that Toronto was having, they did it wrong. [. . .] We didn’t, when race was examined as a criteria in who we were having the street checks with, no big nails were sticking up like there was in Toronto. (WPS 1)

Just because this happened in Toronto doesn’t mean... Street checks are a good example. The provincially mandated street checks forms are derived from issues that happened in Toronto, and that maybe there was an abuse or a misuse or whatever. I don’t think we’re doing anything wrong here. (WPS 3)

A lot of the issues came about because of the issues in Toronto. But those are not at all our issues. [. . .] Like I think our chief was one of the ones who really argued with the street checks saying, ‘If Toronto has a problem, fix Toronto’s area.’ We don’t have the same problems, so why are you imposing Toronto’s problems on the whole province? (WPS 5)

This distancing from racial profiling concerns follows—what I have previously shown to be—an established pattern of Canadian appeals to “racial innocence” by describing racism as a problem

that happens elsewhere, such as the United States.⁷⁷ The purported inapplicability of racism-related concerns to the Windsor context reflected a *lack of openness* to the concerns being voiced by many Black and racialized members of the Windsor community, such as University of Windsor Law student graduate, Lily Tekle, (as quoted in Chen, *Windsor Star*, February 13, 2008), who went to the Human Rights Tribunal for the expressed purpose of “striving to address the public interest in preventing police from engaging in racial profiling.” Further, the WPS engaged in confidential settlement processes to resolve these racial profiling complaints which shielded the service from facing findings before the Tribunal which may have laid bare the necessity of race-specific measures germane to the Project Charter with the Windsor Police.

The WPS initiated discussions with the Commission on creating a human rights partnership agreement modeled after the Project Charter with the TPS, two years after the University of Windsor protest and one year following the students’ applications to the Human Rights Tribunal. OHRC staff reported that though there was a history of human rights complaints and settlements, at the time of the agreement there was “no active file” with WPS (OHRC 1). The WPS’s prior engagement with the OHRC is reflected in the background to the Project Charter agreement (2011) which describes the Board and the Service as continuously “working with the OHRC to develop policies that serve the public good [. . .] such as an expanded policy for Unlawful Profiling or Bias-Based Policing and an additional policy directive specific to Racially Biased Policing and Racial Profiling.” The agreement is devoid of any specifics regarding the nature of the complaints which gave rise to the OHRC’s involvement or the need to create a policy directive that is specific to racial profiling. Instead, the agreement (2011) dwells

⁷⁷ WPS 3 similarly averred that “we’re being blamed for something that maybe we didn’t do, or weren’t a part of, you know whether it’s history, or whether it’s recent history, or whether it’s something that’s happening in the United States that’s not really happening here.”

on the “continued” need to “make efforts to be reflective of the community’s demographics.” This need, to become “reflective” and “representative” of “the diversity of the City of Windsor,” features prominently throughout the agreement, despite a lack of articulation as to what sort of diversity is being sought or which grounds under the Ontario *Human Rights Code* have given rise to concerns. Further, in trying to build a more “representative” service, the agreement (2011, emphasis added) sets out that “Barriers will be assessed relating to *all Ontario Human Rights Code* grounds.” This movement, away from focused attention to any particular ground or form of discrimination, imbues the agreement with a broad mandate and general change objectives that can be met through a variety of diversity-oriented initiatives.

The WPS Charter agreement (2011) set out four initial indicators of success. Firstly, the identification of human rights issues and the implementation of detailed response plans. Secondly, that specific concerns relating to employment and services that are addressed, such as: objectives relating to recruitment, hiring and promotion; diversity and human rights training; accountability; and public relations. Thirdly, the establishment of effective human rights complaint processes. Finally, the development of public confidence amongst “marginalized and alienated communities.” As with the TPS Project Charter agreement, the only mentions of race, racial bias, racial discrimination, or racial profiling appeared under the heading of “Training” and, as with the TPS, this training is specified for new recruits—with the possibility of current Service members receiving training on racial or faith biased policing “where necessary.” The limitations of focusing exclusively on new recruits to the WPS is confounded by the Ontario Police College’s involvement as a project sponsor. The involvement of the Ontario Police College (OPC) —a “post-hire” institution that provides police training to “new and seasoned” police officers throughout the province (OPC website) —underscores the centrality of training to

the organizational change strategy set out in the Project Charter. The OPC is positioned in the agreement as an advisory body who, along with the OHRC, will guide the WPS towards “progressive organizational change [. . .] by applying a human rights lens to all aspects of policing” (Foster & Jacobs, 2015: 12). In its Annual Report (2012), the OHRC described their partnership with the OPC as extending beyond this agreement to include joint “human rights training events to police organizations across Ontario” which operate under the premise that the goals of policing and human rights are harmonious and mutually-reinforcing.

Notwithstanding the OHRC’s assertion (Annual Report 2010/2011) that this joint initiative would “ultimately prevent discrimination and racism,” the word “racism” does not appear once in the twelve-page agreement and there are no explicitly anti-racism measures included. Instead, the agreement is principally concerned with achieving diversity, and describes the protection and promotion of “human rights and equity” as being served through the implementation of diversity initiatives, such as the previously developed WPS “Diversity Statement” (August 12, 2004):

The Windsor Police Service is committed to providing quality service to all members of the community respecting their personal dignity, culture, diversity and differences. Through recruitment, training, public consultation and internal communications, the culture of the Windsor Police Service will support these community values, and promote them throughout the organization as we relate to one another. The principles of the Ontario *Human Rights Code* set the spirit, tone and parameters for the development of our policies and practices. Bias conduct and harassing behaviours are not tolerated.

This conflation of human rights with diversity allows for any initiatives aimed at diverse representation to be held out as responsive to public concerns of racial disproportionalities, racial profiling, and use of force.

Notwithstanding the OHRC’s efforts to focus the Project Charter on *human rights* issues and expressed recognition (OHRC 1) that diversity can bear a “marginal connection to human

rights inequity,” WPS staff expressed confusion when asked to describe the difference between diversity and human rights.

I kind of see it as one and the same. I don’t really see it as being different, I guess that’s why your question is confusing me. (WPS 5)

I’m not sure I know what you mean [...] I think they should be one and the same. (WPS 2)

I mean to me diversity is basically everybody being equal, and that’s what human rights does. (WPS 6)

Even in instances where human rights and diversity were recognized as distinct, WPS staff described human rights as in the service of diversity—“looking at human rights [will] help us be a more diverse organization” (WPS 1). The prioritization of diversity over human rights is reflected in what measures were accepted within the scope of the Project Charter and which measures were excluded. While the WPS was willing to engage in measures, such as an employee census, that aimed at tracking the representativeness of the *police force in relation to the community*, they were unwilling to entertain measures that would track racial disproportionalities in the *policing of the community*. As with the TPS, the WPS exercised its institutional will to prevent the collection of race-based data: “the Commission was really interested in data collection and we weren’t. We weren’t going to make that part of this project at the time” (WPS 9). The WPS selectively set the objectives of the Project Charter with little reference to the community concerns of racial profiling and use of force, and demonstrated an enduring unwillingness to disrupt the *status quo*.

At the time of entering into the Project Charter agreement, the WPS was striving to create a counter-narrative to publicized accounts of police misconduct and human rights complaints. This constructed narrative presented the WPS as proactively initiating human rights change and building on *pre-existing* efforts to become a more “reflective” and “representative” service. As

demonstrated, this fabricated account of the context for the Project Charter neglects the role of community mobilization and negative press which compelled the WPS towards a public policy response. Further, WPS staff (WPS 9) presented diversity as the paramount concern, and in so doing, downplayed the significance of human rights concerns that related to actions taken by police:

There were some complaints made to the Human Rights Tribunal, and I think that was part of it. And also the biggest piece too was the representativeness of our service. Both in our recruit pool, but also – and it’s getting better – but in our promotion through the ranks as well.

In pivoting from the significance of human rights complaints to the need to diversify the service, the WPS shifted the primary focus away from the conduct of police to the challenges of attracting racialized community members to join the service. This shifted the direction of the problem from the service’s treatment of the community to the community’s perception of policing.

Windsor Police Project Charter 2011-2014 – “*Keep It Simple To Keep It Effective*”

Examining what was changed and what was cemented through the WPS Project Charter requires returning again to the politics of documentation, namely, the crafting of institutional equity and diversity narratives through the production of diversity-related documents. Drawing again on Sara Ahmed (2007: 608), I use these documents to illustrate “the gap between what organizations ‘do do’ and what they ‘say they do’ or even how they appear.” Windsor Police currently showcase their “Human Rights Documentation” prominently on the WPS website as evidence of the WPS’s human rights commitment and undertakings. These documents include annual reports, community consultation summaries, and published updates for the duration of the Project Charter. As with the TPS Project Charter, I focus my documentary review on two

primary source documents: the WPS's own Final Report (released October 2014); and the commissioned evaluation report completed by Lorne Foster and Leslie Jacobs (released October 2015). Furthermore, I consider these documents in relation to all of the publicly released documentation and in relation to my interviews with WPS staff, as well as the additional internally-facing documents they provided to me. Through these combined sources, I establish that the All Rights Matter approach of the WPS Project Charter served to reinforce, rather than challenge, the *status quo* within Windsor Police under the semblance of human rights change.

The All Rights Matter approach undertaken by WPS under the Project Charter relied on a conflation of racial equity with diversity, and of diversity with human rights. Though the Windsor Police website (n.d. accessed: 2016-10-16, emphasis added) positioned the main objective of the Project Charter as being to “develop and implement initiatives aimed at identifying, eliminating, and preventing any possible discrimination and *racism* in the Windsor Police Service’s employment practices and service delivery,” the Final Report released by WPS contained no mention of racism and no particular emphasis on the ground of race. The only race-specific measures that were identified in the background section of the Final Report note that in response to internal and external complaints made to the Human Rights Tribunal of Ontario, the WPS released a three-page policy directive on “Racially Biased Policing and Racial Profiling.” This directive (2013: 2) —which was released during the period that the Project Charter was in effect—is framed around the previously-developed “Diversity Statement” which professed respect for all members of the community and “their personal dignity, culture, diversity and differences.” The directive claimed to establish a framework for compliance with OHRC policy, however, whereas the OHRC’s *Policy and Guidelines on Racism and Racial Discrimination* stresses the operation of systemic racism and the need for data collection, the WPS directive,

instead, constructs racial discrimination as cleanly demarcated from legitimate investigatory techniques such as criminal profiling. The directive prohibits “irrelevant” and “unjustified” consideration of race but offers little guidance as to how and when racial descriptions and characteristics can justifiably be considered as relevant factors in an investigation. Additionally, the directive contains no accountability mechanisms or systemic measures for tracking or identifying racial disproportionalities in service provision, and is thus, entirely reliant on the officer’s own self-awareness and self-assessment as to whether or not they are taking race into consideration—and, if so, whether or not they are justified in so doing. This brief and superficial directive exhausts the WPS’s efforts to prevent racism specifically.

Throughout the Final Report, the WPS constructs the focus of the Project Charter as the representativeness of those employed in the Police Service in relation to the community’s demographics. The WPS (2014: 10) described the Project Charter as stemming from the Board’s and the Service’s recognition that the “lack of representativeness has contributed to the public’s view that the Service is not reflective of the City of Windsor.” Therefore, the strategies embarked upon under the Project Charter set out to address the companion problems of the “lack of representativeness” within the police force and the “public’s view” of the WPS. Notably, neither of these recognized problems brought into question the practices or conduct of the WPS. These problems of representation and public relations informed the objectives of the four subcommittees: Recruitment, Selection, Promotion & Retention; Accommodation; Accountability; and Public Liaison. The subcommittees were led by WPS staff, with support from the OHRC and the OPC. Distinct from the TPS committee’s structure, the WPS model also involved four separate groups (research, training, evaluation, and project communication) to support the work of the subcommittees.

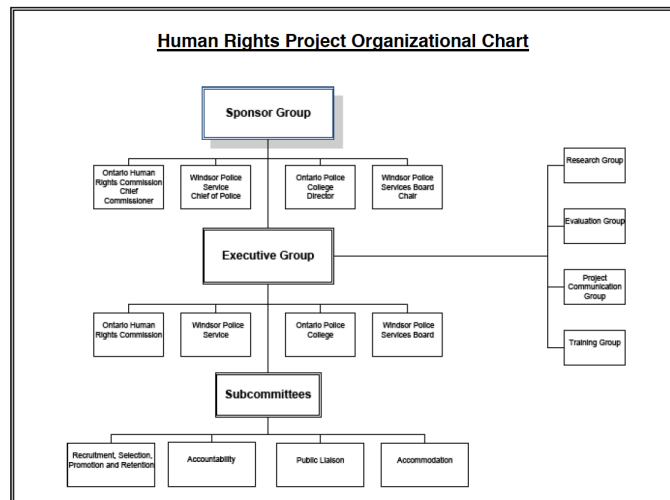


Figure E: WPS Org Chart, *Human Rights Project: Final Report* (2014)

A central issue for the WPS was the public perception that there was *problem*—a perception which they attributed, primarily, to a lack of diversity. The WPS Final Report (2014: 13) depicts the situation as follows: “The Windsor Police Service is not representative of the community it serves. Being more reflective and representative of the community enhances the Service’s ability to work cross culturally and more effectively serve the citizens of Windsor.” Based on this assessment (2014: 15), one of the primary objectives of the Project Charter was to increase the diversity of the workforce with the long-term goal being that WPS becomes: “reflective and representative of the diversity within the City of Windsor, in particular, underrepresented members of the community.” The WPS Final Report does not name which members of the community are deemed to be “underrepresented” beyond a footnote which claims that these groups have been identified through the 2012 WPS Workplace Census.

The 2012 Census was conducted as part of the Project Charter initiative and found that the WPS workforce is 86.7% White, 97% heterosexual and 67.8% male (which increases to 83.1% male when considering only the sworn members). Yet the Workplace Census (2012: 24) uses the term “underrepresented” only once—within the context of racial representation,

identifying that there are several racial communities (such as “Afro-Canadian” and “Afro-Caribbean”) that are “markedly underrepresented within the WPS.” The WPS Workforce Census captured representational gaps by comparing the demographic composition of its workforce to the composition of the Windsor community, primarily using Statistics Canada 2011 results as a benchmark. The Census Report offers a neutral summary of the key demographic findings, one which fails to differentiate between which aspects of WPS’s demographic profile are considered cause for concern and which aspects are deemed unproblematic. For instance, the summary notes “Almost 79% of Windsor Police Service members are 35 years of age and older”, alongside “Among sworn members there is about one female for every five males” (2012: 4), without providing any evaluative commentary on either finding or what significance these findings hold for the institution’s commitments to diversity.

While the Census was described as “voluntary” the reported response rate of 100% amongst all 602 “active employees” (and 96% of all Service employees) suggests that the command structure of policing was utilized to compel participation. Additionally, while the overall response rate was extremely high, so was the number of “blank or corrupted” responses for particular questions—especially those involving ethnic origin (109) and race (61). With respect to race, the total number of “blank or corrupted” responses (61) were equal to the total number of “visible minority” respondents (61) which means that the reported representational gap of “visible minorities” (11% WPS vs. 21% in the Windsor community) could be significantly more pronounced. The Census (2012: 6) was structured to “guarantee full anonymity” such that “the survey did not include any questions regarding rank, position, or work unit, and analysis of the responses was on a question by question basis only.” This choice

precludes the ability to analyze the intersection of any of the equity-seeking categories or how equity-seeking members of the WPS are positioned within the workforce.

Instead of placing any dedicated emphasis on one underrepresented group—or even invoking the federal employment equity categories—the WPS Census (2012: 15) purported to “measure its demographic status with respect to *Code* categories,” with no particular emphasis on any one ground or element of diversity. As described by one of the architects of the census: “it always was with the full range [. . .] no higher weight given to any one part of it. So, gender or sexual orientation or race? No, it was always, they’re all important, no one is more important than the other” (WPS 4). This flattened approach to difference offers little reflection on the specific disparities revealed through the census, nor how particular institutional practices or hierarchies may have produced the underrepresentation that WPS seeks to remedy. Instead, like the TPS, the WPS’s approach to diversification was premised on dispelling “anti-police sentiment” which was purported to be the driving impediment to a more diverse workforce. In announcing the results of the 2012 Workplace Census, one of the Project Charter Leads, Inspector Rick Facciolo told the press (as quoted in Liedtke, 2013): “What we want to represent to the community is that policing is a good job, that our doors are open, we have no biases, [and that] there are no barriers here at all.” Despite the census itself revealing significant race and gender-based disparities, the WPS clung to the narrative that they were maintaining a barrier-free workplace and that the challenge lies in the public’s misperception of policing. I heard repeatedly from WPS staff that exceptional efforts have been made to attract a more diverse workforce, but despite these noble efforts the underrepresentation persists:

. . . we can show the evidence to the world that we are reaching out to different groups to try and get them to come and apply. But if they don’t apply, or they don’t meet the basic requirements [. . .] it still doesn’t equal a direct translation into results. (WPS 4)

. . . we've done huge female recruitment nights to try and generate that interest, to make them feel more comfortable. And again, going out to different communities and doing a recruitment session. [. . .] even if it's using our officers that are *from an ethnic background* to go out there and do the talks, that's awesome. I think that's very good. (WPS 8)

. . . it's been difficult. I think some of our people have tried hard, but maybe with people like [Diversity Officer] in place in a certain role here, he can assist in reaching communities that don't always provide us a lot of candidates here. [. . .] The more we hire a reflective face of this community, the better off we will be. (WPS 3)

While WPS staff rarely named these resistant communities through explicitly racial categories, it was evident that the recruitment efforts were aimed at *visibly diversifying* the face of WPS. This public relations objective is particularly reliant on officers deemed by the organization to be “*from an ethnic background*” in order to supply a visual counter-narrative to the census findings which found the WPS workforce to be overwhelmingly White—a diversity management strategy known as “window-dressing.”

Window-dressing is an exclusively representational approach to diversity which focuses on increasing the presence and visibility of racial and ethnic minorities in order to give the appearance of organizational change, but neglects the experience of racialized employees within the institution and the treatment of racialized communities by the institution. The work of the Recruitment, Selection, Promotion, and Retention Subcommittee reflects a preference for recruitment initiatives that seek to bring racialized recruits into the WPS, without accompanying efforts to monitor exclusionary hiring and promotion practices or collect data on the racial stratification of the workplace. The subcommittee was initially tasked with developing strategies for equitable practices throughout all stages of employment, but while the strategies aimed at recruitment outreach were implemented early within the period of the Project Charter, the

strategies aimed at identifying barriers within the promotional process⁷⁸ and developing internal support networks⁷⁹ were left unaddressed or placed on indefinite “hold.”

This preference for recruitment over promotional processes and internal supports is consistent with the WPS’s representation of the problem as residing within the community, rather than within the institution. One of the central recruitment strategies advanced by the WPS under the Project Charter was the PEACE (Police Ethnic and Cultural Education) program. As described within the Project Charter Final Report (2014: 19): “This program targets pre-employment, culturally diverse youth, and incorporates education and training in various police related topics, with an aim to foster a positive approach to policing careers.” This targeting of “culturally diverse youth” involves increasing police presence in high schools, and in particular, purposefully increasing police interactions with racialized youth. Like the School Resource Officer (SRO) program pursued by the Toronto Police, WPS also described themselves as employing Community Services & High School Liaison officers in recruitment outreach. In 2016, Police Chief Al Frederick (as quoted by Schmidt, *Windsor Star*, January 7, 2016, emphasis added) described this program as key to helping depict officers in a “positive light” amongst “some of these ethnic communities” and proclaimed, “we have access to *their children* in the school system—we have a captive audience there.”

⁷⁸ The Recruitment, Selection, Promotion, and Retention Subcommittee’s strategy 9 proposed to hold targeted focus groups with underrepresented groups within the WPS (such as women and racialized minorities) to identify concerns, but this initiative was placed “on hold” in anticipation of a new promotional process which was being developed apart from the Project Charter.

⁷⁹ The Subcommittee’s strategy 10 was aimed at exploring the feasibility of Internal Support Networks and mentorship opportunities for underrepresented groups, the formal canvas for this strategy was put “on hold” and instead WPS members were encouraged to form their own ISNs based on their own initiative.

These police diversity outreach strategies are contrary to community concerns that increased police presence subjects Black and immigrant communities to hyper-surveillance practices. Instead of examining how their own deployment practices have fostered police animus in racialized communities, WPS staff invoked xenophobic rationales to justify community members' resistance to outreach efforts:

So, for some, the new immigrants, becoming a police officer, honestly, is a long and hard road. [...] And a lot of it is a reflection about police in their own countries. Corrupt, dishonest, assaultive, they're afraid [...] we're trying to change the perception of policing in Canada, and know that police are their friends, someone to go to for help. (WPS 7)

This explanation of anti-police sentiment—as arising from corrupt policing practices beyond Canada's borders—is discordant with Canadian-based research which has found that attitudes towards the justice system are most positive amongst recent immigrants and least positive amongst those born in Canada (Wortley and Owusu-Bempah, 2009). Instead, as identified by the OHRC's own public inquiry into racial profiling (2003), distrust towards the police amongst racialized communities can be credited to the excessive force and disproportionate scrutiny imposed on racialized communities *within this country*.

The WPS's desire to portray police “as friends” reverberates in the approach to community engagement undertaken by the Public Liaison Subcommittee. Through the Project Charter, the WPS identified that it lacked any formal process to consult with the community regarding human rights issues. The Final Report (2014: 8) described the WPS as having held three separate community outreach sessions which sought to promote awareness of “the Service's commitment to human rights and diversity initiatives” —again reflecting the conflation of human rights with diversity. These public sessions served the dual purpose of publicizing the WPS's human rights efforts within the community and eliciting feedback from the community

regarding what areas of human rights concerns should be prioritized. The Final Report (2014: 44) described the desired outcome of putting in place a community consultation process as ensuring that the “WPS is responsive to community needs and concerns related to human rights.” Yet, the disconnect between the recorded human rights concerns identified through these consultation processes and the prioritizations of the Project Charter indicates a lack of responsiveness to community concerns and criticisms, and instead a selective endorsement of community voices that encourage increased interactions between the community and the police.

The WPS’s summary accounts of the consultation sessions are enthusiastic towards the community feedback that seeks to foster an integrated “two-way relationship” between the police and community, and that reflect an attachment to the logic of “race relations” which—as described by Audrey Kobayashi (1992: 13) —erroneously posits an “equanimity” between “races.” The WPS recorded participants as commenting:

Encourage your community to at least invite a police officer to come to your gatherings and develop a rapport. This will create a ripple effect and encourage rapport building. (2013: 12)

Send officers that are representative to engage youth in the underrepresented communities to demonstrate support for the community, and dispel the belief that stereotyping and over enforcement are the norm. (2012: 5)

The police need to be seen in the schools once a month or so to build relationships with the students. (2013: 11)

These recorded suggestions align with the WPS’s pre-existing community policing initiatives that seek to embed visible police presence within community events and institutions (such as the Community Services & High School Liaison program). Further, these suggestions are premised on the belief that negative perceptions of the police will be dispelled by *increased police interactions*. Critics of community policing have drawn attention to how these strategies subject racialized and immigrant communities to disproportionate scrutiny and serve to reinforce police

control over communities and the social order (Saber, 2017; Baker, 2006). By strategically collecting community feedback that sanctions police presence in non-crisis response settings, including schools and community events, the WPS community consultations pursued a selective narrative that justified allocating resources to enable proactive community policing.

While the community consultation reports reflect that the participants were largely enthusiastic towards the police⁸⁰, there were still some recorded criticisms contained within these reports that did not find expression within the strategies pursued under the Project Charter.

Specifically, participants voiced concerns of racial profiling, such as:

Racial profiling should be a priority—Officers need to be aware of the historical relationship between the young black males and the police. (2012: 6)

Minority people are those that are stopped more frequently. There needs to be a culture shift. The police need to recognize their own stereotypes. (2013: 11)

Police stop more minority people statistically. Is there solution for this problem so that black people will fairly not be the target as they are thought to be poor. This falls into discrimination. I would like to see more done to change this because it puts young people in system and that is the fact. (2013: 15)

Concerns regarding racial profiling were raised recurrently over the three community sessions, yet these concerns were absent from the work pursued by the Public Liaison Subcommittee. Instead, the Public Liaison Subcommittee focused their efforts on multi-language guides and translation services to improve communications with the community, despite language barriers receiving little mention as an area of concern for participating community members. It is telling that the five issues that WPS set on the agenda⁸¹ at the first community outreach session

⁸⁰ Participant feedback surveys included: “I personally thank [WPS] for their continued involvement in all that they do” (2013: 16) and “You are doing well. Keep up the good work.” (2012: 8).

⁸¹ Namely: 1. Community Consultation Process; 2. Outreach/Recruitment Process; 3. Community Feedback; 4. Accommodation Policy Relating to Creed; 5. Development of a local Language Guide (WPS, May 1, 2012).

remained the guiding areas of focus for the Public Liaison Subcommittee, irrespective of the feedback that the subcommittee received through the community outreach sessions. This conceptualization of the barriers facing racialized communities within Windsor as a lack of language fluency reflects a larger refusal on the part of the WPS to consider how the *conduct of police* is contributing to negative conceptions of policing within racialized communities.

The commitment to provide access to language interpretation also found expression in the Accommodation Directive, which was created, in consultation with the OHRC, by the Project Charter Accommodation Subcommittee. The Project Charter coincided with compliance deadlines under the 2005 *Accessibility for Ontarians with Disabilities Act* (AODA), such that the work of the Accommodation Subcommittee was driven by the need to be compliant with both the *AODA* and the *Code*. This compliance-based context entailed that the work accomplished in relation to accommodation contained enforcement mechanisms which were relatively absent from other areas of the Project Charter, such as disciplinary provisions set out in the Accommodations Directive (Directive # 310-02, implemented August 2014). In addition, the Accommodations Directive demonstrated the ability of the WPS to invoke ground-specific considerations—such as “creed as it relates to external services” and “family status as it relates to internal service”—but failed to provide any rationale for why these two particular grounds merited focused attention. Despite the ground of creed being considered in relation to external service provision, the commissioned Evaluation Report of the Human Rights Project (Foster & Jacobs, 2015: 33) found that: “For many of the community participants, it was difficult to point to any evidence of the Project Charter affecting accommodation for the diverse Windsor community.” The lack of community impact of the Accommodations Directive is exacerbated by

the guidelines on creed-based accommodations not being publicly accessible on the WPS website.

The WPS Final Report (2014: 33) described the Accountability Subcommittee as tasked with developing and implementing “measurable and achievable performance indicators to measure compliance with change initiatives” aimed at upholding the Ontario *Human Rights Code*.

Whereas the Recruitment and Retention Subcommittee conducted a service-wide census and identified thirteen distinct strategies to support the recruitment of more diverse candidates, the Accountability Subcommittee proceeded on the basis of existing data and only identified six strategies to improve the WPS’s accountability to human rights. The primary source of data identified for measuring accountability was internal and external complaints facing the WPS. This data source is reliant on individual members of the public or the WPS to bring forward human rights concerns to the WPS or an external complaint process (such as the Human Rights Tribunal of Ontario or the Office of the Independent Police Review Director). As noted in the OHRC’s own public inquiry on racial profiling (2003), community members do not have confidence in the processes in place to lodge complaints against the police, distrust that their complaints would be taken seriously, and fear that they will face reprisal for exercising their rights or participating in human rights processes. Rather than rely exclusively on complaint processes, the OHRC (2003: 71) recommended: “Where anecdotal evidence of racial profiling exists, the organization involved should collect data for the purpose of monitoring its occurrence and to identify measures to combat it.” Yet, despite Windsor community calls to address racial profiling and police brutality, the WPS was unwilling to collect race-based data which would enable them to monitor and address racial disproportionalities in their provision of services.

The Accountability Subcommittee assumed an All Rights Matter approach to human rights data collection and set-out no specific provisions to measure race-based complaints. Through the Project Charter, the WPS (2014: 33) identified the need for “a central repository to collect data in relation to internal and external complaints that have a human rights component”⁸² and “an overarching human rights directive, which includes policy and procedures, to guide the activities of the Service to ensure compliance with the Ontario *Human Rights Code*.” This amalgamated approach to human rights grounds foreclosed a dedicated focus to specific allegations of racism and intersecting inequities, and instead adopted generalized commitments to prevent all forms of discrimination. This generalized approach informed the policy revisions undertaken by the Accountability Subcommittee. As expressed by one Subcommittee member:

We had stuff like directives on racial bias, equal rights, workplace violence, code of ethics, human rights in the workplace. [. . .] We thought it was best to get rid of all these ones that seemed to fall under the *Code* and just put one overarching one in place. [. . .] We had the attitude of: ‘keep it simple to keep it effective.’ (WPS 05)⁸³

This desire to simplify human rights commitments was inimical to targeted strategies to address racial profiling which require specific consideration of how racial differentiation is perpetuated through standard institutional practices. The WPS’s simplified approach to examining all rights simultaneously involved a “Directive Review Checklist” which *simply* lists all of the grounds

⁸² At the time of the final report, the WPS reported that they were still in the process of researching recommendations on the collection and reporting of internal and external complaints and so the subcommittee was restricted to offering recommendations on those complaints with a human rights component. Like the Human Rights Directive checklist, the recommended approach simply involved identifying the relevant ground from a template of all listed grounds.

⁸³ Notwithstanding WPS 5’s account of “getting rid” of all the other *Code*-related directives, the Racially Biased Policing and Racial Profiling directive (140-03) remains in place following the Project Charter. Yet the diminished significance of this directive in relation to the overarching human rights directive is reflected in this mistaken impression that the directive no longer exists and the lack of prominence given to this directive—which unlike the Human Rights Directive—is not publicly available on the WPS website.

protected by the Ontario *Human Rights Code* and instructs the reviewer to “make note of your review in the space allocated next to the prohibited ground, even if you do not find impacts. It is important to show that you considered ALL prohibited grounds during your review” (n.d.). This flattened approach to considering ALL grounds lacks any contextualized guidance for how inequities based on particular grounds may manifest within the environment of policing. Further, the absurdity of addressing all protected grounds is apparent in the inclusion of the ground “receipt of public assistance” which is noted to be legally applicable only in the area of “housing” and thus of little relevance to the Project Charter which deals with employment and service provision.

The human rights directive review is entirely reliant on the WPS staff members’ own assessments of how standardized practices could potentially produce inequitable results. The insufficiency of this process is underscored by the results of the WPS workplace census which revealed the overwhelming homogeneity of the Windsor police workforce—particularly in relation to gender and race—such that reviewers will most likely be drawn from the same racial and gendered groups that dominate the workforce. Thus, despite the checklist proclaiming that “multiple perspectives are critical to a thorough and proper review” (n.d.), the composition of the workforce structurally inhibits the inclusion of multiple perspectives. The human rights checklist exercise also led to the inclusion of a human rights statement at the beginning of every directive: “This directive shall consider provisions of the Ontario *Human Rights Code* to prevent and address human rights issues, and shall follow the Human Rights Policy Directive” (from WPS Dress & Grooming Directive # 146-01, last reviewed: 2016-08-30). This cursory statement reflects the partial application of human rights to existing directives, with the effect that the

Accountability Subcommittee reported having only reviewed one directive due to “workload and staffing issues” (WPS Final Report, 2014: 38).

Despite the development of an overarching Human Rights Directive, the specific human rights precepts set out therein do not find expression in the operational directives—even those updated in the wake of the Project Charter. For instance, the Human Rights Directive describes gender-based harassment as “behaviour and policies that reinforces heterosexual gender norms” (n.d.) yet the *updated* WPS Dress & Grooming Directive sets out *distinct* acceptable attire for “males” and “females” including specifications for the length of females’ skirts, dresses and shorts. This disconnect reflects the limited permeation of the human rights documentation into established institutional protocols and practices. In this instance, the institutionalized habit of heteronormative dress distinctions within WPS reveals itself to be stronger than the codification of human rights commitments within WPS directives. The presence of the Human Rights Directive can thus serve as a defence against human rights critique without changing institutional norms.

The Accountability Subcommittee relied primarily on the individual responsibility of every member of the WPS in observing and upholding human rights commitments, rather than instituting any measures to ensure that members were answerable to these directives. For example, the subcommittee added human rights duties into all job descriptions, but these duties simply require that the WPS member “assess one’s own attitudes towards members of the public, and ensure that decisions and actions are not influenced by biases” (CPIC Operator Job Posting, August 15, 2016). This reliance on self-assessment to detect the operation of bias is particularly ineffective in relation to racial profiling, where the historic racialization of deviance and criminality are embedded within standard policing practices. The Human Rights Directive

provides no guidance with respect to how race and racism operate within the context of systemic or institutional discrimination, nor does it contain any specific mention of racial profiling, yet this directive is purported to support the WPS's commitment to bias-free policing. Resultantly, as expressed by one WPS staff member in the context of street checks, the presence of this directive has little bearing on daily policing:

We've had street checks for my entire career [...] With respect to the concerns, mostly in the Toronto area, that it was disproportionate maybe towards the Black community [...] we were forced to revisit what exactly we have here, *and I don't think that we've changed a lot of what we'll ask our officers to do*, the only thing that was a major change to that particular policy was our Human Rights Directive and policy is new in the last few years. And it is something that has to be considered while you're doing a street check. [...] So as long as people understand that street checks are still a very valuable part of police work, they just can't be conducted using anything that would be considered against human rights. (WPS 3, emphasis added)

Here, the introduction of the Human Rights Directive is described as having little impact on the overall practice of street checks beyond an abstract commitment to not violate human rights.

Like the 2013 WPS directive on racial bias which relies on the officers' abilities to self-assess whether or not their own decisions are racially-motivated, the broad human rights duties inserted into WPS members' job descriptions contain no metrics for assessment. Yet, unlike the racial bias directive—which was created in response to community concerns of racially differential treatment—the broad inclusion of “all rights” under one omnibus directive encourages an abstract commitment to human rights with little direction on how this commitment requires either institutional, or individual, change.

Prior to the Project Charter, the WPS had already implemented institution-wide training initiatives in order to address internal and external human rights complaints. As part of the Project Charter, the WPS developed another “human rights checklist” to evaluate all existing training programs, materials and curriculum on an ongoing basis. While this approach was

adopted with the stated aim in the Final Report (2014: 77) to ensure the “inclusion of human rights themes through all WPS training” and that “human rights issues are being addressed on an ongoing basis,” like the modifications to operational directives, this cursory inclusion entails that human rights commitments are repeatedly mentioned, but not substantively explored throughout the organization. Given the proliferation of human rights commitments throughout the institution, WPS leaders described the Project Charter as raising awareness and understanding of human rights:

I think there’s a lot more awareness within our service. [...] so I think we do have more people with that sort of awareness and basic understanding of human rights. (WPS 09)

I would give the human rights project credit for the awareness. So, increasing people’s awareness, and now we, we have these directives that we, everyone is required to read. (WPS 02)

Rather than identify procedures or practices that were altered by virtue of the Project Charter, WPS described *awareness* as a primary outcome. Through making declarative statements against discrimination—without committing resources to monitor and identify institutional discrimination—the WPS’s human rights awareness efforts served to obscure a systemic understanding of human rights by rendering discriminatory acts as both aberrant and abhorrent. As expressed by one WPS member that I spoke to:

A lot of the human rights training [. . .] to me, seems very common sense. Unless you’re an absolute racist, it all seems to be common sense, that you wouldn’t treat people any different, based on any of the grounds [. . .] People have biases though. So, we need the training. (WPS 3)

While WPS leaders describe the Project Charter as instilling a basic understanding of human rights throughout the service, I heard from those less directly connected to the Project Charter that the precepts of human rights are “common sense” and self-evident, suggesting that the training affirmed, rather than challenged, their existing approach to policing. For these members,

racism was still rendered as exceptional and blatant, rather than as embedded within institutional norms.

The WPS Project Charter illustrates how the generic adoption of human rights qua diversity entails little organizational disruption. As described by WPS staff, the precepts of human rights communicated within the context of the Project Charter were seen as “common sense” in that they accorded with pre-existing values and approaches already entrenched within Windsor Police. The institutional proliferation of human rights language through the adoption of the Project Charter served to stamp the *status quo* with a documented commitment to human rights. Even as an awareness campaign, the Project Charter served to obscure understanding of the systemic operation of discrimination and instead conflated human rights with representational diversity. Thus, the Project Charter expended significant resources towards identifying the demographic composition of the Windsor police force but declined to dedicate similar efforts towards enhancing human rights accountability mechanisms, such as through race-based data collection. Through the Project Charter, the WPS initiated community engagement efforts in which they heard from community members regarding concerns of racial profiling, however, the WPS responded selectively to community input so as to construct a narrative that supported the WPS’s pre-existing initiatives towards community policing. The WPS Project Charter was presented as a public policy response to the Windsor Police’s problems of a lack of diversity and community criticism, while veering away from the substantive concerns raised by the community relating to police brutality and racism.

Containment Strategy: Human Rights Branding

As with the TPS Project Charter, the WPS and the OHRC commissioned an evaluation report on the human rights project which was completed by York University researchers Lorne Foster and Lesley Jacobs. Foster and Jacobs (2015: 9) described the project as “providing a platform to review police service operations and act[ing] as a catalyst for significant organizational change innovations.” Like the Ryerson Diversity Institute’s report on the TPS Project Charter, the WPS evaluation report is premised on the value of diversity in law enforcement. Foster and Jacobs (2015: 16) aver that: “Bringing diversity into the mainstream of public policing attracts a broad cross-section to join the ranks of public policing, and assures others they can flourish as engaged citizens.” Consistent with diversity management discourse, Foster and Jacobs depict diversity as both a challenge facing the police and as the solution to that challenge. In discussing the framework of “Human Rights Organizational Change Management in Policing” they write:

Police services must come to grips with the difficult task of maintaining law and order in increasingly vibrant and *diverse metropolitan populations* who *often contest the boundaries of the status quo*. The dimensions of this issue are reflected in the growing frequency of newspaper and media accounts of confrontations in multiple jurisdictions between police and *diverse publics* over the ‘use of force doctrines’ and racial profiling. Television news programs and social media campaigns sometimes provide dramatic supporting videos, graphically depicting the *visible tensions between the police and racialized minority communities*. (2015: 16, all emphasis added)

This passage reinforces the centrality of accusations of racial profiling to pursuing human rights organizational change within policing. Within this account, “diverse populations” and “diverse publics” are used synonymously with “racialized minority communities.” These communities are depicted as making demands that contest the social order and as engaging in confrontations with the police. The characterization of these tensions as taking place *between* the police and racialized communities ignores their radically disparate positions of power, obfuscating how the

power of the state is being mobilized in opposition to the demands and wellbeing of racialized communities. Recall that this depiction of diversity is consistent with the OHRC's own framing in its *Human Rights Guide to Policing* (2011) which positions diversity as new and disruptive to police-community relations, but also posits that through embracing diversity and seeking to diversify their ranks, police services can reap organizational benefits. Foster and Jacobs (2015: 17) adopt the OHRC's enthusiasm for human rights change qua diversity management and position human rights as "a vital tool for effective policing in a diverse and multicultural society." It is within this diversity management framework that the Project Charter was evaluated.

In the WPS Human Rights Project Evaluation Report, Foster and Jacobs describe having employed a mixed methods approach to collect and integrate quantitative and qualitative data, including: a review of existing organizational data; forty-one interviews with the WPS Human Rights Project Charter internal and external stakeholders⁸⁴; and policy analysis of organizational systems, procedures and practices.

⁸⁴ Foster and Jacobs offer no commentary on how the external stakeholders and community organizations were selected or what efforts were made to ensure that they were well positioned to speak on community perceptions or the impact of the Project Charter on "marginalized groups."

Graph 1: Aggregate Summary of All Respondents about the Success and Impact of the Windsor Police Service Human Rights Project

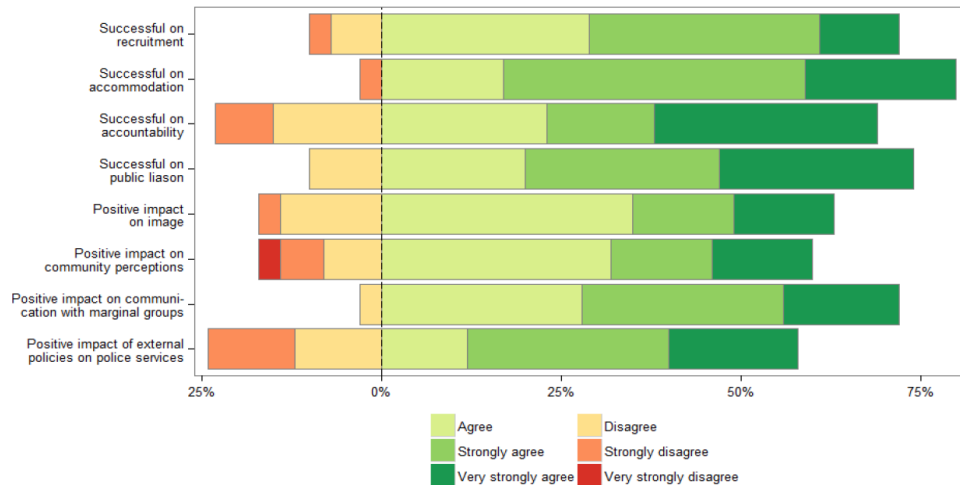


Figure F: Aggregate summary of All Respondents about the Success and Impact of the Windsor Police Service Human Rights Project from the *WPS Human Rights Project Evaluation Report* (Foster and Jacobs, 2015)

Notably, the Project Charter was considered to have had the least success in relation to accountability, community perspectives, and external policies on police services. This evaluation corresponds with the Project Charter's relatively low allotment of resources to accountability measures and human rights in service provision. Based on their review of policy initiatives, as well as community feedback, Foster and Jacobs (2015: 35) conclude that the Project Charter offered "little innovation with regard to strengthening accountability to the communities the WPS serves." In order to address this gap, the reviewers identify the need for a stronger focus on human rights in services and operations along with an increased investment in community policing initiatives. Foster and Jacobs (2015: 56) are enthusiastic about community policing strategies that seek to embed the police in non-emergency community interactions and offer "a proactive deterrent-effect approach and crime prevention activities." The evaluation report draws on policing literature which embraces community policing as a progressive model for multicultural cities, but selectively avoids consideration of critical race perspectives on

community policing, which have described this model as an extended form of surveillance and control.⁸⁵ Instead, in describing the purported benefits of community policing, Foster and Jacobs claim that this approach will improve community perceptions of police as well as provide an opportunity for the police to listen to community concerns, such as around issues like carding and racial profiling.

Racial profiling is invoked repeatedly within the Evaluation Report as informing the context of human rights and policing in Ontario. Foster and Jacobs (2015: 58) outline the organizational context facing the WPS as shaped by the presence of “raging anti-police backlash” and a consensus amongst Canadian policing professionals that references to racial profiling are “conceptually confused, adversarial, and unproductive.” Despite noting that there is a policy directive in place within the WPS which defines and prohibits “racially biased policing and racial profiling,” Foster and Jacobs’ account of the broader policing community as being hostile to specific consideration of racial profiling effectively diminishes the significance of this directive within the context of human rights efforts. The absence of specific strategies to address racially-biased policing is only noted once in the Evaluation Report (2015: 42), by a community respondent who is quoted as saying: “The Windsor Police Service (WPS) need to go out of their ‘comfort zone’ with communities where there has been an uneasy relationship, with initiatives geared specifically to racialized communities, rather than generic approaches.” While Foster and Jacobs report on this identified need to attend to the concerns of racialized communities, they claim that it is evident that the “human rights lens” adopted under the Project Charter has enabled WPS to refine and improve existing practices. To the extent that these improvements are

⁸⁵ For instance, David Baker (2006: 98) describes community policing as an attempt to “penetrate communities to break down community resistance, to engineer consent and support for the police, and to reinforce social discipline.”

not being perceived by the broader Windsor community, Foster and Jacobs (2015: 43) suggest that investments in communication efforts to better publicize the WPS's "development of more inclusive services," such as Video Remote Interpreting and women-only Physical Readiness Evaluation for Police (PREP) sessions, would improve "overall community assessment of police." This broad evaluation of *all human rights* provides for the easy transition from an identified absence (the need for initiatives geared specifically to racialized communities) to praise for inclusive services (interpretation services and targeted recruitment sessions for women). This serves to obscure the sustained unwillingness by policing institutions to engage in specific anti-racism measures.

In their evaluation of the impact of the Project Charter on community perceptions of the WPS, Foster and Jacobs (2015: 38, emphasis added) posited that there was the "possibility of project input lag" wherein "the *new human rights branding of the WPS* [would require] a substantial period of routine to actually take hold in the public consciousness, and to recast negative public perceptions." In order to facilitate this desired change in public perception, Foster and Jacobs (2015: 45) recommended creating a "community contact role" that would act as a "representative for the Service to various ethno-racial cultural and faith organizations and communities." The perceived need for this community contact role was rendered urgent for the WPS in January 2016 when the *Windsor Star* published an article on the hiring of an all-White slate of new cops (see Figure G). This article spurred the immediate creation of the TPS's first-ever "diversity, inclusion and recruitment outreach officer" position less than a month later, which was framed as an extension of the Project Charter. The creation of the diversity officer position was a continuation of the WPS's human rights *branding* strategy to deflect attention away from claims of racism and police misconduct, and instead pursue a project of diversity.

Despite all-white slate of new cops, chief says diversity still the goal

Despite an all-white slate of new officers sworn in this week and added to a predominantly white workforce, Windsor police chief Al Frederik insists his department is committed to a goal of having a force that is as diverse as the community it serves.

Doug Schmidt • Windsor Star
Jan 07, 2016 • January 7, 2016 • 3 minute read



Windsor Police embrace diversity

Todd Shearon March 11, 2016 12:31 <http://themediaplex.com>



Figure G: “Despite all-white slate of new cops, chief says diversity is still the goal” (Schmidt, *Windsor Star*, January 7, 2016) and “Windsor Police embrace diversity” (Shearon, *The MediaPlex*, March 11, 2016)

The human rights branding pursued by the WPS constituted a form of diversity washing, a practice Edward Chang (2020: 121) describes as “overrepresenting people from underrepresented groups in externally visible settings like websites” to provide the impression that institutions are more diverse than they are in actuality. Following the *Windsor Star*’s reporting of the “all-White slate of new cops”, the WPS prominently featured its new “diversity officer” position and the Black officer, Wren Dosant, who was selected to fill it. Dosant’s appointment was publicly announced in February 2016 coinciding with the public release of the Foster and Jacobs Evaluation Report. While Foster and Jacobs (2015: 33) conclude that “if a central measure of success of the project is the goal of making the WPS membership a better reflection of the diverse community it serves, it is still too early to praise the Project for its effects,” the appointment of Dosant was employed by the WPS to present an image of diversity that diverged significantly from the established under-representation of Black officers (as demonstrated through the 2012 WPS Employee Census).

The Diversity Officer position was conceived of as a catch-all for all of the human rights transformation work that remained outstanding at the close of the Project Charter. Police Chief Fredrick (as quoted in Previl, February 29, 2016) described the role as providing “a point person for diversity” and as a way to “elevate our status within diverse cultures.” The role was announced as containing both internal and external components, including “developing training programs for Windsor police officers in the areas of anti-racism, anti-discrimination and cultural diversity” (Kristy, *Windsor Star*, March 1, 2016), yet the WPS staff that I spoke with described the role as consisting of outreach and recruitment, targeting specifically “non-White” groups. These outreach efforts continued to frame the lack of diversity as resulting from police animus amongst those communities coded as “diverse.” I heard from WPS staff that the diversity officer was charged with trying to attract “different faces [for] the Windsor police” and this objective was explicitly tied to the need to combat community criticisms: “We had to do something to better our face with the public, cause the public was really coming down hard on us” (WPS 7). Thus, the diversity washing efforts, pursued through the creation of the diversity officer position, relied on both the “face” of the Black diversity officer and the interface between this officer and the “diverse” public in order to quell community criticisms.

Through the Project Charter, Windsor Police reconfigured community criticism of policing practices as calls for increased representation in policing and increased police presence in “diverse” communities. Despite these diversity washing efforts, Windsor Police continued to face more human rights complaints per capita than most municipal forces in Ontario⁸⁶ and

⁸⁶ The CBC reported that between 2008 and 2018, only four police services in Ontario had more complaints per capita than Windsor (Viau, *CBC News*, May 1, 2019)

continued to report a predominantly White workforce.⁸⁷ The Project Charter provided the WPS leadership with a template for how to subsume concerns about racism under diversity management. Furthermore, the WPS has continued to respond to anti-racism driven institutional demands with accounts of the service's diversification efforts⁸⁸ and assertions as to the inapplicability of province-wide racial-profiling concerns.⁸⁹ Recall that the irony of diversity management discourse is that while the broad invocation of difference is used to turn away from focused discussions of race and racism, diversity also circulates as a euphemism for race and the integration of racialized groups. Windsor Police's diversification strategy places the burden on racialized officers to shift police culture through "changing the face" of policing within Windsor and establishing connections with underrepresented communities. This approach to institutional change places little burden or scrutiny on the predominantly White workforce at the WPS.

Conclusion

Although the WPS consciously pursued a diversity management strategy that purported to attend to "all grounds" and evaded specific measures to attend to race and racism, the context of province-wide attention to the practice of racial-profiling in policing is evident at both the onset and the conclusion of the Project Charter. The Project Charter agreement was signed in the wake of University of Windsor protests against anti-Black racism in the WPS and in relation to ongoing work with the OHRC to develop a policy directive specific to "Racially Biased Policing and Racial Profiling." At the conclusion of the Project Charter, commissioned project evaluators,

⁸⁷ The 2018 Windsor Police workplace census found that 82.6 per cent of the workforce is White compared to 84.8 per cent in 2012. (*CBC News*, June 21, 2019)

⁸⁸ See for instance the *CBC News* (July 2020) headline: "Defunding isn't necessarily the answer' says Windsor police chief focused on diversity."

⁸⁹ See for instance the *Windsor Star* (Schmidt, June 17, 2015) coverage of Chief Al Frederick's defence of street-checks: "Police defend street checks; Chief says policy works in Windsor."

Foster and Jacobs (2015: 58), situated the project within the broader provincial climate of “problematic police-minority relations” and “raging anti-police backlash” spurred by accusations of racism in policing. It is within this context of community criticism relating to racism and police brutality that the WPS sought to change “the face” of the service. The human rights branding which the WPS pursued through their partnership with the OHRC served to reinforce existing policing practices—such as community policing approaches and street-check protocols—while stamping these practices with a documented commitment to human rights. Further, this human rights branding was pursued with an emphasis on representational diversity at the expense of accountability mechanism. The Windsor Police’s pursuit of diversification was consciously unresponsive to community concerns of racial profiling and misuse of force, and instead sought to rebrand the *status quo*.

Conclusion

“The very appearance of bringing something into effect can be a way of conserving the past, of keeping hold of what has apparently been given up.”

- Sara Ahmed (2012: 126)

The OHRC has itself acknowledged failures of the Human Rights Project Charter agreements in achieving transformative change in policing. Speaking about the TPS agreement, the OHRC (2019a: 8) claims that “as the OHRC did not have control over developing, prioritizing or implementing the recommendations, the Project Charter failed to enhance independent monitoring or accountability for systemic racial discrimination.” Yet despite this disavowal of the results of past partnerships, the Commission has persisted with the approach of *working with* police services. Having reviewed the limitations of the OHRC’s past conciliatory attempts to address racism in policing through human rights policy and partnerships, I stress the need for community responsiveness and Critical Race Litigation in future human rights reform efforts. These Project Charter agreements are salient to understanding how human rights reform, especially when voluntarist, can, in practice, *impede* anti-racist structural and systemic change. Yet, since the limitations of these agreements are reflective of the OHRC’s selective and restrained use of its own institutional powers, the possibility of utilizing these powers in the service of anti-racism mobilization remains.

Beyond the boundaries of these agreements, the OHRC has shown itself capable of using its powers of litigation, public inquiry, and policy articulation to expand what the Lewis Report (1992, emphasis added) describes as “official and *authorized* knowledge” of racism in policing.

Recalling Patricia J. Williams' (1991) insight that rights exist within a constricted universe, this dissertation has sought to enunciate constraints shaping the OHRC's universe— especially the enduring commitments to conciliation, civil liberties, and minimal economic disruption—which have rendered many manifestations of racism outside the contours of the OHRC's problem representation and policy response (Bacchi, 1999). Yet, also in accordance with Williams, I leave open the possibility that human rights-driven reform can abet transformative justice movements. In order for human rights reforms to serve broader mobilization against structural racism, however, they must attend to the duality of law and build towards challenging—not sustaining—the Canadian carceral system.

Anti-racists scholars concerned with police violence (Alexander, 2020; Maynard, 2017; Ritchie, 2017) have insisted that change efforts that fail to address the racialization of crime or to adopt an expansive conception of racial justice risk being absorbed or deflected by policing institutions (and criminal justice institutions more broadly) invested in maintaining the *status quo*. Michelle Alexander (2020: 304) suggests that “we should ask ourselves whether efforts to achieve ‘cosmetic’ racial diversity—that is, reform efforts that make institutions look good on the surface without the needed structural changes—have actually helped to facilitate the emergence of mass incarceration and interfered with the development of a more compassionate race consciousness.” Indeed, through the Project Charters, the participating police institutions were able to shroud themselves in language of “human rights leadership,” “organizational change,” and “best practices.” This human rights branding enabled the TPS to evade enforceable HRTO systemic remedies and blunt the impact of the *Toronto Star*'s contemporaneous reporting of racially-disproportionate policing practices. For the WPS, this branding also assisted in combatting negative press coverage of police brutality with the narrative that the WPS was

“embracing diversity.” Through these cooperative and voluntarist Project Charter agreements, premised on a commitment to diversity, participating policing services were able to uphold pre-existing racially inequitable practices while projecting a public commitment to human rights.

The OHRC’s partnership with police also created institutional distance between the Commission and mobilization efforts to hold Ontario policing institutions responsible for police violence and racial profiling. During the OHRC’s 60th year virtual celebration (March 29, 2021), former Interim Chief Commissioner Ruth Goba described her brief tenure (February 28 – October 30, 2015), which coincided with the end of the WPS Project Charter, as driven by a commitment to begin “working with the Black community again” rather than “working with the police [to try] to get them to move in the right direction.” Under the Project Charter approach, however, the OHRC prioritized maintaining collaborative relationships with policing institutions above holding these institutions publicly, and legislatively, accountable. As one community member told the Diversity Institute (Cukier *et al.*, 2014: 55), in the context of the TPS Project Charter evaluation: “I am uncomfortable with how cozy the OHRC has become with the police and I think it does impede their judgement.” In order for human rights reform efforts to serve broader mobilization against structural racism, the OHRC must maintain dialogue with, and be responsive to, community members and those otherwise mobilizing extra-legal strategies towards achieving racial justice.

While the Project Charters served to legitimize the policing institutions through human rights branding, the Ottawa Race Data Collection Project offers a potential counter example of how the scrutiny applied through the race-based data collection settlement agreement with the OHRC actually brought attention to the racially disproportionate practices of the Ottawa Police and provided impetus for further anti-racism mobilization. Whereas Ottawa Police leadership

attempted to explain the racial disproportionalities as the result of necessary deployment strategies to address crime in “ethnically diverse” neighbourhoods, the OHRC (2016) stated publicly that the findings offered circumstantial evidence of racial profiling and that the over-policing of racialized neighbourhoods could itself be a form of systemic racial discrimination. The OHRC (2016) offered a public deputation to the Ottawa Police Services Board, standing alongside the African Canadian Legal Clinic, on how institutional policing practices create and sustain racial disproportionalities and quoted the United Nations Working Group of Experts on People of African Descent as having found “clear evidence that racial profiling is endemic in the strategies and practices used by law enforcement.” In this way, the OHRC utilized its institutional authority to bolster community critiques of Ottawa policing and lend official credibility to community-based claims of systemic racism in policing. Additionally, the correlation between the Ottawa Race Data Collection Project and the 35% decline in the overall number of stops for traffic violations identified by Lorne Foster and Lesley Jacobs (2019) is indicative of how this settlement-based intervention shifted frontline policing practices. While the racial disparities in *who* gets stopped (Black and Middle Eastern drivers) persisted throughout this period, the reduction in overall stops is consistent with strategies advocated by racial justice advocates such as Rachel Herzing (2016: 115), who asserts that “the best way to reduce the violence of policing is to reduce contact with cops.”

The dynamics of litigation informed the OPS’s initial willingness to engage in, and their continued commitment to, race-based data collection. Juxtaposing the Ottawa Project with the Project Charter agreements draws attention to the centrality of the OHRC’s litigation powers, that is, its institutional ability to not only persuade but *compel* Ontario policing institutions to engage in anti-racist systemic change initiatives. Retrospectively, the OHRC (2019a) has

identified that the absence of enforcement mechanisms within the Project Charters created an impediment to enhancing police accountability. Yet, this diagnosis fails to account for the OHRC's own role in constructing a voluntary All Rights Matter approach that de-emphasized racial profiling concerns and prioritized diversification in recruitment and hiring over addressing systemic discrimination. Both the Ottawa case study and the TPS Project Charter also demonstrate how the OHRC's conciliatory approach has aided policing institutions in evading more comprehensive mandatory enforcement measures through demonstrations of voluntary and discretionary human rights measures in cases before the HRTTO.

Emphasizing the OHRC's litigation power risks obscuring the failure of the HRTTO, and of the Canadian court system more broadly, to issue transformative remedies that address systemic discrimination. As legal scholars David Tanovich (2008), Gwen Brodsky, Shelagh Day and Frances Kelly (2017), Sujith Xavier (2021), and Constance Backhouse (2021) argue, Canadian jurisprudence has repeatedly failed to attend to group patterns of discrimination or support the application of an anti-racist analysis. In calling for the OHRC to apply its powers of litigation more effectively to the problem of racism in policing, I return to Carol Aylward's (1999) Critical Race Litigation strategy, which is attentive to the operation of racism both within the structures of the Canadian legal system and within the particulars of a specific case. As the foregoing analyses have demonstrated, Project Charter agreements have often undermined the OHRC's limited success in securing enforceable public interest remedies against policing institutions before the HRTTO. Alternatively, were the OHRC to use litigation, including the power to initiate complaints, to open pathways to claims of collective racial discrimination and increase the availability of group litigation (as suggested by Jean-Simon Schoenholz, 2017), the Commission could potentially disrupt the bifurcation of human rights wherein individual

complaints are met with firm enforcement strategies while collective inequities are addressed through cooperative partnership-oriented approaches. Critical Race Litigation, with its simultaneous attentiveness to racism in legal structures and the harm of racism to individuals, offers a more fruitful path for the OHRC to employ reform-based measures towards transformative racial justice than partnering with police.

There is evidence in the OHRC's more recent activities of a greater institutional awareness that addressing anti-Black racism requires both dedicated scrutiny of, and procedural distance from, Ontario police services. Rather than deepening their institutional partnership, in the wake of the Toronto Project Charter, the OHRC became increasingly and publicly critical of the TPS and in 2017 launched *An Inquiry into the Racial Profiling and Racial Discrimination of Black persons by the Toronto Police Service*. This public inquiry eschewed both the partnership approach and the "all grounds" focus of the TPS Project Charter and was, instead, explicitly attentive to anti-Black racism in Toronto policing. The OHRC's distancing from police institutions and re-engagement with Black communities was necessitated by mounting Black activism across Ontario in response to police violence. In particular, the killings of Andrew Loku in 2015 by Toronto Police and Abdirahman Abdi in 2016 by Ottawa Police ignited public demand for police accountability and an end to racist carding practices in Ontario. Black Toronto activist and journalist Desmond Cole (*Toronto Life*, April 15, 2015) ignited a provincial debate around carding (or "street checks") through writing about his experience being interrogated by police more than fifty times without having ever been charged. Black Lives Matter Toronto (Hudson and Diverlus, 2020) held a series of highly publicized actions demanding an end to police violence against Black, Indigenous and other racialized communities, including shutting down both sides of the Allen Road Expressway and forming a Tent City outside of Toronto

Police headquarters. These Black mobilization initiatives spurred multiple provincial government responses, including the establishment of the Ontario Anti-Racism Directorate in 2016, the Independent Street Checks Review by Justice Michael Tulloch in 2017, and the passage of the Ontario *Anti-Racism Act* in 2017. It is within the context of this conflict-driven provincial response to racism that the OHRC’s policy approach shifted towards a re-engagement with Black communities and the application of independent scrutiny to racial profiling within policing.

Yet despite the OHRC recognizing the failure of these collaborative agreements to advance accountability for systemic discrimination, and their efforts to re-engage with Black community mobilization, the OHRC continues to form partnerships with police. In 2020, OHRC announced that it is working with Peel Regional Police Service (PRP) to establish a “legally binding plan to address systemic racism and discrimination” (as reported by Miller, *Toronto Star*, Jan 15, 2022). As with the Ottawa Race Data Collection Project—and distinct from the Project Charters—the partnership with PRP will constitute a legally-enforceable agreement and involve explicit attention to race and racism.⁹⁰ Crucially, however, the enforcement of this “legally binding” agreement will rely on the OHRC’s willingness and ability to identify and pursue PRP’s non-compliance—a willingness which was largely absent from the OHRC’s laudatory treatment of the participating institutions at the close of the Project Charters. Even in the OHRC’s most recent policy efforts, *Eliminating Racial Profiling in Law Enforcement* (2019b), there is continued endorsement of the organizational change approach laid out in the

⁹⁰ The 2020 Memorandum Of Understanding between the Ontario Human Rights Commission and Peel Regional Police and Regional Municipality of Peel Police Services Board contains explicit acknowledgement of racial profiling and the need for race data collection.

OHRC's 2011 guide on *Human Rights and Policing*, an approach which I have shown to be premised on *selling* police leadership on the institutional advantages of diversity.

Together with tracing the Commission's policy approach to race-based discrimination from 1962 to 2016, this exploration of the OHRC's engagement with Ontario policing institutions illustrates that the substance of human rights is not theoretically pre-determined but is instead shaped by the institutions, contexts, and locations in which rights are invoked. I have sought to underscore that the OHRC's recurrent role as mediator between transformative equity-based demands and an inequitable *status quo* has limited the application of a substantive equality framework in Ontario human rights policy. In the process, I have also illustrated that this conciliatory approach to human rights has particular consequences for the advancement of anti-racism policy, as the Canadian attachment to racial innocence and neutrality creates both a need for, and impediment to, the integration of anti-racism analysis within human rights law. In my documentary review of OHRC policy and the Project Charter agreements, I have established how the All Rights Matter approach to difference and human rights protections obscures an institutional unwillingness to address structural racism. This examination of the Project Charter agreements, in relation to the OHRC's evolving policy approach to race and racism, establishes the continuities between the *race relations* framework and *diversity management* strategies. Just as the race relations framework presupposes equanimity between naturally-occurring "races," diversity management strategies essentialize differences as individual attributes. Further, both sets of strategies prioritize harmonious public relations over structural change. Finally, I have applied this analysis to the context of human rights and policing in Ontario to demonstrate how policing sustains a racially-inequitable social order and is particularly resistant to engaging in anti-racism based organizational change. Through the establishment of these Project Charter

agreements, the OHRC forfeited an inquiry into the institutionalized practices that perpetuate racial disproportionalities and police brutality and instead cast the problem facing Ontario policing services as arising primarily out of a combined lack of diversity and human rights awareness.

Throughout this inquiry, I have attended to the scope of problem representation and what is left unproblematicized, drawing from the work of Carol Bacchi (1999, 2012). In concluding this inquiry, I am drawn to Bacchi's (2012: 152) insistence that "researchers examine the realities they create and assess the political fallout accompanying those realities." This insistence calls for reflection on the containment strategies that have been, and will be, applied to the OHRC itself that impede consistent and transformative human rights enforcement approaches, as well as the institutional risks involved in diverging from a conciliatory approach to human rights change. Although the restraining impact of the Harris government's Common Sense Revolution on social policy and public institutions was readily apparent, the neoliberal obfuscations of the McGuinty government cloaked budget reductions and privatization in progressive equality commitments. It was within this context of reduced resources and massive institutional changes brought on by Bill 107 that the OHRC embarked on partnership-building to sustain their public policy initiatives. Although, since the rise of Black Lives Matter in Ontario, the OHRC has moved to apply public scrutiny to police services and advanced explicit anti-racism interventions, the sustainability of this new direction has been brought under question with further shifts in provincial politics, including the Conservative Ford government's appointment of a Toronto Police Officer, Randall Arsenault,⁹¹ as a Commissioner of the OHRC. This appointment serves

⁹¹ Arsenault's appointment was opposed by the Black Legal Action Centre who expressed concern that the appointment raises concerns about the "integrity of the commission and its ability to fight racism" (as quoted in Benzie et al., *Toronto Star*, Jan 24, 2020).

as a reminder that, as articulated by Brian Howe (1991: 798), the “forces of restraint” leave “their mark on policy.”

The OHRC is limited in its ability to intervene into systemic claims due to the resources allotted and appointments selected by the governments of the day. Accordingly, as an institution, the Commission must be strategic in its efforts to effect human rights change without attracting backlash. This strategic negotiation of human rights advancement and institutional perseverance, however, should never again involve an All Rights Matter approach to policing. As utilized in creating and undertaking Project Charter agreements, such an approach enabled the *appearance of change* while simultaneously condoning standard policing practices and evading anti-racist accountability. The OHRC’s persistent ambivalence between maintaining the *status quo* and using its institutional powers to push against it necessitates continued attention to the substance and direction of these human rights reforms— be they in service of, or an obstacle to, transformative racial justice.

References

- Abbott v. Toronto Police Services Board, 2009 HRTO 1909 (CanLII), <https://canlii.ca/t/26kq7>
- Abella, R. S. (1984). *Equality in employment: a Royal Commission Report. Supply and Services Canada*.
- Abu-Laban, Y. & Gabriel, C. (2008). *Selling Diversity Immigration, Multiculturalism, Employment Equity, and Globalization*. University of Toronto Press.
- Abu-Laban, Y. (2002). "Liberalism, Multiculturalism and the Problem of Essentialism." *Citizenship Studies*, 6(4), 459–482. <https://doi.org/10.1080/1362102022000041268>
- Abu-Laban, Y. (2007) "Political Science, Race, Ethnicity, and Public Policy" in *Critical Policy Studies*. M. Orsini, & M. Smith (Eds.). UBC Press.
- Abu-Laban, Y. (2017). "Narrating Canadian Political Science: History Revisited: Presidential Address to the Canadian Political Science Association Toronto, Ontario May 30, 2017." *Canadian Journal of Political Science*, 50(4), 895–919. <https://doi.org/10.1017/S000842391700138X>
- African Canadian Legal Clinic. (2002). *Report on the Canadian Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination*. African Canadian Legal Clinic.
- African Canadian Legal Clinic. (2007) "Condition Critical: Anti-Black Racism and the Imperative for Action: Report to the Committee on the Elimination of Racial Discrimination." *Review of Canada's Seventeenth and Eighteenth Periodic Reports under the International Convention on the Elimination of All Forms of Racial Discrimination*. Geneva: United Nations, Committee on the Elimination of Racial Discrimination. https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CAN/INT_CERD_NGO_CAN_70_8269_E.pdf
- Agocs, C. (2004). "Surfacing Racism in the Workplace: Qualitative and Quantitative Evidence of Systemic Discrimination." *Canadian Diversity*, 3(3).
- Ahmed. (2006). "The non-performativity of anti-racism [1].(institutional speech acts)." *Borderlands e-Journal*, 5(3).
- Ahmed, S. (2007). "'You end up doing the document rather than doing the doing': Diversity, race equality and the politics of documentation." *Ethnic and Racial Studies*, 30(4), 590–609. <https://doi.org/10.1080/01419870701356015>
- Ahmed, S. (2012). *On being included: Racism and diversity in institutional life*. Duke University Press.

- Aiken v Ottawa Police Services Board, 2015 ONSC 3793 (CanLII), <https://canlii.ca/t/gjj34>
- Aiken v. Ottawa Police Services Board, 2019 HRT0 934 (CanLII), <https://canlii.ca/t/j0vxxm>
- Alexander, M. (2020). *The new Jim Crow: mass incarceration in the age of colorblindness* (Tenth anniversary edition.). The New Press.
- Anderson, B. (2019). "New Directions in Migration Studies: Towards Methodological De-Nationalism." *Comparative Migration Studies*, 7(1), 1–13.
<https://doi.org/10.1186/s40878-019-0140-8>
- Accessibility for Ontarians with Disabilities Act* (2005) Ontario.
<https://www.ontario.ca/laws/view>
- Aylward, C. (1999). *Canadian Critical Race Theory: Racism and the Law*. Fernwood.
- Azmi, S. (2004). "Racial Discrimination, Racism, and Human Rights." *Canadian Diversity*, 3(3).
- Azmi, S. (2017). "The Human Rights Approach to Addressing Racial Profiling: The Activity of the Ontario Human Rights Commission." *Canadian Diversity*, 14(1).
- Bacchi, C. (1999). *Women, Policy, and Politics: The Construction of Policy Problems*. Sage.
- Bacchi, C. (2012). "Introducing the 'What's the Problem Represented to be?' approach." In *Engaging with Carol Bacchi*. University of Adelaide Press.
<https://doi.org/10.20851/j.ctt1sq5x83.7>
- Backhouse, C. (1999). *Colour-coded: A legal history of racism in Canada, 1900-1950*. Published for the Osgoode Society for Canadian Legal History by University of Toronto Press.
- Backhouse, C. (2021) Turning the Tables on RDS: Racially Revealing Questions Asked by White Judges. *Dalhousie Law Journal*, 44(1), 181.
- Bakan, A. & Dua, E. (2014). *Theorizing Anti-Racism: Linkages in Marxism and Critical Race Theories*. University of Toronto Press.
- Bakan, A. & Kobayashi, A. (2007). "Affirmative Action and Employment Equity: Policy, Ideology, and Backlash in Canadian Context." *Studies in Political Economy*, 79(1), 145–166. <https://doi.org/10.1080/19187033.2007.11675095>
- Baker. (2006). *Forms of exclusion: Racism and Community Policing in Canada*. de Sitter.
- Bannerji, H. (2000). *Dark Side of the Nation: Essays on Multiculturalism, Nationalism, and Gender*. Canadian Scholars.

- Bannerji, H. (2005). "Building from Marx: Reflections on Class and Race." *Social Justice*, 32(4:102), 144–160.
- Beecham, M. (2020). "Whataboutism" accessed through: <https://www.mariebeebecham.org/>
- Bell, J. & Hartmann, D. (2007). "Diversity in Everyday Discourse: The Cultural Ambiguities and Consequences of 'Happy Talk.'" *American Sociological Review*, 72(6), 895–914.
<https://doi.org/10.1177/000312240707200603>
- Benjamin, A. (2002). "The Social and Legal Banishment of Anti-racism: A Black Perspective." *In Crimes of Colour Crimes of Colour: Racialization and the Criminal Justice System in Canada*. W. Chan, & K. Mirchandani. Broadview Press.
<https://doi.org/10.3138/j.ctt2tv1ct>
- Benzie, R., Ferguson, R., & Rankin, J. (2020, January 24). "Ford defends 'phenomenal' appointment of Toronto police officer to Human Rights Commission." *The Toronto Star*.
<https://www.thestar.com/politics/provincial/2020/01/24/ford-defends-phenomenal-appointment-of-toronto-police-officer-to-human-rights-commission.html>
- Betcherman, L.R. (1975). *The Swastika and the Maple Leaf: Fascist Movements in Canada in the Thirties*. Fitzhenry & Whiteside.
- Bilge, S. (2013). Intersectionality Undone: Saving Intersectionality from Feminist Intersectionality Studies. *Du Bois Review*, 10(2), 405–424.
<https://doi.org/10.1017/S1742058X13000283>
- Black, B. (2004). The Human Rights Process and Race Discrimination Complaints. *Canadian Diversity*, 3(3).
- Bonilla-Silva, E. (2014). *Racism Without Racists : Color-Blind Racism and the Persistence of Racial Inequality in America* (Fourth edition.). Rowman & Littlefield Publishers, Inc.
- Borovoy, A. (1999). *The New Anti-Liberals*. Toronto: Canadian Scholars' Press.
- Brodie, J. (2008). "We are all equal now: Contemporary gender politics in Canada." *Feminist Theory* 9, no. 2: 145-164.
- Brodsky, G., Day, S., & Kelly, F. (2017). "The Authority of Human Rights Tribunals to Grant Systemic Remedies." *Canadian Journal of Human Rights*, 6: 1-48.
- Brown, G. (2019). "To Swerve and Neglect: De-Policing Throughout Today's Front-Line Police Work." Thesis (Ph.D.) - Carleton University.
- Brown, W. (1995). *States of Injury: Power and Freedom in Late Modernity*. Princeton University Press.

- Brown, W. (2019). *In the Ruins of Neoliberalism: The Rise of Antidemocratic Politics in the West*. Columbia University Press. <https://doi.org/10.7312/brow19384>
- Brown, W. (2000). "Suffering Rights as Paradoxes." *Constellations*, 7(2), 230–241.
- Bruckert, C. & Chabot, F. (2010). *Challenges: Ottawa area sex workers speak out*. POWER (Prostitutes of Ottawa-Gatineau Work Educate and Resist).
- Bryan, T. (2019). *Race, Diversity, and the Politics of Hate Crime: an Analysis of Police Response to Racially Motivated Hate Crimes in the Greater Toronto Area*. [Doctoral dissertation, York University] https://yorkspace.library.yorku.ca/xmlui/bitstream/handle/10315/36780/Bryan_Timothy_J_2019_PhD.pdf?sequence=2&isAllowed=y
- Bryant, M. (2006). "Ontario Passes Human Rights Code Amendment Act." [Ontario press release] <https://news.ontario.ca/en/release/82630/ontario-passes-human-rights-code-amendment-act>
- Cameron, B. (1996). From Equal Opportunity to Symbolic Equity: Three Decades of Federal Training Policy for Women. In *Rethinking Restructuring: Gender and Change in Canada*. Ed. I. Bakker. Toronto: University of Toronto Press.
- Canada's Top 100. (n.d.). Canada's Best Diversity Employers: Selection Process. <https://www.canadastop100.com/diversity/>
- Canadian Hearing Society. (2006, Aug 8) Standing Committee on Justice Policy. Legislative Assembly of Ontario. *Official Report of Debates (Hansard)*, https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2006/2006-08/committee-transcript-2-EN-2006-08-08_pdfJP016.pdf
- CBC News. (2010, December 1). Video of homeless man being kicked released. <https://www.cbc.ca/news/canada/ottawa/video-of-homeless-man-being-kicked-released-1.877111>
- CBC News. (2012a, January 6). "Status quo not path forward" says Windsor Police chief. <https://www.cbc.ca/news/canada/windsor/status-quo-not-path-forward-says-windsor-police-chief-1.1163275>
- CBC News. (2012b, May 4). Ottawa police racial-profiling settlement questioned. <https://www.cbc.ca/news/canada/ottawa/ottawa-police-racial-profiling-settlement-questioned-1.1199823>
- CBC News. (2012c, October 16). Beyond the Badge: A CBC series on Windsor Police. <https://www.cbc.ca/news/canada/windsor/beyond-the-badge-a-cbc-series-on-windsor-police-1.1232552>

- CBC News. (2015, September 18). Faced with criticism, Harper explains his “old-stock Canadians” debate comment. <https://www.cbc.ca/news/politics/canada-election-2015-harper-debate-1.3233785>
- CBC News. (2019, June 21). How has Windsor police, city changed under Chief Al Frederick. <https://www.cbc.ca/news/canada/windsor/chief-frederick-retiring-1.5178302>
- CBC News. (2020, July 7). “Defunding isn’t necessarily the answer” says Windsor police chief focused on diversity. <https://www.cbc.ca/news/canada/windsor/windsor-police-chief-pam-mizuno-defunding-and-force-size-diversity-1.5640085>
- Centre for Equality Rights in Accommodation. (2006, Nov 22). Standing Committee on Justice Policy. Legislative Assembly of Ontario. *Official Report of Debates (Hansard)*.
- Chadha, E. (2021, October 23). A black man, a fatal police shooting, and a widow who didn't back down: The 1979 case that electrified the city and launched a movement. *The Toronto Star*. <https://www.thestar.com/news/gta/2021/10/23/a-black-man-a-fatal-police-shooting-and-a-widow-who-didnt-back-down-the-1979-case-that-electrified-the-city-and-launched-a-movement.html>
- Chan, W. & Chunn, D. (2014). *Racialization, crime and criminal justice in Canada*. Toronto: University of Toronto Press.
- Chang, E. (2020). *Diversity as Impression Management*. [Doctoral dissertation, University of Pennsylvania] ProQuest Dissertations Publishing.
- Chen, D. (2008, Feb 13). Students urge probe of police. *Windsor Star*, 2009, *PressReader.com*—*Digital Newspaper & Magazine Subscriptions*: <https://www.pressreader.com/canada/windsor-star/20080213/281535106680610>
- Chen, D. (2013, Aug 13). Windsor cop found guilty of assault (with videos). *Windsor Star*. <https://windsorstar.com/news/local-news/windsor-police-const-kent-rice-guilty-of-assault>
- Clark, D. (2002). Neoliberalism and Public Service Reform: Canada in Comparative Perspective. *Canadian Journal of Political Science*, 35(4), 771–793. <https://doi.org/10.1017/S0008423902778438>
- Claybourn v. Toronto Police Services Board, 2013 HRTO 1298 (CanLII), <https://canlii.ca/t/fzv79>
- Clément, D. (2012). *The Evolution of Human Rights in Canada*. Ottawa: Canadian Human Rights Commission.
- Clément, D. (2016). *Human Rights in Canada: A History*. Waterloo: Wilfrid Laurier University Press.

- Closs, W. J. (2005). *The Kingston Police Data Collection Project: A Preliminary Report to the Kingston Police Services Board*. <http://hdl.handle.net/1974/8656>
- Cole, D. (2015, April 15). The Skin I'm In: I've been interrogated by police more than 50 times—all because I'm black. *Toronto Life*. <https://torontolife.com/life/skin-im-ive-interrogated-police-50-times-im-black/>
- Cole, D. & M. Gittens (1995). *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*. Retrieved April 11, 2022, from <https://www.torontopubliclibrary.ca/detail.jsp?Entt=RDM128952&R=128952>
- Comack, E. (2012). *Racialized policing: Aboriginal people's encounters with the police* Fernwood Pub.
- Cornish, M. (1992). *Achieving Equality: A Report on Human Rights Reform / Ontario Human Rights Code Review Task Force*. Ministry of Citizenship.
- Coulter, K. (2009). Women, Poverty Policy, and the Production of Neoliberal Politics in Ontario, Canada. *Journal of Women, Politics & Policy*, 30(1), 23–45. <https://doi.org/10.1080/15544770802367788>
- Coulthard, G. (2014). *Red skin, white masks: rejecting the colonial politics of recognition*. University of Minnesota Press.
- Cranford, C. & Vosko, L. (2006). Conceptualizing precarious employment: Mapping wage work across social location and occupational context. In L. F. Vosko (Ed.), *Precarious employment: Understanding labour market insecurity in Canada*. McGill–Queen's University Press.
- Crenshaw. (1991). Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color. *Stanford Law Review*, 43(6). <https://doi.org/10.2307/1229039>
- Crenshaw, K., Gotanda, N., Peller, G., & Thomas, K. (1995). *Critical Race Theory: The Key Writings that Formed the Movement*. The New Press.
- Cukier, W., Bindhani, P., Connely, K., Holmes, M., Jackson, S., Saekang, A., & Smarz, S. (2014). *Evaluation of the Human Rights Project Charter*. Canadian Electronic Library.
- Cukier, W., Gagnon, S., Roach, E., Elmi, M., Yap, M., & Rodrigues, S. (2017). Trade-offs and disappearing acts: shifting societal discourses of diversity in Canada over three decades. *International Journal of Human Resource Management*, 28(7), 1031–1064. <https://doi.org/10.1080/09585192.2015.1128459>
- Das Gupta, T. (1996). *Racism and paid work*. Garamond Press.

- Das Gupta, T. (1999). The Politics of Multiculturalism: "Immigrant Women" and the Canadian State. In *Scratching the Surface: Canadian Anti-Racist Feminist Thought*. E. Dua, & A. Robertson. Canadian Scholars.
- Das Gupta, T. (2021). *Twice migrated, twice displaced : Indian and Pakistani transnational households in Canada*. UBC Press.
- Davis, K. (2008). Intersectionality as buzzword: A sociology of science perspective on what makes a feminist theory successful. *Feminist Theory*, 9(1), 67–85.
<https://doi.org/10.1177/1464700108086364>
- Dawson, M. & Francis, M. (2016). Black Politics and the Neoliberal Racial Order. *Public Culture*, 28(1), 23–62. <https://doi.org/10.1215/08992363-3325004>
- DisAbleD Women's Network. (2006, Aug 8) Standing Committee on Justice Policy. Legislative Assembly of Ontario. *Official Report of Debates (Hansard)*,
https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2006/2006-08/committee-transcript-2-EN-2006-08-08_pdfJP016.pdf
- Diversity Journal. (2011, Mar 22). William Blair, Toronto Police Department.
<https://diversityjournal.com/category/ceo-in-action/>
- Dobson, S. (2009, Mar 23). Changing the ranks: Police forces are stirring up the status quo by focusing on diversity in recruiting. *Canadian HRReporter*.
<https://www.hrreporter.com/news/hr-news/changing-the-ranks/312331>
- Dykstra, A. (2020). The Rhetoric of “Whataboutism” in American Journalism and Political Identity. *Res Rhetorica*, 7. <https://doi.org/10.29107/rr2020.2.1>
- Eliadis, P. (2014). *Speaking Out On Human Rights: Debating Canada's Human Rights System*. McGill-Queen's University Press.
- Ericson, R. (1991). *Reproducing order : a study of police patrol work*. University of Toronto Press. <https://doi.org/10.3138/9781442679245>
- Failler, A. (2018). Canada 150: Exhibiting national memory at the Canadian Museum for Human Rights. *Citizenship Studies*, 22(4), 358–380.
<https://doi.org/10.1080/13621025.2018.1462500>
- Fairclough, N. (2002). Critical discourse analysis as a method in social scientific research. In *Methods of Critical Discourse Analysis*, ed. R. Wodak and M. Meyer. SAGE Publications Inc.
- Finkel, A. (2006) *Social Policy and Practice in Canada: A History*. Waterloo: Wilfrid Laurier University Press.

- Flaherty, M. & L. Reaume. (2017). Mediation-Arbitration in Ontario: Labour Relations, Human Rights, and Beyond? *Canadian Journal of Administrative Law & Practice*, 30(3).
- Fleras, A. & J. Elliott (2002). *Engaging diversity: multiculturalism in Canada* (2nd ed.). Nelson Thomson Learning.
- Forrester v. Peel (Regional Municipality) Police Services Board *et al*, 2006 HRTO 13 (CanLII), <https://canlii.ca/t/1r78d>
- Foster, L. & Jacobs, L. (2015). *Evaluation Report: Windsor Police Service Human Rights Project*. https://windsorpolice.ca/about/human-rights/Documents/Final%20REPORT_Foster_Jacobs%20January%202016.1.pdf
- Foster, L. & Jacobs, L. (2019). Traffic Stop Race Data Collection Project II Progressing Towards Bias-Free Policing: Five Years of Race Data on Traffic Stops in Ottawa. Ottawa Police Service. <https://www.ottawapolice.ca/en/news-and-community/resources/EDI/OPS-TSRDCP-II-REPORT-Nov2019.pdf>
- Foster, L., Jacobs, L. & Siu, B. (2016) Race Data and Traffic Stops in Ottawa, 2013-2015: A Report on Ottawa and the Police Districts. Ottawa Police Service. https://www.ottawapolice.ca/en/about-us/resources/.TSRDCP_York_Research_Report.pdf
- Fraser, N. (2016). Expropriation and Exploitation in Racialized Capitalism: A Reply to Michael Dawson. *Critical Historical Studies*, 3(1), 163–178. <https://doi.org/10.1086/685814>
- Friesen, J. (2005, April 27). New Police Chief Blair is sworn in. *The Globe and Mail*. <https://www.theglobeandmail.com/news/national/new-police-chief-blair-is-sworn-in/article18222069/>
- Fudge, J. & Glasbeek, H. (1992). The Politics of Rights : a Politics With Little Class. *Social & Legal Studies*, 1(1), 45–70. <https://doi.org/10.1177/096466399200100104>
- Fudge, J. (1992). *Law, labour relations and the state: the legal regulation of women's work*. York University, Osgoode Hall Law School.
- Galabuzi, G.E. (2006). *Canada's economic apartheid: the social exclusion of racialized groups in the new century*. Canadian Scholars's Press.
- Galldin, K. & L. Roberston. (2010, Dec 1). Request for Public Inquiry into Discrimination against Ottawa-area Sex Workers by Ottawa Police Service. Galldin Law - Public letter. <http://nswp.org/sites/default/files/Request%20to%20Commission%2C%201%20Dec%202010-1.pdf>

- Gill, S. (2000). The Unspeakability of Racism: Mapping Law's Complicity in Manitoba's Racialized Spaces. *Canadian Journal of Law and Society*, 15(2), 131–162. <https://doi.org/10.1017/S0829320100006396>
- Gilroy, P. (2021). Introduction: Race is the Prism. In P. Gilroy & R. W. Gilmore (Eds.), *Selected Writings on Race and Difference* (pp. 359–373). Duke University Press. <https://doi.org/10.2307/j.ctv1hhj1b9.23>
- Glasbeek, H & M. Mandel. (1984) The Legalization of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms. *Socialist Studies* 2: 84.
- Hall, B. (2007, Oct 26) Class of Rights (Opinion Editorial). *The Globe and Mail*. <https://www.ohrc.on.ca/en/opinion-editorial-class-rights>
- Goba, R. (2021, March 29) *The OHRC at 60*. Ontario Human Rights Commission. [Video – 48:24] <https://www.youtube.com/watch?v=AZqVC2H2BcQ>
- Gold, A. (2003). Media Hype, Racial Profiling, and Good Science. *Canadian Journal of Criminology and Criminal Justice/Revue Canadienne de Criminologie et de Justice Penale*, 45(3), 391–399. <https://doi.org/10.3138/cjccj.45.3.391>
- Goldberg, D.T. (1993). *Racist culture philosophy and the politics of meaning*. Blackwell.
- Goldberg, D.T. (2009). *The threat of race reflections on racial neoliberalism*. Wiley-Blackwell.
- Goldberg, D.T. (2015). *Are we all postracial yet?* Polity.
- Griffith, A. & D. Smith. (2014). *Under new public management: institutional ethnographies of changing front-line work*. University of Toronto Press.
- Hall, B. (2006, April 28) “Commission's initial response to the introduction of Bill 107 to reform Ontario's Human Rights System” [Ontario Human Rights Commission press release] <https://www.ohrc.on.ca/es/node/9607>
- Hall, B. (2012, May 4) “Ottawa Police agree to collect race-based data.” [Ontario Human Rights Commission press release] https://www.ohrc.on.ca/en/news_centre/ottawa-police-agree-collect-race-based-data
- Hall, S. (2021). Race, the Floating Signifier: What More Is There to Say about “Race”? [1997]. In P. Gilroy & R. W. Gilmore (Eds.), *Selected Writings on Race and Difference* (pp. 359–373). Duke University Press. <https://doi.org/10.2307/j.ctv1hhj1b9.23>
- Hankivsky, O. & R. Cormier. (2011). Intersectionality and Public Policy: Some Lessons from Existing Models. *Political Research Quarterly*, 64(1), 217–229. <https://doi.org/10.1177/1065912910376385>

- Haque, E. (2012). *Multiculturalism within a bilingual framework language, race, and belonging in Canada*. University of Toronto Press.
- Hart, M. and G. Sanson. (2005). Getting Rid of the "Gatekeeper": A Practical Model for Human Rights Reform. [Unpublished paper]. <https://www.law.utoronto.ca/scholarship-publications/conferences/archives/administrative-design>
- Head, W. (1975). *The Black Presence in the Canadian Mosaic: A Study of Perception and the Practice of Discrimination Against Blacks in Metropolitan Toronto*. Ontario Human Rights Commission.
- Henry, F. (2004). Concepts of race and racism and implications for OHRC policy. *Canadian Diversity*, 3(3).
- Henry, F., James, C., Li, P. S., Kobayashi, A., Smith, M., Ramos, H., & Enakshi, D. (2017). *The Equity Myth: Racialization and Indigeneity at Canadian Universities*. UBC Press.
- Herman, D. (1993). Beyond the Rights Debate. *Social & Legal Studies*, 2(1), 25–43. <https://doi.org/10.1177/096466399300200102>
- Herzing, R. (2016). Big Dreams and Bold Steps: Toward a Police-Free Future. In *Who Do You Serve, Who Do You Protect?: Police Violence and Resistance in the United States*. Eds. Schenwar, M., Macaré, J., & Price, A. Y., Haymarket Books.
- Hickey, R. (2012). “End-users, Public Services, and Industrial Relations: The Restructuring of Social Services in Ontario.” *Relations Industrielles* (67)4.
- Hill, D. & M. Pollock. (1967). Human Rights Legislation in Ontario. *Race & Class*, 9(2), 193–203. <https://doi.org/10.1177/030639686700900204>
- Hill, D. (1969). The Role of a Human Rights Commission: The Ontario Experience. *The University of Toronto Law Journal*, 19:30.
- Hill Collins, P. & Bilge, S. (2016). *Intersectionality*. Polity Press.
- Hillstrom, L. (2018). *Black Lives Matter: from a moment to a movement*. Greenwood, an imprint of ABC-CLIO, LLC.
- Holmes, G., Wright, K., Basu, S., Hurley, M., Martin de Almagro, M., Guerrina, R., & Cheng, C. (2019). Feminist Experiences of “Studying Up”: Encounters with International Institutions. *Millennium*, 47(2), 210–230. <https://doi.org/10.1177/0305829818806429>
- Howe, B. and D. Johnson. (2000). *Restraining Equality: Human Rights Commissions in Canada*. Toronto: University of Toronto Press.

- Howe, B. (1991). "The Evolution of Human Rights Policy in Ontario." *Canadian Journal of Political Science* 24: 4.
- Hucker, J. (1997). Antidiscrimination Laws in Canada: Human Rights Commissions and the Search for Equality. *Human Rights Quarterly*, 19(3), 547–571.
<https://doi.org/10.1353/hrq.1997.0028>
- Hudson, S. & Diverlus, R. (2020) The Origin Story of Black Lives Matter Canada. In *Until we are free : reflections on Black Lives Matter in Canada*. Eds. Diverlus, R., Hudson, S., & Ware, S. M. University of Regina Press.
- Humphrey, J. (1970) Minority Report in *Report of the Royal Commission on the Status of Women in Canada*. By Florence Bird. Hull: Information Canada.
- Hunter, I. (1972) The Development of the Ontario Human Rights Code: A Decade in Retrospect. *The University of Toronto Law Journal*. 22:4, 1972.
- Hunter, I. (1976) Human Rights Legislation in Canada: Its Origin, Development and Interpretation. *Ontario Law Review*. 15.
- Jackson, J. (2018). The Non-Performativity of Implicit Bias Training. *Radical Teacher* 112(112), 46–54. <https://doi.org/10.5195/rt.2018.497>
- Jamieson, R. (1993). *Special report of the Ombudsman Ontario following her investigation into the Ontario Human Rights Commission, the complaint of Ms. R, the complaint of Ms. M.* Ombudsman Ontario.
- James, C. (1998). "Up to No Good": Black on the Streets and Encountering Police. In *Racism and social inequality in Canada: concepts, controversies and strategies of resistance*. Ed. Satzewich, V., Thompson Educational Pub.
- James, C. (2019). Black Leadership and White Logic: Models of Community Engagement. In *African Canadian leadership : continuity, transition, and transformation*. Eds. Kitossa, T., Lawson, E., & Howard, P., University of Toronto Press.
- Jenson, J. (2015). The Fading Goal of Gender Equality: Three Policy Directions that Underpin the Resilience of Gendered Socio-economic Inequalities. *Social Politics*, 22(4), 539–560.
<https://doi.org/10.1093/sp/jxv035>
- Joseph, T. & Hirshfield, L. (2011). "Why don't you get somebody new to do it?" Race and cultural taxation in the academy. *Ethnic and Racial Studies*, 34(1), 121–141.
<https://doi.org/10.1080/01419870.2010.496489>
- Keene, J. (1993, July 20). Scaremongering over the Human Rights Commission The politics of innocence and guilt. *Toronto Star* [Factiva]

- Kempthorne, E. G. (2013). *Claims Making and Policymaking in State Anti-Racism in Ontario: The Case of the Ontario Anti-Racism Secretariat*. [Doctoral dissertation, McMaster University] <https://macsphere.mcmaster.ca/bitstream/11375/13154/1/fulltext.pdf>
- Kernerman, G. (2005). *Multicultural nationalism civilizing difference, constituting community*. UBC Press.
- Keung, N. (2005, June 29) New rights guide targets racism, not racists; Better to tackle practice than people: Norton Critics say policy manual too soft on bigots. *Toronto Star* [Factiva]
- Kil, S.H. (2020). Reporting From the Whites of Their Eyes: How Whiteness as Neoliberalism Promotes Racism in the News Coverage of “All Lives Matter.” *Communication Theory*, 30(1), 21–40. <https://doi.org/10.1093/ct/qtz019>
- Kobayashi, A. (1992). Japanese-Canadian redress settlement and its implications for ‘race relations. *Canadian Ethnic Studies*, 24(1), 1–19.
- Kormos, P. (2006, Nov 22). Standing Committee on Justice Policy. Legislative Assembly of Ontario. *Official Report of Debates (Hansard)*.
- Kristy, D. (2016, Mar 1). Windsor police names force’s first-ever diversity officer: “I’m a pioneer.” *Windsor Star*. <https://windsorstar.com/news/local-news/windsor-police-names-forces-first-ever-diversity-officer-im-a-pioneer>
- Kymlicka, W. (1998) *Finding our way: rethinking ethnocultural relations in Canada*. Oxford University Press.
- Lambertson, R. (2001). “The Dresden Story’: Racism, Human Rights, and the Jewish Labour Committee of Canada” *Ubour/Le Travail*, 47.
- Levant, E. (2009). *Shakedown : how our government is undermining democracy in the name of human rights*. McClelland & Stewart.
- Lewis, S. (1992). *Stephen Lewis report on race relations in Ontario*. Govt of Ontario.
- Liedtke, J. (2013, Jan. 24). Police release internal census results. *Inside Halton*. <https://www.insidehalton.com/news-story/1492473-police-release-internal-census-results/>
- Linden, S. (2007). *Report of the Ipperwash Inquiry*. <https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/>
- Luft, R. (2009). Intersectionality and the Risk of Flattening Difference: Gender and Race Logics, and the Strategic use of Antiracist Singularity. In *The Intersectional Approach: Transforming the Academy Through Race, Class and Gender* Eds. M. Berger and K. Guidroz. The University of North Carolina Press.

- Luft, R. & R. Ward. (2009). "Toward an intersectionality just out of reach: Confronting challenges to intersectional practice." *Advances in Gender Research, Special Volume: Intersectionality*. 13: 9-37.
- Mackey, E. (2002). *The house of difference: cultural politics and national identity in Canada*. University of Toronto Press.
- MacKinnon, C. (1989). *Toward a Feminist Theory of the State*. Harvard University Press.
- Marin, A. & Addo, K. (2008). *Ombudsman report oversight unseen: investigation into the Special Investigations Unit's operational effectiveness and credibility*. Ombudsman Ontario.
- Maynard v. Toronto Police Services Board, 2012 HRT0 1220 (CanLII), <https://canlii.ca/t/frsxs>
- Maynard, R. (2017). *Policing Black lives: State violence in Canada from slavery to the present*. Fernwood Publishing.
- McCooley, P. (2005, Nov 11). Police clear officers of racial profiling. *The Ottawa Citizen*. [ProQuest 240909261].
- McKay v. Toronto Police Services Board, 2011 HRT0 499 (CanLII), <https://canlii.ca/t/fkkfn>
- Mégret, F. (2004). The relevance of international instruments on racial discrimination to racial discrimination policy in Ontario. *Canadian Diversity*, 3(3).
- Melchers, R. (2003). Do Toronto police engage in racial profiling? *Canadian Journal of Criminology and Criminal Justice*, 45(3), 347–366. <https://doi.org/10.3138/cjccj.45.3.347>
- Miles, R. (1982). *Racism and migrant labour*. Routledge & Kegan Paul.
- Millar, E. (2008, February 14). Windsor students accuse police of racially motivated excessive force at school event. *Macleans.ca*. <https://www.macleans.ca/education/uniandcollege/windsor-students-accuse-police-of-racially-motivated-excessive-force-at-school-event/>
- Miller, J. (2022, January 15). Police must continue 'uncomfortable' transformations, Peel Chief Nishan Duraipappah says. *The Toronto Star*. <https://www.thestar.com/news/gta/2022/01/15/police-must-continue-uncomfortable-transformations-peel-chief-nishan-duraiappah-says.html>
- Mosher, C. J. (1998). *Discrimination and denial systemic racism in Ontario's legal and criminal justice systems, 1892-1961*. University of Toronto Press.
- Murdocca, C. (2013). *To right historical wrongs: race, gender, and sentencing in Canada*. UBC Press.

- Murdocca, C. (2004). The Racial Profile: Governing Race through Knowledge Production (Research Note). *Canadian Journal of Law and Society*, 19(2), 153–167.
<https://doi.org/10.1017/S0829320100008176>
- Nader, L. (1972). Up the Anthropologist – Perspectives Gained from Studying Up. In *Reinventing anthropology*. Ed. D. Hymes. Pantheon Books.
- Nassiah v. Peel (Regional Municipality) Services Board, 2007 HRTO 14 (CanLII),
<https://canlii.ca/t/1rgcm>
- Nath, N. (2011). Defining Narratives of Identity in Canadian Political Science: Accounting for the Absence of Race. *Canadian Journal of Political Science*. 44(1), 161–193.
- Nath, N., Tungohan, E., & Gaucher, M. (2018). The Future of Canadian Political Science: Boundary Transgressions, Gender and Anti-Oppression Frameworks. *Canadian Journal of Political Science*, 51(3), 619–642. <https://doi.org/10.1017/S0008423918000197>
- Nettelbeck, A., & Smandych, R. (2010). Policing Indigenous Peoples on Two Colonial Frontiers: Australia’s Mounted Police and Canada’s North-West Mounted Police. *Australian & New Zealand Journal of Criminology*, 43(2), 356–375.
<https://doi.org/10.1375/acri.43.2.356>
- Nipp, D. & Taylor, L. (1994). *Guidelines and Recommendations for Dealing with Race Cases from Intake to Board of Inquiry*. Ontario Human Rights Commission. [Internal]
- Norton, K. (2001, Mar 27). “Ontario Human Rights Commission achieves a current caseload.” [Ontario Human Rights Commission press release].
https://www.ohrc.on.ca/en/news_centre/ontario-human-rights-commission-achieves-current-caseload
- Norton, K. (2002, Feb 20) “Statement by Chief Commissioner Keith Norton regarding the Ontario Human Rights Commission inquiry into racial profiling.” [Ontario Human Rights Commission press release]. https://www.ohrc.on.ca/en/news_centre/statement-chief-commissioner-keith-norton-regarding-ontario-human-rights-commission-inquiry-racial
- Norton, K. (2003, Feb 20) “Ontario Human Rights Commission takes action on racial profiling.” [Ontario Human Rights Commission press release].
https://www.ohrc.on.ca/en/news_centre/ontario-human-rights-commission-takes-action-racial-profiling
- Ontario, Legislative Assembly. *Bill 107: An Act to amend the Human Rights Code*. Royal Assent: December 2006.
- Ontario, Legislative Assembly. *Bill 7: An Act to revise and extend Protection of Human Rights in Ontario*, 32nd Legislature, 1st Session, 1981.

- Ontario. *Human Rights Code*. R.S.O. c. H.19, 1990.
- Ontario. (1981). "c 53 Human Rights Code, 1981." *Ontario: Annual Statutes*. 1981: 55.
http://digitalcommons.osgoode.yorku.ca/ontario_statutes/vol1981/iss1/55
- Ontario. (1961/62). "Ontario human rights code 1961-62." *Ontario: Annual Statutes*. 1962: 93, Queen's Printer.
- Ontario Human Rights Commission. (1977). *Life together: report on Human rights in Ontario*. Queen's Printer.
- Ontario Human Rights Commission. (1979). *Policy on Slurs and Harassment and Racial Jokes*. Toronto: The Ontario Human Rights Commission
- Ontario Human Rights Commission. (1989). *Policy statement on racial slurs and harassment, and racial jokes*. Ontario Human Rights Commission.
- Ontario Human Rights Commission. (1982/83). *Annual report of the Ontario Human Rights Commission*. Toronto: The Ontario Human Rights Commission.
- Ontario Human Rights Commission. (1987/88). *Annual report of the Ontario Human Rights Commission*. Toronto: The Ontario Human Rights Commission.
- Ontario Human Rights Commission. (1991/92). *Annual report of the Ontario Human Rights Commission*. Toronto: The Ontario Human Rights Commission
- Ontario Human Rights Commission. (1993/94). *Annual report of the Ontario Human Rights Commission*. Toronto: The Ontario Human Rights Commission
- Ontario Human Rights Commission. (1994/95). *Annual report of the Ontario Human Rights Commission*. Toronto: The Ontario Human Rights Commission
- Ontario Human Rights Commission. (1996a). *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims*. Toronto: The Ontario Human Rights Commission
- Ontario Human Rights Commission. (1996b). *Policy on Slurs and Harassment and Racial Jokes*. Toronto: The Ontario Human Rights Commission
- Ontario Human Rights Commission. (2001). *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims*. Toronto: The Ontario Human Rights Commission Retrieved from:
https://www3.ohrc.on.ca/sites/default/files/attachments/An_intersectional_approach_to_discrimination%3A_Addressing_multiple_grounds_in_human_rights_claims.pdf

- Ontario Human Rights Commission. (2003) *Statement by Chief Commissioner Keith Norton regarding the Ontario Human Rights Commission inquiry into racial profiling*. Toronto: The Ontario Human Rights Commission.
http://www.ohrc.on.ca/en/news_centre/statement-chief-commissioner-keith-norton-regarding-ontario-human-rights-commission-inquiry-racial
- Ontario Human Rights Commission. (2004) *Submission of the Ontario Human Rights Commission to the Toronto District School Board Safe And Compassionate Schools Task Force*. The Ontario Human Rights Commission. <https://www.ohrc.on.ca/en/submission-ontario-human-rights-commission-toronto-district-school-board-safe-and-compassionate>
- Ontario Human Rights Commission. (2005a). *Policy and guidelines on racism and racial discrimination*. The Ontario Human Rights Commission. <https://www.ohrc.on.ca/en/policy-and-guidelines-racism-and-racial-discrimination>
- Ontario Human Rights Commission. (2005b). *Discussion paper: Reviewing Ontario's human rights system*. The Ontario Human Rights Commission.
https://www3.ohrc.on.ca/sites/default/files/attachments/Policy_and_guidelines_on_racism_and_racial_discrimination.pdf
- Ontario Human Rights Commission. (2005c). *Consultation Report: Strengthening Ontario's Human Rights System - What We Heard*. The Ontario Human Rights Commission.
<https://www.ohrc.on.ca/en/consultation-report-strengthening-ontarios-human-rights-system-what-we-heard>
- Ontario Human Rights Commission. (2005/06). *Annual report of the Ontario Human Rights Commission*. The Ontario Human Rights Commission.
<https://www.ohrc.on.ca/en/annual-report-2005-2006>
- Ontario Human Rights Commission. (2006/07). *Annual report of the Ontario Human Rights Commission*. The Ontario Human Rights Commission.
<https://www.ohrc.on.ca/en/annual-report-2006-2007>
- Ontario Human Rights Commission. (2007/08). *Annual report of the Ontario Human Rights Commission*. The Ontario Human Rights Commission.
<https://www.ohrc.on.ca/en/annual-report-2007-2008>
- Ontario Human Rights Commission. (2008). *Human Rights at Work – Third Edition*. The Ontario Human Rights Commission. <https://www.ohrc.on.ca/en/human-rights-work-2008-third-edition>
- Ontario Human Rights Commission. (2008/09). *Annual report of the Ontario Human Rights Commission*. The Ontario Human Rights Commission.
<https://www.ohrc.on.ca/en/annual-report-2008-2009>

- Ontario Human Rights Commission. (2009/10). *Annual report of the Ontario Human Rights Commission, Educate Empower Act*. The Ontario Human Rights Commission. <https://www.ohrc.on.ca/en/annual-report-2009-2010-educate-empower-act>
- Ontario Human Rights Commission. (2009a). *Count me in! Collecting human-rights based data*. The Ontario Human Rights Commission. <https://www.ohrc.on.ca/en/count-me-collecting-human-rights-based-data>
- Ontario Human Rights Commission. (2009b). *Fishing without fear: Follow-up report on the Inquiry into assaults on Asian Canadian anglers*. The Ontario Human Rights Commission. <https://www.ohrc.on.ca/en/fishing-without-fear-follow-report-inquiry-assaults-asian-canadian-anglers>
- Ontario Human Rights Commission. (2010/11). *Annual report of the Ontario Human Rights Commission: Looking back, moving forward*. The Ontario Human Rights Commission. <https://www.ohrc.on.ca/en/annual-report-2010-2011-looking-back-moving-forward>
- Ontario Human Rights Commission. (2011). *Human rights and policing: Creating and sustaining organizational change*. The Ontario Human Rights Commission. https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_depotes_a_la_Commission/P-674.pdf
- Ontario Human Rights Commission. (2011/12). *Annual report of the Ontario Human Rights Commission, Human rights: the next generation*. The Ontario Human Rights Commission. <https://www.ohrc.on.ca/en/annual-report-2011-2012-human-rights-next-generation>
- Ontario Human Rights Commission. (2012). *Policy on competing human rights*. The Ontario Human Rights Commission. <https://www.ohrc.on.ca/en/policy-competing-human-rights>
- Ontario Human Rights Commission. (2012). *Minds that matter: Report on the consultation on human rights, mental health and addictions*. The Ontario Human Rights Commission. <https://www.ohrc.on.ca/en/minds-matter-report-consultation-human-rights-mental-health-and-addictions>
- Ontario Human Rights Commission. (2012/13). *Annual report of the Ontario Human Rights Commission, Rights, Partners, Action!* The Ontario Human Rights Commission <https://www.ohrc.on.ca/en/annual-report-2012-2013-rights-partners-action>
- Ontario Human Rights Commission. (2016). *Ontario Human Rights Commission Strategic Plan (2017-2022)*. The Ontario Human Rights Commission. <https://www.ohrc.on.ca/en/ontario-human-rights-commission-strategic-plan-2017-%E2%80%932022>

- Ontario Human Rights Commission. (2017). *Under suspicion: Research and consultation report on racial profiling in Ontario*. The Ontario Human Rights Commission. <https://www.ohrc.on.ca/en/under-suspicion-research-and-consultation-report-racial-profiling-ontario>
- Ontario Human Rights Commission. (2019a). *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service*. The Ontario Human Rights Commission. <https://www.ohrc.on.ca/en/public-interest-inquiry-racial-profiling-and-discrimination-toronto-police-service/collective-impact-interim-report-inquiry-racial-profiling-and-racial-discrimination-black>
- Ontario Human Rights Commission. (2019b). *Policy on eliminating racial profiling in law enforcement*. The Ontario Human Rights Commission. <https://www.ohrc.on.ca/en/policy-eliminating-racial-profiling-law-enforcement>
- Operation Black Vote Canada, (2006, Nov 22) Standing Committee on Justice Policy. Legislative Assembly of Ontario. *Official Report of Debates (Hansard)*.
- Ottawa Police Services Board. (2012). Minutes of Settlement (File No. HR-1282-07). https://www.ottawapolice.ca/en/news-and-community/resources/Letter_of_Understanding.pdf
- Ottawa Police Service. (2015, Mar 23). Traffic Stop Race Data Collection Project: Update to Ottawa Police Services Board. Ottawa Police Service.
- Ottawa and District Labour Council. (2006, Aug 9). Standing Committee on Justice Policy. Legislative Assembly of Ontario. *Official Report of Debates (Hansard)*. https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2006/2006-08/committee-transcript-2-EN-2006-08-09_pdfJP017.pdf
- Owusu-Bempah, A. (2014). *Black Males' Perceptions of and Experiences with the Police in Toronto*. [Doctoral dissertation, University of Toronto] ProQuest Dissertations Publishing.
- Palmater, P. (2014). Genocide, Indian Policy, and Legislated Elimination of Indians in Canada. *Aboriginal Policy Studies* 3(3). <https://doi.org/10.5663/aps.v3i3.22225>
- Patrias, C. & R. Frager. (2001). 'This Is Our Country, These Are Our Rights': Minorities and the Origins of Ontario's Human Rights Campaigns." *Canadian Historical Review* 82: 1.
- Phipps v. Toronto Police Services Board, 2009 HRT0 1604 (CanLII), <https://canlii.ca/t/2608k>
- Pinto, Andrew. (2012). *Report of the Ontario Human Rights Review*. Ontario Ministry of the Attorney General. http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human_rights/

- Police Association of Ontario. (2006, Aug 8) Standing Committee on Justice Policy. Legislative Assembly of Ontario. *Official Report of Debates (Hansard)*, https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2006/2006-08/committee-transcript-2-EN-2006-08-08_pdfJP016.pdf
- Powell, B. (2011, December 23). Windsor police chief abruptly resigns. *Toronto Star*. https://www.thestar.com/news/canada/2011/12/22/windsor_police_chief_abruptly_resigns.html
- Previl, S. (2016, Feb 29). Windsor Police appoint first diversity officer to start the conversation *Hamilton News*. <https://www.hamiltonnews.com/news-story/6369348-windsor-police-appoint-first-diversity-officer-to-start-the-conversation/>
- Psychiatric Patient Advocate Office (2006, Aug 8) Standing Committee on Justice Policy. Legislative Assembly of Ontario. *Official Report of Debates (Hansard)*, https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2006/2006-08/committee-transcript-2-EN-2006-08-08_pdfJP016.pdf
- Puzic, S. (2008, Feb 15). Student protest targets cops: Marchers allege Windsor police brutality, racism. *Windsor Star*. <https://www.pressreader.com/canada/windsor-star/20080215/281578056354720>
- R. v. S. (R.D.), 1997 CanLII 324 (SCC), [1997] 3 SCR 484, <https://canlii.ca/t/1fr05>
- R. v. Sitladeen, 2021 ONCA 303 (CanLII), <https://canlii.ca/t/jftps>
- Racial Discrimination Act*, RSO 1950, c 328
<https://digitalcommons.osgoode.yorku.ca/rso/vol1950/iss4/16>
- Rankin, J. (2002, Oct 20). Police target black drivers. *Toronto Star*. [Factiva].
- Rankin, J. (2010, Feb 6) Carded: Probing a racial disparity. *Toronto Star*. [Factiva].
- Rankin, J., Quinn, J., Shephard, M., Simmie, S., & Duncanson, J. (2002, Oct 19). Singled Out. *Toronto Star*. [Factiva].
- Ritchie, A. J. (2017). *Invisible no more: Police violence against black women and women of color*. Beacon Press.
- Rummens, J. (2004). Operationalizing race and its related grounds in Ontario Human Rights Policy. *Canadian Diversity*, 3(3).
- Runciman, R. (2002, Oct 21). Racial Profiling. Legislative Assembly of Ontario. *Official Report of Debates (Hansard)*. <http://hansardindex.ontla.on.ca/hansardeissue/37-3/1045a.htm>

- Saberi, P. (2017). Toronto and the “Paris problem”: community policing in “immigrant neighbourhoods.” *Race & Class*, 59(2), 49–69.
<https://doi.org/10.1177/0306396817717892>
- Sangster, Joan. (1995). "Women Workers, Employment Policy and the State: The Establishment of the Ontario Women's Bureau, 1963-1970." *Labour/Le Travail*: 119-145.
- Scheurich, J. (1997). *Research method in the postmodern*. Falmer Press.
- Schmidt, D. (2016, Jan 7). Despite all-white slate of new cops, chief says diversity still the goal. *Windsor Star*. <https://windsorstar.com/news/local-news/despite-all-white-slate-of-new-cops-chief-says-diversity-still-the-goal>
- Schmidt, D. (2015, June 17). Police defend street checks; Chief says policy works in Windsor. *Windsor Star*. [Factiva]
- Schoenholz, J-S. (2017). Opening the Doors of Justice: Group Litigation and Claims of Systemic Discrimination. *Ottawa Law Review*, 48(2).
- Schucher, K. (2014) *Coercing Justice? Exploring the "Aspirations and Practice" of Law as a Tool in Struggles Against Social Inequalities* [Doctoral dissertation, Osgoode Law, York University]. <http://digitalcommons.osgoode.yorku.ca/phd/9>
- Scoggins, S. (2014). Navigating Fieldwork as an Outsider: Observations from Interviewing Police Officers in China. *PS, Political Science & Politics*, 47(2), 394–397.
<https://doi.org/10.1017/S1049096514000274>
- Scott, C. & Aylen, J. (1993). *Participation by racial community groups in criminal justice policy development: Report*. Commission on Systemic Racism in the Ontario Criminal Justice System.
- Sears, A. (1999). The “Lean” State and Capitalist Restructuring: Towards a Theoretical Account. *Studies in Political Economy*, 59(1), 91–114.
<https://doi.org/10.1080/19187033.1999.11675268>
- Shearon, T. (2016, March 2011). Windsor Police embrace diversity. *The MediaPlex*.
<http://themediaplex.com/diversity-created-by-windsor-police/>
- Sheppard, C. (2010). *Inclusive equality: the relational dimensions of systemic discrimination in Canada*. McGill-Queen’s University Press.
- Sirvent, R. (2018, Oct 24). BAR Book Forum: Robyn Maynard’s “Policing Black Lives” and Alex Vitale’s “The End of Policing.” *Black Agenda Report*.
<http://www.blackagendareport.com/bar-book-forum-robyn-maynards-policing-black-lives-and-alex-vitales-end-policing>

- Smith, C. (2007). *Conflict, crisis and accountability: Racial profiling and law enforcement in Canada*. Canadian Centre for Policy Alternatives.
- Smith, C. (2010). *Anti-racism in education: missing in action*. Canadian Centre for Policy Alternatives.
- Smith, Malinda. (2003). 'Race Matters' and 'Race Manners.' In *Reinventing Canada : politics of the 21st century*. (Eds.) Brodie, J. & Trimble, L.. Prentice Hall.
- Smith, Miriam. (2009). Diversity and Canadian Political Development: Presidential Address to the Canadian Political Science Association, Ottawa, May 27, 2009. *Canadian Journal of Political Science*, 42(4), 831–854. <https://doi.org/10.1017/S0008423909990692>
- Steffan, S. (1999). Human Rights Commissions and Racial Discrimination. In *The Ontario Human Rights Code and Its Impact on the Workplace*. Insight Press.
- Tanovich, D. (2004). E-Racing Racial Profiling. *Alberta Law Review*, 41, 905–933.
- Tanovich, D. (2006). *The colour of justice policing race in Canada*. Irwin Law.
- Tanovich, D. (2008). The Charter of whiteness: twenty-five years of maintaining racial injustice in the Canadian criminal justice system. *Supreme Court Law Review*, 40.
- Tanovich, D. (2011) Gendered and Racialized Violence, Strip Searches, Sexual Assault and Abuse of Prosecutorial Power, CanLIIDocs 577, <https://canlii.ca/t/t0vd>
- Tarnopolsky, W. (1968) The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada. *Canadian Bar Review*.
- Tator, C. (2004). Advancing the Ontario Human Rights Commission's Policy and Education Function *Canadian Diversity*, 3(3).
- Tator, C. & Henry, F. (2006). *Racial profiling in Canada challenging the myth of "a few bad apples."* University of Toronto Press.
- Taylor, C. (1994) The Politics of Recognition in *Multiculturalism: Examining the Politics of Recognition* (Ed.) Amy Gutmann. Princeton University Press.
- Thompson, D. (2008). Is Race Political? *Canadian Journal of Political Science*, 41(3), 525–547. <https://doi.org/10.1017/S0008423908080827>
- Thompson, D. (2016). *The Schematic State: Race, Transnationalism, and the Politics of the Census*. Cambridge University Press. <https://doi.org/10.1017/CBO9781316442951>

- Tomlinson, F. & Schwabenland, C. (2010). Reconciling Competing Discourses of Diversity? The UK Non-Profit Sector Between Social Justice and the Business Case. *Organization* 17(1), 101–121. <https://doi.org/10.1177/1350508409350237>
- Toronto Police Service Human Rights Project Charter (2007) Ontario Human Rights Commission. <https://www.ohrc.on.ca/en/human-rights-project-charter-tps-tpsb>
- Toronto Police Service. (2009) “Fair and Equitable Policing” In *Human Rights Project Charter: Final Report*. Toronto Police Service. <https://www.tpsb.ca/consultations-and-publications-mobile/publications-list-mobile/send/2-publications/13-evaluation-of-the-human-rights-project-charter-full-report>
- Toronto Police Service. (2010) *Human Rights Project Charter: A Celebration of Progress*. Ontario Human Rights Commission. <http://www3.ohrc.on.ca/sites/default/files/police%20project%20charter%20celebration%20handout.pdf>
- Toronto Police Service. (2010) *Human Rights Project Charter: Final Report*. Toronto Police Service. <https://www.tpsb.ca/consultations-and-publications-mobile/publications-list-mobile/send/2-publications/13-evaluation-of-the-human-rights-project-charter-full-report>
- Toronto Police Services Board. (2007, Mar 22). Minutes of the meeting of the Toronto Police Services Board held on March 22, 2007. www.tpsb.ca
- Treasury Board of Canada (2019). Employment Equity in the Public Service of Canada for Fiscal Year 2018 to 2019. Government of Canada. <https://www.canada.ca/content/dam/tbs-sct/documents/employment-equity-report/20200406-eng.pdf>
- Tremblay, C. (1999) Human Rights and Employment Equity. In *The Ontario Human Rights Code and Its Impact on the Workplace*. Insight Press.
- Trickey, J. (1997). The Racist Face of “Common Sense.” In *Open for business, closed to people Mike Harris’s Ontario*. (Eds.) Ralph, D., Régimbald, A., & St-Amand, N. Fernwood Pub.
- Tumilty, R. (2017, Jan 23) “Ottawa Police officers didn't trust traffic stop race data project: Study.” MetroNews. <http://www.metronews.ca/news/ottawa/2017/01/23/ottawa-police-officers-didnt-trust-traffic-stop-race-project.print.html>
- Tunnicliffe, J. (2013) “‘Life Together’: Public Debates over Human Rights Legislation in Ontario, 1975-1981” *Histoire Sociale/Social History*, 46: 92.
- Ubale, B. (1982). *Working together: Strategy for race relations in Ontario* [Microform Toronto Public Library]. Ontario Human Rights Commission.

- UN Committee on the Elimination of Racial Discrimination. (2017). *Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada*. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fCAN%2fCO%2f21-23&Lang=en
- Van Dijk, T. A. (2003). Critical discourse analysis. In *The Handbook of Discourse Analysis*, (Eds.) D. Schiffrin, D. Tannen, and H. Hamilton. Blackwell Publishing.
- Viau, J. (2019, May 1). “Windsor police among forces with highest number of human rights complaints in Ontario” *CBC News*. <https://www.cbc.ca/news/canada/windsor/windsor-police-human-rights-complaints-1.5111105>
- Vosko, L. (2022). Temporary labour migration by any other name: differential inclusion under Canada’s “new” international mobility regime. *Journal of Ethnic and Migration Studies*, 48(1), 129–152. <https://doi.org/10.1080/1369183X.2020.1834839>
- Vosko, L. and the Closing the Enforcement Gap Research Group (2020). *Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs*. University of Toronto Press.
- Walker, J. (1997). *"Race," Rights and the Law in the Supreme Court of Canada: Historical Case Studies*. Wilfrid Laurier University Press.
- Welsh, M. (2010, Feb 8). Elite police squad looks for trouble. *Toronto Star*. [Factiva].
- Wilkins, K. (1999). But We Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government. *The University of Toronto Law Journal*, 49(1), 53–121. <https://doi.org/10.2307/826053>
- Williams, C. (2006). “Obscurantism in Action: How the Ontario Human Rights Commission Frames Racial Profiling.” *Canadian Ethnic Studies*, 38(2), 1–18.
- Williams, T. (2001). Racism in Justice: The Report of the Commission on Systemic Racism in the Ontario Criminal Justice System. (*Ab)using power: the Canadian experience*. (Eds.) Boyd, S. Chunn, D., & Menzies, R. Fernwood Publishing.
- Williams, P. (1991). *The alchemy of race and rights*. Harvard University Press.
- Wortley, S. & Marshall, L. (2005). *Bias Free Policing: The Kingston Data Collection Project Final Results*. <http://hdl.handle.net/1974/8655>
- Wortley, S. & Owusu-Bempah, A. (2009). “Unequal Before the Law: Immigrant and Racial Minority Perceptions of the Canadian Criminal Justice System.” *Journal of International Migration and Integration*, 10(4), 447–473.

- Wortley, S. & Owusu-Bempah, A. (2011). "The usual suspects: police stop and search practices in Canada." *Policing & Society*, 21(4), 395–407.
- Wortley, S. & Tanner, J. (2003). "Data, Denials, and Confusion: The Racial Profiling Debate in Toronto." *Canadian Journal of Criminology and Criminal Justice*, 45(3), 367–389.
- Windsor Police Service. (2016) Dress & Grooming Directive # 146-01. Windsor Police Service. [Internal]
- Windsor Police Service. (2012) Workplace Census: Report on the Windsor Police Service's Demographic Profile. Windsor Police Service. <https://windsorpolice.ca/about/human-rights/Documents/2012%20WPS%20Census%20Report-Long.pdf>
- Windsor Police Service. (2012, May 1) Community Outreach Sessions: May 1st, 2012, Summary of Discussion and Evaluations. Windsor Police Service. <https://windsorpolice.ca/about/human-rights/Documents/12-05-01%20Outreach%20Discussion%20and%20Evaluation%20Summary.pdf>
- Windsor Police Service. (2012, Jan 18 & 19) Community Outreach Sessions: Community Outreach Sessions January 18th & 19th, 2012, Summary of Discussion and Evaluations. Windsor Police Service. <https://windsorpolice.ca/about/human-rights/Documents/Community%20Outreach%20January%202012.pdf>
- Windsor Police Service. (2013, May 9) Community Training & Consultation Sessions May 9, 2013 Summary of Discussion and Evaluations. Windsor Police Service. <https://windsorpolice.ca/about/human-rights/Documents/13-05-09%20Outreach%20Discussion%20and%20Evaluation%20Summary.pdf>
- Windsor Police Service. (2014). Human Rights Project: Final Report. Windsor Police Service. <https://windsorpolice.ca/about/human-rights/Documents/WPS%20Human%20Rights%20Project%20Final%20Report%20Oct%202014.pdf>
- Windsor Police Service. (2013) Racially Biased Policing and Racial Profiling Directive # 140-03. Windsor Police Service. [Internal]
- Windsor Police Service. (2016) Dress & Grooming Directive # 146-01. Windsor Police Service. [Internal]
- Windsor Police Service. (2016, Aug 15) CPIC Operator Job Posting. Windsor Police Service. [Internal]
- Windsor Police Service. (n.d.). Human Rights Directive. Windsor Police Service. <https://www.police.windsor.on.ca/about/human-rights/Pages/Human-Rights-Directive.aspx>

- Windsor Police Service. (n.d.) Human Rights Project. [Website: accessed: 2016-10-16].
<https://www.police.windsor.on.ca/about/human-rights/Pages/Documentation.aspx>
- Windsor Police Services Board. (2004). Diversity Statement. In Racially Biased Policing and Racial Profiling Directive # 140-03. Windsor Police Service. [Internal]
- Xavier, S. (2021). Biased Impartiality: A Survey of Post-RDS Caselaw on Bias, Race and Indigeneity. *Canadian Bar Review*, 99(2), 354.
- Yanow, D. & Schwartz-Shea, P. (2014). *Interpretation and method: empirical research methods and the interpretive turn* (2nd ed.). M.E. Sharp, Inc.
- Yogaretnam, S. (2016, Oct 24) Data shows Middle Eastern and black drivers more likely to be pulled over by Ottawa police. *Ottawa Citizen*.
- Young, D. (1992). *The Handling of Race Discrimination Complaints at the Ontario Human Rights Commission*. The Ontario Human Rights Commission.
- Zimonjic, P. (2020, June 17). “NDP Leader Jagmeet Singh booted from Commons for calling Bloc MP a racist.” *CBC News*. <https://www.cbc.ca/news/politics/ndp-jagmeet-singh-rotaracist-therrien-1.5616661>

Appendix A: Qualitative Interviews

My twenty interviewees all signed forms confirming their consent to participate in this research (see the sample informed consent form provided in Appendix A1). In addition to seeking and receiving ethics approval from York University's Ethics Review Board (#STU 2015 - 145), I sought and received institutional approval from the Ontario Human Rights Commission, the Toronto Police Service, the Windsor Police Service, and the Ottawa Police Service to conduct interviews. At the time of the interviews, all interviewees were current employees of one of these four institutions. The interviewees included policy analysts, uniformed officers, Deputy Chiefs, Sergeants, Staff Sergeants and Diversity Management Unit staff. All interviews were conducted in-person at the interviewee's workplace unless otherwise indicated. I confirmed with all interviewees that I had their consent to record our interview and these recordings were subsequently transcribed. Though a small number of interviewees provided their consent to waive anonymity, and gave permission for their names to appear in the final reports and publications of this research, I have chosen to maintain anonymity for all interviewees.

I used slightly different interview guides for interviews conducted with officials from each of the institutions (see Appendix A2). Though I included questions about the interviewees' background and work experience, I made limited use of these responses in order to maintain interviewees' anonymity. Instead of asking interviewees to self-identify their race and gender, I asked them to share whether or not they identified as being "a member of a historically marginalized group" and, if so or if not, what impact this might have on their work. Though this question elicited interesting and varied responses around the relevance that the interviewees attached to their own identities in relation to their work, I also make limited use of these data in order to protect the anonymity of the few interviewees with whom I spoke who identified as non-

White cis straight men. Next, I asked about interviewees' specific involvement in the Project Charter agreements. Through these responses I learned details about the processes and impacts of the Project Charters not readily available through written documentation. I concluded each of the interviews with reflection questions on organizational change, human rights and diversity. The length of the interviews ranged from forty-five minutes to three-hours.

Appendix A1 - Sample Informed Consent Form for Interviews

Which Humans' Rights? A Critical Examination of the Ontario Human Rights Commission's Systemic Change Initiatives [**title of research subsequently changed*]

This form provides a description of this research project, outlines the role of your interview, and explains my responsibilities to you. Please ask any questions as we go over this information.

I am a PhD student at York University in Toronto. This study is part of my dissertation. The information I gather will be used in my dissertation and will also be shared in publications and presentations.

I am researching the systemic impacts of the Ontario Human Rights Commission's human rights charter agreements.

The research has been reviewed and approved for compliance to research ethics protocols by the Human Participants Review Subcommittee (HRPC) of York University.

In exploring the systemic change work of the Commission my purpose is twofold: first, to illuminate the systemic change accomplishments which are possible through the Commission's charter agreement governance model; and, second, to inform current debate regarding the limitations of achieving collectivist anti-discriminatory aims within the parameters of human rights frameworks.

I am asking you to participate in an interview. This will last between 60-90 minutes. The interview will be at the location of your choice. You will **not** be paid for the interview, but I would be pleased to pay for a non-alcoholic drink and snack during the interview.

I don't expect there to be any risks or discomforts for you from participating in the interview. However, because I am asking you questions about your place of work, it is possible that you will feel pressure or concern about your responses.

For this reason, if you would prefer I could conduct this interview outside of your place of work and outside of working hours. Furthermore, I will ensure the confidentiality of your answers. It is also important that you know that **you can choose not to answer any question, or to end the interview, at any point.**

I will do my best to offer a safe, comfortable space for you to share your knowledge and experience. Your account of the human rights measures taken by your institution will be included in my dissertation and you will be given the opportunity to comment on the public policy potential of these initiatives, thereby contributing to the potential broader impact of any systemic change accomplishments, and voicing any persisting limitations.

I will ask you if I can record our interview. If a recording device is a problem for you, I will rely on handwritten notes. While I am recording the interview, you will be clearly informed as to when

it is turned on and off.

All information you supply during the research process will be held in confidence and your name will not appear in any report or publication resulting from the research. In presenting and writing about this research, I will take care to change any identifying details you give, so that you will remain anonymous. Please ask any questions about this if this part of the confidentiality agreement is unclear.

Your data (information about you) will be safely stored in a locked filing cabinet in my home or on a password protected computer. Only I will have access to the filing cabinet and computer. I will retain the interview data for a period of 3 years following the completion of my dissertation defense. I will be in contact with various Canadian archives to discuss the possibility of my recorded conversations or transcripts being transferred after the retention period. Anything that is not then stored in an archive will be destroyed. Confidentiality will be provided to the fullest extent possible by law.

Your participation in the research is completely voluntary. You may choose to stop participating at any time, including after reading the consent form. You also have the right not to answer any questions I may ask. If you choose to stop participating, this will not influence your relationship with the researcher or York University: York University will not be made aware of any of the details of your participation, including your decision to stop participating.

If you decide you no longer want to participate in the research, I will destroy all the information you have already given me.

If you have any questions or concerns about any part of the research process, please contact me, my supervisor (Dr. Leah Vosko), my program office, or the Manager of Research Ethics. They may be contacted at:

Nicole Bernhardt
Email: nsb@yorku.ca

Dr. Leah Vosko
E-mail lvosko@yorku.ca.

This research has been reviewed and approved by the Human Participants Review Sub-Committee, York University's Ethics Review Board and conforms to the standards of the Canadian Tri-Council Research Ethics guidelines. If you have any questions about this process, or about your rights as a participant in the study, please contact the Sr. Manager & Policy Advisor for the Office of Research Ethics, 5th Floor, York Research Tower, York University (telephone 416- 736-5914 or e-mail ore@yorku.ca)

If, after reading this form and discussing it with me, you would like to participate in an interview, please sign below

I, _____, consent to participate in **Which Humans' Rights? A Critical Examination of the Ontario Human Rights Commission's Systemic Change Initiatives** conducted by Nicole Bernhardt. I understand the nature of this project and wish to participate. I understand that I can withdraw my participation at any time. I am not waiving any legal rights by signing this form. My signature below indicates my consent.

Signature _____
Participant

Date _____

Signature _____
Nicole Bernhardt

Date _____

Can I record our interview?

I, _____, consent to having my interview for the research project in **Which Humans' Rights? A Critical Examination of the Ontario Human Rights Commission's Systemic Change Initiatives** recorded by Nicole Bernhardt. My signature below indicates my consent to the recording of my participation in interview form.

Signature _____
Participant

Date _____

Signature _____
Nicole Bernhardt

Date _____

Do you wish to **waive your anonymity** and have your name included in any final reports/publications of this research?

☐ I agree to waive my anonymity and give permission for my name to be included in any final reports/ publications of this research.

☐ I **do not** agree to waive my anonymity and **do not** give permission for my name to be included in any final reports/ publications of this research

Appendix A2 – Interview Guides

ONTARIO HUMAN RIGHTS COMMISSION INTERVIEW GUIDE

The purpose of this interview is to gain better understanding of the OHRC's human rights project charter agreements. The interview has three main parts:

1. Questions about your background and experience in order to contextualize your work on the human rights charter agreements.
2. Your work on the human rights project charter agreements.
3. Your personal reflections on human rights frameworks.

As this is a semi-structured/open-ended interview, you will be asked specific questions, but will also be encouraged to expand and comment on matters relevant to this research. I am interested in your personal perspective and knowledge. If you agree, the interview will be recorded, for accuracy in my research. Subsequently, the record will be destroyed. Your participation is voluntary: should you wish to skip a question, or at any time wish to stop completely, it is entirely your right to do so.

Please feel free to ask me any questions that might arise during the interview.

A) Background/Experience:

How long have you worked at the Ontario Human Rights Commission?

- What is your educational background?
- What work were you doing prior to starting at the OHRC?
- What drew you to the OHRC?

Have you had prior experience in organizational change?

- If yes, please elaborate?
- If yes, did it have a human rights focus?

Have you been previously been involved in the OHRC's public interest remedies?

- How do these remedies align/differ from the human rights project charter agreements?
- Similarities/differences?

Do you identify as a member of a historically marginalized group?

- Do you feel that this has any impact on your work at the OHRC?

B) Charter Agreements:

Please describe your role in the OHRC's human rights project agreements?

- When did you first become involved?
- Which agreements have you been involved in?
- Were these agreements shaped by work in other jurisdictions?

Were you involved in framing the agreements?

- Nature of involvement?
- Difficulties in framing?
- Discussions of scope?

Priorities/goals of project charter?

- How did you arrive at the stated priorities?
- What problem was being solved?
- In your opinion, what was the impetus for the institution to engage in human rights project charter work?

Was emphasis placed on particular protected grounds?

- If yes, which grounds?
- Was there any resistance to focusing on any particular ground?

Please describe the process of implementing the human rights project charter?

- How frequently did you meet?
- What work is done by the institution?
- What work is done by OHRC staff?

Who is involved/who do you work with/who is at the table?

- Which members of the organization?
- Are community groups involved/consulted?
- How are the voices of historically marginalized groups incorporated?

What is your involvement in monitoring the process of the project charter work?

- Does the OHRC function more like an advisor, an auditor or both?

Are any public reporting or consultation requirements in place?

- What mechanisms are used to facilitate public consultation and/or reporting?

What results have you observed through working on human rights project charter agreements?

- How do you measure success?
- What obstacles have you faced and how have these obstacles been overcome?

C) Reflection:

What limits did you identify in the ability to address structural inequalities?

What would you like to see improved in the use of charter agreements?

Did you encounter any debates around language or terminology when working on the human rights project charters?

Is intersectionality incorporated into the human rights project charter work? If so, how?

In describing the use of these agreements to others what distinctions/similarities would you draw between legally mandated public interest remedies and voluntary charter agreements?

Several of the charter agreements reference “diversity”; what do you see as the relationship between “human rights” and “diversity”?

- Do “human rights” and “diversity” call for the same organizational change strategies?

May I contact you if I have any follow-up questions?

- If yes, what is the preferred method of contact?

TORONTO POLICE SERVICES INTERVIEW GUIDE

The purpose of this interview is to gain better understanding of the OHRC's human rights project charter agreements. The interview has three main parts:

1. Questions about your background and experience in order to contextualize your work on the human rights charter agreements.
2. Your work on the human rights project charter agreements.
3. Your personal reflections on human rights frameworks.

As this is a semi-structured interview, you will be asked specific questions, but will also be encouraged to expand and comment on matters relevant to this research. I am interested in your personal perspective and knowledge. If you agree, the interview will be recorded, for accuracy in my research. At the conclusion of my research the record will be destroyed. Your participation is voluntary: should you wish to skip a question, or at any time wish to stop completely, it is entirely your right to do so. Please feel free to ask me any questions that might arise during the interview.

A) Background/Experience:

How long have you worked for the Toronto Police Service (TPS)?

- What drew you to the TPS?
- What work were you doing prior to starting at the TPS?

Have you had prior experience in organizational change?

- If yes, please elaborate?
- If yes, did it have a human rights focus?

Do you identify as a member of a historically marginalized group?

- Do you feel that this has any impact on your work at the TPS?

B) Charter Agreements:

Please describe your role in the OHRC's human rights project agreement?

- When did you first become involved?

Were you involved in framing the agreements?

- Nature of involvement?
- Difficulties in framing?
- Discussions of scope?

Priorities/goals of project charter?

- How did you arrive at the stated priorities?
- What problem was being solved?

- In your opinion, what was the impetus for the TPS to engage in human rights project charter work?

Was emphasis placed on particular protected grounds?

- If yes, which grounds?
- Was there any resistance to focusing on any particular ground?

Please describe the process of implementing the human rights project charter?

- How frequently did you meet?
- What work is done by the institution?
- What work is done by OHRC staff?

Who is involved/who do you work with/who is at the table?

- Which members of the organization?
- Are community groups involved/consulted?
- How are the voices of historically marginalized groups incorporated?

What results have you observed through working on human rights project charter agreement?

- How do you measure success?
- What obstacles have you faced and how have these obstacles been overcome?
- What limitations have you observed?

C) Reflection:

What limits did you identify in the ability to address structural inequalities?

What would you like to see improved in the use of charter agreements?

Did you encounter any debates around language or terminology when working on the human rights project charter?

Is intersectionality incorporated into the human rights project charter work? If so, how?

In describing the use of these agreements to others what distinctions/similarities would you draw between legally mandated public interest remedies and voluntary charter agreements?

Several of the charter agreements reference “diversity”; what do you see as the relationship between “human rights” and “diversity”?

- Do “human rights” and “diversity” call for the same organizational change strategies?

WINDSOR POLICE SERVICES INTERVIEW GUIDE

The purpose of this interview is to gain better understanding of the OHRC's human rights project charter agreements. The interview has three main parts:

1. Questions about your background and experience in order to contextualize your work on the human rights charter agreements.
2. Your work on the human rights project charter agreements.
3. Your personal reflections on human rights frameworks.

As this is a semi-structured interview, you will be asked specific questions, but will also be encouraged to expand and comment on matters relevant to this research. I am interested in your personal perspective and knowledge. If you agree, the interview will be recorded, for accuracy in my research. At the conclusion of my research the record will be destroyed. Your participation is voluntary: should you wish to skip a question, or at any time wish to stop completely, it is entirely your right to do so. Please feel free to ask me any questions that might arise during the interview.

B) Background/Experience:

How long have you worked for the Windsor Police Service (WPS)?

- What drew you to the WPS?
- What work were you doing prior to starting at the WPS?

Have you had prior experience in organizational change?

- If yes, please elaborate?
- If yes, did it have a human rights focus?

Have you had any previous interactions with the OHRC or HRTTO?

Do you identify as a member of a historically marginalized group?

- Do you feel that this has any impact on your work at the WPS?

B) Charter Agreements:

Please describe your role in the OHRC's human rights project agreements?

- When did you first become involved?

Were you involved in framing the agreements?

- Nature of involvement?
- Difficulties in framing?
- Discussions of scope?

Priorities/goals of project charter?

- How did you arrive at the stated priorities?

- What problem was being solved?
- In your opinion, what was the impetus for the WPS to engage in human rights project charter work?

Was emphasis placed on particular protected grounds?

- If yes, which grounds?
- Was there any resistance to focusing on any particular ground?

Please describe the process of implementing the human rights project charter?

- How frequently did you meet?
- What work is done by the institution?
- What work is done by OHRC staff?

Who is involved/who do you work with/who is at the table?

- Which members of the organization?
- Are community groups involved/consulted?
- How are the voices of historically marginalized groups incorporated?

What results have you observed through working on human rights project charter agreements?

- How do you measure success?
- What obstacles have you faced and how have these obstacles been overcome?
- What limitations have you observed?

C) Reflection:

What would you like to see improved in the use of charter agreements?

Did you encounter any debates around language or terminology when working on the human rights project charter?

Is intersectionality incorporated into the human rights project charter work? If so, how?

In describing the use of these agreements to others what distinctions/similarities would you draw between legally mandated public interest remedies and voluntary charter agreements?

What do you see as the relationship between “human rights” and “diversity”?

- Do “human rights” and “diversity” call for the same organizational change strategies?

ONTARIO POLICE SERVICE INTERVIEW GUIDE

The purpose of this interview is to gain better understanding of the OHRC's human rights project charter agreements. The interview has three main parts:

1. Questions about your background and experience in order to contextualize your work on the human rights charter agreements.
2. Your work on the human rights project charter agreements.
3. Your personal reflections on human rights frameworks.

As this is a semi-structured interview, you will be asked specific questions, but will also be encouraged to expand and comment on matters relevant to this research. I am interested in your personal perspective and knowledge. If you agree, the interview will be recorded, for accuracy in my research. At the conclusion of my research the record will be destroyed. Your participation is voluntary: should you wish to skip a question, or at any time wish to stop completely, it is entirely your right to do so. Please feel free to ask me any questions that might arise during the interview.

C) Background/Experience:

How long have you worked for the Ottawa Police Service (OPS)?

- What drew you to the OPS?
- What work were you doing prior to starting at the OPS?

Have you had prior experience in organizational change?

- If yes, please elaborate?
- If yes, did it have a human rights focus?

Do you identify as a member of a historically marginalized group?

- Do you feel that this has any impact on your work at the OPS?

B) OHRC Partnership Work:

Please describe your role in the Ottawa Police Service's Traffic Stop Race Data Collection Project?

- When did you first become involved?

Were you involved in framing the project?

- Nature of involvement?
- Difficulties in framing?
- Discussions of scope?

What is the relationship between this initiative and other human rights initiatives underway?

- Please describe how you dealt with any resistance to collecting race-based data?
- What was done to achieve buy-in from front-line officers?

Please describe the process of implementing the Ottawa Police Service's Traffic Stop Race Data Collection Project?

- What training was provided?
- What work is done by the service?
- What work is done by OHRC staff?

Please describe the involvement of Ottawa Police Service Community Police Action Committee (COMPAC)?

- How are committee members identified?
- What is the nature of their involvement in the project?

What results have you observed through working on the Ottawa Police Service's Traffic Stop Race Data Collection Project?

- What obstacles have you faced and how have these obstacles been overcome?

What process is in place for attending to the recommendations?

- What are the next steps?
- What work is underway to determine the sources of the disproportionately high instances identified in the study?

C) Reflection:

What lessons would you pass on to other services considering the collection of race-based data?

- How would you explain the disproportionality identified in the report?

How would you characterize the role of the Ontario Human Rights Commission with respect to this project?

- Do you have any recommendations regarding what role they ought to play in projects such as this?

What are the advantages/disadvantages to focusing specifically on race?

In describing the use of these agreements to others what distinctions/similarities would you draw between legally mandated public interest remedies and voluntary charter agreements?

Appendix A3 – Interviews

Ontario Human Rights Commission (OHRC)

OHRC 01	Senior Official	January 12, 2016	Toronto
OHRC 02	Senior Official	January 13, 2016	Toronto
OHRC 03	Senior Official	January 20, 2016	Toronto

Toronto Police Services (TPS)

TPS 01	Senior Official	August 9, 2016	Toronto
TPS 02	Senior Official	August 10, 2016	Toronto
TPS 03	Senior Official	August 10, 2016	Toronto
TPS 04	Senior Official	August 24, 2016	Toronto

Windsor Police Services (WPS)

WPS 01	Senior Official	July 26, 2016	Windsor
WPS 02	Senior Official	July 26, 2016	Windsor
WPS 03	Senior Official	July 26, 2016	Windsor
WPS 04	Senior Official	July 26, 2016	Windsor
WPS 05	Senior Official	October 17, 2016	Windsor
WPS 06	Senior Official	October 17, 2016	Windsor
WPS 07	Senior Official	October 17, 2016	Windsor
WPS 08	Senior Official	October 17, 2016	Windsor
WPS 09	Senior Official	June 5, 2017	<i>*Telephone interview</i>

Ottawa Police Services (OPS)

OPS 01	Senior Official	June 22, 2017	Ottawa
OPS 02	Senior Official	June 23, 2017	Ottawa
OPS 03	Senior Official	June 23, 2017	Ottawa
OPS 04	Senior Official	June 23, 2017	Ottawa